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IBA/ICC Programme



Counsel Matters at the International Criminal Court: A Review of Key Developments Impacting Lawyers Practising before the ICC

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An International Bar Association's Human Rights Institute (IBAHRI)
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List of Acronyms

ADC	Association for Defence Counsel
APIC	Agreement on Privileges and Immunities of the ICC
ASP	Assembly of States Parties
CSS	Counsel Support Section
IBA	International Bar Association
IBAHRI	International Bar Association's Human Rights Institute
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the former Yugoslavia
OPC	Offices of Public Counsel
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UNSC	United Nations Security Council

About the Programme

The International Bar Association (IBA) Programme (the 'Programme') on the International Criminal Court (ICC or the 'Court') monitors fair trial and counsel related issues at the ICC and encourages the legal community to engage with the work of the Court.

The IBA's monitoring work includes thematic legal analysis of the ICC's pre-trial and trial proceedings; and ad hoc evaluations of legal, administrative and institutional issues, which could potentially affect the rights of defendants, the impartiality of proceedings and the development of international justice.

The Programme also acts as the interface between the Court and the global legal community. As such, special focus is placed on monitoring emerging issues at the Court of particular relevance to lawyers and collaborating with key partners on specific activities, such as the IBA/ICC List Counsel Campaign, to increase engagement of the legal community on ICC issues.

Parameters for monitoring

In keeping with the Programme mandate, the IBA's monitoring of the ICC focuses in particular on fair trial issues and the rights of the accused, as established in relevant provisions of the Rome Statute, the Rules of Procedure and Evidence (RPE), Regulations of the Court and other legal texts. The Programme conducts critical analysis of legal, administrative and institutional developments to assess the potential impact on the overall fairness of the proceedings.

IBA/ICC monitoring includes the following:

- analysis of the interpretation and implementation of fair trial standards at the Court;
- legal, institutional and policy developments impacting the rights of accused persons; and
- issues of relevance to the legal profession.

Research is complimented by detailed consultations with key legal professionals, including: Court officials; academics and legal researchers; NGOs; staff of the ad hoc tribunals; individual defence counsel; and diplomatic representatives. Analysis of the relevant issues and detailed findings are published in monitoring reports and widely circulated to an extensive Listserv. To ensure the highest quality, reports are vetted by senior-level IBA officials including the IBA Executive Director, Mark Ellis, the International Bar Association's Human Rights Institute (IBAHRI) Co-Chairs, and the Honorary IBAHRI President, Justice Richard Goldstone.

This programme report was prepared by IBA/ICC Programme Manager Lorraine Smith van Lin, with the significant contribution and helpful research assistance of IBA interns Andreas Herzig, David Sabatelle and Kristy Simm. The IBA/ICC Programme team is grateful to all Court officials, counsel and other experts who kindly participated in consultations (formal and informal) for this report.

Executive Summary

In 2012, the International Criminal Court (the ICC or the 'Court') celebrated ten years since the coming into force of the Rome Statute, its founding instrument. In that same year the ICC accomplished several historic milestones, including the conclusion of its first trial. Members of the legal profession have been integral to the success of the Court to date through their contribution in several different capacities including as legal representatives of victims, counsel for accused and suspects, ad hoc and duty counsel among others.

This International Bar Association (IBA) monitoring report explores the dynamic and evolutionary relationship between lawyers and the ICC. Tracing the role of legal professionals at the Court over the years, the report examines how the relationship has evolved to meet the demands of the Court. While generally positive, the report notes that on a number of levels there is need for systemic change to ensure that counsel at the ICC are able to effectively function. Furthermore, there is need to ensure that the views, experiences and concerns of counsel are taken into account in relation to legal and policy decisions undertaken by the Court. Importantly, the report concludes that while the ICC must continue to reinforce and strengthen the counsel's capacity, counsel also have a corresponding obligation to support the Court and enable its efficient and effective function.

The report begins with a discussion of the important role played by counsel at the ICC over the last ten years, some of which were not always clearly articulated in the legal texts. Indeed lack of clarity in some of the legal provisions lead to significant litigation and judicial pronouncements on key issues, most notably, the provisions of the Code of Professional Conduct for Counsel (the Code of Conduct); and administrative decisions of the Registrar regarding counsel. More recently, in 2011 and 2012 jurisprudential activity has been supplemented by revisions of the Regulations of the Court and proposed revisions to the Regulations of the Registry with the aim of further clarifying the role and responsibilities of counsel in their interaction with the Court. The amendments to the Regulations of the Court are timely and welcome, and are a first step in the right direction. The Court must now go further by finalising amendments to the Regulations of the Registry and amending relevant provisions of the Code of Conduct to ensure congruence in the legal provisions governing lawyers at the Court.

At a more practical level, the report highlights some of the unique challenges encountered by counsel in seeking to effectively represent victims and defendants before the Court. These range from difficulty utilising the Court's e-Court system

to challenges in conducting investigations in the field, particularly where the State is not a party to the Rome Statute. The work of the Registry in supporting counsel must be commended. However, the report reveals that counsel were not always consulted in a timely manner and their views were not taken into account in relation to major policy decisions at the Court that could potentially have an impact on the conduct of their work. For example, the contentious review of the legal aid system currently underway has led to concerns that the views of counsel on this important issue are secondary and that the process is entirely budget-driven. Furthermore, there is a perception that for similar reasons, the internal Offices of Public Counsel (OPCs) are being appointed in place of external counsel at the Court.

The report also considers the Registry's proposed establishment of a mechanism to monitor the performance of counsel. Aimed at regulating and improving the efficient representation of victims and defendants at the Court, the proposed mechanism would be a proactive way to qualitatively assess counsel's performance. However, views on the need for and purpose of such a mechanism diverge, given the very detailed provisions for disciplinary breaches in the Code of Conduct and the oversight role of the Chambers. While there remains a lack of consensus as to the utility and necessity of monitoring counsel, the legal profession consistently opposes the establishment of a Registry-directed monitoring mechanism.

Finally, the report reiterates its denouncement of the unwarranted detention of ICC staff in Libya, one of whom was acting as counsel on behalf of a suspect in a case before the Court. The report emphasises that States Parties to the Rome Statute and non-States Parties referred to the Court by the United Nations Security Council (UNSC) must fully adhere to and respect the privileges and immunities of ICC staff and counsel in exercising their duties on behalf of the Court.

Throughout, the report emphasises that it is important for the Court to support and reinforce the work of counsel, including through training and provision of resources in order to enable the effective exercise of their function. However, counsel also has a corresponding obligation to act professionally and effectively in their legal representation duties. More fundamentally, given the principle of complementarity, the report posits that the role and responsibilities of counsel at the ICC extend beyond the four walls of the Court in The Hague and must equally resonate at the national level in expressions of support for the ICC. In sum, the relationship between the legal profession and the Court must be mutually reinforcing.

IBA findings

The role of counsel

Counsel at the ICC play a variety of divergent roles, some of which have evolved to meet the demands of the Court. The issue of whether victims and defendants should be represented by internal counsel from the OPC or through external counsel from the ICC List of Counsel has generated much debate during the past few years of the Court's operation. The issue is a sensitive and difficult one. Both the OPCs and external counsel play an important role in ensuring that victims and defendants enjoy quality, effective representation at the Court. The legal representation of victims has seen the most fractious debate amid perceptions that changes to the representation of victims is being driven by budgetary considerations. In addition, judicial decisions reflect a major divergence in the approach of different Chambers on the respective functions of the Office of Public Counsel for Victims (OPCV) and legal representatives of victims. The issue merits thoughtful review and transparent discussions, as well as judicial clarity at the appellate level.

While the effective representation of victims and defendants must be a priority for counsel appearing before the ICC, counsel has a much broader mandate. The principle of complementarity, which places the primary obligation on national governments to investigate and prosecute serious international crimes, creates opportunities for counsel that are far greater than possibilities that lie in the Hague. Looking ahead, it is important for the legal profession to begin to reflect on the range of possibilities that exist for contributing to the success of the ICC.

The laws governing counsel

The IBA notes that the laws governing counsel did not fully reflect the developments in the Court's jurisprudence and practice. The recent amendments to the Regulations of the Court are an important step forward in this regard, which must be further supplemented by the finalisation of the amendments to the Regulations of the Registry and the initiation of a review of the ICC Code of Professional Conduct for Counsel (the Code). In relation to the latter, a review is timely as some provisions are vaguely defined, poorly articulated or inconsistently applied and/or are now inconsistent with the amended Regulations of the Court. The Registry should ensure that there is full consultation with legal professional organisations, counsel and other relevant stakeholders with a view to its revision.

The existing Code should also be amended to include the prosecution or a separate Code of Conduct for the Prosecution should be

promulgated in order to ensure uniformity and consistency in the normative framework governing the ethical standards applicable to all counsel at the ICC. Furthermore, a Code of Conduct for the Prosecution will only serve to enhance the existing normative framework by providing greater clarity on certain ethical matters not expressly addressed in the other legal texts.

Monitoring counsel

The IBA considers that, in principle, the idea of a proactive monitoring mechanism to review the performance of counsel has some appeal, given its aim to provide an additional quality assurance mechanism to ensure the highest quality of legal representation. Such a mechanism could encourage greater compliance with the Code of Conduct and act as a valuable standard-setting tool. If governed by an independent, neutral body, this mechanism could also provide counsel with a forum in which to obtain guidance and advice from their peers in a neutral, non-contentious and non-litigious setting and alleviate the Chambers from having to rule on ancillary ethical issues. The question is whether an additional monitoring mechanism risks becoming a parallel process to the established disciplinary regime under the Code of Conduct and to Chambers' oversight functions. The Registry is urged to continue to engage in dialogue with counsel, representative associations of counsel including the IBA and other relevant concerned stakeholders regarding the establishment of this proposed monitoring mechanism.

Support for counsel

The IBA acknowledges the important supportive role played by the Counsel Support Section (CSS) and commends the Registry in its continued organisation of training initiatives for counsel, in particular the Annual Seminar for Counsel. External partners, such as the European Commission, are urged to continue supporting this important initiative. However, the IBA found that counsel were not always consulted regarding the preparation of the agenda for the seminars, thus the sessions were not always practical or relevant for counsel.

In general, the IBA found that ICC counsel face numerous challenges in carrying out their mandate before the ICC, including difficulties in fully utilising the Court's e-Court system while away from the seat of the Court and in conducting investigations in some ICC situation countries such as Sudan, which was referred by the United Nations Security Council. Counsel also experienced challenges with significantly delayed judicial and policy decisions. More fundamentally, counsel are challenged by the persistent failure of the Court to

engage in timely and meaningful consultations on issues affecting their work.

For example, the process of reviewing the legal aid system in 2012 was rushed and very focused on budgetary considerations. It was not the comprehensive, transparent process that such an important mechanism deserves. While decidedly late in the process, it is heartening that the views of civil society and the legal profession appear to have been considered in the formulation of the second set of Registry proposals but it remains unclear to what extent these views will impact the final decisions when the issue is ultimately determined by the Assembly of States Parties (ASP) during the eleventh ASP meeting in November 2012.

The IBA also welcomes the very encouraging judicial decisions on legal aid in the *Lubanga* and *Katanga* cases, which reflect the fact that while mindful of the financial strictures under which the Court is currently operating, ICC judges consider that their primary duty in interpreting policy decisions is to safeguard the rights of defendants and victims and the overall fairness of proceedings, without seeking to micro-manage the Registrar.

Ensuring safe passage – privileges and immunities for ICC counsel

The detention of ICC staff, one of whom was acting as counsel on behalf of a detained person charged before the Court, has raised awareness concerning the immunities and privileges under the Rome Statute and in particular the scope of the obligation by non-States Parties referred by the UNSC to cooperate and respect immunities under the Rome Statute, and whether such States are also bound by the Agreement on Privileges and Immunities of the ICC (APIC). The IBA considers that non-States Parties referred by the UNSC must respect Article 48 of the Rome Statute and guarantee immunities and privileges of ICC staff and counsel before the Court. It is critical for staff and counsel working for or on behalf of the Court to be able to enjoy all the privileges and immunities associated with their position. The ASP is encouraged to make this a priority issue for discussion at the level of the Security Council to ensure that there is concerted condemnation of any attempts to violate privileges and immunities of Court personnel or counsel.

