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Towards an ICC Association of Counsel

An International Bar Association Discussion Paper

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Executive Summary

The IBA considers the creation and recognition of an Association of Counsel at the ICC to be a key step in promoting equality of arms and improving the efficient operation of the Court.

What an Association of Counsel at the ICC is not

The creation of an Association of Counsel in no way obviates the need for an institutional voice for the defence through the continued existence of an internal independent office. The experience of the Special Tribunal for Lebanon (STL) Defence Office demonstrates the importance of an institutional voice with an equal and guaranteed place at the table, particularly in the context of international criminal justice institutions where complex and novel operational and legal issues frequently arise. Although the Office of Public Counsel for the Defence (OPCD) is not an organ of the Court with this specific mandate, it enjoys independence¹ and has years of expertise and institutional knowledge that will be essential for an Association of Counsel to be able to draw upon.² The resources devoted to the OPCD should thus be maintained, or increased if needed, and consideration of further development of the role of the OPCD along the lines of the STL's Defence Office should remain on the table.

Funding

An Association of Counsel needs to be independent and representative of the interests of its members with adequate funding from a neutral source. It is unlikely that members' dues will provide adequate funding for its effective operation; therefore, the Assembly of States Parties (ASP) should consider providing funding to such an association through an independent budget at least in the early years of an association's existence.

Channels of communication

The ASP should establish channels of communication between itself and an Association of Counsel, while the Association itself should reach out to the diplomatic community in The Hague to ensure broad and adequate support and understanding of its function. An Association of Counsel will need time to gain respect and trust to open up informal channels of communication to the judiciary, Registry and Presidency. The Court organs also need to be alert to opportunities to consult with such an association and make efforts to interact with it where relevant.

The legal framework of the Court

Some areas of responsibility for an Association of Counsel can be identified in the legal framework of the Court, but it may need to be amended as needed to give the association a place on committees dealing with matters affecting the defence (taking into account the need for possible separate victim/defence representation).

Membership

The IBA advocates for an ICC Association of Counsel to include both members of the ICC List Counsel and the ICC List of Assistants to Counsel.

1 Regulations of the Court, Regulation 77 (2) reads: 'The Office of Public Counsel for the defence shall fall within the remit of the Registry solely for administrative purposes, in accordance with article 43, paragraph 2, and it shall function in its substantive work as a wholly independent office. Counsel and assistants within the Office shall act independently.'

2 The OPCD was described by the President of the ADC-ICTY as the 'permanent focal point within the Court' for a Counsels' Association with '... day to day experience and interaction with the numerous personnel at the Court and an already existing institutional knowledge of the functioning of the Court and the development of defence issues and concerns.' (ADC-ICTY paper 'ADC-ICTY Comments on the March 2015 Expert Conference on the Proposed Creation of the Victims and Defence Offices of the ICC ("Revision Project")', 1 June 2015).

Introduction

The IBA, through its Hague Office in particular, has followed the discussions surrounding the establishment of an Association of Counsel at the ICC for many years. Despite lengthy debate, it has remained elusive, due in no small part to divisions among counsel as to certain aspects of its structure and functions.³

To stimulate further discussion and, it is hoped, progress towards achieving a solution, this paper seeks to identify some key issues of principle by drawing on the IBA's own extensive experience (including that of the Bar Issues Commission)⁴ as an international legal association of over 190 Bars and law societies with more than 55,000 individual members. In addition, the International Bar Association's Human Rights Institute (IBAHRI) has carried out extensive work developing Bars in national jurisdictions⁵ and recently produced a report entitled *Understanding Bar Associations and their Roles and Responsibilities*.⁶

As far as the experiences of international courts are concerned, this paper does not aim to carry out an extensive survey of all defence-related bodies operating at similar international institutions. Instead, it focuses on the two that seem to have the experience most relevant to the current situation at the ICC: the Association of Defence Counsel Practising before the International Criminal Tribunal for the former Yugoslavia (ADC-ICTY); and the Defence Office of the STL. In the IBA's view, there is a need for both strong independent internal and external bodies to support defence rights and promote equality of arms and fairness of proceedings at the ICC. The IBA has previously made clear its position that an Association of Counsel would complement rather than replace an internal office that in its substantive work functions as an independent office.⁷

This paper will consider the implication for defence rights and for the Court of the establishment of an Association of Counsel at the ICC in the context of recent initiatives. Although it is expected that an ICC Association would likely include both victims and defence lawyers, this paper focuses mainly on the implications for defence counsel as there are specific and different implications for counsel representing victims. The IBA nevertheless welcomes the independent representation of all counsel and assistants to counsel acting before the ICC through a representative body such as an Association of Counsel.

