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EQUALITY OF ARMS IN INTERNATIONAL CRIMINAL PRACTICE

I am honored and humbled to have been invited to address this body of prominent lawyers and jurists in this remarkably beautiful country. I have traveled here as a representative of the National Association of Criminal Defense Lawyers the preeminent organization in the United States which advances the mission of criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. We are a professional bar association with more than 12,800 direct members and 35,000 affiliate members -- including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within the criminal justice system.

In particular, I have been asked to address the concept of equality of arms in international criminal practice. I was pleased to have been asked to address this topic since the issue is very important to me. After 25 years of defending individuals and businesses charged with crimes, I have learned that being direct and sometimes blunt is often necessary to assure that one is completely understood. I have no doubt that at the end of this address, you will fully understand my views on the notion of equality of arms in international criminal tribunals.

The International Criminal Court is the realization of a dream. It is a method of dealing with lawlessness beyond that which most people can even conceive. During its formation the men and women of the United Nations, representing countries from around the world, addressed the issue of actual and apparent fairness in trials and demonstrated their commitment to the rule of law by writing into the Rome Statue, the legislation which enabled the formation of the International Criminal Court, the foundational principle, at Article 67(1) (b), that there be equality in the resources allocated to the defense.

Let us be clear... equality of arms is not an aspirational goal. It is not an ideal to be approached in careful incremental steps. The Rome Statue defines equality of arms as a minimum guarantee of fairness. Full equality of arms is the minimum standard which must be provided for on the day the court house opens its doors. It is defined as a human right. We expect members of our society to follow minimal behavioral rules fully and completely. When we drive a car, we do not aspire to stop at all red lights. We agree and commit to do so fully from the moment we step into a car. Guarantees of human rights should be afforded no less compliance than that which we give to mere traffic rules.

The idea of equality of arms has a very nice pleasing sound. It is so pleasing in fact that the International Criminal Court has used the phrase in many of its promotional materials. The Court's website explains that:

The rights of the accused are on an equal footing with those of the prosecution. This equality is of the utmost importance when it comes to conducting investigations and research into alleged crimes as it is when it comes to the scope for the accused to be heard by the Court. It is vital to ensure equality of arms between the prosecution and the defense in the interests of a fair judgment being reached.

The words themselves are almost poetic, suggesting a conscious giving of attention to issues of fairness, equity and even-handedness. Equality of arms has been guaranteed by law in the International Criminal Court. The fact of that guarantee makes

One imagines that men and women of good character with strong moral convictions have acknowledged, by enacting legislation, that they actually care about fairness. One would also believe that those who administer international criminal justice are truly committed to the concept of equality of arms.

Indeed, less than a year ago, in September 2006, the International Criminal Court in The Hague had the occasion to address the concept of equality of arms. In a decision issued in the Lubanga case which arose out of the situation in the Democratic Republic of the Congo, the court held that

Equality of arms is treated as an indivisible element of a fair trial, as repeatedly acknowledged and proclaimed by international courts and institutions established to monitor human rights. Furthermore, equality of arms constitutes an indispensable requisite of an adversarial trial, an incident of a fair trial, designed to afford the same opportunities to the prosecution and the defense in confronting one another's case. The notion of a fair trial is interwoven with that of equality of arms, warranting the assurance of equal opportunities to either side to present his or her case before the court. It is a pillar of justice; a fundamental principal of law.

The mere repetition of the phrase, however, does not make it so. Declaring the idealistic hope of the international legal community and of most clear thinking people does not mean that those charged with carrying out the mandate of the statute will actually do so. Most who have publicly considered the issue agree that that the promise of equality of arms can only be actualized by providing equal resources to the defense and the prosecution. But the promise of equality of arms has become mired in a swamp of politics and disingenuousness.

I am saddened to report that in every single modern international tribunal including the ad-hoc criminal tribunals for Sierra Leone, Rwanda, the former Yugoslavia

and most regrettably in the newest, The International Criminal Court, the shining promise of equality of arms has been deeply tarnished. One would have hoped that the lessons born of the obvious disparities, inefficiencies and inequalities which beleaguered each of the ad-hoc tribunals would have resulted in a renewed awareness and understanding at the International Criminal Court. And although the International Criminal Court uses its public relations machine to promote its conviction to maintaining equality of arms... it's just talk.

Despite the legal complexity and novelty of the proceedings and the increased number of interventions required in addition to the basic task of preparing for trial, the current basic legal aid package at the ICC allows for only one Counsel and one legal assistant during the pre-trial stage. During the first case before the ICC, proposed victims filed 74 applications to intervene in the case. The single defense counsel permitted on the matter had to respond to over 300 motions during the first three months of the case. Each of those applications had to be read, researched and responded to by the defense. No additional resources were allocated for this unexpected level of work. Given the level of legal complexity and the number of pleadings that are required in relation to novel questions of law and victims' participation, the current basic legal aid package available to indigent persons at the ICC is grossly insufficient to provide for a fair trial.

Defense counsel at the ICC have reported trouble speaking to witnesses, getting access to exculpatory prosecution documents and having evidence translated into the lawyers' native languages. And, with just one legal assistant assigned during the pretrial stage, counsel was virtually drowning in an ocean of documents provided by prosecutors. Incredibly, counsel is required to accept an appointment without prior knowledge of the terms of their employment. Defense counsel and their staff do not enjoy the same privileges and immunities when traveling abroad as do the prosecution and their staff. They can not count on receiving a steady income during the course of their work. Amazingly, the Registrar of the court decided on his own to withhold 40% of the income earned pending some unarticulated method of verification that the proposed work plan had been accomplished. Does anyone think that the prosecution had 40% or 20% or 1% of their income withheld pending some sort of verification of entitlement? Such behavior is insulting, humiliating and counter to any construction of equality of arms.

It is vital that the Court maintain its appearance impartiality. The lack of resources for the defense will severely compromise the principle of the equality of arms and the Court's legitimacy in the public eye. The legal and procedural issues raised at the ICC are complex and without any precedent. Recent suggestions by the Registrar to compensate counsel based on the numbers of pages of documents received and to quantify investigative resources based on the number of prosecution witnesses which have been identified reveals a deeply flawed understanding of the defense function as little more than a mechanical response to external stimulus.

Virtually every document filed by the prosecution is signed by four senior lawyers. The prosecution's office has a back office team of several more lawyers and layers of support staff, assistants and interns who assist the prosecution in their work. The

Defense has one senior lawyer, one junior lawyer (only at specific points in the case) and one assistant. Does this sound like equality of arms?

Thankfully, even the ICC's Office of Public Counsel for the Defense, in its recent comments on the Registrar's proposed changes to the Legal Aid procurements for the Defense was deeply troubled at the meager resources allocated by the Registrar for Defense services. On March 2, 2007, The Office of Public Counsel for the Defense wrote:

If the prosecution and the Defense have the right and responsibility for performing exactly the same function, i.e., responding to victims' applications, reviewing evidence, attending hearings, drafting briefs, examining witnesses, failure to accord the Defense the same resources as the Prosecution will result in procedural inequality of arms which will prejudice the right of the defendant to a fair and impartial trial

Maybe someone is listening. Maybe not. The one thing which is clear is that without adequate resources allocated for the defense by professionals who truly understand the defense function in an adversarial system, the notion of equality of arms in the newest jewel of international criminal justice at the ICC will be revealed as a complete sham.