IBA recommendations

To the Registry

- The IBA recommends that the Registry initiates a principled discussion regarding the role of the OPCs and external counsel with relevant stakeholders and not exclusively from the perspective of cost efficiencies.

In this regard, the IBA suggests that particular attention is paid to the system of legal representation of victims, given the inconsistent judicial decisions and significant changes implemented within a relatively short period of time and the potential impact on the work and perception of the Court.

- The IBA urges the Registry to complete the proposed amendments to the Regulations of the Registry and initiate a review of the Code of Conduct in order to standardise the normative framework governing counsel. The Registry should ensure that there is full consultation with legal professional organisations, counsel and other relevant stakeholders, with a view to its revision. At the outset, in light of the amendments to the Regulations of the Court, revision of the following provisions should be considered:

Current provisions in the Code	Proposed amendments
Article 1 (scope)	Include standby counsel in the definition
Article 2 (use of terms)	Redefine associate counsel; Change defence team to legal team
Articles 11, 12, 14 (representation agreement)	Modify to take into account particular situation of victim representatives
Article 15 (communication with client)	Modify to take into account particular situation of victim representatives
Article 17 (termination of representation agreement)	Modify to take into account particular situation of victim representatives

- The IBA recommends that in the context of the Annual Seminar, the Registry organises a ‘Best practices, lessons learnt’ exercise, during which counsel who have appeared or are currently appearing before the Court can share their experiences with colleagues and relevant stakeholders. The Registry is also urged to ensure that the training sessions are practical and relevant for counsel attending the seminar.
- The IBA continues to encourage the Registry to establish an Expert Commission comprising representatives from the Court, representatives of independent associations of counsel and members of the legal profession, and experts from civil society organisations to conduct a comprehensive review of the Court’s legal aid

system. Such an expert commission would, in our view, allow for a considered and holistic review by those with the requisite expertise and understanding of the complex issues involved in devising a legal aid system.

- The IBA also recommends that the Registry continues the dialogue regarding the establishment of a monitoring mechanism for counsel at the ICC. The discussion forum on this issue should include relevant stakeholders and should include a detailed review of the legal framework necessary for establishing this mechanism, including congruence with the disciplinary regime of the Code of Conduct.

- The IBA recommends that States to support a comprehensive review of the legal aid system that takes into account the input of all relevant stakeholders.
- The IBA urges the ASP to call upon all States Parties who have not yet done so to ratify the Agreement on Immunities and Privileges of the ICC. Concerning non-States Parties referred by the Security Council, the IBA urges the ASP to continue to have discussions with the Security Council to ensure that there is concerted condemnation of any attempts to violate privileges and immunities of Court personnel or counsel.

To the Office of the Prosecution

- In order to standardise the normative framework governing all counsel appearing before the ICC, and consonant with the practice at other international tribunals, the IBA recommends that the existing Code of Conduct should be amended to include the prosecution or a separate Code of Conduct for the Prosecution should be promulgated.

To States Parties

- States Parties are urged to respect the legal requirement for the Registry to meaningfully consult with the legal profession and associations of counsel prior to the finalisation of policy decisions on legal aid. As such, the IBA recommends that sufficient time is given to the Registry to organise such consultations before submitting a report to the Bureau of the ASP (the 'Bureau').

To counsel

- The IBA urges counsel to ensure full respect for, and adherence to, the normative provisions governing effective representation of victims and defendants before the Court.
- Counsel are encouraged to envisage their role and mandate at the ICC as broader than the representation of individual clients. The principle of complementarity demands that counsel's involvement with and support for the ICC is not limited to its work in The Hague.

The ICC's tenth anniversary provides a unique opportunity to reflect on the important role of counsel at the Court. For defendants, the right to counsel of their choosing is a fundamental due-process guarantee under Article 67 of the Rome Statute. Victims may also be represented in proceedings by a legal representative of their own choosing or by a common legal representative in the case of multiple victims. In the ten years of the ICC's operation, several counsel have appeared in ICC proceedings to date as defence, victims, ad hoc, duty or standby counsel. Counsel from ICC situation countries in Africa have had the opportunity to appear as advocates alongside colleagues from other countries. Counsel's work on behalf of victims and accused has undoubtedly contributed to the effective and expeditious conduct of cases at the Court and significantly enriched the jurisprudential evolution of the ICC.

Nevertheless, defining the scope of diverse roles for ICC counsel and providing institutional structures for their support has been an evolutionary process for the Court. The Court has made excellent progress in recently amending several key legal provisions governing counsel; a subject that will be discussed more extensively in the next chapter of this report. While streamlining the normative framework is an important progressive step, at a more practical level, there are a number of aspects of counsel's role and function that warrant attention.

1.1 Diversity of roles

The Rome Statute framework specifies a number of roles that legal practitioners may undertake as counsel,¹ or assistants to counsel.² Counsel is generally defined in the legal texts as 'defence counsel and the legal representatives of victims'³ except in the Code of Conduct, which broadens the definition to include counsel acting for States and amici curiae.⁴ The legal texts draw a clear line between the responsibilities and privileges of counsel and those of team members who are

assisting counsel.⁵ Counsel may also be appointed as ad hoc⁶ or duty counsel⁷ in specific circumstances.

In circumstances where an individual requires urgent legal assistance either because he or she has not yet secured legal assistance or where his or her counsel is unavailable, the Registrar may appoint duty counsel.⁸ When making the appointment, the Registrar will take into account the individual's wishes as well as the languages spoken by counsel and his or her geographical proximity.⁹ Duty counsel have acted before the ICC at initial appearances, assisted persons being interviewed in the field by the Office of the Prosecutor (OTP),¹⁰ and have also been appointed with a limited mandate, such as responding to a specific submission.¹¹

A Chamber can appoint ad hoc counsel to represent the general interests of the defence where there is a unique opportunity to take testimony, a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial or, finally, where the interests of justice so require. This type of appointment is especially relevant where there is no person charged but investigative activities are being carried out by the Prosecutor, in particular where victims apply to participate in the proceedings at this preliminary stage. The mandates of ad hoc counsel are limited in time and scope and have a clear purpose in the context of a situation or

1 See Rules 20, 21, 22, Rules of Procedure and Evidence (RPE); Chapter 4, Regulations of the Court; and Code of Professional Conduct for Counsel (Code of Conduct).

2 See Regulation 68, Regulations of the Court; Regulations 124–127, Regulation of the Registry; Articles 7(4), 8(3), 24(1); and 32, Code of Conduct.

3 See Regulation 2(1), Regulations of the Court; Article 1(l), APIC; and Article 1(v), Headquarters Agreement between the ICC and the Host State.

4 Article 1, Code of Conduct.

5 APIC, Article 18(1) applies to counsel, whereas Article 18(4) applies to persons assisting counsel; Headquarters Agreement, Article 25(1) applies to counsel, whereas Article 25(6) applies to persons assisting counsel; and Code of Conduct, Article 1 limits the scope of the Code of Conduct to counsel, whereas Articles 7(4) and 32 set out the relationship of counsel vis-à-vis members of his or her team.

6 Article 56(2)(d), Rome Statute. See also Rule 89, RPE. This occurred in the situation in the Democratic Republic of Congo, ICC-01/04-147, Decision Appointing Ad Hoc Counsel and Establishing a Deadline for the Prosecution and Ad Hoc Counsel to Submit Observations on the Applications of Applicants a/0001/06 to a/0003/06, 18 May 2006, PTC I, www.icc-cpi.int/iccdocs/doc/doc183532.pdf.

7 Regulations 73 and 74, Regulations of the Court. See, for example, in the *Lubanga* case where two duty counsel were appointed, each with a mandate limited to respond to submissions by the Prosecutor: *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-870, Appointment of Duty Counsel, 19 April 2007, PTC I, at 4, www.icc-cpi.int/iccdocs/doc/doc259593.pdf; *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-882, Appointment of Ms Annick Mongo as Duty Counsel pursuant to the Appeals Chamber's Decision of 3 April 2007, 4 May 2007, AC, www.icc-cpi.int/iccdocs/doc/doc271662.pdf; *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-881, Désignation de Maître Emmanuel Altit comme conseil de permanence conformément à la Décision de la Chambre Préliminaire I du 19 Avril 2007, 4 May 2007, PTC I, www.icc-cpi.int/iccdocs/doc/doc263533.pdf.

8 Regulation 73(2), Regulations of the Court.

9 *Ibid.*

10 Article 55(2) grants suspects the right to counsel of their choice to be present during the interrogation.

11 See above n 7, *Prosecutor v Thomas Lubanga Dyilo*.

case under the jurisdiction of the Court.¹² Ad hoc counsel may be appointed to represent the general interests of the defence during the preliminary stages before formal charges are laid, and during which several procedural matters are being considered.¹³ Counsel may be similarly appointed to represent the general interests of the defence in situations where an investigation presents a unique opportunity, which may not be available subsequently, to take testimony or a statement from a witness or to examine, collect or test evidence.¹⁴

In relation to ad hoc counsel, the rudimentary nature of the provisions related to their appointment, the lack of precedent in exercising their function and the potentially ambiguous formulations employed by the Chambers at the time of appointment, created some uncertainty in exercising their individual mandates.¹⁵ As will be discussed in the next chapter, the Appeals Chamber has provided some clarity regarding the role and obligations of ad hoc counsel and whether the mandate is governed by the Code of Conduct.¹⁶

It is important to note that the appointment of ad hoc or duty counsel does not necessarily conflict with the right to freely choose counsel provided by Article 67 of the Rome Statute. Indeed, the ICC Presidency has confirmed that, 'a person's scope for choice [in the appointment of duty counsel] is limited since the final decision for appointing counsel lies with the Registrar. While the latter must take into account a person's wishes prior to making appointment, such wishes may be overridden where there are valid and reasonable grounds to do so.'¹⁷

However, the appointment of counsel from the OPC has sparked debate concerning the scope of the respective roles of internal and external counsel, with the latter concerned that these appointments are driven by budgetary considerations rather than the desire to ensure effective representation. It must be noted that the OPC include qualified, competent counsel who meet the criteria for inclusion on the List of Counsel (although they are not included on the List) and are bound by the Code of Conduct of the ICC. Their appointment as duty counsel to protect the general interests of the defence and victims is consonant with the legal texts of the Court, and has been further elaborated in the recent amendments to the Regulations of the Court. Nevertheless, the issue warrants thoughtful consideration.

1.2 Internal and external counsel

The debate within the legal profession regarding the scope and role of the OPCs and external counsel is not new. However, recent discussion among States Parties concerning an expanded role for the OPCV in representing victims¹⁸ and the appointment of the Office of Public Counsel for the Defence (OPCD) to represent a defendant in the Libya case,¹⁹ have prompted renewed dialogue on the issue. Additionally, the recent amendments to the Regulations of the Court (discussed further in Chapter Two) have significantly expanded the role of the OPCs, including allowing them to be appointed by the Chamber as duty counsel, in the interest of justice and in other contexts deemed appropriate. The prevailing view among counsel is, however, that the primary role of the OPCs should be limited to a supporting one – that is, to provide legal research and advice to defence and victims' teams. Counsel are concerned that the emphasis on internalising representation threatens the independence of counsel, undermines the original intent of these offices to provide support and may lead to conflicts of interest.

12 This term is not used in the Rome Statute framework but is used in the jurisprudence of the Court (see cases cited below, as well as by the Registry. The authority for ad hoc counsel can be found in Art 56.2, Rome Statute, Rule 103, Rules of Procedure and Evidence and Regulation 76, Regulations of the Court.

