



A QUESTIONNAIRE FOR THE CANDIDATES FOR REGISTRAR OF THE INTERNATIONAL CRIMINAL COURT

Note: please feel free to use a separate document to submit your answers.

Question 1: ICCBA as Independent Representative Body of Counsel

Context: The ICCBA was established as the independent representative body of Counsel before the Court, pursuant to Rule 20(3) of the Rules of Procedure and Evidence (“RPE”). It was formally acknowledged as such by the Assembly of States Parties (“ASP”) at its 15th session. At its 16th session the ASP further welcomed the enhanced dialogue between the Court, States Parties, ICCBA and civil society in the area of cooperation.¹ As set out in the in the Vacancy Announcement for the Registrar position, “liaising and cooperating with the ICC Bar Association” forms part of the core functions of the ICC Registrar with respect to Court Services.

Question: How do you envisage the place and role of the ICCBA and its interaction with the ICC Registry?

Answer:

I do firmly believe that the place and role of the ICCBA and its interaction with the ICC Registry, under my watch, will be capital and of the highest importance to ensure that ICC lives up to its core and strategic mandate. Both the ICCBA and the ICC Registry shall always be guided by a shared ideal, which is to ensure a fair trial for all and respect for the rule of law. My vision is to strengthen the existing cooperative framework with the ICCBA and to fully support Counsel in the performance of their duties before the Court. Under my tenure as ICC Registrar, I would reinforce the active participation of Counsel Community in helping to shape the ICC Policy on issues of interest to Counsel in the delivery of court services.

Long before the establishment of the ICC, as an advocate and member of the UNICTR, I was involved in a series of initiatives that contributed to the development of the international criminal law. These fora provided Defence Experts, Lawyers, legal practitioners from different legal traditions in Africa, Europe, America and Asia with ample opportunities to discuss Defence related issues, which were later successfully moved onto the agenda of policy makers who were working on the establishment of the ICC.

Mindful of the diversity of Counsel interested and actually involved in the work of the Court, I advocated the need for Counsel to better organize themselves and assert their concerns related to the effective fulfillment of their noble mandate before the ICC.

¹ Resolution ICC-ASP/16/Res.6, Strengthening the International Criminal Court and the Assembly of States Parties, 14 December 2017, para. 22.



From my viewpoint, I applaud the establishment of the ICCBA with the support of the Court and its recognition by the ASP, which is a further evidence of the importance that all the stakeholders give to the place and the role of Counsel in the development of the Court.

I consider that the ICCBA should now take full advantage of this momentum, and work side by side with the OPCs to further and effectively engage the Registry, the Court and other relevant stakeholders on the need to: i) institutionalize and reinforce the presence of the Defence within the Court; ii) provide more robust, meaningful and effective legal representation of Victims before the Court; and iii) ensure that Counsel and their support staff receive the most appropriate administrative and financial assistance to discharge their functions.

In my opinion, ICCBA shall be treated as one of the key interlocutors on all matters dealing with the work of Counsel and their support staff before the Court. As Registrar, I will commit myself to ensure their involvement through a close institutionalized consultative process that shall form part of the policy and operational decision making processes, where such issues are to be debated and decided within ICC.

Moreover, I shall endeavor to ensure that the role of Counsel is widely understood, accepted and supported within the Registry as mandated by the legal framework of the Court. This internal appropriation of their role will immensely facilitate their interaction with the Court in the most effective and constructive manner.

Question 2: Legal Aid

Context: At its 12th session (November 2013), and at every session thereafter, the ASP has instructed the Registry to review the legal aid scheme. The external consultant hired by the ICC Registrar for that purpose issued in January 2017 a first report entitled “Assessment of the ICC’s Legal Aid System”.² One of the major conclusions of that Report (pp. 15-20) is that Counsel and Support Staff before the ICC are by far the least paid compared to other international criminal tribunals, in particular following the last revision of the legal aid scheme in 2012.

Question: Present your vision regarding the current legal aid scheme and its possible enhancement pursuant to the ASP request.

Answer:

In my previous capacities as Head of the then Division of Victims and Counsel from 2004 to 2008, and as ICC Deputy Registrar from 2008 to 2013, I played a key role in the design and implementation of the initial ICC Legal Aid Program and its subsequent revisions/adjustments. While I understand that a review of the legal aid system has been requested by the States Parties, it is worth bearing in mind that we need to be

² The Report is available here: <https://www.icc-cpi.int/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf>.



careful and avoid being constantly involved in a stage of continuous review and change without giving opportunity to the system to be tested properly during all stages of the proceedings, including reparation.