Such an association, if created, would be a unique addition to defence rights before international tribunals being the only permanent lawyers' association of its kind. Such a body could not only support individual counsel and assistants to counsel in a manner similar to a Bar, but, due in particular to the unique structure of international criminal courts, which operate outside national jurisdictions, potentially have a wider impact on fair trial rights at the ICC and in the field of international criminal justice.

The IBA considers that the manner of establishment, funding, structure, powers and relationships with court organs and external bodies of any such association is consequently deserving of wider debate and has produced this paper to contribute to such discussion.

3 For this reason, the IBA has chosen not to consult individual defence or victims' counsel in preparing this paper in order to avoid entering into the minutiae of the debate or reflecting the views of any particular group or individual.

4 The Bar Issues Commission, known as the BIC, is a division within the IBA which supports and represents the interests of the IBA's organisations. The cornerstone of the BIC is the recognition and acknowledgement of independence of the legal profession and bar associations. By developing protocols and guidelines, and encouraging their adoption by local bar associations, the IBA promotes professional standards, thus contributing to the independence of the profession. For more information, see www.ibanet.org/barassociations/bar_associations_home.aspx.

5 For instance, in Afghanistan, Myanmar, Sri Lanka, Tajikistan and Timor-Leste. See more in the 2014 IBAHRI Annual Report, available at www.ibanet.org/Human_Rights_Institute/HRI_Publications/Other_HRI_Publications.aspx. This and all other URLs last accessed 26 October 2015, unless otherwise stated.

6 International Bar Association, *Understanding the Roles and Responsibilities of Bar Associations*, Myanmar (2014), available at www.ibanet.org/Document/Default.aspx?DocumentUid=6a0a6d72-09ef-4976-8ccc-df30c9674f05.

7 See, for example, the IBA address before the European Union Council Working Group on Public International Law (Co-Jur ICC) on 12 October 2015, available at www.ibanet.org/ICC_ICL_Programme/Programme_commentaries.aspx.

Lawyers' associations and Bars – the IBA experience

Associations of lawyers come in many different shapes and sizes: they may be local, national, regional or international; they may focus on a specific area of law or exist for a particular type of lawyer; membership may be voluntary or compulsory. Their mandates can be just as varied, ranging from direct regulation of the profession and the practice of law to something more akin to a voluntary trade association. They may train and certify lawyers, advocate for changes in the law or they may operate more as a networking organisation.⁸

Nevertheless, in the IBA's experience, though no single model may apply, associations of lawyers tend to share certain characteristics. These are echoed in the *International Bar Association's International Principles on Conduct for the Legal Profession*⁹ ('IBA Principles'), which in turn draw on the *United Nations Basic Principles on the Role of Lawyers*¹⁰ ('UN Principles').

UN Principle 24 provides that: 'Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.'

Bar associations therefore generally possess a democratic element, are independent and self-regulating. The need for independence is one of the most important and prominent principles, echoed in bar association constitutions worldwide.¹¹ This conforms to the sentiment in the IBA principles, which notes that the role of bar associations in promoting the rule of law requires that the legal profession itself also be governed 'in line with the Rule of Law'.¹²

In the IBA's experience in particular, the independence of lawyers exercised through an association contributes to the independence of courts and the fair administration of justice. Bar associations and Courts have common interests in the promotion of the rule of law and the independence of the legal profession and Courts.¹³

In the words of Justice Martin Daubney, Chair of the IBA Judges' Forum, '[i]t is axiomatic in contemporary society that proper maintenance and protection of the rule of law depends on an independent judiciary. It is equally obvious that judges, individually and collectively, need the support of the wider legal profession in order to preserve that necessary independence. Bar associations, and other societies of legal professionals, perform a vital role in providing that essential support, and are also able to provide a mechanism for proper and transparent interface between the judiciary and the wider profession.'¹⁴

In addition, the IBA's experience shows that serving the legal profession and advocating for change are the two main areas in which bar associations generally play an important role. Serving the legal profession can take

8 See International Bar Association, Understanding Bar Associations and their Roles and Responsibilities. There is not always an agreed understanding of what the word 'Bar' connotes, but for the sake of simplicity it will be taken to include a range of lawyers' associations. Broadly speaking, when a Bar controls admission to practice in a jurisdiction and regulates the conduct of its members through a disciplinary regime, membership is compulsory. Where a bar association is more akin to a voluntary trade association, it will not normally have control over admission to practise or discipline. In the middle stands the type of Bar that may have limited authority, but still be influential through its formal role in such matters as accrediting law schools or drafting rules.