13 Rule 89, RPE. This was done in the Situation in the DRC, Situation No ICC-01/04-147, Decision Appointing Ad Hoc Counsel and Establishing a Deadline for the Prosecution and Ad Hoc Counsel to Submit Observations on the Applications of Applicants a/0001/06 to a/0003/06, Public (Pre-Trial Chamber I, 18 May 2006), www.icc-cpi.int/iccdocs/doc/doc183532.pdf.

14 Article 56(2)(d).

15 J Dieckmann, 'Representing the "General Interests of the Defence": Boon or Bane? – A Stocktaking of the System of ad hoc Counsel at the ICC,' (2011) *International Criminal Law Review*, Vol 11: 105–136, at 106.

16 *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05-408, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19(1) of the Statute of 10 March 2009', 16 September 2009, AC, at para 56, www.icc-cpi.int/iccdocs/doc/doc743635.pdf.

17 *Prosecutor v Thomas Lubanga Dyilo*, Decision on the 'Demande Urgente en vertu de la Regle 21(3) du Reglement du Procédure et de preuves and on the Urgent Request for the appointment of Duty Counsel filed by Thomas Lubanga filed before the Presidency on 7th May 2007 and 10th May 2007 respectively', ICC-01/04-01/06-937, 18 July 2007.

18 Committee on Budget and Finance (19th Session), Supplementary Report of the Registry on four aspects of the Court's legal aid system, 17 August 2012, CBF/19/6 (Supplementary Report).

19 *Prosecutor v Saif al-Islam Gaddafi and Abdullah Al Senussi*, ICC-01/11-01/11-113, Decision Appointing Counsel from the OPCD as Counsel for Saif Al-Islam Gaddafi, 17 April 2012, PTC I, www.icc-cpi.int/iccdocs/doc/doc1396574.pdf.

The role of the Offices of Public Counsel

THE OPCD

In May 2011, a select committee of judges and the Deputy Registrar of the ICC initiated a review of the role of the OPC. The review was prompted by concerns expressed by relevant stakeholders concerning the manner in which the respective mandates were being implemented. The review of the OPCs was prompted by differences in the interpretation of mandates by both offices; and the absence of clear mechanisms to ensure governance and accountability for these independent offices.

In relation to the mandate of the OPCD Judge Sir Adrian Fulford, one of the chief architects of the OPCD and one of the judges involved in the internal review, opined that the OPCD was intended to provide ‘hands-on, case-focused help to individual defendants and to the Court’.²⁰ Judge Fulford indicated that it was envisaged that the OPCD would expedite trials and reduce expenditure on legal aid, and was concerned that the office was not fulfilling that role.²¹ However, in a 2010 report of the ICC Registry, the Office appeared to have interpreted its mandate as primarily behind-the-scenes rather than in Court: ‘[T]he OPCD is not a public defender’s office per se, it exists to supplement rather than replace the role of external defence counsel’.²²

The OPCD emphasised that its main goals were representing the general interests of the defence in the investigation stage, and supporting defence counsel in the preparation of their defence. It does not seek to affect the defence’s strategy, and opts not to appear in court – except to represent defendants during their initial appearance who have not yet been assigned or retained counsel.

The OPCD was appointed in December 2011 to represent Saif Al-Islam Gaddafi, one of two defendants charged in the case arising from the situation in Libya. In making the appointment, the judges took note of a declaration signed by Mr Gaddafi and indicated that ‘while the Gaddafi Declaration is not a formal power of attorney, the Chamber is mindful of the practical difficulties the OPCD faces in relation to representing Mr Gaddafi’s interests, including trying to ascertain Mr Gaddafi’s choice of counsel if indeed he wishes to have legal representation appointed for him. The OPCD’s appointment to represent a specific defendant appears to be a departure from the practice to date. Nevertheless, this appointment is not inconsistent with the legal role of the OPCD, and appears to have been due to the practical challenges in facilitating the free choice of counsel for the suspect. The more fundamental question is

whether continued appointments of the OPCD to specific defendants could create practical and legal challenges.

THE OPCV

By contrast, the OPCV has directly represented more than 1,000 victims in pre-trial and trial proceedings at the ICC in addition to supporting victims’ legal representatives. The Office also represents the collective interests of victims in Court.

As part of the review of the legal aid system (discussed in Chapter Five of this report), the ASP mandated the Registry to consider the option of an enhanced role for the OPCV in cases of common legal representation. The view of the Committee on Budget and Finance (CBF) – the subsidiary body of the ASP responsible for financial oversight – and the ASP was that appointing the OPCV as the primary representative of victims would lead to significant cost savings. Civil society organisations and some legal representatives argued that appointing the OPCV limited the right of victims to freely choose counsel, to have their views heard in the case of common legal representation and to challenge the choice of common legal representation.²³

The Registry’s position is that given the existing provisions governing the right of victims to freely choose their legal representatives, a privileged or exclusive role for the OPCV would require modification of the Regulations of the Court and judicial determination.²⁴ In the Registry’s view, a two-tiered system as currently established, which allows OPCV and external counsel to represent victims in proceedings before the Court, is the most suitable and cost-effective option. Two options were proposed. In option 1, senior counsel from OPCV is appointed as common legal representative and builds his or her team from external lawyers and other field staff. This formulation has been implemented in the case of Laurent Gbagbo, former President of Côte d’Ivoire, currently at the pre-trial stage at the ICC. In option 2, external counsel is appointed to head the legal representation of victims and builds his or her core team from OPCV staff if available.

The OPCV’s view by contrast is that there is no legal or practical impediment to an enhanced role for the Office contrary to the Registry’s view.²⁵ Indeed, the OPCV notes that an enhanced role for the OPCV is provided for in the legal framework and finds support in the Court’s jurisprudence.²⁶ Therefore, no amendments to the current legal

20 Judge Sir Adrian Fulford, ‘Reflections of a Trial Judge’ (2011), *Criminal Law Forum*, Vol 22 Nos 1–2, 215–223, at 222.

21 *Ibid.*

22 The Report of the Registry, *Behind The Scenes: The Registry of the International Criminal Court*, 2010, at 69.

23 Supplementary Report at 50.

24 *Ibid* 54, 55.

25 Report of the OPCV, *Paper on the Review of the Legal Aid Scheme*, 27 September 2012, submitted to The Hague Working Group (on file with the IBA), at 4 (OPCV Paper).

26 *Ibid* 5; Regulations 73(4), 80(1) and 81(4), Regulations of the Court; and Rule 90(3), RPE.

framework of the Court would be needed for the relevant Chamber to appoint OPCV as common legal representative. The OPCV favours the first of the two options proposed by the Registry, citing conflicts of interest and independence concerns if the latter option is implemented.

The issue of an enhanced role for the OPCV remains under consideration by the Bureau of the ASP, and will be debated during the eleventh ASP meeting. However, at the time of writing, trial judges in the Kenya cases implemented a procedural approach consistent with option 2 – primary representation role played by field based legal representatives with supporting role by the OPCV – which has raised a number of legal and practical questions.²⁷ At least one victims' rights civil society organisation has expressed concern about 'the design of the new system in ongoing proceedings, and the feasibility of its implementation' and called upon the relevant organs of the ICC 'to adopt all measures required to ensure that the scheme established by the judges allows victims to have a meaningful, efficient and effective participation in the proceedings'.²⁸

1.3 Beyond The Hague

While the debate concerning the scope and responsibilities of counsel continues, it is important to point out that the mandate of counsel at the ICC must extend beyond the representation of an individual victim or defendant at the ICC. The principle of complementarity, which places the primary obligation on national governments to investigate and prosecute serious international crimes, creates opportunities for counsel that are far greater than what is possible in The Hague.

Indeed, there is every likelihood that only a small percentage of the over 400 members of list counsel will ever appear before the ICC. Nevertheless, as members of list counsel, counsel are exposed to training and resources in international criminal law that set them apart from their counterparts at the national level. It is therefore imperative for the legal community to also reflect on how the skills garnered from practice before the ICC may be transferred to, and become relevant within, domestic legal systems.

Additionally, the legal profession plays an important role in helping to dispel some of the myths and misunderstandings about the ICC and its work. Legal representatives of victims for example, play an important role in helping to manage the expectations of their victim clients by ensuring that their information about and perception of the Court are grounded in facts. Defence counsel who diligently perform their duties can help to dispel misperceptions about the role of the defence and the rights of the accused.

1.4 IBA comment

The issue of the appointment of internal or external counsel is a sensitive and difficult one. Both the OPCs and external counsel play an important role in ensuring that victims and defendants enjoy quality, effective representation at the Court. However, the assignment of internal rather than external counsel is a matter of concern for list counsel, some of whom are of the view that the appointment of the OPCs should be secondary to the appointment of duty or ad hoc counsel from the List.

The decision concerning whether to assign external counsel or counsel from the OPCs is a matter of judicial discretion, which must take into account the skill and competence of counsel and the particular circumstances of each case. Indeed, both internal and external counsel are required to meet similar competency criteria to represent victims and defendants before the Court. Therefore, the primary judicial consideration must be effective representation of victims and defendants and the fairness of proceedings.

Nevertheless, there are a number of issues worth considering. For example, the current size of the OPCD, with only two counsel currently meeting the eligibility criteria for inclusion on the List of Counsel, lends itself to potential conflicts of interest if counsel from that office are frequently assigned to represent individual defendants at the pre-trial stage. In relation to the OPCV, the mixed approach to legal representation will undoubtedly present legal and practical challenges in relation to the interaction of OPCV counsel and their external colleagues – most notably in relation to their respective independence, strategic decisions and leadership. At a more practical level, without additional staff and resources, representation assignments by the OPCs could place additional demands on these already-overstretched offices, thereby compromising their ability to provide legal support and advice extemporaneously if the need arises.

27 *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-460, Decision on victims' representation and participation, TC V, 3 October 2012, www.icc-cpi.int/iccdocs/doc/doc1479374.pdf; *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-498, Decision on victims' representation and participation, TC V, 3 October 2012, www.icc-cpi.int/iccdocs/doc/doc1479387.pdf.

28 FIDH Press Release, 'FIDH and KHRC Call Upon the ICC to Ensure a Meaningful Participation and Legal Representation for Kenyan Victims', <http://allafrica.com/stories/201210101381.html> accessed 22 October 2012.

While the debate on the appointment of the OPCs is slightly more nuanced for victims than the defence, effectiveness of representation and the fairness of proceedings must be the determining factors in any representation appointment. It is therefore important that a principled discussion regarding the role of the OPCs and external counsel is undertaken and that it is driven by fairness rather than budgetary considerations. This is particularly important for victims' legal representation, given the inconsistent judicial approaches to the issue and the significant changes implemented within a relatively short period of time.

Concerning a role for lawyers beyond the ICC in the Hague, the IBA considers that while lawyers are not required to become ambassadors on the Court's behalf, they are nevertheless a useful source of information about the Court's work. Indeed, lawyers appearing before the ICC frequently provide media interviews or appear in conferences or other public engagements to discuss the work of the ICC. For example, in May 2012, during an IBA Bar Leaders' Conference in The Hague, the IBA/ICC Programme organised a panel discussion entitled 'Representing justice, the role of lawyers in establishing criminal courts and safeguarding their legacy', with an expert panel that included ICC defence counsel Karim Khan and Sureta Chana, legal representative of victims in the *Kenya 2* case.²⁹ Their contributions provided very useful insight concerning the ICC.

Looking ahead, it is important for the legal profession to begin to reflect on the range of possibilities for contributing to the success of the ICC. While the primary responsibility must be as counsel in a representative capacity for both victims and defendants, counsel's engagement at a broader level including on policy issues within the context of discussions at the level of the Working Groups of the ASP must also be explored.

²⁹ See the IBA film of the panel discussion at www.ibanet.org/Article/Detail.aspx?ArticleUid=8D4EA15B-E8FB-4379-A8B6-FBFD2F91BE52.