It is crucially important to remember that the rights of the Defence and of Victims before the Court should not be sacrificed or compromised for reasons solely related to budgetary constraints. This should compel the Registry to remain vigilant and draw attention of the States Parties on the dire financial situation should this happen. This is particularly important because the Defence does not have its own standing as an organ of the Court or regular channels of communication with States Parties.

One of the constructive options that I would consider in my capacity as Registrar will be to engage States Parties in a strategic dialogue to have a shared vision and clear understanding on the quality of legal representation they expect before the Court bearing in mind that one of its key strategic objectives is to deliver quality justice. Such strategic dialogue can be undertaken through a facilitator or focal point in The Hague Working Group with the aim to have this issue as an agenda point during one the next ASP sessions. It is also my view that States should clearly commit themselves in providing enhanced and comprehensive support to ICC Legal Aid Program.

With this in mind, I consider that the five core principles underlying the Court legal aid system i.e. equality of arms, objectivity, transparency, continuity and economy are sound and still relevant. As Registrar, I will ensure that these principles continue to be strictly adhered to in practice and in the implementation of the Court's legal aid system. The system has been tailored around the peculiarities of the proceedings before the ICC, the evolving role of victims in the proceedings and the need to ensure accountability and efficiency in the management of public funds. It is also designed to ensure the fairness of the proceedings. I believe that the current system based on the assignment of qualified Counsel and support staff who are pre-registered on the ICC lists (Counsel, Assistants, Investigators) and paid through a system of lump sum provided to a core team, readjusted when the stage of proceedings so require, with a fee structure of each team member comparable to their OTP counterparts and an investigative budget for the defendants and Victims with appropriate and adequate administrative and logistic support mechanism within the Registry in the field and at the seat of the Court has correct features.

These main features, coupled with the possibility for Counsel to request for additional resources at any given stage, based on the progress and development of the case, as well as the substantive legal assistance available to them through the two Offices of Public Counsel, arguably provide indigent defendants and victims with the resources reasonably necessary for an effective and efficient legal representation before the Court.

Despite some legitimate criticisms levelled against the current legal aid system, I believe that the system should retain its main features and specific adjustments/improvements be made to the system in the following areas:

1. Determination of indigence

For victims, I would advocate for a presumption of indigence given the fact that to date victims benefit from a common legal representation before the Court and they are unlikely to have incomes, which would enable them to partially or fully cover the costs of their legal representation before the Court. On top of it, the time and resources spent by the Court to assess their indigence might be more costly and such assessment might even further re-traumatize them.



For Defendants, I would reconsider the calculation of their disposable assets/means for the determination of their indigence. More specifically, I will look into another way to calculate their obligations towards their family and dependents.

2. Team composition

I would maintain the principle of core team envisaged in the current policy and, for the Defence, I would authorize the intervention of the Assistant Counsel at an earlier stage in the proceedings.

3. Remuneration

The current remuneration level is described as the lowest compared to any other international criminal tribunals. Yet, the proceedings before the ICC are arguably more complex and time consuming with the involvement of victims. If the Court intends to attract experienced Counsel, who could provide high level of legal representation for their clients, the Court must consider a positive increase in the level of remuneration, which could be informed by the past or prevailing market rate and lessons learned from other international ad hoc criminal jurisdictions.

Another tool worth taking into account in the reassessment of the remuneration level of Counsel and support Staff is the use of the gross salary of their counterpart in the prosecution office, as a reference scale, with an average increment of about 30% to compensate them for their professional charges.

Another avenue worth exploring is to engage the Host State through an interpretation of the Host State Agreement, which could provide Counsel and their support staff with an exemption from tax payment..

Finally, part of my revamping efforts will also entail providing qualitative and quantitative increase in the staffing level of Counsel Support Section, after a thorough staffing review process. The new staffing level will enable the Section to handle, in the most diligent and effective manner, all aspects of the administration of the system.

Question 3: Protection of Victims and Witnesses

Context:

In March 2011, the ICC Office of the Prosecutor and the Registry signed the non-public “Prosecution-Registry Joint Protocol on the Mandate, Standards and Procedure for Protection” (“Joint Protocol”). According to publicly available information in the record of ICC proceedings, the purpose of the Joint Protocol is “to improve coordination between the [Victims and Witnesses Section] and the OTP and clarify responsibilities for each other on issues of witness protection”.³ Additionally, according to the Office of the Prosecutor, the Joint Protocol is to apply *mutatis mutandis* to persons who are placed at risk on account of their interaction with defence or victims

³ Trial Chamber V(A), *Prosecutor v. Ruto and Sang*, Public Redacted Version of Decision on the Ruto Defence Application for Nullification of the Prosecution-Registry Joint Protocol, 14 November 2013, ICC-01/09-01/11-1097-Red, p. 9 (available at: https://www.icc-cpi.int/CourtRecords/CR2017_07166.PDF).



teams, “and may be the basis for an analogous Protocol to be established between the Registry and Defence [and Victims] teams”.⁴

To date, the Registry has not enacted a protocol analogous to the Joint Protocol with respect to Defence and Victims teams.

