



the global voice of
the legal profession

ICC Monitoring and Outreach Programme

IBA OUTREACH REPORT

Beyond The Hague:

Forging linkages between

the International Criminal

Court and Key Jurisdictions

September 2008

An International Bar Association

Human Rights Institute Report

Supported by the John D and Catherine T MacArthur Foundation

Material contained in this report may be freely quoted or reprinted,
provided credit is given to the International Bar Association



International Bar Association

10th Floor, 1 Stephen Street
London W1T 1AT, United Kingdom
Tel: +44 (0)20 7691 6868
Fax: +44 (0)20 7691 6544
Website: www.ibanet.org

Beyond the Hague:

Forging linkages between the International Criminal Court and Key Jurisdictions

Contents

Executive Summary	7
PART I	
INTRODUCTION	11
PART II	
EXTERNAL COMMUNICATION OF THE INTERNATIONAL CRIMINAL COURT (ICC)	13
Chapter 1: Outreach by the ICC	
1.1 The ICC's Outreach Report 2007	13
1.2 The establishment of the ICC's Outreach Unit	13
1.3 Increased outreach activities	14
1.4 More diverse outreach tools	15
1.5 The evaluation process and the web-based database	18
1.6 Current challenges	19
1.7 Conclusion	20
Chapter 2: External communication activities by the ICC	
2.1 Background	23
2.2 Public information activities by the Office of the Prosecutor and the Public Information and Documentation Section of the Registry	23
2.3 External communication staff of the Office of the Prosecutor	25
2.4 IBA recommendations to the Office of the Prosecutor in relation to external communication	25
2.5 Conclusion	26

PART III

IBA OUTREACH IN KEY COUNTRIES	27
-------------------------------	----

Chapter 3: Indian and South Asian perspectives on the ICC

3.1 Outreach to lawyers in India and South Asia	27
3.2 Is there an Indian and South Asian perspective on the ICC?	28
3.3 The status of ratification in South Asia	29
3.4 The impact of the Rome Statute on the definition of gender-based crimes	30
3.5 Other examples of domestication of ICC standards through litigation and law reform	33
3.6 The exclusion of terrorism as a crime under the Rome Statute	34
3.7 The role of national judicial proceedings	35
3.8 The challenge of cooperation by non-states parties	37
3.9 Conclusion	38

Chapter 4: The International Criminal Court as an opportunity for Malaysian lawyers

4.1 Malaysia and the ICC	39
4.2 The 4 April 2008 lawyers' seminar in Kuala Lumpur	40
4.3 Malaysia and the ICC: outstanding but not irresolvable concerns	41
4.4 Malaysia and the ICC: advantages and opportunities	42
4.5 The challenges and role of lawyers at the ICC	43
4.6 The List of Counsel of the ICC	44
4.7 Improvements in the organisation of the defence: counsel at the ICC and Extraordinary Chambers in the Courts of Cambodia (ECCC)	46
4.8 Conclusion	47

PART IV

OUTREACH TO THE WIDER IBA MEMBERSHIP	49
--------------------------------------	----

Chapter 5: Outreach to IBA bar leaders and the legal profession at large

5.1 The IBA Council's Resolution on the ICC	49
---	----

5.2 Outreach to bar leaders: IBA bar leaders' visit to the ICC	50
--	----

5.3 The IBA Round Table Discussion on the Right to Defence and Equality of Arms before the ICC	52
--	----

5.4 Conclusion	54
----------------	----

PART V

CONCLUSIONS AND RECOMMENDATIONS	57
---------------------------------	----

Executive Summary

With four suspects before the International Criminal Court (ICC) and more than 400 victims applying to participate in the proceedings, outreach to the affected communities and public information play a crucial role in making the ICC a truly global institution. From the inception of its outreach programme on the ICC and in keeping with its monitoring role, the International Bar Association (IBA) has been closely following the development of outreach as a key non-judicial function of the Court.

Since the IBA last reported on the ICC's outreach work, several notable improvements have been made and a number of tangible results have been achieved. As this IBA report notes, the increased allocation of resources to the Public Information and Documentation Section (PIDS) has resulted in more outreach activities and the employment of a wider variety of outreach tools. The Outreach Unit, established in 2007, has developed indicators and evaluation methodologies, together with a new database. In addition, not only has the Court demonstrated an increased ability to adapt outreach activities and tools to the local context, but it has also shown a great degree of flexibility in dealing with upcoming judicial developments. In relation to the outreach efforts of the Court as a whole, the IBA also notes a greater engagement by the Office of the Prosecutor (OTP) in the Registry's outreach activities.

Despite these positive developments, challenges remain especially in relation to the staffing of the Outreach Unit, the timing of outreach, the revision of the ICC Outreach Strategy and the renovation of the ICC website. In addition, the IBA report notes with concern the poor coordination between the OTP and the Registry in relation to public information issued on court proceedings. This is recognised as having a negative impact on the perception of neutrality of the Court as a whole and possibly on the fairness of the proceedings, while being inconsistent with legal instruments and the ICC's Strategic Plan.

The IBA report also provides an overview of the issues discussed during outreach activities on the ICC organised by the IBA in key jurisdictions. For example, in February 2008 a regional workshop for South Asian lawyers took place in New Delhi to analyse the state of affairs on the ICC in South Asia. It emerged that national systems have become more amenable to ICC standards than expected. ICC norms have also begun to influence national legislation and jurisprudence in jurisdictions which do not recognise the ICC, thus demonstrating its far-reaching impact. The Court is establishing itself as a standard-setting mechanism which national courts may look up to decide domestic cases. This impact was not anticipated in 1998, and is especially remarkable in relation to non-states parties.

In April 2008 a seminar targeting legal professionals was organised in Kuala Lumpur by the IBA and the Bar Council of Malaysia. The topics under discussion at the seminar are emblematic of perceptions on the ICC in a part of the world where the Court is regarded as a distant body of law with little relevance to local practitioners and civil society groups. Strong arguments were presented in favour of a greater engagement of Malaysian lawyers with the work of the ICC. The ICC's List of Counsel and the training to counsel provided by the Registry were found to provide an interesting

opportunity for independent counsel practicing before the ICC. In addition, it was argued that a stronger engagement by Malaysian legal professionals would stimulate positive changes in the domestic justice system and unlock the great potential of the engagement of a key regional leader, such as Malaysia.

In addition, the IBA report provides information on outreach activities organised for the wider IBA membership. In October 2007 the IBA Council passed a resolution in support of the ICC. The resolution calls on member organisations to encourage discussion and facilitate debate on how to best support the ICC's goals. On 16 May 2008 a visit of IBA bar leaders to the ICC was organised to promote exposure and the involvement of bar associations across the globe with the ICC.

A round table discussion on 'Equality of Arms and the Right to Defence' was organised by the IBA in The Hague in November 2007. The discussion drew attention to the challenges faced by independent lawyers in practicing before the ICC, which should not be overlooked or ignored. Coaching and training must be provided to fill the gap between national and international practice. In order to attract the most qualified professionals it is important that support and resources are given to counsel practicing before the ICC. This support also impacts on the fairness of the proceedings in that it counter-balances the role played by the prosecution.

The IBA, established in 1947, has a membership of 30,000 lawyers and 195 Bar Associations. Since 2005, the IBA has implemented an ICC monitoring and outreach programme under a grant from the John D and Catherine T MacArthur Foundation. The outreach element aims to deepen understanding of the ICC's place both within the broader landscape of international justice and at the local level. Its main activities include: dissemination of information and updates on the activities of the Court in key countries; sensitisation activities specifically targeting IBA bar leaders; and general outreach for legal professionals and the wider IBA membership.

Observations and recommendations

Recommendations concerning outreach by the PIDS

In order to maximise the improvements made in the past year and tackle some of the outstanding challenges, the IBA makes the following recommendations:

- The IBA recommends that the ICC Outreach Strategy be revised soon. The Outreach Unit is encouraged to include a definition of participatory approach to outreach in its strategy and to develop methodologies designed to ensure this is applied consistently throughout all programmes. In revising its outreach strategy, the PIDS is encouraged to rethink the purpose of outreach in order to dissociate it from any attempt to 'win support' of the local population.
- In relation to outreach staff in the field, PIDS is urged to complete its recruitment process as soon as possible, particularly in relation to the positions of Public Information and Outreach Coordinator for the CAR and the DRC.
- The IBA recommends that an intense outreach campaign start in the CAR as a matter of urgency.
- The IBA recommends extending the practice of focused public information and outreach

campaigns in relation to specific moments of the proceedings.

- The IBA urges the Court to resolve the current impasse in relation to the renovation of the ICC website.
- The IBA also encourages the Outreach Unit to plan for more outreach activity during the situation and investigations phases.
- The IBA urges States Parties to provide additional resources to the Outreach budget to allow for increased activities in situation countries.

Recommendations concerning public information activities of the OTP

In order to ensure consistency among external communication functions of the Court, and to emphasise the central role of the Registry in relation to public information function, the following recommendations are made:

- The IBA recommends that press releases related to judicial proceedings be issued exclusively by PIDS.
- The IBA also urges the OTP to appoint a focal point at senior level for external communications.
- The IBA further recommends the OTP to make its communication strategy public, identifying the scope of its mandate in relation to external relations, outreach and public information.

Observations and recommendations concerning key jurisdictions targeted by the IBA Outreach Programme

During the regional workshop held in New Delhi in February 2008 the following observations and recommendations were put forward:

- It would be beneficial for the region to be part of the ICC and to promote greater accountability for internal crimes through national proceedings and cooperation with the Court.
- The ICC is having an impact on national legal systems of countries in South Asia despite the poor record of ratification in the region.
- Best practices should be shared across the region in relation to domestication of international standards through law reform initiatives and litigation before national courts.
- South Asian countries (and particularly India) should strive to provide consistent and effective cooperation with the ICC.
- Legal communities in South Asia should promote the adoption of national legislation related to international crimes and cooperation with the ICC.
- The IBA calls upon its members in South Asia to ensure that the fight against impunity does not end where the ICC cannot reach.

At the Seminar organised by the Bar Council of Malaysia and the IBA the following

recommendations and observations were made in relation to a closer engagement between Malaysian lawyers and the ICC:

- Members of the Bar Council of Malaysia recommended launching a campaign for registration to the List of Counsel of the ICC.
- In order to address outstanding obstacles to ratification, it was suggested that research be carried out as to how other jurisdictions have dealt with the issue of impunity of monarchs.
- It was felt that a visit by the ICC Prosecutor to Malaysia might prompt a renewed commitment to ratification by the Attorney General Chambers of Malaysia.
- The IBA encourages the Government of Malaysia to participate as an observer at the 2010 Review Conference.

Recommendations concerning the legal profession at large

On the occasion of the IBA bar leaders' visit to the ICC, Court's officials identified several areas of collaboration between bar associations and the Court. They can be summarised as follows:

- Lawyers shall make the Court better known and foster support on its work.
- Lawyers associations shall encourage governments to ratify and when they have, encourage the adoption of implementing legislation.
- Lawyers and lawyers' associations are encouraged to provide advice to the Court on legal issues, especially defence-related issues and matters related to the training of counsel.
- Lawyers' associations shall strive to ensure that those in charge of international relations support the new system put in place by the establishment of the ICC.

In light of the need to promote engagement of lawyers with the work of the Court and to ensure the highest standards of practice before the ICC:

- The IBA welcomes the work of the OPCD and OPCV in supporting independent counsel through research and technical advice.
- The IBA encourages the Registry of the ICC to organise regular training sessions to fill the gap between national and international practice.
- The IBA welcomes the efforts made by the Registry to ensure that retribution of counsel compensate the inconveniences caused to private practitioners.
- Finally, the IBA encourages States Parties to look at defence issues more closely and encourages the Court to be vocal in requesting support to the defence.

PART I

INTRODUCTION

Since 2005, the IBA has implemented a programme to monitor the work and to conduct outreach activities on the International Criminal Court (ICC or ‘the Court’) with funding provided by the John T and Catherine D MacArthur Foundation.

The IBA has a membership of over 30,000 lawyers and 195 Bar Associations. IBA outreach activities help to disseminate information and promote discussion on the ICC through this membership network. In particular, the IBA Outreach Programme on the ICC aims to deepen understanding of the place of the ICC both within the broader landscape of international justice and at the local level. Its main activities include: dissemination of information and updates on the activities of the Court in key countries; regular sessions on the ICC at each annual IBA Conference; sensitisation activities specifically targeting IBA bar leaders; and general outreach for legal professionals and other relevant stakeholders who work closely with the ICC.

In this report, the IBA aims to share and provide feedback on its 2008 activities to those key stakeholders and to the ICC and analyse the outreach work carried out by the Court itself. Chapter 1 of the report presents the current outreach activities of the ICC and the challenges ahead. Chapter 2 provides a critique of the public information activities of different organs of the Court with the aim of encouraging a more neutral approach to public information which may reflect the position of all actors involved in the proceedings.

Chapters 3 and 4 analyse those issues discussed during IBA outreach activities in key countries in Asia. Chapter 3 reports on the Regional Workshop facilitated by the IBA in New Delhi in February 2008, which provided a unique opportunity to bring together practitioners from different jurisdictions in South Asia to discuss the relevance of the ICC in the region. The presentations and discussion held at the Regional Workshop highlighted that despite the poor record of ratification in the region, the ICC is having an impact in the South Asian legal systems through litigation and lobbying activities of lawyers. The feedback from the Regional Workshop describes examples of domestication of ICC standards in Nepal and India, while recognising the central role of national accountability mechanisms.

Chapter 4 discusses Malaysia’s position on the ICC and the opportunities available to Malaysian practitioners. Thus the issues raised during the IBA–Bar Council of Malaysia Seminar held in April 2008 in Kuala Lumpur are emblematic of perceptions on the ICC in a part of the world where the Court is regarded as a distant body of law with little relevance to local practitioners and civil society groups. The chapter therefore discusses the potential for, and challenges of, fostering greater engagement of a key regional leader, such as Malaysia, and the opportunities for the ICC to engage more closely with practitioners from different jurisdictions.

Chapter 5 reports on IBA efforts to reach out to its wider membership. In particular it recalls the 2007 IBA Resolution in support of the ICC and describes outreach activities undertaken by the IBA targeting IBA bar leaders and the legal profession at large. In relation to the latter the issue of equality of arms before the ICC is discussed in light of the high level Round Table discussion held in November 2007 in The Hague, the Netherlands. Recommendations to engage more closely legal professionals around the world are also put forward in this section.

The last part of the report presents some conclusions and recommendations for the ICC as well as the legal profession and the Assembly of States Parties (ASP) with the aim at making the ICC a truly global institution.

PART II

EXTERNAL COMMUNICATION OF THE INTERNATIONAL CRIMINAL COURT (ICC)

Chapter 1: Outreach by the ICC

1.1 The ICC's Outreach Report 2007

In November 2007, the ICC's Public Information and Documentation Section (PIDS)/Outreach Unit presented its Outreach Report 2007¹ to the sixth session of the Assembly of States Parties (ASP). The Outreach Report 2007 (hereafter called the ICC Report) describes activities carried out to implement the Strategic Plan for Outreach of the International Criminal Court² (hereafter called the Strategic Plan for Outreach), which had been issued a year earlier.

From an analysis of the ICC Report, the IBA considers that several notable improvements have been made in the Court's outreach strategy and a number of tangible results have been achieved.

Firstly, there was a noticeable increase in the budgetary allocation to the PIDS of the Registry.³ This allocation allowed for increased spending on critical outreach activities. Secondly, the presence of a dedicated Outreach Unit at the Court allowed for an exponential increase in the volume of outreach activities. In addition the quality of the Court's outreach efforts improved both in terms of variety of audiences reached and tools and material used.

It was noted from the ICC Report that the Outreach Unit now enjoys a greater flow of information from the field which enables it to ensure a two-way system of communication and a more participatory approach to outreach. Significantly, the Outreach Unit has engaged in a process of developing indicators to measure its work.

Despite these and other improvements, the IBA believes that challenges remain. These range from the staffing of the Unit to the timing of outreach and the renovation of the ICC website. The positive developments, challenges and recommendations will be discussed in more detail below.