9 International Bar Association, IBA International Principles on Conduct for the Legal Profession, adopted on 28 May 2011. The IBA Principles are as follows (1) Independence; (2) Honesty, integrity and fairness; (3) Conflicts of interest; (4) Confidentiality/professional secrecy; (5) Clients' interest; (6) Lawyers' undertaking; (7) Clients' freedom; (8) Property of clients and third parties; (9) Competence; and (10) Fees.

10 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August – 7 September 1990, Basic Principles on the Role of Lawyers, 118-123, U.N. Doc. A/CONF.144/28/Rev.1 (May, 1991).

11 See International Bar Association, Understanding Bar Associations and their Roles and Responsibilities.

12 Ibid, 5.

13 The IBA Forum for Barristers and Advocates and the Judges' Forum held a showcase session on the subject of 'No independent Court without independent lawyers' at the 2015 IBA Annual Conference on 8 October 2015.

14 Quote to the IBA Hague Office (2 November 2015).

different forms, such as preserving the independence of the legal profession, defending the role of lawyers, promoting standards of conduct and ethics, and the disciplining of lawyers.¹⁵

Finally a lawyers' association should be organised with an eye to the unique needs of the legal profession it serves, and the organisational structure of each association should be dictated by the following factors: the model for the regulation of the practice of law in the jurisdiction; the scope of the bar association's mission; and the structure of the legal profession in the jurisdiction.¹⁶

So where would an ICC Association of Counsel fit into this picture? Its membership would be international rather than national, and relatively limited in number (the current number of list counsel is just below 600 to which should be added some other small categories, such as assistants to counsel).

An ICC Association would be highly specialised, serving counsel appearing at one particular court, specialising in one particular area of law.

In order for such an association to be truly representative and play a significant role at the Court, membership will need to be sufficient in number and percentage, and subject to a sufficiently democratic Constitution.

The remit of such an association is yet to be determined, but, taking the ADC-ICTY as a model, it could safeguard the independence of counsel, have a role in training and serve as a consultative body for the Court on legal or practical issues of concern to the defence. Other areas that could (or typically would) fall within the remit of a more robust and influential Bar are currently partially or wholly under the Registry, such as admission to practise before the ICC¹⁷ and the disciplinary regime of the Court (the latter of which currently includes defence counsel representation).¹⁸

However, as any newly created association finds its feet and gains respect, it is hoped that these areas would increasingly be devolved from the Registry to such an association following amendments to the legal framework of the Court, in particular the Rules of Procedure and Evidence (RPE), the Regulations of the Court and the Registry, and/or the Code of Professional Conduct (CPC), similar to the experience of the ADC-ICTY.

The experience of the ADC-ICTY

The ADC-ICTY (hereafter referred to as the 'ADC') serves as a useful model for the creation of an Association of Counsel at the ICC, although it should be kept in mind that this is not a case of 'one size fits all'. There are significant differences between the ICTY and the ICC, such as the composition and number of defence counsel and, of course, the ICTY is now nearing the end of its period of operation, while the ICC is, relatively speaking, only in its infancy. Still, a brief examination of the similarities and differences between the ADC and a possible Association of Counsel at the ICC may provide some illumination and points for further consideration.

The ADC was established under Dutch law in 2002, nine years after the ICTY was created. The ADC has now been in existence for 13 years and has gone through many changes during this period. The founding documents of the ICTY did not envisage either a defence office charged with promoting the rights of the defence within the Court or an association for defence counsel operating outside it. Defence support was largely mandated to the Registry, under whose auspices an Office for Legal Aid and Defence (OLAD) was charged with running the legal aid regime and providing administrative support to defence counsel.

¹⁵ See International Bar Association, *Understanding Bar Associations and their Roles and Responsibilities*, 6–11.

¹⁶ *Ibid.*, 6.