Questions:

- A. Do you consider that there should be such a Protocol for Defence and Victims teams? If so, please briefly set out your reasons.

If such a Protocol is not yet in place, I shall lead the Registry in its development in close consultation with the ICCBA and Counsel appearing before the Court. The protocol shall provide for an operational coordination mechanism between the Registry and the Defence and Victims teams. It will assist them in conducting risk identification, assessment and mitigation while clarifying the nature and scope of services available to them, with improved quality of services, which are offered in the best interest of the witnesses, victims and justice.

- B. If you are in favour of such a Protocol, do you consider that Defence and Victims representatives (including the ICCBA) should be consulted in the drafting of the Protocol? What forms should any such consultation take? Please briefly set out your reasons for their inclusion / non-inclusion in the process.

Answer:

As you can see, I am in favor of the development of such a protocol. Defence and Victims representatives and the ICCBA, who have hands on experience in this matter and are in a position to share their common concerns and expectations, shall be consulted and invited to provide their inputs (consultations can be made by way of written exchanges, in-person discussions between the Registry and the relevant stakeholders including other lessons learned from any other international criminal jurisdictions). Under the Registrar’s lead, at the end of the consultation process, a working draft serving as a proposal shall be developed and tabled at a special workshop. Once the review is completed, and the proposal validated by all the relevant stakeholders, the protocol will be issued. Such a protocol will indeed serve as a reference tool and facilitate a smooth operation of the Registry, enhance coordination and cooperation between the Registry, the Defence and Victims Teams and ensure efficient delivery of a wide range of services to Defence and Victims teams in relation to the protection of their witnesses in accordance with the ICC Rules and Regulations.

Question 4: Outreach

Context: The Registry has primary responsibility for ICC Outreach in Situation countries. It is widely acknowledged that Outreach is a critical aspect of the ICC’s work. Outreach activities are coordinated by the Registry Public Information and Outreach Section (“PIOS”). OTP regularly

⁴ *Ibid.* at p. 7, citing to *Prosecutor v. Ruto and Sang*, Prosecution response to “Defence Application for: 1) Nullification of the “Prosecution – Registry Joint Protocol on the Mandate, Standards and Procedure for Protection” and 2) Order for disclosure, 3 September 2013, ICC-01/09-01/11-901-Conf, para. 13.



participates in Outreach activities. The Registry Victims Participation and Reparations Section (“VPRS”) and Office of Public Counsel for Victims (“OPCV”) are also involved in outreach activities on victims’ issues. Neither the Independent Bar, the Office of Public Counsel for Defence (“OPCD”), ICC List Counsel and acting Defence and Victims’ Counsel before the Court, nor their Assistants, are associated with or consulted about the ICC’s Outreach.

Questions:

- A. What, if any, should be the role of the Defence and Victims representatives in ICC Outreach activities? Please explain your position.
- B. Do you see a role for the ICCBA in the ICC’s Outreach, and if so, what?

Answer:

- A. *The outreach programme is a link between the ICC and the public at large and the people in the situation countries. Moreover, its purpose is to bridge the information gap between the ICC and its clients who are the public and the people. The initial conception of the ICC Outreach programme impacted the priority placed on the ICC Outreach, its development, the resources devoted to it, the choice of the actors involved, as well as how should it be done/by whom/who should it target. It is therefore my considered opinion that, as key actors in the proceedings before the ICC, Defence Counsel as well as Legal representatives for Victims should have been more involved in ICC outreach activities. They could have contributed in narrowing the information gap between the ICC and the people in the situation countries and the public at large, regarding the role of the Defence, the place of the victims and how they interact with the ICC given their unique position in the criminal proceedings which is as equally important as that of the Prosecution.. It goes without saying that their involvement would certainly have increased the credibility of the Court, improved the awareness about the rights of the Defence and Victims before the Court and promoted the visibility of the Court.*
- B. *Indeed, ICCBA has a tremendous role to play in the ICC Outreach programme. Part of The ICC Registry Outreach programme dealing with Defence and Victims place and role in the proceedings could be developed in joint collaboration with the ICCBA and Representatives of the Defence and Victims Teams.*