1.2 The establishment of the Outreach Unit of the ICC

The Court was established in 2002, but in fact an ICC Outreach Unit was not established until 2007. Its establishment within the PIDS is a positive and long-awaited development. The body is led by the

1 ICC Public Information and Communication Section (PIDS), Outreach Report 2007, ICC-PIDS-RT-13/07_En.

2 Strategic Plan for Outreach of the International Criminal Court, ICC-ASP/5/12 (29 September 2006).

3 Official Record of the ASP to the Rome Statute of the ICC, Fifth Session, The Hague, 23 November–1 December 2006.

Head of the Outreach Unit and composed of three outreach officers based in The Hague, and four country teams, each made of one Public Information and Outreach Coordinator (professional level P2) and field Public Information and Outreach Assistants. Although the organisational chart of the Outreach Unit is reduced in comparison to what was envisaged in the Strategic Plan for Outreach,⁴ the IBA welcomes the fact that the position of Head of the Outreach Unit has been promoted to a Professional Level 3 (as opposed to Level 2 provided for in the Strategic Plan for Outreach), which is more consistent with the overall level of professionals heading other sections of the Court (usually Level 4 or 5).

The IBA had pointed out in its 2007 Outreach Report that ‘outreach activities are generally led by headquarters’ staff’ and made through representatives from The Hague.⁵ Field outreach coordinators have since been recruited for Uganda and Darfur, Sudan. The IBA considers the recruitment of dedicated staff in the field a very positive development. However, staffing of the Outreach Unit is still not complete and overall recruitment has been slow. This has been attributed to the time lapse between approval of the position and actual disbursement of funds.

To date, only the Uganda country team is fully staffed. One field Public Information and Outreach Coordinator (P2 level) and two Public Information and Outreach Assistant positions in the Democratic Republic of Congo (DRC) have yet to be filled. The IBA has learned that two of the three outreach assistant positions intended for Darfur have been redeployed to the Bunia Office in the DRC and to the Central African Republic (CAR) respectively to cover for a shortage of staff in those two offices. Yet the recruitment of both the Public Information and Outreach Coordinator and the Public Information and Outreach Assistant is still under review in CAR. Interaction with the local population is greatly handicapped in CAR and DRC because of the delay in recruiting the field staff. To compensate for this shortage of human resources in the field, the IBA understands that the outreach team in The Hague had to micro-manage field activities, in addition to fulfilling their primary coordination and reporting roles.

The IBA welcomes the degree of flexibility applied by PIDS in redeploying staff in light of the actual needs of the Unit. In particular the IBA welcomes the employment of short-term consultants who have assisted in developing new outreach tools, such as audio-visuals. It is hoped that the number of staff will be increased to match the needs of the Outreach Unit and that permanent audio-visual advisor positions will be created. Despite the zero nominal growth policy pursued with regard to the budget level of the Court, the number of cases and situations before the Chambers has a direct impact on the volume of work for the Outreach Unit. Therefore, the increased judicial activity in The Hague demands additional staff and resources allocated to outreach, as well as more timely recruitment and disbursement of funds.

1.3 Increased outreach activities

The IBA welcomes the reported increase in the Court’s outreach activities between January and October 2007. In 2006, the Court reported a total of ten outreach sessions in both Uganda and the

⁴ Strategic Plan for Outreach of the International Criminal Court, *supra*, at paras 77–83 which envisaged the use of four outreach staff in The Hague and six in each field office.

⁵ IBA Outreach Report 2007 at p 8.

DRC; in 2007, 43 outreach sessions/activities were reportedly undertaken in the DRC, 47 in Uganda and one in Eastern Chad.⁶ The Outreach Unit reported reaching 8,874 people in 2007 in Uganda, compared to reaching only 300 in 2006. In the DRC, 3,600 individuals were reached as opposed to 2,025 in 2006.⁷

In 2007, the target groups and audience for the outreach activities were also more varied, comprising the general public, local stakeholders, internally displaced persons and refugees, the media, lawyers, children and youth, the diaspora and victims. The IBA considers this a positive development in light of the recommendation for a broader range of target audiences advanced in the IBA's 2007 Outreach Report.

1.4 More diverse outreach tools

The Strategic Plan had defined outreach as an 'effective system of two-way communication'⁸ and mentioned that a 'participatory approach' to outreach is also used. However, the document failed to define what it means by a participatory approach. The IBA has in the past lamented the lack of indication on the methodologies that PIDS was planning to use to engage with local communities.⁹ The IBA notes that during the course of 2007, the Outreach Unit resolved some of these doubts by developing more sophisticated and diverse outreach tools. The result is a more interactive and participatory approach to outreach.

In 2006, outreach activities were limited to informative meetings and workshops with a narrow range of tools used. In 2007 and 2008, outreach activities became more diverse and now include radio and television programmes, newspaper publications, listener clubs, drama performances, seminars, workshops, face-to-face and town-hall meetings, interviews, screening of proceedings, visits of ICC officials, media briefings and training sessions.

During 2008, PIDS has also invested in the development of new tools such as booklets and posters, which include photos and sketches. These tools were found to be more suitable for non-literate audiences. The Unit also utilised 'public services announcements', collections of pictures and information products and audio-visual products. Two television producers have been recruited on a temporary basis and have produced seven audio-video summaries in relation to the cases currently before ICC Chambers.

The audio-video summaries have been used for broadcasting on national and local radio and television programmes in the DRC and CAR. The video summary of the first hearing in the case of Jean-Pierre Bemba Gombo has been also published on YouTube and received 330 page visits. In addition, audio-video summaries have been used during ICC outreach seminars and workshops in the field. These summaries have been made available to partners and intermediaries and are expected to be posted on the ICC website.

Overall, the new tools used by the ICC Outreach Unit appear to be more tailored to the target audience and represent a notable progress in relation to the Unit's ability to engage with local communities.

⁶ Outreach Report 2007, *supra*, in Annexes.

⁷ *Ibid*, in Introduction.

⁸ Strategic Plan for Outreach of the International Criminal Court, *supra* at para 3.

⁹ See IBA Second Outreach Report (May 2007) at p 9.

Addressing concerns of the local population

The IBA notes that the Outreach Unit has also pursued the promised two-way system of communication, taking more into consideration concerns and questions raised by the target groups of ICC outreach activities. In its 2007 Outreach Report, the IBA noted that the ICC Outreach Unit had failed to address specific concerns related to its outreach activities in Uganda which arose routinely during meetings held in that country.¹⁰ This practice appears to have changed. Presently, questions asked during outreach sessions are recorded and reportedly addressed in a timely manner by ICC staff either in the field or in The Hague.

The ICC Report notes that issues raised by the local populations are also taken into consideration in developing outreach activities. For example, in the aftermath of the stay of proceedings ordered by Trial Chamber I in the case of Thomas Lubanga Dyilo¹¹ the Outreach Unit collected questions from the local population in order to prepare a thematic information sheet that could address those concerns and prevent misinformation.

The Outreach Unit appears also to have adopted innovative methods to provide timely feedback to local populations. Media broadcasting now includes weekly interactive radio programmes. In Uganda, the Court facilitates the broadcasting of the so called 'Mega Lawyer' radio programme during which listeners can call to ask questions. In the case of Darfur, the Outreach Unit is using web-based tools which include the creation of interactive windows on online blogs dedicated to the Darfur crisis. Finally, the audio-video products also include an interactive component in the section called 'Demandez a la Cour' through which questions from the public can be collected and recorded to be answered by the Court's officials in The Hague and re-broadcast locally.

While it welcomes these developments, the IBA notes that more remains to be done and additional resources will be needed to ensure successful implementation of outreach strategy. For example, due to budget constraints the audio-visual products are currently available only in French, which impedes the ability of the Court to reach segments of the affected communities in the DRC who speak Lingala, Suali or Sango, but not French.

In addition, feedback from the field highlights that misperceptions and misinformation on the Court's work are persistent in Uganda, DRC and Chad, and continue to represent a challenge for the Outreach Unit.¹²

A participatory approach to outreach

The IBA is pleased that during the course of 2007/08, the Outreach Unit made significant efforts to develop good practices to engage local communities. For example, in an attempt to interact more closely with journalists in the DRC, the Unit organised weekly media briefings during which participants were given the opportunity to receive information directly from the Court and to request additional information or clarification. The Unit has also facilitated the screening of

¹⁰ IBA Second Outreach Report, *supra* at p 9.

¹¹ Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (13.06.2008); ICC-01/04-01-06/1401.

¹² See Human Rights Watch Report 'Courting history – the landmark of International Criminal Court's first years' (2008), at p 126.

video summaries of the proceedings in Kinshasa and Ituri (DRC) followed by question-and-answer sessions. In Uganda, drama performances on the ICC have been facilitated in the schools targeted by outreach activities. All outreach activities conducted by the Court currently include a participant evaluation form which assesses the quality and relevance of the session.

In early 2008, the Outreach Unit conducted two participatory workshops. The first was designed to assist the development of the outreach strategy for CAR; the second was aimed at promoting dialogue with key stakeholders towards a revision of the general outreach strategy of the Court. Both workshops were facilitated by an external consultant and conducted using the so-called 'Logical Framework planning technique', a workshop methodology designed to assist in fostering participatory communication among the participants.

The first participatory workshop was organised at the beginning of 2008 in Bangui (CAR). Participants included local stakeholders, local non-governmental organisations (NGOs) and the media. The workshop reportedly produced important ideas for the development of the CAR outreach strategy. However, the absence of a field outreach coordinator for CAR has prevented further development of these initiatives.

A second workshop following the same methodology took place on 20–21 February 2008 in The Hague. This workshop was specifically targeted at ICC Outreach Unit staff members and international NGOs, including the IBA, which focus on outreach. The workshop aimed to draw from lessons learnt in order to revise the Court's 2006 Outreach Strategy. The workshop was moderated by an external consultant and focused on the development of logical framework for outreach by identifying purpose, overall objectives, expected results and indicators for outreach.

Although these new practices are a step in the right direction, the IBA notes that the participatory approach has not yet been defined and does not appear to be consistently applied throughout the programmes. For example, participatory workshops similar to the one organised in Bangui did not take place in Uganda and DRC. Participation of local communities is included as one of the outcomes in the general evaluation plan of the Outreach Unit; however it seems to imply only general attendance at the events and interaction with the ICC as a whole, rather than effective participation in the planning and organising of outreach activities¹³ which remain the exclusive domain of ICC staff.

On the other hand, the workshop in The Hague was successful in stimulating discussions on the outreach strategy, an evolving document which must be periodically evaluated and revised in order to suit the evolving situations before the Court. During the workshop, participants held a long discussion in relation to what the purpose of outreach should be, but could not arrive at a consensus on this issue.

The IBA believes that outreach should not aim to 'win the support' of the affected communities or to 'defend by all means' Chambers' decisions and the strategy of the Office of the Prosecutor (OTP). Outreach is not about the different organs of the Court but about the message that the Court as a whole is delivering to the affected communities. This message is the very same mission of

¹³ Outreach Report 2007, at Annex 2.

the ICC, which is that of an independent judicial institution that acts transparently and efficiently.¹⁴ Thus the IBA believes that the scope of outreach should be to increase awareness and understanding of the goals and work of the Court by dissemination of impartial and neutral information on judicial activities and by tackling concerns of the local population. This is consistent with the neutral role envisaged in the ICC's legislative instruments for the Registry as well as with the need to reflect the position of all actors involved in the proceedings (including the defence).

To date the revised strategy for outreach incorporating the inputs produced by the workshop has not yet been circulated; thus it is not known how the Outreach Unit has resolved the issue of the scope of outreach. The IBA urges that the revision of the strategy be finalised in a timely manner, incorporating lessons learnt during the past year. It is hoped that the revised outreach strategy will be made available before the next meeting of the ASP in November 2008.

1.5 The evaluation process and the web-based database

In its 2007 report, the Outreach Unit noted that it had engaged in a process of developing 'a comprehensive approach to outcome-focused evaluation'.¹⁵ The process reportedly comprised 18 different stages, including the identification of outcomes and indicators for each country programme, development of data collection and data management tools, consultations with stakeholders inside and outside the Court and development of a formal evaluation plan.

A general evaluation plan for the unit is attached to the 2007 ICC Outreach Report and includes outcomes and expected results/outcomes for the Outreach Unit as well as a list of relevant indicators to measure its performance. During the course of 2008, the Outreach Unit also developed a methodology for engagement with key stakeholders, NGOs and the media as well as evaluation methodology for public meetings which comprises evaluation and multi-question log forms that combine multiple choice and open questions. Information collected through the new evaluation methods is fed into the evaluation plan and used to adjust the structure and content of the upcoming activities in the field.

This initiative is interesting because it not only allows for the collection of quantitative information in relation to meetings and workshops, but also of qualitative data. Thus this data collection methodology serves not only evaluation purposes, but also ensures that outreach and information materials are the most suitable and effective for the target audience.

In relation to information management, the Outreach Unit is currently testing a web-based database that could improve statistical data collection by using homogenous data. The database is expected to strengthen the evaluation and reporting capacity of the Unit and to increase cross-country programme learning and communication.

Overall, the evaluation process embarked by the Outreach Unit can be described as a very positive development towards greater consistency and more effective outreach.

¹⁴ Strategic Plan of the International Criminal Court, ICC-ASP/5/6 at III.

¹⁵ Outreach Report 2007, *supra* in Annex 2: Evaluation Process.

1.6 Current challenges

Without underestimating the remarkable progresses and positive developments made by the ICC Outreach Unit, the IBA notes that there are aspects of the work of the PIDS and Outreach Unit that require more attention and more resource allocation by the ASP. Besides the challenges posed by the recruitment of staff in the field, it is hoped that further clarity will be provided in relation to the timing of outreach and the revision of the ICC website. These remain problematic areas.

Timing of outreach

The Strategic Plan for Outreach links outreach activities to the different phases of judicial proceedings, placing the greatest emphasis on the trial phase.¹⁶ Experience has shown that there is a need to start outreach activities earlier than the start of the proceedings; in fact there is scope for engaging with the local population as early as at the analysis phase. As shown by the *Prosecutor v Thomas Lubanga Dyilo* case, centring outreach activities on the trial phase does not reflect the reality of the work of the Court nor the actual focus of outreach activities. To date, ICC outreach activities have necessarily dealt only with cases in the pre-trial stage and with situations under investigation.

The PIDS/Outreach Unit has been proactive in better calibrating public information and outreach to the specifics of the cases currently before the Court. For example, a strategic communication plan was developed in relation to the confirmation of charges hearing in the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*. The plan included outreach and public information activities implemented in the DRC as well as at the international level through the media. This reactivity of the Court's work is a good practice and should be continued.

By contrast, outreach in CAR has been extremely limited despite the fact that the decision to open an investigation has been made public since May 2007 and referral of the situation had been publicly made in January 2005. In addition, following the arrest of Jean-Pierre Bemba Gombo, the Outreach Unit conducted public information campaigns in the DRC, but due to the absence of an outreach staff in the field (as previously discussed) no specific outreach activities have been conducted in CAR.

The PIDS indicates that there is an intrinsic procedural delay between the opening of an investigation and the recruitment of a field Public Information and Outreach Coordinator for the same situation, which also explains the inability to recruit for CAR to date. The IBA notes that such procedural impediments greatly hamper the ability to conduct effective outreach campaigns and prevent misinformation and misperceptions that are most likely to be generated before the opening of a case. This may pose additional challenges to the OTP's investigation efforts.

In light of those concerns, the IBA welcomes the recent change of policy by the OTP regarding disclosure of information relating to countries under analysis, which recognises the importance of transparent and proactive information from the outset. Although budget constraints necessarily demand a prioritisation of activities (which presumably led PIDS to decide not to conduct outreach activities during the analysis phase), the IBA reiterates the importance of starting outreach as early as possible by developing alternative outreach methods for countries under analysis to cope with

¹⁶ Outreach Strategic Plan, *supra* at paras 32–28.

scarce financial resources.¹⁷

The ICC website

In order to foster the participation and engagement of external actors, the renovation of the ICC website is a long-awaited development yet to take place. The website remains a crucial means to reach out to the local population and to publicise globally the work of the Court.¹⁸ The website is also an indispensable tool for intermediaries conducting outreach activities on the ICC. In 2006 the IBA was informed that the website would be revised by the end of the year.

According to PIDS the awaited changes have not been made yet because of technical difficulties in uploading the extensive volume of information related to court activities which were not anticipated at the time of the website's creation. The amount of information to be contained in the website requires the installation of different search engines and a need to change the setup of the different pages regularly.