¹⁷ For the moment, lawyers who wish to practise before the ICC, whether as duty counsel, ad hoc counsel, defence counsel or as legal representative of victims, must meet the criteria of admission to the List of Counsel created and maintained by the Registrar in accordance with Rule 21(2) of the Rules of Procedure and Evidence (RPE). To be admitted, candidates must satisfy the minimum quality assurance requirements set out in Rule 22 of the RPE, and Regulation 67 of the Regulations of the Court.

¹⁸ ICC Regulations of the Registry, Regulation 147 (election of members of disciplinary board) and Regulation 148 (election of members of disciplinary appeals board).

Without reiterating at length the early problems for defence counsel at the ICTY, which are well known among the international legal community, it is fair to say that defence rights were widely considered to be sorely under-represented at the outset.

Initially the ADC was not integrated into the activity of the Court, and it has fought hard over a long period to obtain the recognition that it enjoys today. The ADC has become the main bastion for defence rights at the ICTY and was recently officially designated as the defence counsel association for the Mechanism for International Criminal Tribunals (MICT), the organisation that will take over the remaining functions of both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) after the completion of their respective mandates.

The ADC has the following salient features: membership is compulsory for defence counsel wishing to practice at ICTY; it is funded solely by membership dues (with office space and related resources provided by the Court); and it has its own disciplinary regime complementary to that of the Tribunal. Among others, it carries out the following activities on behalf of defence counsel: training; participation in the Rules Committee, the Disciplinary Panel and the Disciplinary Board of the ICTY; issuance of advisory opinions to defence counsel on ethical issues (on a confidentiality basis); coordination of common positions on legal and operational issues of concern, such as on the provisions of legal aid policies; and preparing *amicus curiae* briefs.¹⁹

All these features could be part of an ICC Association of Counsel; however, the ADC differs from a possible ICC Association in several ways.

First, while the ICTY has dealt with a set of interconnected conflicts and cases, and counsel at the ADC have knowledge of the jurisdictional boundaries of the ICTY, ICC list counsel represent an extremely diverse collection of nationalities and legal backgrounds, and the cases before the ICC derive from vastly different situations and contexts in countries and regions all over the world. Therefore, a potential challenge for an ICC Association of Counsel will be bridging the inevitable cultural gaps between association members and finding a common perspective and approach to legal issues facing counsel practising before the Court. This challenge is compounded by the fact that a significant portion of the ICC list counsel does not and may not have cases before the ICC, which presents the additional obstacle of maintaining an informed membership. With an immensely more diverse composition than the ADC, and a lack of active involvement with the Court from the majority of members, an ICC Association will face greater difficulty sustaining member engagement, ensuring educated voting on key policy decisions, and reaching consensus through the democratic process.

Another key difference is the likelihood that an Association of Counsel at the ICC will encompass lawyers representing victims. This would present different challenges in that the representation of victims' interests may not coincide with that of the defence. Thus, there is a need to ensure that both the internal structure and external interactions of an Association of Counsel at the ICC allow for the separate representation of these interests.²⁰ Though more cumbersome, it may be necessary to ensure that formal representation in Court structures is separated between victims and defence lawyers. Likewise, in more informal consultations with Court officials, the Association of Counsel needs to ensure that a voice is given to victims' interests.

Aside from potentially instructive differences, what can be drawn from the ADC's ability and methods to successfully achieving both formal and informal acceptance by the ICTY? And how can that be beneficial to an ICC Association of Counsel?

¹⁹ See notably ICTYRPE Rules 44 and 45; CPC Articles 40, 47 and 48.

²⁰ As Ken Gallant observed when sitting on the Advisory Committee on Legal Texts (ACLT) of the ICC as the sole 'representative of counsel' with a mandate to represent both victims and defence: 'One can easily imagine that the interests of victims and accused persons are not always the same in the making of substantive and procedural criminal law, and that a single Representative of Counsel might find it difficult to represent both sets of interests at the same time.' (Kenneth S Gallant, *Independent Bars in International Criminal Courts and Tribunals*, in *Defence Rights: International and European Developments*, 23, Gert Vermeulen (ed), Maklu Publishers (2012)).