Chapter Two: Streamlining the Laws Governing Counsel

As the ICC's work evolved, inconsistencies developed between the terminology in the legal texts and the actual practice of the Court. For example in November 2008, the Pre-Trial Chamber in the case of Jean-Pierre Bemba Gombo reminded the Registry and the parties that 'terms such as "co-lead counsel", "associate counsel", "temporary associate counsel" and "counsel of record" did not exist in the Statute, the Rules, the Regulations and the Code of Conduct'.³⁰ Thus, a revision of the legal texts became necessary to streamline the law governing counsel.

Over the past two years, as the Court's initial trial activities were nearing completion, judges initiated a review of the Regulations of the Court. In November 2011, a Working Group established by the Plenary of Judges to review Chapter 4 of the Regulations of the Court promulgated the amended version of the Regulations of the Court, which entered into force on 29 June 2012. In that same month, the Registry also published an amended draft of the Regulations of the Registry, which included provisions of relevance to counsel, and invited comments from relevant stakeholders. A workshop on the proposed amendments was convened in July 2012. No amendments have to date been proposed in relation to the Code of Conduct.

In sum, the amendments to the Regulations of the Court have made the following key changes to provisions governing counsel:

- the term 'counsel' includes both lead and associate counsel, who require ten and eight years respectively of practising experience (Regulations 2 and 67);
- the List of Counsel shall also include legal representatives of victims and privately retained counsel (Regulation 2);
- the provisions governing the appointment of duty counsel have been clarified and expanded, including the possibility for duty counsel from the OPCs to be appointed (Regulation 73);
- the provisions governing defence counsel have been clarified to include privately retained counsel, duty counsel or other appointments by the Chamber (Regulation 74);
- the term 'standby counsel' has now formally been included in the legal texts (Regulation 76); and
- the duties and responsibilities of the OPCD and OPCV have been expanded (Regulations 77, 80 and 81).

The amendments to the Regulations now necessitate a review of other legal texts, including the Code of Conduct, to ensure congruence in the legal framework governing counsel. Amendments to the Regulations of the Registry are currently under consideration and steps should already be taken by the Registry to begin the process of reviewing the Code of Conduct.

2.1 The Code of Conduct

The Code of Conduct was adopted on 2 December 2005 at the 3rd Plenary Meeting of the ASP. The Court has since confirmed the importance of the Code as part of the Court's applicable law under Article 21(1) (a) of the Rome Statute and as an important tool for ensuring the fairness and integrity of the proceedings.³¹

While the Code of Conduct has proven to be an important source of reference on ethical and professional standards for counsel appearing before the Court, a revision of certain aspects of the Code may be necessary in light of the amendment to other legal texts in the Rome Statute framework, jurisprudential developments and overall practices of the Court. For example, the manner in which victims' counsel are dealt with in the Code may require revision to accord with the current practice of the Court.

2.2 Clarity of terminology

Certain terms in the Code are vaguely defined, poorly articulated or inconsistently applied. For instance, the Code defines 'associate' as lawyers who practise in the 'same law firm' as counsel. 'Law firm' is not defined or used elsewhere in the Code and its meaning is not universally understood. This creates uncertainty around who is to be considered an associate of counsel, given provisions governing conflicts of interest in Article 12 and 16 of the Code and in light of the recently amended Article 67(1) of the Regulations of the Court.

³⁰ *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-274, Decision on the Request for Withdrawal of a Counsel, 21 November 2008, PTC III, at para 9, www.icc-cpi.int/iccdocs/doc/doc596443.pdf.

³¹ *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-252, Judgment on the appeal of the Prosecutor Against the Decision of Trial Chamber IV of 30 June 2011 Entitled 'Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence', 11 November 2011, AC, at paras 6-7, www.icc-cpi.int/iccdocs/doc/doc1266895.pdf; *Prosecutor v Francis Kirimi Muthaura et al*, ICC-01/09-02/11, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber II of 20 July 2011 Entitled 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence', 10 November 2011, AC, at para 11, www.icc-cpi.int/iccdocs/doc/doc1266155.pdf.

'Client' is used in the Code to refer to both accused and victims. However, given that a common legal representative can be appointed to represent a group of victims, it may be appropriate to amend the definition to distinguish between victims as clients and accused as clients.³² Additionally, 'defence team' is defined in the Code as 'counsel and all persons working under his or her oversight' but no similar definition exists for victims' teams. Given that the responsibilities of lead counsel for both defence and victims' teams are similar under the Code, the term 'defence team' should be replaced by a neutral phrase like 'legal team' to clearly include those who are representing victims as well as accused.³³

In general, the Code has been criticised for the lack of clarity in the terminology with respect to victims and victims' counsel.³⁴ For example, while a representation agreement can conceivably be established between defence counsel and an individual accused, it is difficult to envisage a common legal representative representing 300 or more victims signing individual agreements with each. Given the recent amendments and developments in the law and practice of the Court, a review of the Code may be warranted at this time.

2.3 Scope and application of the Code

Should the Code apply to the prosecution?

Article 1 of the Code sets out the scope of its application, providing in sum that it *shall apply* to defence counsel, counsel acting for States, amici curiae and counsel or legal representatives for victims and witnesses practising at the ICC. Additionally, the *Regulations of the Registry* provide that members of the OPCs are also bound by the Code of Conduct.³⁵ Notably, prosecution counsel are not bound by the provisions of the Code. In 2002, the International Association of Prosecutors and the Coalition for the ICC proposed

a draft Code of Conduct for the OTP.³⁶ However, this code was never adopted.

The issue concerning whether the Code of Conduct should apply to prosecution counsel has been raised in several contexts at the ICC. Allegations of inappropriate public statements by the OTP in the *Lubanga* case and the Libya situation among others, has created angst among some defence counsel, who opine that the provisions on misconduct in the Rome Statute should be supplemented by some behavioural code for prosecution counsel. In the case of Laurent Gbagbo, following an order by Pre-Trial Chamber III for the parties to file a joint proposal on a Protocol for the handling of confidential information, the defence proposed the insertion of a clause that the Code of Conduct should be extended beyond its specific terms to apply to the prosecution counsel. This was vehemently opposed by the OTP.

Significantly, the absence of either a joint code that applies to all counsel at the ICC including the prosecution, or a separate code applicable to prosecuting counsel alone is a major departure from the practice of the other international criminal tribunals.

THE PRACTICE AT OTHER TRIBUNALS

The Code of Professional Conduct for Counsel Appearing before the International Criminal Tribunal for the former Yugoslavia (ICTY Code of Conduct) is similar to the Code of Conduct in that it is not applicable to prosecuting counsel at the Tribunal. However, in 1999, the Prosecutor of the ICTY established a separate code, the Standards of Professional Conduct for Prosecution Counsel (ICTY Standards of Prosecution Conduct), to which counsel in the OTPs of both ad hoc Tribunals are to adhere.³⁷

By contrast, the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (SCSL Code of Conduct), adopted in 2006, generally applies to 'all counsel who appear or have appeared before the Special Court or who otherwise act or have acted on behalf of the Prosecutor, a suspect, an accused, a witness or any other person before the Special Court' [emphasis added].³⁸ Indeed, the SCSL Code of Conduct is structurally unique

32 Fédération Internationale des ligues des droites de l'Homme, Comments on the Draft Code of Professional Conduct for Counsel before the ICC, 13 April 2005, submitted to the 3rd Meeting of the Task Force of the Hague Working Group of the Bureau of the ASP at 2, www.iccnw.org/documents/FIDHRedress_codeofconducts2.pdf.

33 *Ibid.*

34 Redress (2005), 'Ensuring the Effective Participation of Victims before the International Criminal Court: Comments and Recommendations Regarding Legal Representation for Victims', at 2, www.redress.org/downloads/publications/REDRESS%20-%20Legal%20Representation%20for%20Victims%2023%20May%202005.pdf.

35 Regulations 144(2) and 115(2) (respectively), Regulations of the Registry.

36 *The Secretariats of the International Association of Prosecutors and the Coalition for the International Criminal Court, Code of Professional Conduct for the Prosecutors of the International Criminal Court* (2002), <http://amicc.org/docs/prosecutor.pdf>. See also M Markovic, 'The ICC Prosecutor's Missing Code of Conduct' (2011) *Texas International Law Journal* Vol 47, Issue 1, 201-236, at 205.

37 The ICTR has a virtually identical code of conduct to the ICTY, see also J T Tuinstra, *Defence Counsel in International Criminal Law*, (TMC Asser Press, 2011) at 197.

38 Art 2, Code of Professional Conduct for Counsel with the Right of Audience before the SCSL (SCSL Code of Conduct) [emphasis added].

as it has separate sections enumerating specific obligations for defence and prosecution counsel within an otherwise joint code.

The Special Tribunal for Lebanon (STL) also has a joint code applicable to all counsel appearing before the Tribunal. Promulgated in 2011, the Code of Professional Conduct for Counsel Appearing Before the Tribunal (Joint STL Code) applies to 'any Counsel who addresses the Tribunal on behalf of the prosecution, the accused, or victims recognized pursuant to the Rules, as well as Counsel who work outside the courtroom and directly supports their co-counsel's in-court representation and whose conduct may impact the integrity and fairness of the Tribunal's proceedings'.³⁹ In addition to the Joint Code, the STL also has a separate Code of Conduct for Defence Counsel appearing before the Tribunal.

DISCUSSION

It should be noted that the fact that counsel in the OTP are not bound by the Code of Conduct does not imply the absence of ethical and professional standards. Prosecution counsel are bound by the Regulations of the OTP and the Staff Rules and Regulations. Regulation 17 of the Regulations of the OTP specifies that 'the Office shall ensure compliance with the Staff Rules and Regulations and Administrative Instructions of the Court in order to ensure that its staff members uphold the highest standards of efficiency, competence and integrity.' The Staff Rules of the ICC apply to all staff holding fixed-term appointments, and includes provisions about independence, confidentiality and conflicts of interest.⁴⁰ Specific members of the OTP, notably investigators, are bound by the Code of Conduct for Investigators that has been adopted pursuant to Rule 17(2) (a) (v) of the RPE.

Moreover, Article 71 of the Rome Statute, which addresses sanctions for misconduct before the Court, also applies to prosecution counsel. This provision prohibits 'misconduct, including disruption of [Court] proceedings or deliberate refusal to comply with [the Court's] directions'. However, there is no definition provided in the Rome Statute for what constitutes 'misconduct'. The Code of Conduct defines 'misconduct' as a violation of the Code, but as the Code has no application to prosecution counsel it is not clear that such violations are similar to those contemplated by Article 71. There are definitions provided for 'serious misconduct' and 'misconduct of a less serious nature' in the RPE but these only relate to the conduct of the Prosecutor and

Deputy Prosecutor.⁴¹

What then is the added value of a Code of Conduct for the Prosecution at the ICC? Codes of conduct are more than just a disciplinary mechanism; they are a set of mores that govern counsel's day-to-day practice. They are also a clear articulation of common ethical and professional standards against which all counsel at the Court can be equally judged.⁴² Lawyers who work in the OTP come from equally diverse legal and cultural backgrounds as other counsel appearing before the Court and thus the professional and ethical standards to which they adhere may vary.⁴³ Unfortunately, the absence of a code of conduct for the OTP may create the unfortunate and inaccurate impression that defence and victims' counsel require more ethical guidance than the counsel in the OTP.

Aspects of counsel's conduct may have ethical implications but not reach the threshold of misconduct. This is also true of counsel representing the OTP. The Court has had to address for example some ethical issues specific to the OTP without the benefit of a unified code of ethical standards. For instance, what rules, if any, should govern statements to the media by the OTP. The ICTY Standards of Prosecution Conduct expressly requires prosecution counsel to avoid 'public comments about the merits of cases'.⁴⁴ The section of the SCSL Code of Conduct addressing obligations on prosecution counsel similarly requires them to 'respect the presumption of innocence of all suspects and accused [and] refrain from expressing a public opinion on the guilt or innocence of a suspect or an accused in public or outside the context of proceedings'.⁴⁵ The Joint STL Code restricts counsel from making, publishing or disseminating public statements that do not 'respect the presumption of innocence'.⁴⁶ Finally, the Code of Judicial Ethics of the ICC prohibits judges from making 'comment on pending cases' and requires they 'avoid expressing views which may undermine the standing and integrity of the Court'.⁴⁷ There is no similar guideline provided for the OTP of the ICC.