The IBA has been informed that the technical part of the new ICC website is almost ready and that new search engines have been developed. In light of the exponential increase in judicial activities expected for the year 2008/09, the IBA recommends that the technical challenges be resolved promptly and that the new website be made available as soon as possible.

1.7 Conclusion

The ICC Outreach Report 2007 conveyed notable progress in relation to outreach. After the Outreach Unit was established in 2007, the volume of activities carried out by the Court grew remarkably. A wider range of outreach activities have been conducted using new outreach tools and information materials. Of note, audio-visual products have been developed in 2008 and are already in use for a number of purposes. The Outreach Unit has also engaged in an evaluation process which has led to the development of indicators and evaluation methodologies as well as a web-based data management system. The greater engagement and participation of local actors in outreach activities is to be welcomed.

The allocation of more resources by the ASP has therefore contributed to tangible results. However, these have not been sufficient to meet fully the needs of the Outreach Unit. There is still much to be done to bring the Court closer to the affected communities. Additionally, new challenges are posed by the increased volume of court activity in The Hague. The IBA considers that country programming should be strengthened as the effective establishment of a two-way communication system is only possible through fully-staffed field offices. In this regard, the IBA urges the Outreach Unit to complete the recruitment process particularly for the field office in Bangui (CAR).

Ongoing challenges are posed by the need to revise the outreach strategy to incorporate lessons learnt in the past year of intense activities. The IBA believes that a solid strategic framework would assist in tackling unforeseeable developments in the proceedings that have greatly challenged outreach to affected communities in the past. The IBA therefore recommends a prompt revision of

¹⁷ IBA Second Outreach Report (May 2007) at p 11.

¹⁸ See also Strategic Plan for the International Criminal Court, ICC-ASP/5/6 at para 39.

the Outreach Strategy.

The IBA recommends that consideration be given to extending the practice of targeted public information campaigns and strategies following specific and important developments in the proceedings. This would allow local communities to feel more engaged in courtroom events.

The IBA considers that it is important that the term ‘participatory approach’ is clearly and accurately defined to reflect the experience in the field. The Outreach Unit is further encouraged to ensure that this newly defined participatory approach allows for greater input by the local population in the planning and organising of outreach activities.

While it is important for the Outreach Unit to engage with the local population, the IBA cautions against an outreach strategy that attempts to ‘win the support’ of the local population. In the view of the IBA, such a strategy would undermine the neutral position of the Outreach Unit and affect the credibility of the Court. The IBA believes that the scope of outreach should be consistent with the Court’s mission statement and should aim to increase awareness and understanding of the work of the Court without taking any position in relation to Chambers’ decisions or to prosecutorial strategy. A neutral approach to outreach will help foster the perception of the Court as a truly transparent and independent institution, while enhancing the credibility of PIDS in the field. This is consistent with the neutral role envisaged for the Registry in relation to external communication as well as with the need to reflect the position of all actors involved in the proceedings (including the defence). To this end, the IBA encourages the Outreach Unit to reconsider the scope of outreach as defined in the current Outreach Strategy.

Finally, the IBA considers that efforts should be strengthened to finish the renovation of the ICC website. In relation to the timing of outreach, the IBA recommends that PIDS revise its outreach strategy to include more intense activities at the situation and investigation phase. To support this policy decision, and as an indication of the importance of outreach as a key non-judicial function of the Court, States Parties are urged to encourage PIDS’ efforts in this direction by allocating more resources to outreach in the 2009 budget.

Chapter 2: External communication activities by the ICC

2.1 Background

In July 2005 the Court made public in summary form its Integrated Strategy for External Relations, Public Information and Outreach¹⁹ (hereafter called the Integrated Strategy), noting the importance and interaction between different aspects of external communication by the ICC. The implementation section of the Integrated Strategy emphasises the need for coordination between different organs of the Court as well as integration between functions. In relation to implementation of the Integrated Strategy the document states that external relations, public information and outreach are to complement each other and that ‘the Court must to avoid duplication and fragmentation in activities of organs’.²⁰

In addition, the Integrated Strategy defines the roles of different organs in relation to external communication. In this regard, the Presidency acts as ‘the external face of the court as a whole (...) the OTP builds support and cooperation for OTP activities’ whereas the Registry also provides basic information on the Court and is instrumental in making proceedings public.²¹ Coordination among the organs of the Court is realised through an inter-organ external communication Working Group which meets on a regular basis.

Despite this framework, external communications do not appear to be completely harmonised.

2.2 Public information activities by the OTP and the PIDS

The IBA notes with concern that the OTP’s public information activities appear to overlap with the role of the PIDS. Although it is recognised that the OTP as an independent organ of the Court might use specific messages to explain its policy and activities and that these messages might at times differ from those elaborated by PIDS, the overlap between the organs at times results in fragmented information.

From January to August 2008, the OTP issued 17 press releases. Eight of those dealt with visits and meetings attended by the Prosecutor or the Deputy Prosecutor.²² Three press releases gave

19 See www.icc-cpi.int/library/cases/ICC-PIDS-WB-OR-03-07-070402_IS_En.pdf.

20 Integrated Strategy, *ibid* at VI (1).

21 Integrated Strategy, *ibid* at VI (1).

22 ICC Prosecutor visits Senegal; ICC Deputy Prosecutor in Botswana: Working with African leaders to stop crimes in Darfur, 13.08.08, ICC-OTP-20080813-PR345-ENG; Deputy Prosecutor on official visit to Africa to mark the 10th anniversary of the Rome Statute of the International Criminal Court, 23.07.08, ICC-OTP-20080723-MA22-ENG; Deputy Prosecutor of the ICC to meet African Union Commission Chairperson and Brief AU Peace and Security Council in Addis Ababa on 11 July, 11.07.08, ICC-OTP-20080711-MA21-ENG; ICC Prosecutor to brief European Union Foreign Ministers on 16 June, 16.06.08, ICC-OTP-20080616-PR325-ENG; ICC Prosecutor meets with Jordanian Foreign Minister and the Secretary General of the Arab League, 07.03.08, ICC-CPI-20080307-PR292-ENG; ICC Prosecutor and Prime Minister of Qatar to discuss cooperation, 29.01.08, ICC-OTP-20080129-PR281-ENG; Deputy Prosecutor of the ICC meets AU Commission Chairperson in Addis Ababa, 28.01.08, ICC-OTP-20080128-PR280-ENG; Deputy Prosecutor attends women’s consultation on Darfur, 24.01.08, ICC-OTP-20080124-MA004-ENG.

information on prosecutorial policy and investigation activities.²³ The remaining six press releases dealt with matters related to court proceedings.²⁴ The issues dealt with in those six court specific press releases had also been addressed in press releases issued by PIDS.²⁵ This trend had obviously continued from 2007 when the OTP had issued three press releases²⁶ on court activities which had also been covered by PIDS.²⁷

Messages contained in the OTP's press releases do not always coincide with those of PIDS. This potentially generates confusion for the public and could undermine the credibility of PIDS which is the general, impartial public information voice of the Court. For example, in relation to the stay of proceedings ordered by Trial Chamber I in the case of Thomas Lubanga Dyilo, an initial press release was issued by PIDS to inform the public of the decision handed down by the Chamber. Later that same day, the OTP issued a separate press release on the same matter. The OTP press release suggested that the trial was expected to start in September 2008 despite the fact that no such indication had been given by the Chamber.²⁸ For the average reader or for the affected communities in the DRC, such information might have created false expectations or generated confusion.

The IBA is concerned about the trend created by these actions of the OTP which is inconsistent with the Rules of Procedure and Evidence (RPE) and the 'one court' principle established by the ICC's Strategic Plan.²⁹ Rule 13 of RPE recognises a central role for the Registrar in relation to coordinating the ICC's external communications activities.³⁰ The ICC Strategic Plan states that the staff and elected officials of the court 'work together as one court on matters of common concern'.³¹ Therefore the OTP's public information efforts should not duplicate those of the Registry and should instead strive to show consistency rather than to suggest fragmentation between different organs of the Court.

In addition, the IBA notes with concern that the OTP's approach might impact negatively on the right of the defence. In the instances mentioned above, there were no press releases outlining the position of defence. If the Prosecution has a medium through which to promote its activities with no

23 ICC Prosecutor confirms situation in Georgia under analysis, 20.08.08, ICC-OTP-20080820-PR346-ENG; ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur, 14.07.08, ICC-OTP-20080714-PR341-ENG; ICC Prosecutor : Darfur is a huge crime scene, 05.06.2008, ICC-OTP-20080605-PR319-ENG.

24 OTP on Jean-Pierre Bemba surrender: this is a day for the victims, 03.07.08, ICC-OTP-20080703-PR336-ENG; ICC Cases an opportunity for communities in Ituri to come together and move forward, 27.06.08, ICC-OTP-20080627-PR332-ENG; The Office of the Prosecutor supports the need for a fair trial and promises justice will be done for Lubanga's victims, 24.06.08, ICC-CPI-20080624-PR329-ENG; ICC Arrest Jean-Pierre Bemba – massive sexual crimes in Central African Republic will not go unpunished, 24.05.08, ICC-OTP-20080524-PR316-ENG; DRC: ICC Warrant of Arrest unsealed against Bosco NTAGANDA, 29.04.08, ICC-OTP-20080429-PR311-ENG; Statement by the Office of the Prosecutor following the transfer to The Hague of Mathieu Ngudjolo Chui, 07.02.08, ICC-OTP-20080207-PR285-ENG;

25 Surrender of Jean-Pierre Bemba to the International Criminal Court, 03.07.08, ICC-CPI-20080703-PR335-ENG; Opening of the confirmation hearing against Germain Katanga and Mathieu Ngudjolo Chui, 27.06.08, ICC-CPI-20080627-PR333-ENG; Trial Chamber imposes a stay on the proceedings of the case against Thomas Lubanga Dyilo, 16.06.08, ICC-CPI-20080616-PR324-ENG; Jean-Pierre Bemba Gombo arrested for crimes allegedly committed in the Central African Republic, 24.05.08, ICC-CPI-20080524-PR315-ENG; Warrant of arrest against Bosco NTAGANDA unsealed, 29.04.08, ICC-CPI-20080429-PR310-ENG; Third detainee for the International Criminal Court: Mathieu Ngudjolo Chui, 07.02.08, ICC-CPI-20080207-PR284-ENG.

26 Statement by the Office of the Prosecutor in response to the apprehension of alleged DRC war criminal Germain Katanga, 18.10.07, ICC-OTP-20071018-251-En; Judges Endorse Prosecutor's Evidence of Crimes in Darfur, 02.05.07, ICC-OTP-20070222-215-En; ICC Prosecutor Presents Evidence on Darfur Crimes, 27.02.07, www.icc-cpi.int/press/pressreleases/230.html.

27 Second arrest: Germain Katanga transferred into the custody of the ICC, 18.10.07, ICC-20071018-250-En; Warrants of Arrest for the Minister of State for Humanitarian Affairs of Sudan, and a leader of the Militia/Janjaweed, 02.05.07, ICC-PIDS-PR-20070502-214; Pre-Trial Chamber I receives documents containing list of evidence in the situation of Darfur, 27.02.07, ICC-CPI-20070227-207-En.

28 'The Office of the Prosecutor supports the need for a fair trial and promises justice will be done for Lubanga's victims', OTP press release of 24 June 2008, ICC-CPI-20080624-PR329-ENG.

29 See Strategic Plan for the International Criminal Court, ICC-ASP/5/6 at paras 14–16.

30 See Rule 13 of the Rules of Procedure and Evidence, ICC-ASP/1/3 (September 2002).

31 See Strategic Plan for the International Criminal Court, *supra* at para 15.

such corresponding possibility being given to the defence, the defence could well argue that this is contrary to the principle of equality of arms. Such imbalance in the use of the media might impact negatively on the fairness of the proceedings and the image of the Court as a whole.

2.3 External communication staff of the OTP

The dichotomy between communication emanating from the OTP and that from the Registry may also be partially attributable to the staffing arrangements made by the OTP in relation to its external communication mandate. The former Public Information Adviser position within the OTP (Professional Level 4) has been split into two Media Officer positions at Professional Level 2. Thus two P-2 Media Officers are currently responsible for the OTP's public information and media work. They are staff of the Immediate Office of the Prosecutor, but fall under the supervision of the OTP's Jurisdiction Complementarity and Cooperation Division (JCCD).

In addition, the proposed programme budget for the year 2009 suggests that the former OTP Spokesperson position in the Immediate Office of the Prosecutor has been redeployed to the Prosecution Division to meet operational needs arising from the arrests and surrender of Germain Katanga and Mathieu Ngudjolo Chui. These arrangements mean that there is no senior staff in the Immediate Office of the Prosecutor fully dedicated to external communications.

The setup chosen by the OTP raises some concerns in relation to its ability to coordinate internally and to harmonise its messages with those of other organs of the Court. The IBA considers that the OTP should equip itself to disseminate its own messages with the highest level of professionalism and without intruding on the mandate of other organs of the Court. Thus the IBA recommends the appointment of a Communication Officer at senior level who could serve as a focal point within the Immediate Office of the Prosecutor on issues related to all aspects of external communications, including public information. To ensure effective coordination the OTP Communication Officer would be expected to liaise directly with the PIDS of the Registry.

2.4 IBA recommendations to the OTP in relation to external communication

The IBA is of the view that outreach and public information are primarily the responsibility of the Registry, whereas the OTP's authority to undertake communications should be confined to investigation-related activity in addition to external relations efforts aimed at increasing support for the work of the Office.³²

The IBA recommends a clearer division of roles and better coordination between the two organs. The IBA also recommends that the OTP communication strategy should be revised and made public. Further, it would also be useful if the OTP clarified its role in relation to the three external communication functions – namely outreach, external relations and public information.

In relation to outreach, the IBA welcomes OTP greater engagement with local communities in the situation countries and recognises the invaluable contribution made by OTP's staff participation to outreach activities designed by PIDS. The IBA praises the efforts made to ensure that at crucial times of the proceedings a representative of the OTP will be in the field to address concerns of the local

³² See Rule 13 of the RPE, *supra*.

population. In this respect, the IBA encourages the OTP to continue collaborating closely with the Registry's Outreach Unit and to make its participation in the Registry's outreach activities a more regular and concerted endeavour.

In keeping with its mandate as an independent investigative organ of the Court the OTP maintains external relations separated from those of the other organs of the Court. The IBA recognises that communications related to external relations activities are within the mandate of the OTP and could be carried out independently. External relations activities might occasionally include media statements and press releases in relation to OTP investigation activities and prosecutorial strategy.

On the other hand, the OTP might also find it appropriate at times to advise the general public about issues related to its prosecutorial strategy and upcoming events. Thus public information by the OTP might also include media statements or press releases as far as related to OTP activities. To ensure effective coordination and un-fragmented information the IBA recommends that the OTP consult with PIDS before issuing OTP press releases or media statements.

By contrast, public information related to court activities and cases exceeds the OTP's external communication mandate and should be managed carefully. To ensure consistency and harmonisation of messages the IBA recommends that any press release or public information related to cases and court activities be issued directly and solely by the PIDS of the Registry.

2.5 Conclusion

In light of the framework posed by the ICC legal instruments and its Strategic Plan there is a need for increased coordination between the OTP and the Registry in relation to the different communication functions.

The IBA recommends that for ICC external communication to be effective and efficient, more attention should be given to coordinating public information activities – recognising the leading role assigned to the Registrar in this respect.

The IBA welcomes increased participation of OTP staff in the Registry's outreach activities and recognises that external relations carried out by the OTP might include media statements and press releases related to its work.

Since the OTP may consider that the need to disseminate public information is an integral part of its mandate, the IBA recommends that at minimum OTP's messages should not duplicate with those issued by the PIDS of the Registry and that the OTP consults with the PIDS before issuing any press statements. The IBA also recommends that press releases and media statements on ongoing cases be issued solely by the PIDS.

The IBA urges the OTP to appoint a Senior Communication Officer as a focal point for external communication and to revise and make its communication strategy public. In addition to the appointment of a focal point within the OTP, it is hoped that the imminent appointment of the Head of Public Affairs of PIDS (who will also function as the Court's Spokesperson) will help to promote greater coordination and the delivery of un-fragmented information to the public. To this end the IBA also recommends that the OTP Senior Communication Officer liaises directly with the Registry spokesperson to ensure more efficient coordination of external communication activities.