In the words of Margery Nicoll, Chair of the IBA Bar Issues Commission, acceptance for any lawyers' association is based on achieving respect through its full independence and performance: 'The independence of bar associations, operating and functioning in a professional, competent and reputable manner, is necessary to support an independent profession of independent lawyers... A lawyer's membership of a liberal profession and the authority deriving from membership of an independent bar association helps to maintain his or her independence. Bar associations provide professional development, which is a method of demonstrating to the public that lawyers value standards and continuous training as a profession to maintain and enhance those standards. Following well drafted guidelines and protocols on the key pillars to protect the integrity of the legal profession... will result in a credible profession which builds public confidence.'²¹

The ADC reports that it is now routinely consulted on matters with implications for the defence by the Registry and regularly invited to the table by all organs of the Tribunal including the judiciary. It attributes this open door policy to the fact that it is seen as a useful, professional conduit for defence counsel views and, indeed, its views are often essential. The ADC has produced several *amicus curiae* briefs that are highly respected and seen as useful to the development of law and procedure at the Tribunal.²² The ADC particularly emphasised its development of a relationship with the judiciary as being important. The IBA has seen that national Bars interact with the judiciary outside of the proceedings particularly in relation to new legal issues where their input and perspective is often found to be highly valuable.

The ADC has achieved this level of acceptance over a lengthy period and it is expected that an Association of Counsel at the ICC would need time to do the same, though it is hoped that it would have better funding and rights (ie, to participate on committees) from the outset.

Finally, the ADC has funding for one full-time staff position to head its office. This one full-time staff position means that the office is over-stretched, even during a time when the ICTY is winding down proceedings and after many operational and legal issues have been resolved. The ADC is heavily dependent on voluntary help through its internship programme, which is far from an ideal situation. It sometimes seeks independent funding for training and events, but obtaining such ad hoc funding is also a drain on limited staff resources.

At the ICC, there is unlikely to be any shortage of work as conflicts and their concomitant crimes proliferate and while the organisation, still relatively in its infancy, faces many complex legal and practical issues affecting the defence, among others. As anywhere, it will take time for an Association of Counsel to build trust with its members, the Court, the ASP and the general public. It is thus more important in the interim that the role of the OPCD in supporting the general interest of the defence, as well as embodying 13 years of institutional memory and experience, is preserved.

An ICC Association of Counsel and the Assembly of States Parties

A distinctive feature of the ICC is its governing body, the Assembly of States Parties (ASP). In contrast to the ad hoc Tribunals such as the ICTY or ICTR, the ASP has much more involvement in the day-to-day running of the ICC. This is accomplished largely through the Bureau of the ASP and various committees, complemented by The Hague and New York Working Groups focusing on specific areas. Although a number of these bodies cover defence-related issues, such as legal aid or cooperation, the defence is a minimal part of the agenda both in these forums and at the annual ASP meeting.

²¹ Quote to the IBA Hague Office (3 November 2015).

²² According to the ADC-ICTY, it has filed about ten *amicus curiae*, not only before the ICTY, but also before other international criminal tribunals.

While Rule 20(3) of the ICC Rules of Procedure and Evidence requires that the Registry consult with ‘any independent representative body of counsel or legal associations’, it also suggests that the establishment of such an association be facilitated by the ASP.²³ To do so, the ASP must engage with the defence directly, rather than relying on the Registry to mediate. The Registry, while having defence-related functions within its remit, must strike a delicate balance to ensure it is not too closely involved in the process to maintain the actual and perceived independence of any Association of Counsel.

Perhaps better communication could be established for the defence within the Bureau and the ASP. While it is maybe natural that emphasis is given to the budget and activities of the organs of the Court, there is a risk that this creates an impression of imbalance *vis-à-vis* the defence. Representatives of an Association of Counsel could play an important role before and within the ASP, notably with the creation of a defence focal point.

Broad contacts can help highlight principles, problems and possible solutions. Better communication would also help create a more nuanced understanding of the defence function. At the informal level, an ICC Association of Counsel should work to establish links with the diplomatic and non-governmental organisation (NGO) community. A number of embassies in The Hague have legal advisors and it is suggested that they and/or ambassadors would benefit from meeting with defence representatives on a more regular basis.

As far as the IBA is concerned, funding is considered a key issue for the success of any future Association of Counsel at the ICC. This is an issue closely related to independence, which, as emphasised above, is crucial for any association of lawyers. The IBA suggests that the ASP is the body best placed to provide direct funding for such association, at least in the early years of the association’s existence. Such funding would be minimal in the context of the overall budget for the Court, but the impact for the overall support of equality of arms and the Court’s efficiency could well be significant.