³⁹ Scope, STL Code of Professional Conduct for Counsel Appearing Before the Tribunal (STL Joint Code).

⁴⁰ Markovic, note 33 at 206. Rules 101.3(a) and (b), 101.4 and 101.6, Staff Rules of the ICC.

⁴¹ Rules 24 and 25, RPE define 'serious misconduct' and 'misconduct of a less serious nature' (respectively) in reference to Article 46(1) (a) and 47, Rome Statute which set out when a judge, the Prosecutor, the Deputy Prosecution, the Registrar or the Deputy Registrar can be removed from office of disciplined.

⁴² Markovic, note 33 at 206.

⁴³ *Ibid* 208.

⁴⁴ Art 2(k), ICTY Standards of Professional Conduct for Prosecution Counsel.

⁴⁵ Art 24(a), SCSL Code of Conduct.

⁴⁶ Art 45(c), STL Joint Code.

⁴⁷ Art 9, ICC Code of Judicial Ethics.

APPLICATION TO LEGAL CONSULTANTS

Judges have also had to determine whether the Code of Conduct is applicable to counsel employed by a defence team as a legal consultant. This issue was considered in the case of Jean-Pierre Bemba following a motion brought by the OTP to invalidate the appointment of Nick Kaufman, one of its former staff members, who was appointed as a legal consultant to Mr Bemba's defence team.⁴⁸ According to the OTP, Mr Kaufman 'was privy to confidential information involving the *Bemba* case and additionally had tangential involvement in that matter when he was a staff member of the OTP'.⁴⁹ Consequently, the OTP was of the view that Mr Kaufman could not concurrently fulfil his duties to the *Bemba* defence team and respect his duty of confidentiality to his former employer required by Article 12(1)(b) of the Code of Conduct.⁵⁰

The Chamber ultimately concluded that the Rome Statute framework, which includes the Code of Conduct, does not specifically regulate the appointment of legal consultants. In their view, a legal consultant would fall within the scope of 'other persons with relevant experience' as provided for in Rule 22(1) of the RPE. The Chamber interpreted the phrase 'practising at the International Court' for the purposes of determining whether the Code of Conduct applied to Mr Kaufman and found that only counsel engaged under the terms of a representation agreement were 'practising' before the Court.⁵¹ It thus excluded from the direct application of the Code members of the defence team such as legal consultants, assistants and other staff who do not 'represent the accused in court and make oral submissions before the Chamber on his behalf, unless expressly authorized to do so'.⁵²

The decision suggests that the conduct of an individual who is admitted to the List of Counsel is not automatically governed by the Code of Conduct. Rather, to determine the application of the Code of Conduct, one must assess the terms of the engagement. However, the judges opined that while the Code of Conduct may not *directly* govern the conduct of legal consultants, they are bound *indirectly* pursuant to Article 7(4) which requires counsel to 'supervise the work of his or her assistants and other staff... to ensure that they comply with this Code'.

48 *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-769-Conf, Decision on the 'Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team, 7 May 2010, TC III, at para 11, www.icc-cpi.int/iccdocs/doc/doc868447.pdf.

49 *Ibid* para 16.

50 *Ibid*.

51 *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-769, Decision on the 'Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team, 7 May 2010, TC II, at para 39, www.icc-cpi.int/iccdocs/doc/doc868447.pdf.

52 *Ibid* para 35.

Application to counsel representing the general interests of the defence

Uncertainty around the application of the Code of Conduct also arose in the case of *Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*. The Pre-Trial Chamber appointed Jens Dieckmann as counsel for the defence for the purposes of the proceedings initiated under Article 19(1) of the Rome Statute.⁵³ Mr Dieckmann was appointed counsel for all four defendants, who were at large. Mr Dieckmann argued that by representing the four defendants he would be in violation of Article 12(1)(a) of the Code, as there was the potential for a conflict of interest and, as the defendants were at large, he could not consult with them as required.⁵⁴ For this and other reasons, Mr Dieckmann requested to suspend the proceedings.⁵⁵

The Appeals Chamber held that the Code of Conduct was not directly applicable to counsel representing the interests of the defence on behalf of a person who has not been arrested nor appeared as foreseen under Article 56 of the Rome Statute.⁵⁶ Instead, the mandate of such counsel is of a *sui generis* nature and must be understood differently from the mandate of counsel appointed to represent suspects as individuals.⁵⁷ Such general defence counsel cannot speak on their behalf, a client and counsel relationship does not exist between them and counsel cannot act for or as agent of the suspects.⁵⁸ Under these circumstances, counsel's mandate is limited to assuming the defence perspective and safeguarding the interests of the suspects in so far as they can be identified. The Appeals Chamber then held that 'the provisions of the Code of Conduct regarding representation are therefore not directly applicable to such counsel'.⁵⁹

This decision, like the *Bemba* decision discussed above, highlights the lack of clarity in the scope of application of the Code of Conduct. Moreover, it is not clear, on the basis of this jurisprudence, which sections of the Code have no application to defence counsel engaged to represent the general interests of the defence. The conclusion of the Appeals

53 *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05-320, Decision initiating proceedings under Article 19, requesting observations and appointing counsel for the Defence, 21 October 2008, PTC II, www.icc-cpi.int/iccdocs/doc/doc578326.pdf.

54 *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05-350, Submission of observations on the admissibility of the Case under Article 19 (1) of the Statute, 18 November 2008, PTC III, at para 34-38, www.icc-cpi.int/iccdocs/doc/doc589227.pdf.

55 *Ibid* para 53.

56 *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05-408, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under Article 19(1) of the Statute of 10 March 2009', 16 September 2009, AC, at para 56, www.icc-cpi.int/iccdocs/doc/doc743635.pdf.

57 *Ibid*.

58 *Ibid*.

59 *Ibid*.

Chamber may be inconsistent with Regulation of the Registry 144(2), which specifies that members of the OPCD, who have a mandate to act in the general interests of the defence, are bound by the Code of Conduct without exception based on the different and unique nature of this mandate.

In light of the narrow interpretation of the definition of ‘counsel’ advanced in the *Bemba* and *Kony* decisions discussed above, it is not clear whether counsel become subject to the Code once accepted onto the List of Counsel or only when he enters into a representation agreement with a client.⁶⁰ Similarly, Article 55 of the Rome Statute provides that when an individual is to be questioned by the Prosecutor or national authorities with respect to a crime under the jurisdiction of the Court, he is entitled to legal assistance (without payment, if required) and to be questioned in the presence of counsel.⁶¹ It is also not apparent whether the Code of Conduct would be binding on such counsel on the basis of the judicial interpretation of the applicability of the Code to ‘counsel’. The importance of having a clear, consistent and principled definition of when a lawyer becomes subject to the Code is evident.

2.4 Conflicts of interest

The appointment of former OTP staff members to defence teams has given rise to debate concerning whether an amendment is required to the Code of Conduct or to internal provisions of the OTP. The issue arose from the appointment of former OTP staff member, Ibrahim Yillah, to the defence team of Abdallah Banda and Saleh Jerbo⁶² and Essa Faal to the *Case of the Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta (Kenya 2)*.⁶³

Similar to its position with respect to Mr Kaufman, the OTP requested that the Chamber invalidate counsel’s appointment on the basis of a conflict of interest, given their: exposure to confidential material in relation to the case and situation; knowledge of the working methods and strategies of the office; and attendance and

participation at meetings. The prosecution argued that counsel’s continued involvement in the case as defence counsel would affect the fairness and expeditiousness of the trial, as the OTP would have to adapt its own strategy and reconsider the submission of certain evidence.⁶⁴ Significantly, the OTP proposed a bar or time limit of at least one year on the appointment of former OTP lawyers to the defence team in cases that were being investigated while they were employed to the prosecution.

There is no regulation in the Court’s statutory documents specifically denying former staff of the OTP the opportunity to be appointed to a defence team and, in its employment contracts to date, the OTP has not included clauses barring staff from seeking employment with the defence upon termination of OTP obligations.⁶⁵ However, Article 16(1) of the Code of Conduct requires counsel to ensure that no conflict of interest arises and imposes the responsibility for counsel to refuse an appointment to the defence team, inter alia, if the appointment constitutes a conflict of interest.⁶⁶

Additionally, counsel is barred from representing a client if he or she was previously ‘involved or [was] privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear’.⁶⁷ Counsel is also required in a broader sense to ensure that the defence team and its work complies with the Code⁶⁸ and to ensure that any measures taken by the defence team is not prejudicial to the proceedings.⁶⁹

The prosecution bears the burden of proving that the concerned counsel was indeed privy to confidential information. In both cases, the prosecution argued that the structure of the OTP allows its staff to be exposed to confidential material related to cases other than the one that the respective staff member is assigned. This is due to the small size of the office, shared work spaces, and the frequency of formal and informal discussions on different cases that allow prosecution attorneys to become privy (accidentally or otherwise) to confidential information in all cases and situations.⁷⁰

In both cases, the Trial Chambers applied the *de minimis* threshold, which requires proof that

60 Human Rights First, Briefing Paper (2004), *Ensuring Ethical Representation: Comments on the Draft Code of Professional Conduct for Counsel before the International Criminal Court*, at 3, www.humanrightsfirst.org/wp-content/uploads/pdf/051129-ij-hrf-icc-ethics.pdf.

61 Articles 55(2)(c) and (d), Rome Statute.

62 *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-173, Prosecution’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence’ (ICC-02/05-03/09-168), TC IV, 6 July 2011, www.icc-cpi.int/iccdocs/doc/doc1104680.pdf.

63 Single Judge Ekaterina Trendafilova ordered the Prosecutor and the Registrar to submit observations on the appointment of Mr Faal in the interest of a fair and expeditious trial. See *Prosecutor v Francis Kirimi Muthaura et al*, ICC-01/09-02/11-185, Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, 20 July 2011, PTC II, at para 3 and 11, www.icc-cpi.int/iccdocs/doc/doc1123821.pdf.

64 *Prosecutor v Francis Kirimi Muthaura et al*, ICC-01/09-02/11-195, Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)’, 26 July 2011, PTC II, at para 24, www.icc-cpi.int/iccdocs/doc/doc1127663.pdf.

65 *Prosecutor v Francis Kirimi Muthaura et al*, ICC-01/09-02/11-185, Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, 20 July 2011, PTC II, at para 27, www.icc-cpi.int/iccdocs/doc/doc1123821.pdf.

66 Article 13(2)(a), Code of Conduct.

67 Article 12, Code of Conduct.

68 Article 7(4), Code of Conduct.

69 Article 24(1)(c), Code of Conduct.

70 *Prosecutor v Francis Kirimi Muthaura et al*, ICC-01/09-02/11-271-Red, Prosecution’s Appeal against the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)’, 1 September 2011, AC, at para 5, www.icc-cpi.int/iccdocs/doc/doc1224635.pdf.

the attorney in question ‘became aware of more than the minimal information relevant to the case under consideration’.⁷¹ This is in contrast to the requirements at other international tribunals, particularly the ICTY, where Article 14(c) of the Tribunal’s Code of Conduct requires in part that the involvement of counsel be personal and substantial as an official or staff member of the Tribunal to potentially constitute a conflict of interest.⁷²

The Appeals Chamber ruling on this issue was an important judicial pronouncement on a contentious issue.⁷³ The Appeals Chamber found that for an impediment to representation to arise based upon the fact that counsel was ‘privity to confidential information’ as a staff member of the Court within the meaning of Article 12(1)(b) of the Code, counsel needed to have had knowledge of *any* confidential information relating to the case in which counsel seeks to appear.

It is not clear whether an amendment to the Code would further clarify the law in this area. The Appeals Chamber decision has interpreted these provisions but declined to be prescriptive regarding what would constitute an appropriate number of years before prosecuting counsel should be allowed to join a defence team after leaving the OTP. The onus therefore rests on the OTP to adopt internal guidelines to address these issues.