PART III

IBA OUTREACH IN KEY COUNTRIES

Chapter 3: Indian and South Asian perspectives on the ICC

3.1 Outreach to lawyers in India and South Asia

Asia is significantly under-represented at the ICC with only 13 States Parties.³³ In South Asia, Afghanistan is the only country that has ratified the Rome Statute, whereas large and densely populated countries such as India and Pakistan remain outside the jurisdiction of the Court.

South Asian legal professionals have been active in the development of international legal standards and institutions. To mobilise the legal community on ICC-related issues, the IBA has organised three workshops in collaboration with lawyers' associations from India over the past years. The workshops received positive feedback; however, fully engaging legal professionals has proved to be a challenge. It was noted that there have been very few fora for South Asian lawyers to discuss issues related to international justice and the ICC from a practitioners' perspective.

To tackle this gap, the IBA organised a workshop on the ICC that would bring together lawyers from different countries in South Asia. On 16 February 2008 the 'Regional Workshop on Indian and South Asian perspectives on the ICC' (hereafter called the Regional Workshop) took place in New Delhi in collaboration with the Bar Association of India (BAI), the Indian Society of International Law (ISIL), the Criminal Justice Society of India (CJSI) and the International Committee of the Red Cross (ICRC).

The Regional Workshop brought together over 80 lawyers, including practitioners from Afghanistan, Bangladesh, India, Nepal and Sri Lanka.³⁴ It offered a unique opportunity for practitioners from South Asia to exchange opinions, compare national systems and discuss the interface between those systems and the ICC. A number of eminent jurists from the region addressed the participants and the ICC Deputy Prosecutor, Mrs Fatou Bensouda, attended the event and represented the Court. International speakers included the ICRC Regional Head of Delegation, Mr Vincent Nicod, and the High Commissioner of Canada to India, Dr David M Malone, who intervened in the workshop to discuss the place of the ICC within the broader landscape of international justice.

³³ These are: Afghanistan, Cambodia, Cyprus, Fiji, Republic of Korea, Japan, Jordan, Marshall Islands, Mongolia, Nauru, Samoa, Tajikistan and Timor-Leste.

³⁴ We express thanks to the Ford Foundation who sponsored participation by five lawyers from Sri Lanka, Nepal and Bangladesh.

3.2 Is there an Indian and South Asian perspective on the ICC?

One topical issue under consideration was whether there was an Indian and South Asian perspective on the ICC. In fact, positions on the ICC by South Asian countries vary and there are a number of outstanding concerns that prevent a higher ratification rate in the region. In particular, India's position has a great impact on regional acceptance of the ICC because of its leadership role in the region.³⁵

India actively participated in the drafting of the Rome Statute and broadly supported the concept of a permanent court; however, at the Rome Conference, India vocally advanced a number of objections to the text and finally abstained from the vote. India's objections to the Rome Statute include: the challenge to state sovereignty posed by *proprio motu* powers of the ICC Prosecutor; the undesirable role of the UN Security Council and its referral power; and the exclusion of terrorism and use of nuclear weapons from the jurisdiction of the Court. The arguments have been analysed and discussed at length by several scholars from India and abroad, some of whom believe that some of these objections could be won over by the Court's work. However, India still maintains distance from the Court which discourages other countries in the region that are considering ratification.

The challenge posed by India's rejection of the ICC was clearly expressed by one of the lawyers participating in the Regional Workshop: 'This region is Indo-centric. The countries in the region especially Nepal, Bangladesh and smaller countries are looking at what India is doing. Is India coming on board? If India is coming on board, we are ready.'³⁶

H E Shri Ram Jethmalani, a former Minister of India who also attended the Regional Workshop, presented an insider perspective on India's position *vis-à-vis* the ICC. In his opening remarks former Minister Jethmalani openly expressed embarrassment for having been a member of Cabinet in the Indian Government that participated in the 1998 Rome Conference. Former Minister Jethmalani condemned the 'hypocrisy' of his Government representatives at the Rome Conference who declared that 'India would have wanted to be one of the first signatories of the ICC', while it had expressed criticism based on a number of arguable objections and finally abstained from the vote.

Former Minister Jethmalani recalled that the matter of signing the Rome Statute never came before the Cabinet and was never discussed in 1998. The Indian press gave no attention to it. Today, he concluded, the press maintains a similar attitude. There is no serious debate in India on the ICC, thus in the opinion of former Minister Jethmalani, 'there is no Indian perspective, at least visible, and there is no Asian perspective either visible' on the ICC.

In the course of the regional workshop a more complex state of affairs emerged from the interventions made by legal practitioners and civil society groups from the region. An overview of the issues discussed and the experiences reported during the regional workshop follows below.

³⁵ See also IBA Second Outreach Report (May 2007).

³⁶

3.3 The status of ratification in South Asia

In Afghanistan – the only South Asian state party to the Rome Statute³⁷ – draft ICC implementing legislation³⁸ has been prepared under the leadership of the Independent Human Rights Commission, with input from civil society groups. This legislation has been awaiting Parliamentary scrutiny since May 2007. However, the Afghan Lower House of Representatives enacted legislation in early 2007 granting amnesty to all ‘political parties and belligerent groups’ involved in the armed conflicts prior to the establishment of the Afghan Interim Administration as well as to those ‘individuals and groups parties’ to the current conflict who would cease hostilities after the enacting of the Amnesty Law.³⁹

Much needs to be done to inform and engage the legal profession and the general public about the ICC’s work and mandate, which, remains unheard of to the majority of lawyers in Afghanistan. The lack of information and awareness about the ICC is a cause of discomfort particularly because the OTP stated publicly that Afghanistan is one of the situations currently under analysis.

Dr Kamal Hossain, Vice Chair of the International Law Association and former UN Special Rapporteur on Afghanistan, noted that Bangladesh was the first Asian state to sign the Rome Statute in 1999, but has yet to ratify it. After signing, senior government officials made statements affirming the political will of the government to move the process forward and an inter-ministerial committee was established to examine the Statute and its implications for domestic legislation. Dr Kamal Hossain also reported that NGOs have been lobbying for ratification. However, after the change of government in 2001 the ratification campaign suffered a major setback and the government has not yet indicated a commitment to move the process forward

In Nepal, the House of Representatives adopted a unanimous motion on 25 July 2006 calling on the Executive to initiate the process of ratification of the Rome Statute.⁴⁰ In October 2006 the government formed an inter-ministerial Task Force to assess the impact of ratification on Nepal’s domestic legal system. The Task Force submitted its report to the government in December 2006 and on receipt of the report, the Deputy Prime Minister and Minister of Foreign Affairs gave assurances that the government would soon begin the ratification process.

Mr Bishwa K Mainali, the President of the Nepal Bar Association, reported that to date no initiative has been undertaken by the Executive to this effect. Civil society organisations in Nepal have organised events to put pressure on the government to ratify. For example, in July 2007, 106 organisations issued a joint press statement calling on the government to live up to its original commitment. In July 2008, two years after the former Nepalese House of Representatives adopted the resolution calling for accession to the ICC treaty, a public hearing was called to question the Nepali Executive on the reasons for delay in ratifying the Statute.

In Pakistan there is a growing engagement with the ICC and Parliamentarians have expressed

37 Afghanistan became a party on 10 February 2003 by initiative of the Afghan Transitional Authority lead by President Harmid Karzai established in the aftermath of the 2001 US led invasion that toppled the Taliban regime.

38 Proposed Law on the Implementation by the State of the Islamic Republic of Afghanistan of the Rome Statute of the International Criminal Court (27 May 2007).

39 In early 2007 the Resolution of the National Assembly regarding Reconciliation and General Amnesty (Hout 1385) was voted by the Lower House of the Afghan Parliament ‘for the purpose of strengthening reconciliation and national stability’.

40 Note that under Nepalese law implementation of a motion from Parliament is mandatory for the Executive.

interest on issues related to the Court; nevertheless, the government's position remains timid.

In Sri Lanka the government has made no specific commitment to ratification. In 2005 an inter-ministerial committee was entrusted to make recommendations on the accession to the Rome Statute but the outcome of this study has not been made public. Like India, the Government of Sri Lanka abstained from voting for the adoption of the Rome Statute in Rome. It called for the recognition of terrorism as a crime against humanity and for its inclusion in the Statute.⁴¹ Mr Desmond Fernando, Former President of the Bar Association of Sri Lanka, reported that this continues to remain a concern for the Sri Lankan Government. However, Sri Lanka has notably expressed interest in attending the ICC Review Conference of 2010 as an observer.

3.4 The impact of the Rome Statute on the definition of gender-based crimes

Despite the poor record of ratifications, efforts continue to be made by several civil society groups to close the gap between the ICC and South Asia, and lawyers have been working to forge linkages between the ICC and domestic systems. During the Regional Workshop, practitioners from India as well as colleagues from Nepal highlighted a number of initiatives related to the ICC or inspired by the Rome Statute. The delegates were informed that at least one positive impact of the ICC is the fact that national systems have become more amenable to ICC standards than expected. For example, ICC norms related to gender-based crimes have begun to influence national legislation and jurisprudence.

The Rome Statute is the first instrument in international law to include a specific list of gender-based crimes.⁴² The inclusion of forms of sexual violence among the most serious crimes of international concern and the gender-based component recognised to other crimes⁴³ mark the outstanding evolution of international criminal law in this area.⁴⁴ The growing international recognition of sexual violence in armed conflicts is confirmed by the adoption on 19 June 2008 of a UN Security Council Resolution noting that in armed conflicts 'women and girls are particularly targeted by the use of sexual violence' and recalling the inclusion of a range of sexual offences in the Rome Statute.⁴⁵

Because the ICC is more progressive than many national legal systems in the way in which gender crimes and sexual violence have been defined, and in the rules and procedures for trials for sexual

41 In Rome, Sri Lanka also advocated for inclusion of money-laundering, trafficking and seminal crimes of concern to small island nations; while expressing concerns regarding the treatment of non-state actors under the Statute.

42 The following crimes have been specifically included in the Statute: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; see Rome Statute Article 7(1)(g) for crimes against humanity, 8(2)(b)(xxii) for war crimes in international armed conflict and 8(2)(c)(vi) for war crimes in non-international armed conflicts.

43 The first is the crime of persecution against any identifiable group or collectivity on various grounds, including gender (Article 7(1)(h)). The second is enslavement, defined at Article 7(2)(c) as 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'.

44 For a comprehensive overview of the evolution of the treatment of gender crimes in international criminal law, see K D Askin, 'Prosecuting Wartime Rape And Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288.

45 See UN Doc S/RES/1820 (18 June 2008). The Resolution also recognised the role played by sexual violence in the deterioration of international peace and security. The Security Council stressed that 'sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security' and affirmed that 'effective steps to prevent and respond to such acts of sexual violence can significantly contribute to the maintenance of international peace and security'.

crimes, the codification of sexual crimes in the Rome Statute has been used in India and Nepal to advance women's rights. Lawyers report that even though these two states have not ratified the Rome Statute, ICC gender provisions are used by women's rights advocates to bring changes into the domestic legal framework, either through case law or legislative reform.

The evolution of domestic laws and recent practice on gender-based crimes described below show that the impact of the Statute is far reaching and extends beyond the boundaries of States Parties. This impact is in itself a product of the work of the Court that many would not have anticipated in 1998, particularly in states that are not ICC members.

The impact on the definition of gender-based Crimes in India

Mrs Saumya Uma, coordinator of the ICC-India Campaign, affirmed that the current definition of rape in the Indian Penal Code⁴⁶ is very limited and outdated compared to international standards. Mrs Uma opined that the definition found in the Elements of Crime of the ICC is not only broader, but also gender-neutral.⁴⁷ These ICC provisions provided arguments for advocacy groups to push for a broader definition of rape and other forms of sexual violence in the draft Indian Sexual Assault Bill⁴⁸ as well as for rules of procedures and evidence that integrate gender and victims perspectives.⁴⁹

The above-mentioned proposals have been the subject of rigorous debate even prior to the Regional Workshop. Mrs Uma reported that in a workshop held in Mumbai in July 2004 by ICC-India and the India Centre for Human Rights and Law, participants explored various means by which the gender provisions of the Rome Statute could be used to strengthen law reform campaigns within India. It was found that in addition to the example of the Sexual Assault Bill, ICC provisions relating to 'reparations' could help strengthen the Scheme for Victim Trust Fund drawn up by the National Commission for Women in 1994 following the directions of the Supreme Court in the Delhi Domestic Workers' case.⁵⁰

During another workshop held in New Delhi in 2006,⁵¹ Dr Usha Ramanathan, a law researcher from India, stated that for gender-based crimes, the existing criminal law provisions in India were inadequate even for crimes against individuals, and hence would definitely be inadequate to deal with mass crimes against women. The Communal Violence Bill, designed to deal with mass violence, does not contain gender provisions and could benefit from the Rome Statute definitions. In that context, the ICC was regarded as an important framework to examine because it dealt only

46 Article 375, available at: <http://india.gov.in/outerwin.htm?id=http://chddistrictcourts.gov.in/THE INDIAN PENAL CODE.pdf>. The definition excludes marital rape from the definition and is limited to 'sexual intercourse'.

47 In the ICC's Elements of Crime, rape is defined as follows (footnotes omitted):

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.'

48 A text and commentary of the draft Bill can be found in *Combat law*, Vol 2 Issue 3, Aug-Sept 2003.

49 See Saumya Uma's presentation, Verbatim of the IBA Workshop, New Delhi, 16 February 2008.

50 'Report of a Workshop on International Criminal Court & India', Mumbai, India, (3 July 2004), at www.iccnw.org/documents/MumbaiWorkshopReportJul04.pdf.

51 'Accountability for Mass Crimes Against Women: The Relevance of International Criminal Court', New Delhi, India (13 March 2006), at www.iccnw.org/documents/ICC-IndiaDiscussionReportCrimesAgainstWomenRelevanceICC.pdf.

with mass crimes.

In the words of Vahida Nainar, a commentator from India, '[t]he strength of augmenting existing law reform processes or initiating new ones for violence against women using ICC standards is tremendous'.⁵² According to the same commentator, '[b]y no means can anyone argue that the elements of the act of rape or torture or enslavement could be different in different context and should therefore be defined differently. [...] The different context does not negate the existence of the basic elements of the act'.⁵³

The impact on the definition of gender-based Crimes in Nepal

Similarly, in Nepal, the Rome Statute definitions of gender crimes have been used by the NGO Forum for Women, Law and Development to have marital rape recognised as a crime. At the Regional Workshop, advocate Sapana Pradhan Malla, a practitioner and human rights activist from Nepal, reported that marital rape was not taken into account in the original definition of rape under Nepali law. Through efforts of advocacy groups arguing on the basis of the Rome Statute and decisions of other international tribunals, marital rape was eventually recognised as a crime by ruling of the Supreme Court of Nepal.⁵⁴

However, when the rape law was eventually changed, the punishment introduced through the new law was minimal and in fact discriminatory.⁵⁵ Again, advocacy groups challenged the law and brought to court the cases of victims whose husbands were released on a modest bail.⁵⁶ The provision was indeed found to be discriminatory and the sentence associated with the offence too minimal. In March 2007 the Supreme Court demanded that members of the Cabinet, the Ministries of Law, Justice and Parliamentary Affairs submit written affidavits on the matter. More recently the Supreme Court of Nepal passed an order to the government to review the law on marital rape in order to 'do whatever is necessary to amend the discriminatory provision on punishment'.⁵⁷

In addition to changes in the law on marital rape, advocate Sapana Pradhan Malla reported that the Rome Statute is being used by advocacy groups to challenge time limitations associated with the offence of rape.⁵⁸

52 V Nainar, 'International Criminal Court – Now a Reality' in V Nainar and S Uma (eds), *Combating Impunity: A Compilation of Articles on the International Criminal Court and its Relevance to India* (Women's Research and Action Group: Mumbai 2003) at 80. Available at www.wragindia.org/publications/Combating%20Impunity%20a.pdf

53 *Ibid.*

54 Supreme Court of Nepal, Writ No 55 of the year 2058 BS (2001–2002). The decision of the Supreme Court outlawing marital rape was issued in 2003 and it is available at www.fwld.org.np/marrape.html.

55 According to section 3 of the Rape Chapter of the Civil Code 1963, a person could be imprisoned for three to six months if he is convicted of raping his wife but according to the 1963 Code, a person can be imprisoned for over seven years if he rapes a woman.