Their involvement in ICC Outreach programme could be secured in the following activities:

- *Production of information materials and documentary films;*
- *Participation in Exhibition programmes and awareness raising workshops targeting various audiences where they could discuss their challenges, achievements and contributions to international criminal justice;*
- *Provision of written contributions to internal institutional communication tools such as Newsletters, Website Postings, Media communication and publications to targeted outreach audiences;*
- *Participation to meetings/conferences/seminars/trainings/Fora, which bring together officials from the ICC, the host country, the situation country, the international community, the NGOs, Legal Experts and*



- consultants to discuss issues of interest to the ICC in relation to its achievements, challenges, way forward and how to strengthen its Outreach programme; and*
- *Capacity building programme for legal practitioners in situation countries.*

Question 5: ICCBA Membership

Context: Unlike the ICTY and the MICT, where List Counsel were and are currently obliged to become members of the Association of Defence Counsel Practicing before International Criminal Tribunals (ADC-ICT), there is no compulsion or requirement for ICC List Counsel, or their Assistants, to become members of the ICCBA. The ICTY/MICT requirements have provided significant assistance for the ADC-ICT in recruiting paying members and in creating a self-regulating, self-financed and independent community of Counsel, which has helped it to develop as a Bar Association and provide professional training and services for its Members.

Question: What is your view about ICCBA membership becoming compulsory for all current ICC List Counsel and applicants to the List, as well as their Assistants? If you are in favour of this course of compulsory ICCBA membership, and you are appointed to the position of ICC Registrar, explain how you would bring this about.

Answer:

In principle, I have personally no objection with the ICCBA membership becoming compulsory for all current ICC List Counsel and applicants to the List, as well as their Assistants. This will require a further thinking process before a definitive position could be taken on the merit of ICCBA compulsory membership.

Meanwhile, it is worth noting that the strategic context of the ICC, which is different from that of any other ad hoc international criminal tribunals or special courts, dictates that due consideration be given to the universality character of the Court, its lists of Counsel and support staff, which reach a far wider community of professionals from far bigger number of situation countries. At the same time, the possibility of a Counsel on the list to be actually assigned is remote and one can question the purpose of being compelled to become a member of a “private” association which is not in a position to guarantee any return from investment made by its members, like for instance, obtaining direct and actual appointment through the ICCBA.

Furthermore, it is gainsaying that the Court has already in place a peer review disciplinary mechanism for Counsel, tasked with investigating and deciding on complaints of misconduct in violation of the Code of Professional Conduct for counsel. This is to say that this important potential role of the ICCBA is already covered by a well-tested mechanism.

As a result, before making any effective move, I would first consult with all Counsel already on the List to assess the extent to which they feel comfortable with the idea of a compulsory ICCBA membership. It is my sincere hope that, in the years ahead, ICCBA will prove to be one of the best and effective Legal Practitioners Associations, capable of rallying the support of all past, current and future ICC Counsel, and chartering a new way of improving the role of Counsel within the regulatory framework of the ICC.



Question 6: ICCBA Presence at the ICC Permanent Premises

Context: At the ICTY, and now MICT, the ADC-ICT has long been provided with office space within the facilities of the ICTY / MICT in order to conduct their work, meet with their constituency, and store important files of the organization.

Question: Do you believe the ICCBA should be provided with permanent office space at the ICC Permanent Premises? Please briefly state the reasons for your position. If your answer is in the affirmative, presuming there is limited office space available within the ICC Permanent Premises, what level of priority would you attach to providing the ICCBA with its own office space and what types of measures would you be ready to take to speed up the process of assigning office space to the ICCBA?

Answer:

As stated in your first question, the establishment of the ICCBA was facilitated by the Court and recognized by the ASP. This reflects the importance the Court and ASP accord to the role of Counsel before the Court and to their interaction with the Court.

As a matter of principle, office space should have been planned for and provided to an association like ICCBA. As of today, I must confess that I am not aware of the current and future office allocation and distribution plans to external but associated entities. Once, I am appointed Registrar, I shall look into this matter, on a priority basis, by first gathering all the necessary information regarding the existing policy, rules and regulation pertaining to office allocation and distribution plans. This will inform my position as well as my proposed course of action, Secondly, I shall discuss about my informed position and proposed course of action with the ICCBA and any other internal relevant key stakeholders before reaching a final decision regarding whether to assign an office space to the ICCBA on the ICC premises or to find alternative and suitable arrangements to accommodate the ICCBA.

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