2.5 IBA comment

The IBA considers that the recent amendments to the Regulations of the Court are an important step towards streamlining the normative framework governing counsel at the ICC. It is imperative that the proposed amendments to the Regulations of the Registry are completed and that further amendments be initiated to other legal provisions in order to

further standardise the normative framework.

Changes in the law and practice of the Court now demand a review of the Code of Conduct. The IBA was instrumental in the Court’s early years in facilitating the drafting of the current Code. Following extensive consultations, the IBA presented the *Code of Practice for Counsel appearing before the Court* to the ICC in February 2003.⁷⁴

The IBA proposes that the Registry initiates a review of the Code and consults with legal professional organisations, counsel and other relevant stakeholders with a view to its revision. At the outset, in light of the amendments to the Regulations of the Court, revision of the following provisions should be considered:

Current provisions in the Code	Proposed amendments
Article 1 (scope)	Include standby counsel in the definition
Article 2 (use of terms)	Redefine associate counsel; Change defence team to legal team
Articles 11, 12, 14 (representation agreement)	Modify to take into account particular situation of victim representatives
Article 15 (communication with client)	Modify to take into account particular situation of victim representatives
Article 17 (termination of representation agreement)	Modify to take into account particular situation of victim representatives

The IBA also considers that the existing Code of Conduct should be amended to include prosecution counsel or a separate Code of Conduct for the Prosecution should be promulgated. In our view, this will ensure uniformity and consistency in the normative framework governing the ethical standards applicable to all counsel at the ICC. Furthermore, a Code of Conduct for the Prosecution will only serve to enhance the existing normative framework by providing greater clarity on certain ethical matters not expressly addressed in the other legal texts. In this regard, the Code of Conduct for Investigators is already an encouraging indication of the OTP’s efforts to streamline ethical standards. A Code of Conduct for Prosecutors would further reinforce these efforts.

71 *Prosecutor v Francis Kirimi Muthaura et al*, ICC-01/09-02/11-185, Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, 20 July 2011, PTC II, at para 17, 20–24, www.icc-cpi.int/iccdocs/doc/doc123821.pdf; and *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-168, Decision on the Prosecution’s Request to Invalidate the Counsel to the Defence, 30 June 2011, TC IV, at paras 14-16, www.icc-cpi.int/iccdocs/doc/doc1100940.pdf. See also *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-769-Conf, Decision on the ‘Prosecution’s Request to Invalidate the Appointment of Legal Consultant to the Defence Team, 7 May 2010, TC III’, at para 42, www.icc-cpi.int/iccdocs/doc/doc868447.pdf.

72 Article 14(c), ICTY Code of Conduct.

73 *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-252, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber IV of 30 June 2011 Entitled ‘Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence’, 11 November 2011, AC, at paras 6–7, www.icc-cpi.int/iccdocs/doc/doc1266895.pdf; and *Prosecutor v Francis Kirimi Muthaura et al*, ICC-01/09-02/11 OA 3, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber II Dated 20 July 2011 Entitled Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, 10 November 2011, AC, at para 11, www.icc-cpi.int/iccdocs/doc/doc1266155.pdf.

74 IBA draft Code of Conduct (2003): www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/About_the_ICC/IBA_ICC_Involvement.aspx.

In a previous report on fairness issues at the ICC, the IBA noted that services and structures that qualitatively support the defence and victims are *indispensable* to ensuring the fairness of proceedings.⁷⁵ Such services and structures may serve the interests of the defence or victims in general, or they may serve particular teams representing defence or victims. Support structures provided by the Court are further complemented by the provision of adequate resources to indigent defendants and victims in order to ensure the overall fairness of the proceedings.

In general, the experience of counsel at the ICC to date can best be described as mixed. Despite the mechanisms within the Registry to support the work of counsel, there are several challenges that counsel face, which may negatively impact their effective function.⁷⁶ Additionally, the fractious debate on legal aid, referred to as a major cost-driver at the Court, risks obscuring the primary aim of ensuring effective and fair representation of indigent defendants and victims.

3.1 Institutional support and training

The Counsel Support Section (CSS) was created by the Registrar in 2009. The CSS's role is to provide technical and logistical support to defence counsel, legal representatives of victims and other counsel (such as those representing witnesses at risk of self-incrimination pursuant to Rule 74 of the ICC RPE). Despite being significantly under-staffed, the CSS unit manages the List of Counsel eligible to practise before the ICC and provides training and support for the more than 400 counsel on the list; it also administers the Court's legal aid scheme on behalf of the Registrar. The CSS's provision of technical and logistical support is complemented by the legal support and advice provided by the OPC.

Among its duties, the CSS has primary responsibility for organising training activities for the benefit of Counsel on the ICC List of Counsel, pursuant to regulation 140 of the Regulations of the Registry. Such training includes detailed information on the activities, case law and proceedings before the Court with a view to fostering knowledge of Court's normative texts. Indeed, the sincere efforts of the Registry to continue to train and support counsel in the face of major (mainly budgetary) challenges must be commended. The organisation of the Annual Seminar of Counsel (Annual Seminar) in The

Hague, which also celebrated its tenth year of existence, is one such endeavour. The Annual Seminar is usually supported through external contributions from partners such as the European Commission. Its continued success is a testimony of the diligence of the organisers and its continued relevance to counsel, many of whom are on the list but have never appeared before the Court.

As efforts to improve these sessions continue, the Registry is strongly urged to ensure timely consultations with counsel regarding topics of greatest relevance. For example, while interesting and topical issues are generally discussed, the IBA considers that greater emphasis should be placed on the sharing of best practices and lessons learnt from counsel who previously appeared, or currently appear, before the Court. Counsel informally consulted during the seminars also appeared to consider some sessions to be too theoretical and of little practical relevance. It is hoped that the Registry will take into account the feedback solicited and provided by the participants during the seminar.

3.2 General challenges

Legal representation in an international setting is a challenging and arduous task, often fraught with uncertainties. The ICC's jurisprudence, policies and procedures are still evolving and there are areas of the law that are still unsettled. Counsel before the Court is in many ways operating in a legal vacuum, as their experience at the national level or before other international tribunals is not always relevant at the ICC. The IBA's review of ICC filings and consultations with counsel has revealed a plethora of challenges faced by counsel, which may affect their ability to effectively carry out their duties.

Inadequate understanding, use of and access to the Court's e-Court system

Despite training carried out by the Registry, counsel continue to have a number of challenges associated with the use of the e-Court system. The Registry's '*Report on the Victims' Strategy*'⁷⁷ indicates that legal representatives for victims and counsel experience difficulties in accessing court filings and evidence when in the field, due to the fact that they must access their email and the Ringtail

75 IBA/ICC Monitoring Report, *Fairness at the International Criminal Court*, August 2011 at 29.

76 Rule 20(1), RPE.

77 Report of the Registry, *Report on the ICC Strategy in Relation to Victims, Past, Present and Future*, 11 October 2011, at paras 119–20 (*Report on Victims' Strategy*).

database via Citrix, which requires a relatively robust internet connection.⁷⁸ Lack of access to a reliable internet connection impedes their ability to conduct any analysis or review of documents on Ringtail. Additionally, it is not possible for the counsel or legal representative of victims to import or export evidence from outside the ICC building, which means that those located in situation countries cannot comply with their obligations under the e-Court Protocol.⁷⁹

Challenges with timeliness and inconsistency of judicial decisions concerning important procedural issues

In relation to legal representatives, the Registry report indicates that decisions regarding the modalities of participation of victims in the proceedings, as well as decisions on common legal representation, are frequently issued at a very late stage, which renders it exceedingly difficult for the legal representatives to effectively represent the interests of their clients.⁸⁰ Defence counsel are also challenged by the slow pace of decisions on important procedural issues, including on applications for leave to appeal.

Inadequate consultation concerning major policy decisions by the Registry and lack of professional courtesy, particularly in filings before the Chambers

On the latter issue, the IBA noted that in a decision on legal aid in the *Lubanga* case, the judges took the unusual step of adding a postscript to the substantive decision, sharply criticising the inappropriate language used in parts of the Registrar's submissions in response to counsel's

filing.⁸¹ The judges found that not only did the submissions come close to alleging bad faith on the part of the defence team (for which no evidence was presented to the Chamber) but the extreme nature of the language tended to obscure the real issues. The Chamber reminded the Registrar that submissions should be restrained, to the point and appropriately persuasive.⁸²

Conducting investigations in situation countries

On 6 January 2012, defence counsel in the case of Abdallah Banda and Saleh Jerbo requested a temporary stay of proceedings, citing the impossibility of conducting investigations in Sudan for both the prosecution and the defence.⁸³ Counsel contended that the combination of a volatile security situation in Sudan, the violation by the Sudanese government of the human rights of political opponents, human rights activists and the population of border regions, and continued witness intimidation and crimes against the Sudanese people, made it impossible to conduct investigations.⁸⁴ As such, it would not be possible to investigate and effectively rebut the prosecution's case, which would contravene the rights of the accused. The prosecution opposed the application for the stay of proceedings on grounds that the defence had not diligently pursued other means of conducting investigations outside Sudan. The defence application was ultimately rejected by the judges, who declined to stay the proceedings against the accused on the basis that the issue would be kept under review during the course of the trial.⁸⁵

These and other challenges vary from case to case and are different for victims and defence counsel. They do not reflect the general experience of counsel at the ICC, but are issues that have arisen and that require resolution.

78 Ringtail is an e-Court management software used by the ICC so all parties have access to the relevant Court-related electronic documents. The report notes that some of these hindrances result from the Court's work to ensure the security of trial-related information and to protect the evidence and other information gathered by specific units of the Court. One example is that Citrix also does not permit counsel or legal representatives of victims to download documents directly onto their computers. It will only permit them to download documents to a Citrix desktop and then email these documents to themselves. This is not feasible with very large documents or files.

79 *Report on Victims' Strategy* at para 120.

80 *Ibid* para 121.

81 *Prosecutor v Thomas Lubanga Dyilo*, Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, ICC-01/04-01/06-2800, 30 August 2011, TC I, at para 64-65, www.icc-cpi.int/iccdocs/doc/doc1212574.pdf (Lubanga Legal Aid Decision). The judges referred to an extract of the Registrar's submissions which stated, 'legal assistance paid to defence teams should not be allowed to be exceeded by beneficiaries, who might use the mantle and threat of pseudo violations of the rights of the defence to coerce and extract additional funds from a publicly funded legal aid system when none are justifiably payable'.

82 *Ibid* para 65.

83 Defence Request for a Temporary Stay of Proceedings, 6 January 2012, ICC-02/05-03/09-274, www.icc-cpi.int/iccdocs/doc/doc1296602.pdf.

84 Public Redacted Version of 'Defence Submission on Updates Regarding Logistical Issues and Security Concerns' filed 6 August 2012, ICC-02/05-03/09-375-Red2, www.icc-cpi.int/iccdocs/doc/doc1447738.pdf.

85 *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-410, Decision on the defence request for a temporary stay of proceedings, TC IV, 26 October 2012, www.icc-cpi.int/iccdocs/doc/doc1498141.pdf.

While counsel have the primary responsibility to mitigate challenges faced in the exercise of their duties, including not taking unnecessary security risks and bringing challenges speedily to the attention of the Registry and Chambers, it is also important that judges at the Court and the Registry take steps to ensure that such issues do not impede Counsel's effective function and the overall fairness of the proceedings.

3.3 The Legal Aid Review

Balancing the need for fiscal prudence in a difficult global economy, and the fundamental rights of accused and victims, remains one of the great challenges at the ICC. The latent risk is that sincere efforts to ensure efficient use of limited resources threatens to undermine fundamental guarantees provided in the Rome Statute.