56 Challenging the provision was a victim, Jit Kumari Pangen, and a group of advocates, including Sapana Pradhan Malla and Meera Dhungana, who filed a PIL challenging section 3 of the Rape Chapter of the Civil Code because the provisions related to marital rape contained in it were found to be discriminatory (Also in http://nepallaw.blogspot.com/2007_03_01_archive.html SC Notices on Discriminatory Marital Rape Law).

57 The order was given in response to public interest litigation filed by a victim of marital rape assisted by advocate Sapana Malla, at: www.kantipuronline.com/kolnews.php?&nid=153110; and at: www.nepalmountainnews.com/news.php/2008/07/11/treat-husbands-who-rape-their-wives-on-par-with-other-rapists-sc.html.

58 See Sapana Malla's presentation, Verbatim Proceedings of the Regional Workshop, New Delhi, 16 February 2008, at 75.

3.5 Other examples of domestication of ICC standards through litigation and law reform

Both in Nepal and India, public interest litigation based on ICC standards has been used as a strategic tool for reforming the law when the Executive and Parliament have been slow, or even resistant, to initiating such reforms.

For example, in Nepal, where the use of child soldiers has been a common practice by both state and non-state actors, advocacy groups used the Rome Statute and international human rights standards to challenge the Regulations⁵⁹ that allowed State Security forces to recruit boys under the age of 18 to the army and the police. As a result the Supreme Court of Nepal in 2005 declared the laws null and void because they contravened the Constitution.⁶⁰

The reasoning of the 2005 decision is echoed by a more recent decision in a habeas corpus case. The Court has ruled that, even if Nepal is not a party to regional human rights instruments, as a member of the United Nations it may still use the standards developed by regional human rights conventions and the decision generated by regional courts as ‘recognised principles of justice’ applicable in Nepal by virtue of its Constitution.⁶¹ According to Nepali advocate Sapana Pradhan Malla, the principle can easily be extended to the Rome Statute in light of the fact that those constitute emerging international law and, as such, the ICC is a standard-setting mechanism from which national courts may decide domestic cases.

Similarly, national systems may draw from ICC standards to promote law reform initiatives. In India, strong resistance by Parliamentarians and civil society to the 2005 draft Communal Violence Bill led to a new text drafted with the inputs of lawyers, academics, human rights activists and advocacy groups. The law is expected to deal with mass crimes, the first legislation of this type in Indian history. Some of the features of the new draft draw extensively from the ICC Statute, such as the definition of certain crimes, the recognition of rights to victims and survivors, and the introduction of the ‘command responsibility’ concept as well as a gender component to the crimes.⁶²

In addition, the Law Commission of India is currently looking at the issue of the protection of victims and witnesses. Advocacy groups have been lobbying for the adoption of standards inspired by those in the Rome Statute. Mrs Saumya Uma reported during the Regional Workshop that Rome Statute-inspired lobby efforts are also ongoing in relation to the model Police Act currently under development.

59 Police Recruitment and Service Regulations 2042 and Recruitment Service Regulations of Royal Nepal Army-2028 which stated that recruits had to be between 13 and 17, and 15 and 18 years of age, respectively.

60 See ‘SC rules against recruiting minors in police and army’ in Legal News from Nepal, 16 December 2005 at www.nepallaw.blogspot.com.

61 ‘Even as Nepal has not become party to a separate regional convention, it has remained an active member of the United Nations, accepted several conventions related to human rights and has repeatedly expressed its commitment towards human rights and freedom of citizen through constitution and other legal provisions. In this context, it seems that this court may take standards and principles established pursuant the above mentioned foreign and human rights related decisions made by the regional courts [Inter-American and European Court of Human Rights] as *recognized principles of justice* embodied in our constitution. There would be no reason to take them otherwise.’ (emphasis in the text). See 01.06.08 **Decision by the Supreme Court of Nepal (Habeas Corpus case)**, Writ no 3775 registration, date 2055/10/7/5 BS (Jan 21, 1999 AD), at 21.

62 See ‘Forging linkages between ICC and Domestic Law Reform and Litigation: some experiences from South Asia’, a paper submitted by Saumya Uma at the Regional Workshop. Also in Verbatim Proceedings of the Regional Workshop where she describes the concept of command/superior responsibility as a ‘novelty’ in India law, at 69.

Civil society groups and actors have also repeatedly called for a domestic law on genocide.⁶³ In 1959, India ratified the 1948 Genocide Convention but no implementing legislation has yet been enacted. In the absence of a law on the crime of genocide it is not possible to prosecute perpetrators within the Indian system because of procedural and jurisdictional issues.

3.6 The exclusion of terrorism as a crime under the Rome Statute

The exclusion of terrorism from the jurisdiction of the ICC was mentioned as an issue of concern by several lawyers speaking at the Regional Workshop. This issue is unsurprisingly recurrent during discussions on the ratification of the Rome Statute in South Asia; almost every country in the region faces terrorist activism in one form or the other.

It is worth mentioning that at the time of the negotiations leading to the adoption of the Rome Statute, a proposal was put forward by India and Sri Lanka, among others, to include terrorism on the list of crimes against humanity as contained in the Rome Statute.⁶⁴ This proposal was ultimately rejected, along with other proposals to include ‘treaty crimes’ within the realm of the Rome Statute,⁶⁵ creating disappointment in the Indian delegation.⁶⁶

During the Regional Workshop, ICRC representative Christopher Harland argued that the major obstacle to date of the inclusion of terrorism in the Rome Statute lies in the definition of the crime. Not only is there is no universally accepted definition of terrorism, but the act also contains an important political element.⁶⁷ In Harland’s view, however, any act which is currently defined as an act of terrorism already falls under the jurisdiction of the Court. This argument was also reiterated by the ICC Deputy Prosecutor, Mrs Fatou Bensouda, who commented that ‘all of the fact patterns that you have in acts of terrorism are already in the ICC Statute’.

As Roberta Arnold has explained, ‘it may be sufficient to prove that so-called acts of terrorism, as they are defined by everyday language, possess the elements of the *already existing* core crimes [...]. This approach would bring terrorism indirectly into the jurisdiction of the ICC’.⁶⁸ It follows from this argument that there might be no need to include the crime of terrorism in the Statute. This approach is not a novelty to international criminal tribunals; in fact the International Criminal Tribunal for the former Yugoslavia (ICTY) adopted such an approach when it included rape, which

63 For example, Siddharth Varadarajan, ‘Communal Violence: Need for a Robust Law on Genocide’, *The Hindu*, 25 August 2004; Priya Pillai, ‘Courting InJustice’, *Industan Times*, 8 November 2007.

64 Proposal submitted by Algeria, India, Sri Lanka and Turkey on Article 5, UN Doc A/CONF.183/C.1/L.27/Corr.1.

65 ‘Treaty crimes’, so-called because of the existence of international conventions proscribing them, include, inter alia, apartheid, drug trafficking, terrorism and crimes against UN personnel. That argument was bolstered by the claim that an objective of the Rome Statute was to codify pre-existing rules of customary international law, and so including a crime whose definition is not agreed upon would have gone against this approach. See A Zimmermann, ‘Article 5 – Crimes within the Jurisdiction of the Court’ in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* (Nomos Verlagsgesellschaft: Baden-Baden 1999) 97 at 98–99.

66 Of note the statement of Mr Dalip Lahri, Indian representative at the Rome Conference: ‘throughout the long process for preparing this conference India has negotiated in the expectation that an international Criminal Court will emerge to which we can be a signatory. We would have wanted to be one the first signatories of the ICC. Equally, it should have been in the interest of the ICC to have a country like India on board’ (available at: www.indianembassy.org/policy/ICC/ICC_Adoption_July_17_1998.html).

67 As William Schabas writes, ‘one person’s terrorist is another person’s freedom fighter’ in W Schabas, *An Introduction to the International Criminal Court*, (3rd edn CUP: Cambridge 2007) at 90.

68 R Arnold, *The ICC as a New Instrument for Repressing Terrorism* (Transnational Publishers: Ardsley 2004), at 61 (emphasis in the original text).

was not a crime listed in the statute, within the definition of torture.⁶⁹

In practice, acts of terrorism could be prosecuted under the Statute as war crimes or crimes against humanity, while trying to prosecute a terrorist act under Article 6 would most probably prove to be a challenge.⁷⁰ According to some scholars, it remains as an open question whether any terrorist acts could truly be prosecuted as crimes against humanity under the Rome Statute. Only very specific terrorist acts could in fact meet the requisite criteria. Acts must be part of a widespread and systematic attack. Article 7(2)(a) defines an attack as ‘a course of conduct involving the *multiple commission of acts*’ (emphasis added). It is true that a single act which kills only one person could in theory qualify as a crime against humanity, but this act must have taken place in the course of a widespread and systematic attack. The only terrorist acts that could fall within the realm of Article 7 are state-sponsored terrorism or acts committed according to the policy of an organisation and as part of a series of actions.

3.7 The role of national judicial proceedings

During the Regional Workshop senior lawyers from the region highlighted the importance of national accountability mechanisms for mass human rights violations. ‘There is no doubt that South Asia has witnessed terrible human rights violations that call for legal accountability and that local actors publicly welcome any deterrent to the commission of similar offences in the region’ stated Dr Kamal Hossain.

The poor record of ratification in South Asia is often due to the internal political turmoil faced by several countries in the region. Despite this, the relevance of international humanitarian law and the ICC has increased in South Asia.

The Rome Statute’s Preamble stresses that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’;⁷¹ such a duty precedes the existence of the Court and applies to all states regardless of the ratification of the Rome Statute. Thus non-state parties’ investigation and prosecution of crimes under the jurisdiction of the ICC may reinforce the latter.

It is to be noted that proceedings might not only be triggered on the grounds of territorial jurisdiction but that non-territorial states are also entitled to prosecute those responsible on active and passive nationality or universal jurisdiction grounds.⁷² Similarly the adoption of legislation covering the jurisdiction *ratione materiae* of the ICC Statute is possible even in non-states parties.

This wide range of options available to nation-states or the consequent trend to retain control over prosecuting nationals should not be seen as detrimental to the ICC; on the contrary it may well have a positive impact on the ICC system as a whole when genuine proceedings are put in place at the national level. Furthermore national investigation and prosecution of international crimes may be

⁶⁹ *Prosecutor v Furundzija*, Judgment of December 10, 1998, IT-95-17/1 at paras 158 and 172. See also R Arnold, *ibid* at 53.

⁷⁰ Genocide, due to its very specific definition, does not easily apply to acts of terrorism. The difficulty lies in proving the specific intent ‘to destroy, in whole or in part’ a group.

⁷¹ Preamble to the Rome Statute at para 6.

⁷² See ‘the principle of complementarity in practice’, ICC-OTP Informal Expert Paper (2003) at 24.

considered a measure of success of the ICC system.

In this context the ICRC representative, Mr Harland, pointed out that it is in the interest of non-states parties to include ICC crimes in their criminal framework because of the status these crimes enjoy under international law. The ICRC representative then explained that to ensure that a national system has the ability to deal with complexity of international crimes and meet the fair trial standards required by the ICC, a number of enabling factors must be in place. Because national systems have a primary duty to prosecute those responsible for crimes, strengthening laws and domestic legal systems is not just a side-effect of the Statute; on the contrary it lies at the very centre of the ICC system.

The ICRC representatives also stressed how ‘actions that states take in this respect are very important to international criminal justice and respect for International Humanitarian Law, and may very well affect, in part, the success of the mission of the Court’.⁷³

Ratification usually implies the adoption of domestic implementation legislation. Currently, only about 47 out of 108 States Parties have enacted such legislation. It was said during the Regional Workshop that the Statute does not require *per se* a review of national laws to incorporate the definitions of crimes described in the Rome Statute. However, many States Parties, especially common law countries of dualist tradition, have done so.

States considering ratification should bear in mind that they would be specifically required to ‘ensure that there are procedures available under their national law for all of the forms of cooperation’.⁷⁴ Legislative changes are required to introduce new procedures dealing with international crimes and cooperation requests from the ICC. To ensure genuine prosecutions of international crimes at the national level that meet the highest standards of international law, States Parties shall adopt administration of justice offences that criminalise acts that can defeat or dilute the work of national courts.

Furthermore, ICC implementing legislation ought to be harmonised with obligations of similar scope generated by other treaties. As pointed out by Christopher Harland, the recognition of ICC jurisdiction does not remove any pre-existing obligations and international law with respect to crimes that are not in the jurisdiction of the Court. All countries in South Asia are party to the Geneva Conventions, and India, Pakistan and Sri Lanka have implemented national legislation to this effect.⁷⁵ There are crimes which are contemplated in the Geneva Conventions that are not in the Rome Statute and some implementing legislation recognises universal jurisdiction for grave breaches of the four Geneva Conventions.⁷⁶ Ratification and acceptance of the jurisdiction of the ICC should not impede their full enforcement.

In conclusion, national legal systems are a cornerstone of the ICC system and according to the ICC Prosecutor, ‘increasing numbers of genuine investigations and trials at the national level may well

⁷³ See C Harland, ‘ICC Implementation aspects’, presentation given at the Regional Workshop, 16 February 2008.

⁷⁴ Art 88 Rome Statute.

⁷⁵ See in India the Geneva Conventions Act of 1960; in Pakistan the Geneva Convention Implementing Act, No XIV of 1936 as well as the Geneva Convention Implementing (Amendment) Act, Act XXI of 1963; in Sri Lanka the Geneva Conventions Act, No 4 of 2006; available at: www.icrc.org/ihl-nat.nsf/WebLAW!OpenView&Start=1&Count=300&Collapse=1.1#1.1.

⁷⁶ See in particular the case of Sri Lanka’s Geneva Conventions Act, No 4 of 2006, adopted on 26 February 2006 and published in the *Official Gazette* on 3 March 2006.

illustrate the successful functioning of the Rome system as a whole'.⁷⁷ In the words of one participant from Sri Lanka, national proceedings maintain a higher level of ownership for victims and therefore 'dispense true justice'.⁷⁸ However, in the opinion of the same lawyer, 'when the perpetrators and the investigative organs remain one and the same and a victim is expected to complain to the same official or to the colleague of the perpetrator, then a permanent ICC will usher in justice for victims more effectively over any domestic remedy'.⁷⁹

3.8 The challenge of cooperation by non-states parties

Notwithstanding the compelling issues and concerns South Asian countries hold against ratification of the Rome Statute, it was noted that the establishment of the ICC has permanently changed the landscape of international justice and international relations in South Asia. For example, the first ever United Nations Security Council (UNSC) referral to the ICC in the case of Darfur has shown that the great powers, including China and the United States, have already entered into a deal with the ICC.

The Statute envisages the possibility of ad hoc assistance by a non-state party.⁸⁰ Scholars have argued that there are cooperation duties binding all states as members of the United Nations. Cooperation is a crucial issue for the ICC. The Deputy Prosecutor noted that requests for cooperation may be directed to states that are not a party to the Statute and such non-states parties may enter into cooperation agreements with the Court. To date, the OTP has obtained cooperation from non-states parties and cooperation is no longer the sole domain of states parties. In the words of the Deputy Prosecutor, 'experience has shown that cooperation may in practice be influenced by feasibility, procedural, policy issues as well as the existence of effective domestic procedures enabling practical executions of request by the ICC'. She added 'if the ICC can wait, the victims cannot wait (...) All of us who are committed have to show a consistent approach'.

The legal profession can play an important role by adopting a consistent supportive approach. Advocacy by lawyers can make a dramatic difference in a region where governments do not accept the jurisdiction of the Court.

It was concluded that India as a country and South Asia as a region cannot afford to ignore the existence of the Court. Commissioner Malone pointed out that: 'as India is definitely emerging as a great power the important thing is for Indians to reflect what sort of great power India wants to be. (...) How is India as a great power going to be different or is it going to be different? Does India want a permanent seat on the Security Council in order to be like China or the United States or to be something different?'.⁸¹

77 See: ICC prosecutorial strategy 2002–06 (14 September 2006), at para 14; available at www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf.

78 See: C Kumarage: 'Forging linkages between the ICC and domestic law reforms and initiatives', paper presented at the Regional Workshop (16 February 2008).

79 *Ibid.*

80 See Art 87(5) Rome Statute.

81 See the Regional Workshop's Verbatim Proceedings at 38 (16 February 2008).

3.9 Conclusion

During the Regional Workshop, there was consensus that it would be beneficial to the region to be part of the ICC; many authoritative lawyers called for ratification of the Statute by their governments. It was also argued that because there are cooperation duties binding all states as members of the United Nations and ICC crimes enjoy a particular status under international law, it is of interest to all states to include ICC crimes in their criminal framework and encourage national prosecution.