The ADC, which had 170 members at its height compared to the almost 600 ICC list counsel, identified the need for more resources to operate effectively. Experience of running the ADC office with only one full-time staff member demonstrates that an ICC Association would be better served with two staff members, who could perhaps divide the substantive legal support and external relations function and the day-to-day administration. Given that the majority of list counsel are not based in The Hague, and even those who are come and go, a permanent office staff is a prerequisite to an Association of Counsel at the ICC.

The seniority and experience of the staff also needs to be considered if they are to interact more easily with senior officials such as the President, the Prosecutor and the Registrar of the Court, as well as diplomats and the ASP. The unique context of the ICC as a permanent international court with a governing body such as the ASP must be taken into account to ensure adequate funding for the recruitment of highly experienced staff who can develop these important external relationships.

Broadly speaking, the budget of the office would need to cover salaries, funds for events, training and external relations activities, such as the production of newsletters. An agreement could include provision for office space and related resources to be provided free of charge at the Court. A detailed budget would obviously need to be prepared, though this goes beyond the scope of this paper.

Equality of arms and an ICC Association of Counsel

International tribunals differ from national systems in that they deal with extremely complex international law issues within the context of new or recently drafted rules. The judicial system itself is often being built from

²³ ICC Rules, Rule 20(3) states, ‘[f]or purposes such as the management of legal assistance in accordance with rule 21 and the development of a Code of Professional Conduct in accordance with rule 8, the Registrar shall consult, as appropriate, with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties’.

scratch. New issues, often lacking precedent, require innovative approaches and interpretations – some of these issues may be legal, but some will be operational or practical. It is rare that they will have no impact on the defence and the fair administration of justice.

In such contexts, the IBA supports the creation of an Association of Counsel in addition to the maintenance and strengthening, where possible, of an internal independent defence office as those two independent, but complementary, bodies will contribute to equality of arms and the efficiency of the Court.

In the words of Colleen Rohan, President of the ADC, ‘[i]n order for the ICC to achieve international validity the Court must be seen to properly and fairly adjudicate the cases before it. This requires institutional integrity and, in real terms, recognition that the Defence, like the Prosecution, is integral to the Court process. This is beyond the competence of the Registry. The ICC is a Court; not a bureaucracy. The existence of a strong, independent defence office and professional association of counsel is fundamental.’

In the context of this discussion, it is worth looking at the Defence Office of the STL. As an independent organ of the Court, it is the most powerful internal defence body in any international criminal justice system.²⁴ The Head of the Office is an equal member of the Senior Management Board of the STL, which is composed of the four heads of organs: the President, the Registrar, the Head of the Defence Office and the Prosecutor. This allows the general interests of the defence to be represented on an equal footing with the Prosecutor and also ensures the defence is in the loop with regards to all institutional and management decisions.

In the words of François Roux, Head of the STL Defence Office, the complementarity of roles and voices is essential to have the Defence as the fourth pillar in international criminal justice institutions:

‘As long as the Prosecutor will be an Organ of the institution, with offices within its premises, it seems essential to me to also have, inside the institution, an independent Organ for the Defence with equal footing with the Office of the Prosecutor. This is the guarantee that the voice of the defence is heard inside the institution for all questions related to its functions, and notably in all-organs coordination and management meetings of the institution, where today the defence is cruelly absent. Similarly this Organ should be the focal point of the Association of Counsel, which should not have the Registry as an intermediary but an Organ that represents and defends its interests inside the institution, notably in administrative related matters. This Organ should also be present at all external events of the Court alongside the President, the Prosecutor and the Registrar, and as such it will be able to impose the presence of the Association as necessary.’²⁵

In the absence of both an independent defence office as an organ and an Association of Counsel at the ICC (despite the latter being envisaged by the RPE), the OPCD stepped into this lacunae and, de facto, acted as an advocate for the general interests of the defence where possible. It has been argued that to some extent this goes beyond its mandate, but the reality of the situation is that such a role has been carved out by the OPCD over time and the IBA would argue that the creation of an Association of Counsel would simply require a fine and balanced division of functions and cooperation with the OPCD, for example in regard to the representation of counsel on various committees and boards. As François Roux has put it: ‘[I]t should not be difficult, notably based on the experience of the OPCD and the STL

²⁴ The Defence Office at the STL was provided for in the STL Statute when the Tribunal was established in 2007.