During informal discussions within The Hague Working Group on the draft programme budget of the ICC for 2012, the Registrar was asked to provide the information available on the state of the review of the legal aid system to be paid by the Court.⁸⁶ In response to this urgent request, the Registrar informally submitted a discussion paper (the 'Paper'), exploring possible preliminary avenues to optimise the efficient use of resources allocated by states to legal aid to be paid by the Court.⁸⁷ The Registrar had indicated that the objective of the Paper was to launch consultations with various partners, including counsel, NGOs and states, following which she would make formal proposals on legal aid. The ASP requested the Registrar to finalise consultations on the Paper with stakeholders, in accordance with rule 20.3 of the RPE, and to present a proposal for a review of the legal aid system to the Bureau before 15 February 2012.⁸⁸ The ASP also mandated its Bureau to decide on the implementation of the revised legal aid system on a provisional basis, and requested it to do so before 1 March 2012, with a view to enabling it to be applied with effect from 1 April 2012 to cases currently before the Court and to future cases.⁸⁹

In response, on 23 March 2012, the Bureau requested that the Court present a report to the CBF at its 19th session on four issues: (i) remuneration for multiple mandates; (ii) legal aid travel policy; (iii) remuneration during periods of reduced activity; and (iv) the possibility of an enhanced role for OPCV in cases of common legal representation.⁹⁰ Following the Bureau request, the Registry drafted options on these four

issues and on 20 April 2012, sought consultation from the legal profession and other pertinent stakeholders. The Registry received 15 replies to its request for consultation by 30 June 2012. After these consultations, the Registry submitted to the CBF its 'Supplementary Report of the Registry on four aspects of the Court's legal aid system' (Supplementary Report) on 17 August 2012.

The very short timeframe within which the ASP instructed the Registry to propose amendments to the legal aid system resulted in an extremely limited period of consultation with key stakeholders, who were constrained to provide feedback on this crucial issue within a matter of weeks. To its credit, the Registry incorporated several of the comments received in response to its first Draft Paper and revised aspects of its original proposals to take into account some of the feedback received.

The IBA considers that the discourse on legal aid should be seen through the prism of ensuring effective representation at the Court, rather than as a purely budgetary issue. Without this mechanism to ensure representation of indigent defendants and victims, the ICC will be unable to function and will lose credibility. The debates on legal aid in 2012 have highlighted two key issues that remain fundamental to the effective functioning of the legal aid system at the Court: (i) the need for a consultative and comprehensive review of the legal aid system; and (ii) the role of judicial intervention in safeguarding the rights of the accused and victims:

Review of the legal aid system must be consultative and comprehensive

In general, a review of the current legal aid system aimed at enhancing the efficiency and effectiveness of legal representation is welcomed. However, one of the biggest drawbacks to the current review of the existing legal aid system is the manner in which the process was commenced. The review was commenced in an expedited manner with inadequate time allocated for meaningful consultation with relevant stakeholders, and focused on isolated aspects of the current legal aid system.

This gradual approach has been criticised as being driven by financial considerations instead of being aimed at improving the system as a whole.⁹¹ In submitting comments on the proposed review, the IBA has made it clear that while a review of the legal aid system is welcome, the process must be comprehensive and inclusive, taking into account

86 Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011, 20 February 2012, para 4.

87 *Ibid* para 5.

88 Resolution ICC-ASP/10/Res.4, adopted by consensus at the 9th plenary meeting, on 21 December 2011.

89 *Ibid*.

90 Supplementary Report at para 1.

91 Legal Representation Team, Coalition for the International Criminal Court (2012) 'Comments on the "Supplementary Report of the Registry on four aspects of the Court's legal aid system"' at 2, www.iccnw.org/documents/CICC_Legal_Representation_Team-Comments_to_CBF_19th_session.pdf.

the views and concerns of all relevant stakeholders. Furthermore, the process must ultimately be aimed at enhancing the effective representation of defendants and victims at the Court.

Judicial intervention in the legal aid process is essential to safeguarding fairness

There is an inevitable tension between policy decisions about the legal aid system taken by the Registry as financial managers of the Court and the ASP with oversight responsibilities, and the judiciary, who are the primary guardians of the rights of victims and accused. A major concern is the extent to which judges should be mindful of the financial implications of their decisions.

A careful reading of judicial decisions arising from challenges to the Registrar's decision under the legal aid system to date makes clear that the judges are fully mindful of the financial constraints under which the Court is operating. Nevertheless, where necessary the judges have boldly rejected policy decisions in order to safeguard fundamental rights.

Applications by defence counsel in the *Lubanga* and *Katanga and Ngudjolo* cases clearly illustrate this point. In the former case, defence counsel challenged the Registry's decision to reduce the allocated resources to the team; specifically that all payments to team members, except for lead counsel, would be terminated after the close of oral pleadings.⁹² The defence argued for retention of the existing defence team until the final verdict was issued by the Chamber. The Registry contended that maintaining the team's current status as suggested by the defence would constitute an affront to the legal aid system and would undermine the finances, reputation and organisation of the Court.

The *Lubanga* Trial Chamber carefully acknowledged the difficult fiscal climate in which the Court was operating and the responsibility that the ASP had placed on the Registrar to manage the legal aid system. However, the Chamber noted that in the formulation of the legal aid policy, no consideration had been given to the sentencing and reparations phase of the trial. The Chamber determined, notwithstanding the ASP's endorsement of the policy, that the current system was an unsound basis for identifying the limits of legal assistance, because it contained no 'consideration or analysis of [...] potentially critical parts of the trial' such as the sentencing and reparations phases.⁹³ On this basis, the Chamber was unprepared to rely upon the adopted system.

92 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2790-tENG, Defence Application for a Review of the 22 July 2011 Decision of the Registry on the Legal Assistance Granted to Mr Thomas Lubanga, TC I, 19 August 2011, www.icc-cpi.int/iccdocs/doc/doc1252117.pdf.

93 *Lubanga* Legal Aid Decision at para 52.

The judges ultimately ruled that the Registrar's proposal infringed the accused's right to a fair and effective defence as the trial continued until final verdict and, in the event of a conviction, until sentence. Until then, the Chamber had not ceased its substantive work.⁹⁴ Thus, equality of arms could not be guaranteed where the defence team was subject to being compulsorily wound up while the prosecution was at no such risk.⁹⁵

A similar application was made by the defence in the *Katanga and Ngudjolo* case.⁹⁶ The Registry informed both defence teams one day after the conclusion of oral pleadings, in keeping with the existing legal aid policy, that remuneration would cease for all team members except lead counsel.⁹⁷ Both defence teams challenged the decision citing the rights to a fair trial, legal assistance and an effective defence in full equality, and relying extensively on the ruling in the *Lubanga* case.⁹⁸ The Registry objected to a blanket application of the *Lubanga* decision; however, the judges agreed with the *Lubanga* Trial Chamber's findings and ruled that the Registry's decision violated the defence's right to a fair trial in full equality.⁹⁹ The Chamber concluded that it would take the ASP's legal aid policy into account to the extent possible, provided that such policies do not compromise the rights of defendants.¹⁰⁰

There have been other clear examples of judges' rejection of aspects of the legal aid policy, including on the issue of the temporal scope of legal aid.¹⁰¹ Judges have made clear that the right of a suspect to legal assistance emanates from Article 67(1)(d) of the Rome Statute rather than from the decision of the Registrar, whose decision-making

94 The Chamber found that a trial continued until decisions under Articles 74, 75 and 76 of the Rome Statute have been delivered.

95 *Lubanga* Legal Aid Decision at para 57.

96 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3305, TCII, 8 June 2012, www.icc-cpi.int/iccdocs/doc/doc1424483.pdf.

97 *Ibid* para 3.

98 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Oral Decision, ICC-01/04-01/07T-341-ENG, TC II, 18 June 2012, at 3-5, www.icc-cpi.int/iccdocs/doc/doc1428958.pdf.

99 *Ibid* 9.

100 *Ibid*.

101 *Prosecutor v Callixte Mbarushimana*, Decision on the 'Defence Request for the Review of the Scope of Legal Assistance', ICC-01/04-01/10-142, PTC I, 11 May 2011, www.icc-cpi.int/iccdocs/doc/doc1070838.pdf. Defence counsel requested legal assistance from the point of Mr Mbarushimana's arrest in France, prior to his surrender to the Court. The Registry refused the assistance, contending that the matter was still within a domestic jurisdiction. The position of the Registrar was that legal aid could not be paid retrospectively and that there was 'no role for ICC appointed counsel in legal proceedings prior to surrender'. Pre-Trial Chamber I rejected the Registrar's observations concerning the temporal scope of legal aid provided by the Court. The Judge disagreed with the Registrar's conclusion and held that legal aid should cover the period when the detained person can challenge his arrest before the domestic court in the arresting State. Specifically, the Judge held that the Registrar had failed to provide a legal basis for the preclusion of retroactive payment.

power is merely declaratory of that right.¹⁰²

The legal texts do not elaborate on the standard to be applied by the Chambers for reviewing decisions of the Registrar on legal aid, leaving the matter for judicial determination. The *Katanga* Trial Chamber enunciated certain standards in this regard. The judges opined that a flexible standard is required, given the broad variation in the impact and importance of the Registrar's decisions. Crucial decisions affecting the composition of defence teams at a given procedural stage warranted a more thorough review by the Chamber because of the potential impact on due process rights. However, the Chamber considered that more limited intervention should take place in relation to decisions concerning the day-to-day operations of defence counsel or legal representatives in order to avoid micro-managing the Registrar and interfering with her discretion to effectively administer the legal aid system.

Interestingly, the legal representatives of victims in the Kenya cases against William Samoei Ruto and Joshua Arap Sang invited the Chamber to consider whether Article 83(4) of the Regulations of the Court¹⁰³ provide for a *de novo* review of the Registrar's decision by the relevant Chamber, in contrast to the *Katanga* view.¹⁰⁴ The legal representatives argued that the *Katanga* decision was not binding on the Kenya Trial Chamber and that no ruling on the standard for review had been laid down by the Appeals Chamber. The decision on the matter was pending at the time of writing.

3.4 IBA comment

The process of reviewing the legal aid system was rushed and very focused on budgetary considerations. It was not the comprehensive, transparent process that such an important mechanism deserves. It is heartening that the views of civil society and the legal profession appear to have been considered in the formulation of the second set of Registry proposals and were given audience by the Hague Working Group, but it remains unclear to what extent their views will affect the final decisions. The discussion continues within the Bureau of the ASP and the proposals will ultimately be determined by the ASP during the 11th ASP meeting in November 2012.

The judicial decisions on legal aid reflect the fact that the judges are mindful of the financial strictures under which the Court is currently operating. Nevertheless, it is heartening that the judges have made clear that their primary duty in interpreting policy decisions is to safeguard the rights of defendants and victims and the overall fairness of proceedings.

The IBA welcomes the *Katanga* standards that have set out the criteria to be taken into account by the Chamber in reviewing the decisions of the Registrar. The judges importantly clarified that their duty is not to micro-manage the Registrar and interfere with her discretion, but are instead to act as the overarching guardians of the process.

The IBA continues to call for the establishment of an Expert Commission comprised of representatives from the Court, representatives of independent associations of counsel and members of the legal profession, and experts from civil society organisations, to conduct a comprehensive review of the Court's legal aid system. Such an expert commission would, in the IBA's view, allow for a considered and holistic review by those with the requisite expertise and understanding of the complex issues involved in devising a legal aid system.

¹⁰² *Ibid* para 16.

¹⁰³ Regulation 83(4), Regulations of the Court provides that decisions by the Registrar on the scope of legal assistance paid by the Court may be reviewed by the relevant Chamber on application by the person receiving legal assistance.

¹⁰⁴ *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Urgent request by the Victims' Representative pursuant to regulation 83(4) of the Regulations, ICC-01/09-01/11-420, TC V, 1 June 2012 at para 35, www.icc-cpi.int/iccdocs/doc/doc1422264.pdf.