In this process, the legislative measures taken by states at the time of ratification are crucial and efforts have to be made to provide technical assistance to countries willing to ratify the Rome Statute.

The contribution of individual lawyers and professional organisations to the success of the Court should not be underestimated. The demand for accountability at the national level creates the environment for the ICC to combat the culture of impunity. Lawyers were viewed as key players in the fight against impunity and in the promotion of the ICC.

Closer interaction between the ICC and the national systems in South Asia and, in practice at least, a 'South Asian perspective' on the ICC is slowly coming into existence. It appears that the Rome Statute is influencing national legal systems through ongoing law reform efforts and litigation before national courts, for example in relation to gender-based crimes. This strengthens the authority of the ICC as a standard-setting body of international relevance and measures the impact the Court might have on states not party to the Statute.

In the opinion of many attending the Regional Workshop, it would also be important for the Review Conference in 2010 to address the concerns expressed by South Asian states.⁸² This would fill the gap between the ICC and non-party states from the region.

Finally, it was also acknowledged that in light of the situations and cases currently before the Court, the referral power of the UN Security Council to date has not jeopardised the independence of the Court, as it was feared in Rome. Five years after the establishment of the ICC the attitude of the Indian Government at the diplomatic level is not obstructive to the Court; however, as a key player in the region more can be expected from India. At minimum, India should take a leading role in encouraging consistent and effective cooperation with the ICC in South Asia.

⁸² See in the Verbatim Proceedings of the Regional Workshop the intervention by Shri RKP Shankardass, who advocated for a Review Conference in 2010 that could take into consideration Indian concerns on the Statute.

Chapter 4: The International Criminal Court as an opportunity for Malaysian lawyers

4.1 Malaysia and the International Criminal Court

Malaysia has not ratified the Rome Statute. In 1998, the Ambassador of the Kingdom of Malaysia to Italy, who represented Malaysia at the Rome Conference stated that, in principle, Malaysia supported the establishment of an ICC although it should complement and not replace national courts.⁸³ Furthermore, in Rome, concerns were expressed regarding the trigger mechanism of the jurisdiction of the Court; the Prosecutor's power to initiate an investigation *proprio motu*; and the ICC lack of jurisdiction on the use of weapons of mass destruction.

After the establishment of the ICC, the Malaysian Government resolved to study the impact of ratification of the Rome Statute on the national legislative framework. An inter-ministerial committee was created under the leadership of the Attorney General Chambers/International Criminal Matters Unit, comprising about 20 members including representatives of the Home Affairs Ministry, the Ministry of Foreign Affairs and the Ministry of Defence. Its study proved to be a lengthy process. In November 2007, the Foreign Ministry's Parliamentary Secretary stated before the *Dewan Rakyat* (Lower House of the Parliament) that Malaysia was not yet ready to sign the Rome Statute and there was 'no need to rush headlong into it'. He added that the government agreed in principle to the objectives of the ICC, but that prior to ratification there were outstanding questions that ought to be resolved regarding the interpretation of certain terms and the compatibility of Malaysian legal framework.⁸⁴

The inter-ministerial committee is reported to have concluded a study of the legal issues posed by the Rome Statute and to be in the process of drafting an ICC Act.⁸⁵ However, no detailed information on the findings of the research or the status of the drafting process has been disclosed. Malaysia had expressed a number of concerns related to the compatibility of the Statute with existing domestic legal framework, including issues related to the immunity of monarchs; the difference in roles of the ICC Prosecutor and the Attorney General of Malaysia; and the acceptance of the death penalty. There is no information as to whether these issues have been resolved positively or what legislative changes, if any, have been found to address them.

Despite the delayed process of ratification the Government of Malaysia has shown a positive attitude towards cooperation with the Court and continues to participate as an observer at ASP meetings. Malaysian civil society is looking with interest at Malaysia's relationship with the ICC. The Bar Council of Malaysia, in particular, has been vocal in calling for prompt ratification of the Statute. The Malaysian Human Rights Commission (SUHAKAM) has also expressed a keen interest in the

83 'Statement by H E Mr Ramanathan Vengadesan, Ambassador of Malaysia to Italy', Rome, 18 June 1998.

84 See press reports in the local newspapers: *The Sun* (15 Nov 2007); *Bernama* (14 Nov 2008); and *The Star* (15 November 2007).

85 Malaysia has a dualistic system where national legislation is required in order to incorporate international treaties.

issue of Malaysian ratification.⁸⁶

In November 2006 the Bar Council joined the Coalition for the International Criminal Court (CICC), and, during the course of 2007, organised various meetings with NGOs and individuals to galvanise support around the initiative. The IBA visited Malaysia in December 2007 seeking to collaborate with the Bar Council of Malaysia on ICC issues.

4.2 The 4 April 2008 lawyers' seminar in Kuala Lumpur

From these preliminary consultations with key stakeholders, including the SUHAKAM, individual lawyers, human rights NGOs, representatives of donor countries and government officials, it became apparent that there was little awareness about the ICC's work and mandate among the legal community. The jurisprudence of the ICC and other international and hybrid tribunals is not known to legal professionals in the country and most ignore its impact on the national and international legal framework. Practitioners in Malaysia view the ICC as a distant body which is not relevant to their practice. Out of the 237 lawyers registered with on the ICC's List only one is a Malaysian national.

To provide support to the Bar Council in raising awareness, the IBA organised a one-day outreach seminar entitled 'Relevance of the ICC to Malaysian lawyers: what can be gained?' (hereafter called the Seminar). The Seminar, organised jointly with the Bar Council of Malaysia, took place on 4 April 2008 in Kuala Lumpur. A total of 50 persons attended, including lawyers, civil society representatives and government officials.

The aim of the seminar was to demonstrate to Malaysian lawyers the relevance of the ICC, to highlight professional opportunities available at the Court that could be beneficial to Malaysian lawyers and to address a number of misperceptions about the ICC. In order to give a truly practitioners' perspective on the ICC, the experts invited to the Seminar were carefully chosen to include lawyers with experience before international tribunals. Panellists and speakers for the Seminar included: Mrs Paolina Massidda, ICC's Principal Counsel for Victims; Mr Rupert Skilbeck, Principal Defender in the Defence Office of the Extraordinary Chambers in the Courts of Cambodia (ECCC); Mr Shanmuga Kanesalingam, advocate and member of the Human Rights Committee of the Malaysian Bar Council; Mr N Sivananthan, criminal law practitioner in Kuala Lumpur; and sole Malaysian counsel admitted to the List of Counsel of the ICC.

The Seminar opened with remarks by the Vice President of the Bar Council, Mr Ragunath Kesavan and by SUHAKAM Commissioner Tunku Datuk Nazihah Tunku Mohamed Rus, who called for a greater engagement by Malaysia with the ICC and noted that the Seminar was a 'timely catalyst'. During the course of the day an overview of the jurisdiction, situation and cases before the ICC was provided as well as an analysis of arguments in favour and against ratification. The second part of the Seminar focused on the role of lawyers before international and hybrid courts, especially ICC and ECCC. A brief overview of the topics discussed at the Seminar follows.

⁸⁶ See Bar Council Press Release 'Malaysia should join the ICC' (17 July 2007) at www.malaysianbar.org.my.

4.3 Malaysia and the ICC: outstanding but not irresolvable concerns

Arguments presented in opposition to Malaysia's ratification of the Statute were also discussed at the Seminar. For example, the issue of the immunities afforded to the Malaysian monarchs as recognised by the Malaysian Constitution⁸⁷ has been cause for concern; it is generally perceived as contradictory to the Rome Statute. The discussion highlighted that the exclusive jurisdiction of the Malaysian Special Court, which is competent to try all offences and all civil cases by or against the *Yang di-Pertuan Agong* or the Ruler of a State, could be reconciled with the Rome Statute in light of the complementarity principle.

Reference was also made to other monarchies that have ratified the Statute, such as Japan. It was further noted that because under the Rome Statute states parties are required to lift immunities for Head of States, best practices from other countries might also be relevant to Malaysia. In such cases, states parties have solved the issue either by amending their Constitution or by recognising the primacy of the obligations posed by international treaties over those of national law.

It was noted that, although according to Article 41 of the Malaysian Constitution the *Yang di-Pertuan Agong* (the Supreme Ruler) is the Commander-in-Chief of the Federation Armed Forces, his role is mostly ceremonial and that, in practice, operative decisions are taken by the Chief of the Armed Forces Staff on the advice of the Armed Forces Council. Thus it is very unlikely that the Supreme Ruler would be charged by the ICC Prosecutor.

Furthermore ICC jurisdiction was found not to be a threat to national sovereignty both in light of the fact that political prosecutions have not occurred in these first years of the Court's existence and because the said principle of complementarity gives primacy to national proceedings and makes the ICC a court of last resort.

It was emphasised that the ICC is not a Western court. Malaysia and other Asian countries participated in the drafting of the Statute; 13 countries in Asia have ratified the Statute, of which four are members of the Association of Southeast Asian Nations (ASEAN). In addition, the experience of judicial accountability for international crimes is not foreign to the region.

The Principal Defender in the Defence Office of the ECCC demonstrated in his presentation that Asia has experienced international justice and endorsed the foundation of what later became the principles of the Rome Statute. The Tokyo Trials after the Second World War, the International Military Tribunal for the Far East which dealt with crimes against peace, other so-called secondary trials held in Asia (namely in Australia, China, and Philippines), and the Singapore and Kuala Lumpur trials, all highlight this thesis. More recently the East Timor trial and the ECCC demonstrate that Asia has not excluded international justice for the most serious crimes.

Moreover, it was emphasised that the Statute codified well-recognised international standards and has unique positive features (such as victims' participation to the proceedings and fair trial guarantees) which are not inconsistent with Sharia Law. Although it is said to be against the spirit of

⁸⁷ Article 182(2) of the Federal Constitution states that 'any proceedings by or against the Yang di-Pertuan Agong or the Ruler of a State in his personal capacity shall be brought in a Special Court established under clause (1) of Article 182'. Pursuant to Article 183, 'no action, civil or criminal shall be institute against the Yang di-Pertuan Agong or the Ruler of a State in respect of anything done or omitted to be done by him in his personal capacity except with the consent of the Attorney-General personally'.

the Statute, ratification *per se* does not demand states parties to abolish the death penalty.⁸⁸ To date, 19 countries of the Organisation of the Islamic Conference (OIC) have already joined, many of which retain the death penalty.

Delegates concluded that, although the arguments in opposition of the ratification of the Rome Statute require analysis, these arguments are not irresolvable.

4.4 Malaysia and the ICC: advantages and opportunities

The issue of ratification was also discussed in relation to the advantages and opportunities made available to Malaysia by joining the Court. Firstly it was stressed that Malaysia has a long commitment to international humanitarian law. Mr Shanmuga stressed that in 1962 Malaysia adopted the Geneva Conventions Act, which provides for punishment of grave breaches of the 1949 Geneva Conventions and regulates certain aspects of legal proceedings instituted against prisoners of war or other protected internees. Malaysia acceded to the Genocide Convention in 1994 and more recently to the Chemical Weapons Convention and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

Malaysia has been outspoken in condemning crimes against humanity committed in East Timor and Myanmar and calling for UN intervention in these countries, thus implicitly recognising the importance of accountability for the serious violation of international law. In addition, Malaysia is an active contributor to UN peacekeeping missions and has taken part in peacekeeping operations in Angola, Bosnia and Herzegovina, Burundi, Cambodia, Chad, Ethiopia, Eritrea, Iran, Iraq, Kuwait, Lebanon, Liberia, Mozambique, Namibia, Sierra Leone, Somalia and Western Sahara. Malaysia also provided humanitarian assistance during the Asian tsunami.

As it places itself at the centre of the South East Asian political landscape and in light of its history, it was argued that Malaysia has everything to gain in joining the Rome Statute. Mr Shanmuga stated that 'there seems to be absolutely nothing happening in our peaceful country at the moment which even remotely resembles the crimes ICC is concerned about. In addition the ICC cannot act retrospectively (...) Ratification is a natural next step for Malaysia'. In an earlier statement for the Bar Council, Mr Shammuga had articulated that it is 'Malaysia's continuing interest as a responsible member of the international community to be a part of this worldwide initiative towards ending impunity for aggressors in conflict-ridden areas of our global village and obtaining justice for victims of some of the gravest crimes against humanity'.⁸⁹

Moreover, it was argued that ratification may trigger positive changes in the domestic justice system and improve the criminal law framework, which is 50 years old and has several faults. The ICC is often said to be a safeguard against executive interference in judicial proceedings, and in Malaysia it might have a positive impact in ensuring more transparency in the justice system and a clearer division of roles between the prosecution and the judicial authorities.

The ICC was recognised as a 'noble initiative' of countries committed to the rule of law and a deterrent to the commission of the most serious crimes. Ratification by Malaysia would not only

⁸⁸ The Malaysian Bar Council's position against the death penalty in Malaysia was nevertheless conveyed by the speaker.

⁸⁹ See 'The Malaysian Bar: justice for victims of war crimes' (17 July 2007), at www.malaysianbar.org.my.

promote its ideals, but also may serve as a self-defence tool discouraging powerful countries from invading Malaysia or committing international crimes on its soil.

Finally, because the ICC is already 'a done deal' and eventually all countries are likely to join the Court, the sooner ratification occurs the easier it would be for Malaysia to influence the structures of the ICC, for example by following the example at ICTY and having a Malaysian judge in the Chambers or by participating actively in the forthcoming Review Conference. In addition, engaging with the Court will also open the doors to Malaysian nationals, particularly lawyers, to work at the ICC.

4.5 The challenges and role of lawyers at the ICC

The issue of what role independent lawyers can play at the ICC was discussed in several of the presentations given at the Seminar. The ICC Principal Counsel for Victims, Paolina Massidda, emphasised that in relation to the ICC proceedings lawyers are needed to ensure that defence and victims' rights are truly respected.

The Rome Statute encompasses fair trial standards, which provide extensive safeguards for the rights of the accused. However, without strong defence the realisation of such guarantees remains at stake. The Rome Statute also recognises a role for victims in the proceedings but without legal representation, the voice of victims might fail to be heard.

The ICC Principal Counsel for Victims advised that the Court has recognised the crucial role played by counsel and legal representatives for victims and explained the challenges posed by ensuring quality legal services. To provide assistance to parties in the proceedings and tackle the natural gap between national and international practice, two independent teams of lawyers exist within the ICC: the Office of Public Counsel for Victims (OPCV) and the Office of Public Counsel for Defence (OPCD). These offices were established pursuant to the Regulations of the Court as independent offices falling under the Registrar for administrative purposes only and became functional in 2005 and 2006, respectively.

In relation to victims, Rule 16 and Rule 90 of the Rules of Procedure and Evidence of the ICC state that the Registrar is responsible for 'assisting them in obtaining legal advice and organising their legal representation' without prejudice of the right of victims to choose freely their legal representatives. The OPCV was established to assist victims in the exercise of their rights⁹⁰ providing support as well as representing individual and groups of victims upon the Chambers' request on either an ad hoc or a permanent basis.⁹¹

The ICC Principal Counsel for Victims noted that the OPCV's role starts as early as the investigation phase having been appointed to represent the interest of victims awaiting the determination of their status by the Chamber. At the time of the Seminar the OPCV was involved in all situations and cases and served as legal representative for 23 victims in the situation of Darfur and 49 victims in the situation of Northern Uganda. In addition the OPCV provided assistance to 13 legal representatives' teams.

On the defence side the OPCD is mandated to ensure that the rights of the accused are guaranteed

⁹⁰ Regulation 81 of the Regulation of the Court.

⁹¹ Regulation 80 of the Regulation of the Court.

throughout all stages of the proceedings and that the defence is put in a position of equality *vis-à-vis* the prosecution. The general interest of the defence is therefore protected before a suspect is summoned to the Court. Thus the OPCD might appear as ad hoc counsel and submit observations in situations and on specific legal issues by order of a Chamber. For example, the OPCD has been appointed by the Chambers to represent the interests of the defence in the situations in Uganda, Darfur and the DRC.