²⁵ Original quote to the IBA Hague Office in French (IBA translation): ‘Tant que le Procureur sera un Organe dans l’institution, hébergé dans ses locaux, il me paraît indispensable d’avoir également à l’intérieur de l’institution un Organe indépendant de la Défense, à égalité de fonction avec le Bureau du Procureur. C’est la garantie pour que la voix de la Défense soit entendue à l’intérieur de l’institution pour toutes les questions qui touchent à son exercice et notamment lors des réunions de coordination des Organes et de co-gestion de l’institution dont aujourd’hui la Défense est cruellement absente. De même cet Organe doit être le point focal de l’Association d’avocats, qui ne doit plus passer par le Greffier mais par un Organe qui la représente et défend ses intérêts, notamment sur les questions administratives, à l’intérieur de l’institution. Cet Organe devra en outre être présent à toutes les représentations extérieures de la Cour au même titre que le Président, le Procureur et le Greffier, et il pourra chaque fois que nécessaire imposer aux autres la présence de l’Association.’

Defence Office, to organise such a division of labor in relation to the exercise of the profession between the Association and an independent defence office.’²⁶

This cooperation will evolve in time, notably as the ICC Association of Counsel grows and the legal framework of the Court is amended. It is worth noting that the legal framework of the Court currently envisages areas of responsibility for such an association only as regards to consultations on legal aid policies, general consultations with the Registry and cooperation for trainings.²⁷

It may also be that an Association of Counsel, in advocating for the interests of individual defence counsel, would not always take a position in harmony with an internal office. An internal defence office may not in fact be in a position to advise as such individual counsel or supporting staff. Additionally, it is not only those accused of war crimes who appear before tribunals: at both the STL and the ICTY journalists have been charged with contempt and the ICC is currently grappling with the case of two members of an ICC defence team charged with interfering with the administration of justice.²⁸ In that case, given the relevance of communications between Mr Bemba, his defence team, and others in the trial against the five accused, subsequent decisions in the case raised issues regarding defence counsel immunity, the use of attorney-client communications, and the lifting of the attorney-client privilege.²⁹ An Association of Counsel is the best independent body to advise on such issues, issues which are at the core of the integrity and legitimacy of the Court.

Conclusion

The IBA is heartened by the fact that there is currently fresh impetus for the creation of an Association of Counsel at the ICC. After 13 years of operation, it is certainly not premature that ICC counsel, the Court and the ASP play their respective parts to ensure that an effective, democratic, influential and well-funded body – long-envisaged by the legal framework of the Court – finally comes into being. Clearly the creation of an ICC Association of Counsel has not and will not be simple and it is important that it is established in the right way from the outset as it is likely to have a long existence.

In pursuit of that goal, the IBA hopes that this paper will stimulate discussion and the exchange of ideas and experience across a broad range of interested parties. The aim of the paper is to open dialogue by presenting some ideas drawn from IBA experience and observations of international criminal courts. They are not exhaustive and certainly are not intended to be the ‘last word’ – quite the opposite. We hope that the preliminary ideas presented here in outline may serve to help counsel, court officials, the ASP, professional legal associations and engaged NGOs to explore different approaches, to challenge existing ideas and assertions (including the IBA’s), and to identify both potential pitfalls and goals to the benefit of the ICC in particular and international criminal justice in general.

26 Original quote to the IBA Hague Office in French (IBA translation): ‘[Enfin] ne devrait pas être difficile, notamment en se basant sur l’expérience de l’OPCD et du Bureau de la Défense du TSL, d’organiser un partage des tâches relatives à l’exercice professionnel, entre l’Association et un Bureau de la Défense comme Organe indépendant.’

27 See ICC RPE Rules 3 and 20, ICC Regulations of the Registry 119 (1) (b) and 141(1) and (2).

28 See Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu & Narcisse Arido, Case No ICC-01/05-01-526-AnxB1-Red, Public Redacted version of ‘Document Containing the Charges’, 30 June 2014, ICC-01/05-01/13-526-Conf-Anx B1 par. 20–22, 32–34 (3 July 2014); see also Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu & Narcisse Arido, Case No ICC-01/05-01, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute (11 November 2014).

29 See, for example, Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu & Narcisse Arido, Case No ICC-01/05-01/13, Decision on Defence Request for Leave to Appeal the ‘Decision Providing Materials in Two Independent Counsel Reports and Related Matters’ (21 July 2015); Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu & Narcisse Arido, Case No ICC-01/05-01/13, Decision Providing Materials in Two Independent Counsel Reports and Related Matters (15 May 2015); Bemba et al, Decision on the Prosecutor’s ‘Request for judicial order to obtain evidence for investigation under Article 70’.



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