However, the ICC Principal Counsel for Victims pointed out that the OPCD does not represent individual suspects or accused in contrast with the representational role recognised to the OPCV. Although the OPCD Principal Counsel has been appointed to represent a suspect, Mr German Katanga, at his first appearance hearing, the Chamber had made it clear that the office's mandate could not extend beyond that. In light of the legal framework governing the offices and the practice of the Pre-Trial Chambers, the OPCD and OPCV play an important function in providing support to external counsel and legal representatives.

The IBA Representative at the Seminar stressed that, according to the framework presented above, the defence of a suspect or an accused is the duty of external counsel only. The ICC has chosen to engage with lawyers from different jurisdictions and not limit the practice to a restricted number of lawyers specialised in international law. The IBA welcomes this policy. However to enable external lawyers to practice before the ICC, the challenges posed by the complexity and specialty of the Rome system should not be underestimated.

A lawyer in private practice might lack knowledge of the ICC system and procedural rules governing the trial. For example, the participation of victims in the proceedings poses challenges both to lawyers defending the accused and those representing victims. Lawyers from different legal systems might be unfamiliar with the procedural role of victims and defence lawyers might not be familiar with addressing both the prosecution case and the submissions made by victims' legal representatives.

In light of these challenges, several speakers emphasised that the OPCD and OPCV provide training on applicable law and the complex ICC procedures. This enables them to perform their duties on an equal footing with OTP.

4.6 The ICC List of Counsel

During the Seminar a full session was dedicated to an examination of what opportunities are available to Malaysian lawyers at the ICC. Both the ICC and the IBA Representatives informed the seminar that, similar to the experience of other international tribunals, lawyers willing to practice before the ICC must be included in the ICC List of Counsel held by the Registry (hereafter called the List).

The List serves as a roster for defence counsel as well as for legal representatives of victims and persons entitled to legal assistance before the ICC. Each can freely choose counsel from the List or appoint another counsel who meets the required criteria and is willing to be included in the List. In addition, counsel on the List can be called upon at any time to provide legal assistance for proceedings before the Court.

The ICC Registry manages the List and establishes whether individual applications are admissible in conformity with the qualification posed by the RPE and the Regulations of the Court.⁹² In addition, the Registry maintains a List of Assistant Counsel.⁹³ This list follows similar application procedures but lawyers are only required to have five years of relevant experience in criminal proceedings instead of ten for the List of Counsel or other specific competence in international or criminal law and procedure.⁹⁴

The IBA Representative mentioned that the List currently includes 236 persons of which 47 are women. Together with Latin America, Asia is the region least represented in the List with only four lawyers. The List is open to any lawyer who possesses the necessary qualifications, regardless of whether he or she is qualified to practice in a country which has ratified the Rome Statute. Whilst the List is open to Malaysian lawyers, only one Malaysian professional is accredited to it.

It was stressed that Malaysian lawyers may have an advantage over other professionals because the Malaysian legal profession enjoys a good reputation at the international level and is currently represented by a strong Council that supports its members' application to the List. Importantly Malaysian lawyers are being trained in, and practice in, English, one of the ICC's two official languages.

Mr Sivananthan reported his experience in applying to the List. He stressed that his application went through a strict and long review process, but that, after being included in the List, he has found that accreditation offered him 'a new challenge' and a number of opportunities regardless of whether one is called to defend an accused or represent a victim. For example, counsel can receive in-house training on advocacy skills and jurisprudence of international tribunals, and have access to training tools including a 'Manual for Counsel' developed by the Court.

List counsel are exposed to a network of professionals with different backgrounds and experiences and are eligible to participate in consultations on defence issues through the Counsel Extra-Net created by the Registry. This is a unique opportunity to contribute to the development of international law while the Court is at a standard-setting phase.

The challenge posed by maintaining a law practice in Malaysia while practicing at the ICC was raised along with questions about the probability of a Malaysian lawyer being selected to represent a party in ICC proceedings. It was emphasised that suspects, accused and victims are free to choose a lawyer of their choice. Registration with the List is an important enabler since those in need of legal assistance are presented with the names and résumés of the members from the List Counsel. In fact, not being in the list makes it more difficult for a lawyer to receive power of attorney.

For those who are called to represent a party in the proceedings, the Court provides logistical and administrative support as well as a competitive remuneration. Competent advice and legal

92 See RPE Rule 20 and 21; Regulations of the Court Reg 67, 69, 70, 73. Of note, to be admitted to the list of Counsel candidates shall meet *all* the following criteria: (i) Have an established competence in international or criminal law and procedure; (ii) Have relevant experience (eg, minimum ten years) in criminal proceedings, whether as a judge, prosecutor, advocate or in another similar capacity; (iii) Possess excellent knowledge of and be fluent in at least one of the working languages of the Court (EN or FR); and (iv) Shall not have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court.

93 Regulation 125 (1) of the Regulations of the Registry.

94 Regulation 124 of the Regulations of the Registry.

research is provided to appointed lawyers by colleagues working at the Court. All filings and submissions are completed electronically and legal representation during the proceedings is administrated by a team of lawyers, allowing counsel to work effectively from a distance and to maintain their practice at home.

Other opportunities are available to Malaysian professionals, namely accreditation to the roster of external experts and the visiting professional programme.⁹⁵ The roster of experts at the Registry and OTP facilitate the provision of specialist, independent legal advice on complex questions arising from the work of the Court. The visiting professional programme also offers the opportunity to work for a short period with one of the organs of the Court and/or to cooperate on a specific project pertinent to the knowledge and specialisation of the candidate. The Court welcomes participation by nationals of non-states parties.

4.7 Improvements in the organisation of the defence: counsel at the ICC and ECCC

The organisation of the defence at the ICC represents an improvement in relation to the practice of the ad hoc tribunals. At the ICTY and ICTR, the office that deals with defence counsel matters is also responsible for maintenance of the lawyers' list. At the Special Court for Sierra Leone (SCSL) the in-house Principal Defender has both an administrative function in relation to the lawyers' list and also acts as defence counsel on its own.

Defence at the ICC

At the ICC, the administrative function creating and maintaining the List has been separated from in-house defence counsel. The OPCD is not involved in the List or the appointment of defence counsel and is not responsible for negotiation and payment of fees to defence lawyers. As at other tribunals, with the exception of the SCSL, the OPCD does not represent individuals.

Besides the creation of the OPCD, the RPE contain specific provisions relating to the responsibilities of the Registry *vis-à-vis* the rights of the defence. For example, according to Rule 20, the Registrar shall 'organize the staff of the Registry in a manner that promotes the rights of the defence' and for that purpose shall also 'facilitate the dissemination of information and case law of the Court to defence counsel'.⁹⁶

This is a complete innovation since the rules and regulations of the ad hoc tribunals do not contain a parallel provision. Additionally, Rule 20(2) specifies that the Registrar has to ensure that the professional independence of defence counsel is maintained.

The defence at the ECCC

Mr Skilbeck reported that the Defence Support Section (DSS) of the ECCC was created by the Office of Administration of the Court and is responsible for providing administrative support to lawyers.

⁹⁵ Under regulation 44 of the Regulations of the Court, the Registrar of the ICC maintains a list of experts accessible at all times to all organs of the Court and to all participants in proceedings before the Court. The Office of the Prosecutor (OTP) has also established a Roster of external experts with regard to international criminal law, international criminal procedure and evidence, and/or international humanitarian law.

⁹⁶ See Rule 20(1)(f) of the RPE.

This support includes maintaining lists of national and foreign lawyers and establishing regulations regarding the ‘criteria and procedures for the inclusion of lawyers and other personnel in the lists’ as well as ‘the procedure for assignment of defence lawyers’ and ‘the criteria for determining indigence and the remuneration of defence lawyers’.⁹⁷ The DSS is also in charge of presenting the lists of lawyers to persons entitled to a defence lawyer and organising training for defence lawyers in consultation and cooperation with the Bar Association of the Kingdom of Cambodia.⁹⁸

In addition to its administrative tasks, the DSS conducts legal and documentary research to assist defence teams. In this the role of DSS is similar to the one of the ICC’s OPCD’s, but it is not conducted by a separate and independent unit, although the Internal Rules mention that the DSS is autonomous ‘with regard to the substantive defence matters’.⁹⁹ According to Mr Skilbeck another distinction between the OPCD and the DSS is found in the representation role that the OPCD may occasionally have before the ICC (acting as ad hoc counsel only). According to the Internal Rules, the DSS never plays a representation role before the Chambers.

Mr Skilbeck noted that at the ECCC each accused may have two co-lawyers, one Cambodian and one foreign. Thus the list of defence lawyers is open to both foreign and Cambodian lawyers; however, foreign lawyers must have ten years of experience to be considered and their inclusion in the list is subject to the payment of fees.¹⁰⁰

The requirement of ten years’ experience also applies to the lawyers in the ICC List of Counsel but without distinction based on nationality. The inclusion in the List is free of charge.

4.8 Conclusion

The seminar was successful in raising awareness about the work of the ICC and opportunities for Malaysian lawyers. The Vice President of the Bar Council of Malaysia affirmed that the effectiveness of the Court required everyone’s cooperation. Bar Council members expressed their commitment to promote a greater engagement of legal professionals with the work of the Court.

Strong arguments were presented in favour of more Malaysian lawyers being included in the List. It was stressed that the added value of the Malaysian legal profession’s contribution to the work of the Court should not be underestimated and that working with legal professionals in Malaysia might have a multiplier effect in the region, with more professionals from Asia joining the List. It was suggested that the Bar Council of Malaysia should launch a campaign to encourage Malaysian lawyers to join the List.

In order to overcome the obstacles related to Malaysia’s ratification of the Rome Statute, it was suggested that interaction with the Attorney General Chambers was required, looking at how other countries, particularly in Asia, have reconciled domestic legal systems and the Rome Statute. It was also pointed out that a visit by the ICC Prosecutor to Malaysia might prompt greater engagement

97 Regulation 11(2)(a) sub-sections (i) to (iii). The Internal Regulations are available at www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01-02-08_eng.pdf.

98 Regulation 11(2) subsections (a) to (h).

99 Rule 11(1).

100ECCC Press Release, ‘Defence Lawyers List Opens’, 9 July 2007, www.cambodiatribunal.org/CTM/Press_Release_10_7_07_ENG_.pdf.

and galvanise interest in the ICC.

On the issue of the immunity of the monarchs in particular, it was recommended that more study was to be undertaken to look at how other monarchies, particularly Japan, have dealt with it.

When compared to other international and hybrid tribunals, the organisation of the defence before the ICC represents many advantages. The ICC has applied the highest standards of independence for the defence and requires the highest level of qualification to counsel. Of note the Court is investing in the training of lawyers (with the first in-house training session organised for members of the List in May 2008) and coaching of counsel through ad hoc advice and development of training tools. This offers interesting opportunities to Malaysian practitioners.

Finally, it was recognised that the legal profession worldwide must be fully engaged in order to ensure the success and acceptance of the ICC. As a global institution, the ICC should strive to encourage contributions from different legal systems and traditions, and tackle the expectations gap between the Court and non-states parties through more outreach activities and visits.

PART IV

OUTREACH TO THE WIDER IBA MEMBERSHIP

Chapter 5: Outreach to IBA bar leaders and the legal profession at large

5.1 The IBA Council's Resolution on the International Criminal Court

The IBA has a membership of 30,000 lawyers and 195 Bar Associations worldwide. On 19 October 2007 the IBA Council meeting in Singapore unanimously adopted a Resolution in support of the ICC. The Resolution recalls the IBA's long commitment to the establishment of an International Criminal Court and appeals on states to ratify the Rome Statute and to promulgate ICC implementing legislation.

The IBA Resolution also calls on member associations to pursue greater engagement with the work of the ICC. The IBA Resolution in particular:

'Recommends to its member organisations to adopt this Resolution and to be aware of their decisive role persuading their national governments to strengthen the rule of law by ratifying the Rome Statute of the International Criminal Court, if they have not already done so;

'Encourages its member organisations to facilitate discussion and debate among their constituencies on how best to support and advance the goals of the International Criminal Court.'¹⁰¹

In light of this, the Outreach component of the IBA's ICC Monitoring and Outreach Programme works to disseminate information and promote discussion on the ICC through the IBA membership network. In addition to tailored activities organised in key countries in partnership with local bar associations, specific activities and sessions are also organised for IBA bar leaders and the legal profession at large. A round table discussion on equality of arms before the ICC was organised in The Hague in November 2007. In addition, regular sessions on the ICC takes place at each of the Annual IBA Conferences, such as those held in Chicago (September 2006) and Singapore (October 2007), with the aim of disseminating information and promoting discussion on the ICC among the IBA membership network.

101 See Annex 6.

5.2 Outreach to bar leaders: IBA bar leaders' visit to the ICC

The Third Annual IBA Bar Leaders' Conference in Amsterdam offered a unique opportunity for bar leaders to get direct exposure to the work of the ICC. A visit to the ICC premises, featuring discussions with senior officials of the Court was organised on 16 May 2008 for participants attending the IBA Bar Leaders' Conference. A total of 45 bar executives representing over 25 different countries attended the event.

The ICC warmly welcomed the IBA's initiative and the President, Prosecutor and Registrar personally participated in the proceedings. In addition, the Head of the Division for Victims and Counsel, the Principal Counsel of the OPCV and the Principal Counsel of the OPCD participated in a panel on issues related to the legal representation before the ICC. Justice Richard Goldstone, IBA Human Rights Institute Co-Chair and former Prosecutor for the ICTR and ICTY, addressed the audience on the behalf of the IBA before opening the floor for general discussion.

Overall the meeting was successful in bringing together representatives of different bar associations and in offering a forum for the ICC to emphasise its interest in establishing a closer dialogue with bar associations throughout the world. In this context senior representatives of the Court welcomed the IBA outreach activities and expressed appreciation for the monitoring component of its ICC programme. An overview of the discussions held at the meeting follows below.

Introductory remarks by the ICC President, Registrar and Prosecutor

Judge Philippe Kirsch, ICC President, opened the meeting by reminding attendees that the goal of the Rome Conference was to replace a culture of impunity with a culture of accountability. President Kirsch presented an overview of achievements to date, stating that the main challenges currently facing the Court are victims' participation and disclosure.

Above all, President Kirsch stressed the importance of state cooperation. He explained that the ICC is a system based on two pillars: the judicial pillar, represented by the judges; and the enforcement pillar, represented by the states. Enforcement of the Court's orders relies on states; states' cooperation is essential to maintain the ICC's credibility. He encouraged states to support the Court more vocally. President Kirsch concluded that the more fully the Court is explained, the better it is understood and, as a result, the more support it obtains.

Ms Silvana Arbia, ICC Registrar, stated that the Court is entering a new phase which requires a mature approach and professionalism. For this reason, cooperation with lawyers' associations was very important for the ICC. Ms Arbia mentioned that bar associations were particularly well placed to provide recommendations and suggestions on the training of counsel and that the Registry would be happy to receive more input from them. She noted that it is in the interest of both the ICC and bars to have the best trained professionals practicing before the Court.

Ms Arbia recalled that the IBA Monitoring and Outreach Programme is looking at the quality of work of defence counsel before the ICC. In that regard, she mentioned that training is one of her institutional duties and that she would be pleased to have input as to whether this training is sufficient or not. In her view, training should be more interactive, with more input from lawyers.

She added that, because of budget constraints, this year's training of counsel was available only to those who could finance themselves to travel to and attend training in The Hague. She called for additional support from the IBA so that all counsel could access training, not only those who could afford it.

Ms Arbia pointed out that outreach is the responsibility of the Registry. She added that ICC field offices are active in outreach and that programmes ought to be improved and developed according to local standards and expectations. She believed it was important for these to be more outreach to the legal profession in the field.

Mr Luis Moreno-Ocampo, ICC Prosecutor, spoke about the difficulty of investigating during ongoing conflict situations, and briefly about the history of criminal justice. Using a world map, the Prosecutor pointed out the states that are party to the Rome Statute. He commented that 70 per cent of African states had ratified the Statute and that Asia was the least represented region. He added that 47 countries had adopted implementing legislation and that 53 had already passed agreements on privileges and immunities, thereby allowing the prosecution of heads of state.

The ICC Prosecutor discussed the impact of the new global criminal justice system on international relations. Relations between states have changed into relations based on the law. The main challenge is to convince those managing international relations that the law must be applied. Prosecutor Moreno-Ocampo added that the IBA could help in that regard.

The ICC Prosecutor concluded by discussing the impact of the ICC outside the court rooms, mentioning that the case of Thomas Lubanga Dyilo could potentially have great impact in countries where child soldiers are used. He said that in fact many states in the world and even militia leaders are adjusting their behaviour and taking into account the work of the ICC.

Panel on legal representation for victims and defence counsel

Mr Didier Preira, Head of the Division for Victims and Counsel, together with the Principal Counsel Mrs Paolina Massidda (OPCV) and Mr Xavier-Jean Keïta (OPCD) participated on a panel on the role of lawyers before the ICC.

Mr Preira spoke about the work of the Registry in relation to defence and victims' issues, and the provision of administrative, logistical and legal support to victims and the defence which assisted legal representatives and defence counsel to fulfil their duties efficiently and effectively. Mr Preira also briefed the participants about the ICC legal aid system and the criteria and qualifications required to practice before the Court. Mr Preira commented on the willingness of the Registry to ensure diversity in the List by including representatives from different jurisdictions and legal systems. He commented that some parts of the world were currently underrepresented (eg, Asia and Latin America), and that too few women are on the List. He encouraged IBA bar leaders to promote registration in the List to their constituencies.

The Principal Counsel (OPCV) recalled that victims' participation was a contentious issue at the Rome Conference. Out of the 105 points of disagreement at the Rome Conference, one third related to victims' participation. These difficulties arise due to differences between civil

and common law traditions. The Principal Counsel spoke briefly about the work of the OPCV, mentioning that her office is currently involved in all the situations and cases. Her office assists 21 legal representatives for victims as well as 81 applicants and victims in the situation of the DRC and its related cases, 49 in the situation of Uganda and its related cases and 23 of the Darfur situation and cases.

Mr Xavier-Jean Keita, Principal Counsel (OPCD), discussed the role of the OPCD in working to ensure respect for the rights of the defence, equality of arms, the presumption of innocence and the right to a fair trial. He said that the OPCD has a role at the preliminary stage of the proceedings and that the OPCD represents the rights of the defence even though it has no clients. The OPCD can be appointed as duty counsel when a suspect is arrested and provides assistance to permanent counsel selected by the suspects. It is a member of the Court, but it is an independent body. When performing their duties, the OPCD's staff is subject to the Counsel Code of Conduct.

Concerns were raised by the participants in relation to the ability of sole practitioners to work on a long-term case before the ICC while maintaining their practices. Mr Pereira explained that the concern had been taken into consideration at the time of the development of the ICC's legal aid system. He mentioned that lawyers are currently assisted by the OPCD and could also be assisted by a co-counsel. He added that the compensation provided by the ICC should be sufficient to keep a law firm running while practising abroad. He also mentioned that appearing before international tribunals is in itself a good publicity for the lawyers when they seek clients in their own countries. Mrs Paolina Massidda added that the majority of the legal representatives for victims are from Africa, more specifically from situation countries. Mr Keita concluded that the OPCD bridges the gap between lawyers from developed and developing countries.

Concluding remarks by Justice Richard Goldstone, Co-Chair of IBA Human Rights Institute

In his concluding remarks, Justice Goldstone thanked the ICC for welcoming the IBA bar leaders. He then noted that the process leading towards a permanent court started only 15 years ago, with the creation of the ad hoc tribunals. Tremendous progress has been made since then. He recalled that the IBA has always supported the ICC.

Justice Goldstone commented on the Prosecutor's statement that 47 States Parties had adopted implementing legislation. He reminded the IBA bar leaders that bars could play an important role by encouraging their governments to ratify the Statute and encourage the adoption of implementing legislation. Finally, when legislation is in place, bars should read closely and ensure compliance.

5.3 The IBA Round Table Discussion on the Right to Defence and Equality of Arms before the ICC

On 27 November 2007, the IBA's ICC Monitoring and Outreach Programme organised a round table discussion on the Right to Defence and Equality of Arms before the ICC in The Hague. The event was attended by over 120 participants, including diplomats, ICC judges, senior ICC Officials, representatives of other international tribunals and International Non-Governmental Organisations (NGOs), lawyers and law professors.

Guest speakers for the event included: Mr Bruno Cathala, ICC Registrar; Mr Jean Flamme, Attorney, Former Lead Counsel of Thomas Lubanga Dyilo before the ICC; Mr Xavier-Jean Keïta, Principal Counsel, OPCD; and Mr David Tolbert, Deputy Prosecutor, ICTY. The event was moderated by Mr Todd Benjamin, Journalist, CNN Networks.

The aim of the round table was to raise public awareness about the importance of fair trial standards and the challenges faced by the defence. In the view of the IBA, fair trial standards are the ground upon which the credibility of the Court will be measured. The round table represented the first opportunity for both independent counsel and the Registry to discuss publicly the issue of the resources allocated to the ICC defence teams.

The participants complimented the event as well as the lively format, which allowed ample time for discussion. The event was held under Chatham House rules with the press not invited to attend the discussion. Thus the summary of the discussion that follows offers an overview of issues raised without reference to individual commentators.

Allocation of resources to defence teams

On the issue of whether resources allocated to defence teams were adequate, it was noted that in order to achieve equality of arms, the defence must have access to adequate resources. Comments were also made about the ASP's role and how critical it is that more funds be allocated to legal aid. In addition the issue of equality of arms was said to depend greatly not only on financial resources but other resources such as computer software. For example, victims' participation has a major impact on the number of filings and documents to be reviewed by the defence, and in order to facilitate research the defence needs to use the same computer software as the prosecution. Currently documents are made available to the defence in electronic version, making the use of the software and search engines challenging.

In this context the role of the OPCD as a resource for the defence was discussed. The OPCD is an independent organ of the ICC, which helps compensate the defence for the disadvantages it faces in comparison to the prosecution. A question was raised as to whether this may be a way for the ICC to save money on defence teams. However, it was made clear that the mandate of the OPCD is only complementary to that of counsel and that OPCD needed to be careful to avoid conflicts of interest.

Competence of defence counsel

A comment was made in relation to the safeguards necessary to ensure the competency of defence counsel practicing before the Court. For example, the practice of fee splitting at the ICTY has tarnished the reputation of the tribunal. Participant reactions stressed that individual bad experiences did not mean that all defence lawyers are incompetent or corrupted. This raised the question of whether fees paid by the ICC's legal aid scheme are sufficient to attract the most competent defence lawyers. It noted that in domestic legal aid systems, where the remuneration is not as high as in private practice, still attract competent practitioners – the competency of counsel is not simply due to the level of remuneration. In fact, lawyers who choose to appear before the ICC are there for the exposure and the challenge posed by international practice rather than by an exceptionally high remuneration.

The role of the prosecution vis-à-vis the defence

The role of the prosecution regarding exculpatory evidence was also discussed in light of the principle of equality of arms. Panellists commented that the ICC is a mix between common law and civil law, and that a solution cannot be imported but must be found within this specific system. In ICC proceedings, the prosecutor does not have merely an obligation to disclose, as is the case in the ad hoc tribunals, but has an obligation to fully investigate. It was argued that the duty to fully investigate leads to a reduced amount of investigation work to be done by the defence. A counter-argument was then advanced that, not only should the defence be independent, but it is impossible for the prosecution to put itself completely in the role of the defence. For example, the prosecution does not receive instructions by a client when it conducts its investigation.

The challenges faced by the prosecution were also discussed during the round table discussion. It is difficult for the prosecution to determine what is incriminating and what exculpatory evidence is. Even though the prosecution may have vast human resources at its disposal, it, like the defence, has restrictions due to security concerns. It also has a duty to protect witnesses, which has an impact on disclosure of documents.

Can the right of the accused to represent himself be achieved in practice?

The discussion was then directed to the meaning of equality of arms when an accused chooses to represent himself. Opinions differed on that matter; one participant argued that in order to exercise this right, resources and technical advice should be provided to the accused. Others were of the opinion that limits had to be set, arguing that if the accused represents himself, the Court should not have to provide him with extra resources. The majority of panellists agreed that, although the right of the accused to represent himself exists in ICC, a fair trial would not be possible in such circumstances.

Is equality of arms achievable?

Most of the panellists and the attendees were optimistic that equality of arms could be achieved by ICC. However, they differed as to how this equality could be achieved. One participant mentioned that respect of the rights of the defence as described in the Statute would constitute equality of arms. Others were of the opinion that true equality could be achieved only if more resources (financial and human) were made available to the defence. A comment was made that instead of more financial resources, the addition of a co-counsel to the defence team from the start of the proceedings could make a real difference.

In order to achieve fairness, tools such as redactions, confidentiality, and *ex parte* hearings have to be used in an exceptional way. The defence has to be trusted in order for fair trials to happen, and for equality of arms to be achieved.

5.4 Conclusion

The IBA believes that bar associations and law societies represent an invaluable resource for the ICC. In October 2007 the IBA called on its member associations to encourage ratification of the Rome

Statute and promote debate among their constituencies as to how best to support and advance the ICC's goals.

Bar leaders have the responsibility to assist their constituencies in developing an understanding of international law issues facing the profession and constantly upgrade the standards of legal practice.

ICC officials have expressed interest in establishing a closer dialogue with lawyers and bar associations. IBA members could be instrumental to persuade those responsible for international relations to comply with the new international regime created by the ICC system. The IBA was also called upon to create a platform of support for the ICC and to support the Registry in developing training programmes for counsel practicing before the ICC. In addition, it was suggested that IBA bar leaders could encourage registration to the List.

The IBA Round Table Discussion concluded that although the competence of counsel is a key factor, it is ultimately the responsibility of the Court to ensure the rights of the defence are respected. The role of independent counsel cannot be replaced and adequate resources should be made available to the defence to realise equality of arms.

The IBA encourages states parties to look at defence issues more closely and encourages the Court to be vocal in requesting greater support to the defence at the next Assembly of State Parties.

PART V

CONCLUSIONS AND RECOMMENDATIONS

Outreach by the ICC

In light of the Outreach Report 2007 issued by PIDS, the IBA notes that remarkable progress has been made in the implementation of the Court's outreach. In terms of institutional support, the Outreach Unit was only established in 2007. The IBA notes that the allocation of augmented resources to PIDS has resulted in an increased volume of outreach activities and the employment of more varied outreach tools. The IBA also welcomes the development of indicators and evaluation methodologies, as well as the testing of a new database. During 2007 and 2008, PIDS has demonstrated an increased ability to adapt outreach activities and tools to the local context. It has also shown a great degree of flexibility in dealing with upcoming judicial developments. In relation to the outreach efforts of the Court as a whole, the IBA also welcomes a greater engagement by the OTP in the registry's outreach activities .

In order to maximise the improvements made in the past year, it is important that the outreach strategy is revised soon. The Outreach Unit is encouraged to include a definition of participatory approach to outreach in its strategy and to develop methodologies designed to ensure this is applied consistently throughout all programmes. In addition, the PIDS is encouraged to rethink the purpose of outreach in order to dissociate it from any attempt to 'win support' of the local population.

PIDS is urged to complete its recruitment of outreach staff in the field as soon as possible, particularly in relation to the position of field Public Information and Outreach Coordinator for the CAR and the DRC.

The IBA recommends that an intense outreach campaign start in the CAR as a matter of urgency.

The IBA recommends extending the practice of focused public information and outreach campaigns in relation to specific moments of the proceedings.

The IBA also encourages the Outreach Unit to include a more intense outreach activity during the situation and investigations phases. To this end the IBA urges states parties to provide additional resources to the Outreach Unit's budget to allow for increased activities in situation countries and to consolidate the achievements to date.

Public information by the ICC

The IBA notes with concern the poor coordination between the OTP and the Registry in relation to public information issued on court proceedings. This is recognised as having a negative impact on the perception of neutrality of the Court as a whole and possibly on the fairness of the judicial

proceedings. The IBA therefore urges the Court to emphasise the central role of the Registry in relation to public information function, and make the proceedings accessible to the public. The IBA recommends that press releases related to judicial proceedings be issued exclusively by PIDS in coordination, when necessary, with other organs of the Court.

The IBA also recommends that the OTP appoints a focal point at senior level for external communications. In addition, it should revise and make its communication strategy public, clearly identifying its objectives and the scope of its mandate in relation to external relations, outreach and public information.

IBA Outreach in key contexts: South Asia

A regional workshop for South Asian lawyers was organised on February 2008 to discuss the state of affairs on the ICC in South Asia. Despite the poor record of ratifications, at the workshop it emerged that national systems have become more amenable to ICC standards than expected. ICC norms have begun to influence national legislation and jurisprudence in non-states parties, which demonstrates the far-reaching impact of the ICC. The Court is establishing itself as a standard-setting mechanism which national courts may look up to decide domestic cases. This impact is in itself a product of the ICC's work that was not anticipated in 1998, and is especially noteworthy in relation to non-states parties.

Notwithstanding the compelling issues and concerns that South Asian countries hold against ratification of the Rome Statute, it was said that the establishment of the ICC has permanently changed the landscape of international justice and international relations. There was consensus that it would be beneficial for the region to be part of the ICC and to promote greater accountability for internal crimes through national proceedings and cooperation with the Court.

At minimum, all South Asian countries (and particularly India) should strive to provide consistent and effective cooperation with the ICC. Adoption of national legislation related to international crimes and cooperation with the Court can, and should, be fostered by legal communities. Thus the IBA called on lawyers in South Asia to ensure that the fight against impunity does not end where the ICC cannot reach.

IBA outreach in key contexts: Malaysia

Although not a party to the Statute, Malaysia has in principle supported the creation of an international criminal court. An inter-ministerial committee has been created to study compatibility between the Statute and domestic legal framework, but no detailed information is available on the status of the study or on whether it has been resolved to reform domestic law.

In the course of the IBA-Bar Council of Malaysia seminar held in Kuala Lumpur in April 2008, strong arguments were made in favour of a greater engagement of Malaysian lawyers in the ICC work. It was advantageous to have strong presence of Malaysian professionals working at the Court. Coaching and training of counsel organised by the Court were found to be an interesting opportunity. In addition, a stronger engagement by Malaysian legal professionals would stimulate positive changes in the domestic justice system and encourage Malaysia's ratification of the Statute

producing a multiplier effect in the region. Malaysia has a long commitment to international law and peace keeping, therefore ratification of the Rome Statute was said to be 'a natural next step'.

To encourage greater engagement with the ICC, it was recommended to launch a campaign for registration to the List. In order to address outstanding obstacles to ratification, it was suggested that the Attorney General Chambers be targeted, and that research be carried out as to how other jurisdictions have dealt with the issue of impunity of monarchy. It was also felt that a visit by the ICC Prosecutor to Malaysia might prompt a renewed commitment to ratification by the Malaysian Government. The IBA remains ready to assist the Bar Council of Malaysia in promoting understanding of and creating awareness about the ICC.

IBA outreach to the legal profession at large

In October 2007 the IBA Council passed a resolution in support of the ICC. The resolution calls on member organisations to encourage discussion and facilitate debate on how to best support the goals of the ICC.

On 16 May 2008 a visit of IBA bar leaders to the ICC was organised. On that occasion, senior Court officials identified several areas of collaboration between bar associations and the Court. Firstly, lawyers shall make the Court better known and to foster support on its work. Secondly, lawyers associations can encourage governments to ratify and when they have, encourage the adoption of implementing legislation. Furthermore, lawyers and lawyers' associations are encouraged to provide advice to the Court on legal issues, especially defence-related issues and matters related to training of counsel. Finally, lawyers' associations shall strive to ensure that those in charge of international relations support the new system put in place by the establishment of the ICC.

The IBA believes that the legal profession has a decisive role to play in the implementation of the strategic plan of the Court; it also constitutes the necessary pool of expertise the Court relies on. The practice of other international tribunals has shown that fair trials can be produced but only if the defence is trusted.

In this framework, the challenges faced by independent lawyers in practicing before the ICC should not be overlooked or ignored. Coaching and training must be provided to fill the gap between national and international practice. To this end the IBA welcomes the work of the OPCD and OPCV in supporting independent counsel through research and technical advice. Because the difficulty of keeping a private law practice active while engaging with proceedings in The Hague is immense, the IBA welcomes the efforts made by the ICC Registry to ensure that retribution of counsel compensate the inconveniences caused to private practitioners. In order to attract the most qualified professionals it is important that support and resources are given to counsel practicing before the ICC. This support also impacts on the fairness of the proceedings in that it counter-balances the role played by the prosecution. The IBA encourages states parties to look at defence issues more closely and encourages the Court to be vocal in requesting support to the defence.