The extraordinary complexity of international criminal cases means that not every lawyer is competent to practise as counsel before an international court. For this reason, the ICC, like other international criminal tribunals, has established strict criteria for admission to the List of Counsel eligible to practise before the Court. These eligibility criteria are cumulatively set out in several of the Court's instruments.¹⁰⁵

Unlike other international tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY),¹⁰⁶ there is no requirement for counsel to be member of a national bar association or other professional organisation regulating the conduct of lawyers domestically. There is no entrance interview such as that employed at the STL. There is also no admission test, even on basic principles of ICC Law and Procedure, international law and international criminal law similar to the recruitment exercise for staff of the Court. Determining who meets the criteria for admission is within the discretion of the Registrar.

In June 2012, the ICC Registry proposed the inclusion of new provisions in the Regulations of the Registry for monitoring the performance of legal representatives of victims (Regulation 112*bis*) and other counsel (Regulation 119*bis*).¹⁰⁷ The proposed monitoring mechanism appears to be

a quality assurance safeguard to ensure effective representation by counsel.

Admittedly, beyond the initial scrutiny of the admissions procedure, once counsel has been admitted to the List of Counsel eligible to practise before the Court, there is no formal mechanism for monitoring their performance or effectiveness. At the ICC, counsel are solely responsible for adhering to the Code of Conduct and all other rules and regulations of the Court, and lead counsel must ensure compliance by subordinate counsel and other members of his or her team.¹⁰⁸ Breaches of the Code can result in the initiation of disciplinary proceedings supervised by the Disciplinary Board established under the Code. Beyond formal disciplinary proceedings, there are no measures contemplated under the Code for addressing minor professional shortcomings by counsel.

While ensuring suspects, accused and victims receive high-quality and effective legal representation before the ICC is a laudable goal, the Registry's proposed monitoring mechanisms invite two substantial questions: (1) is there sufficient rationale for this monitoring mechanism; and (2) if such a monitoring mechanism is necessary, is the Registry the appropriate monitoring body?

4.1 The rationale for monitoring

The explanatory notes to the proposed amendments to the Regulations of the Registry do not expressly outline the rationale behind the proposed monitoring mechanisms. However, in other Registry documents, including filings in support of the establishment of a new system for common legal representation at the Court, the Registry has expressed concerns regarding the quality of representation afforded to some victims at the Court.¹⁰⁹

105 Rule 22, RPE provides that counsel must possess established competence in international and criminal law and procedure, as well as the necessary relevant experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. Counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. This section also provides that defence counsel may be assisted by other persons, including professors of law, with relevant expertise.

106 The ICTY requires counsel to either be a member of a national bar association or a professor of law at a university, see Article 44(1)(1), ICTY RPE.

107 Regulation 112*bis*, Regulations of the Registry provides that 'the Registry shall take measures in order to monitor that *inter alia*:

- (a) Victims assigned to a legal representative are continually informed about the proceedings affecting their interests and consulted, to the extent possible;
- (b) Victims have not been unduly exposed to safety risks as a result of their interaction with the legal representative;
- (c) Victims' physical and psychological well-being, dignity, or privacy have been respected by their legal representative;
- (d) The number of victims assigned to a legal representative or the complexity of the case are considered when allocating resources.'

Regulation 119*bis*, Regulations of the Court reads:

1. The Registrar shall establish, after consultation in accordance with regulations 120 and 121, a mechanism to monitor the quality of performance by counsel. Such mechanism shall be respectful of the independence of counsel.
2. The Registrar, as appropriate, may make recommendation if it appears that the counsel does not show due regard to ethic on his dealings with the persons referred to in regulation 124.'

108 For example, the Chamber held that it is the principal responsibility of lead counsel to ensure that legal assistants and other members of the team do not engage in activities that violate the Code of Professional Conduct, since such a finding would entail liability of the lead counsel. See *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-769-Conf, Decision on the 'Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team', 7 May 2010, TC III, at para 39, www.icc-cpi.int/iccdocs/doc/doc868447.pdf.

109 *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-243, Proposal for the common legal representation of victims, 1 August 2011, Registry, at para 22, ICC-01/09-01/11-243 and *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-164-Red, Report on the implementation of the Chamber's Order instructing the Registry to start consultations on the organization of common legal representation, 21 June 2011, Registry, at para 23, www.icc-cpi.int/iccdocs/doc/doc1093059.pdf.

While Articles 6 and 7 of the Code require counsel to act honourably, freely and professionally in discharging their duties, there are no detailed standards governing what constitutes effective representation. Effectiveness is difficult to assess on the basis of uniform criteria, as such an assessment has both objective and subjective elements. For instance, counsel who are persistently absent during hearings, or are unaware of the law governing a relevant issue or basic facts of their case, could objectively be seen to be ineffective. However, questions about the adequacy or frequency of counsel's filings are highly subjective and may be a matter of professional judgment and strategy.

Neither of the proposed Regulations provides specifics about the mechanism envisioned to monitor counsel's performance and ensure greater effectiveness. It is unclear how the monitoring proposed in Regulation 112*bis* will operate,¹¹⁰ and Regulation 119*bis* fails to provide any indication of the criteria or process envisioned for establishing the proposed monitoring mechanism.¹¹¹

Concern has been expressed that Regulation 119*bis* in particular is redundant and creates a parallel process to the disciplinary regime in the Code of Conduct.¹¹² However, the formal disciplinary process under the Code of Conduct is a passive regime and lacks pre-emptive measures to address minor professional shortcomings of counsel that fall short of misconduct. The proposed monitoring mechanisms, on the other hand, would involve active monitoring of counsel's performance and effectiveness.

4.2 Monitoring mechanisms at other tribunals

With the exception of the STL, none of the other international criminal courts or tribunals has pre-emptive monitoring mechanisms similar to those being proposed by the Registry of the ICC.

The ad hoc tribunals each have a code of conduct regulating defence counsel (similar to the ICC Code of Conduct), which includes a disciplinary regime to address professional

misconduct.¹¹³ The SCSL Code of Conduct, which applies to all counsel appearing before the Court, also has a formal disciplinary process. In each case, adherence to the ethical and professional obligations governing counsel is dependent on reports from other counsel or complaints submitted by those entitled to do so.

The STL is unique for codifying standards of effective representation and creating a mechanism to actively monitor the performance of defence counsel and assistants to counsel, and not just sanction professional misconduct.¹¹⁴ The Code of Professional Conduct for Defence Counsel appearing before the STL (STL Defence Code) defines 'ineffective representation' as 'acts or omissions by Defence counsel or of a member of the Defence team [that] materially compromise, or might irreparably compromise, the fundamental interests or rights of the client'.¹¹⁵

The Head of the Defence Office of the STL is tasked with ensuring that the representation of suspects and the accused meets internationally recognised standards of practice and is consistent with the legal instruments of the STL.¹¹⁶ Where valid reasons exist, and subject to lawyer-client privilege and confidentiality, he may: (i) monitor the performance and work of counsel and the persons assisting them; (ii) request all necessary information in order to exercise the function referred to in (i); (iii) ensure that the appropriate advice is given to the lead counsel as would contribute to an effective defence of the suspect or accused; and (iv) in exceptional circumstances, and after considering the opinion of the lead counsel, invite the suspect or accused to provide his views on the adequacy and effectiveness of his legal representation and the performance of the defence counsel.¹¹⁷ At the end of this monitoring period, if the Head of the Defence Office is unsatisfied with the representation of a suspect or accused, he is empowered to withhold the payment of the fees of counsel, make representations to the Chambers, or initiate disciplinary proceedings.¹¹⁸

The standards for effective representation in the STL Defence Code detail what is expected of counsel and the process for monitoring counsel's performance. In principle, this prescriptive approach provides counsel with certainty

110 Victims' Rights Working Group, Letter to the ICC Registrar in regard to consultation on the amendments to the Regulations of the Registry, 15 June 2012, www.vrwg.org/VRWG_DOC/2012_VRWG%20Letter%20on%20Regulations%20of%20the%20Registry.pdf.

111 The criteria by which to monitor the quality of counsel's performance is to be drafted in consultation with professional associations, experts and representatives of other criminal tribunals. Many of these consultations will resemble those undertaken during the drafting of the Code of Conduct and presumably the guidance and input provided will be similar (See JW Davids, 'Changes to the Regulations of the Registry of the ICC', 16 May 2012, post on *The [New] International Law*, <http://thenewinternationallaw.wordpress.com/2012/05/16/changes-to-the-regulations-of-the-registry-of-the-icc>).

112 Arts 30–44, Code of Conduct.

113 The ICTR does not have a formal disciplinary regime; however the Code of Conduct obliges counsel to report conduct that raises a substantial question about another counsel's honesty, trustworthiness or fitness as counsel to the Judge or Chamber (Art 21(1) ICTR Code of Professional Conduct for Defence Counsel). Available disciplinary sanctions (for both defence and prosecution counsel) are enshrined in Rule 46(A), RPE of the ICTR.

114 Rule 57(1)(g), STL RPE.

115 Art 9, Code of Professional Conduct for Defence Counsel appearing before the Special Tribunal for Lebanon (STL Defence Code).

116 Rule 57(g), STL RPE.

117 *Ibid.*

118 *Ibid.*

regarding performance and ethical standards. Reliance on vague concepts that are not universally understood by all counsel can create uncertainty and a reliance on judicial interpretation and intervention, which is costly, inefficient and may reflect poorly on the integrity of the Court. What amounts to professional conduct as defined by the ICC Code of Conduct, for example, might vary from counsel to counsel, depending on their own experience at the national level or the standards of their national bars.

However, there are several disadvantages to highly detailed provisions. Overly prescriptive formulations concerning the number of filings and the frequency of contact with a client, risk impinging on fundamental principles such as the independence of counsel and attorney-client privilege. The independence, integrity and freedom of counsel appearing before the ICC are inviolable and should not be comprised by external pressure.¹¹⁹

Furthermore, setting out detailed standards for counsel may create an undesirable (and unwarranted) implication that counsel lack the professionalism or competency to be able to determine for themselves how to manage their client's case. More importantly, counsel have a fiduciary duty to their client to ensure respect for professional secrecy and the confidentiality of information and particularly all communication with their client.¹²⁰ While the Registry's Regulation 119*bis* notes that the monitoring mechanism will be 'respectful of the independence of counsel', it is still unclear how this will be achieved in practice, given the necessarily intrusive nature of such mechanisms.

Given the qualification requirements for counsel to be able to practise before the ICC, the bona fides of counsel should be presumed. To suggest otherwise may call into question the basic structure of the Court.

It must also be remembered that the STL is unique in its structure with the independent Defence Office. The ICC does not share this structure and the OPCs lack the mandate, resources and infrastructure to oversee the performance of counsel. The proposed Regulations 112*bis* and 119*bis* do not appear to contemplate the significant practical hurdles that will flow from creating this additional monitoring mechanism, including details concerning possible consequences or sanctions.

4.3 The most appropriate monitoring body

Beyond the issue of the utility of such a mechanism, the question of the most appropriate body to carry out such a function must also be considered. As managers of the ICC List of Counsel and the Court's legal assistance scheme, the Registry already carries out some monitoring functions, for example, in relation to admission to the List of Counsel and under the legal aid scheme.¹²¹ Nevertheless, the Registry may not be best placed to carry out the role of a neutral, independent monitor of counsel's performance and provide ethical guidance. The Registry's administrative role would affect its neutrality and independence in relation to counsel specific matters in two significant ways. First, monitoring counsel's performance together with allocating resources to counsel has the potential of creating a significant conflict of interest. Secondly, there is the strongly-held view that monitoring and ethical guidance for the legal profession is best carried out by a body of its peers who understand the dilemmas, difficulties and intricacies faced by counsel practising before the international court.

In May 2011, the International Criminal Bar (ICB) published a paper addressing ethical issues on behalf of counsel at the ICC.¹²² The ICB proposed the establishment of an independent Committee or Bar Council to provide ethical advice to counsel, similar to the ethical committees that exist in some national bars to which counsel can write or call to discuss matters. According to the proposal, the Committee would have an advisory rather than monitoring function.

At the ICTY, the Association for Defence Counsel (ADC) provides a peer review mechanism to monitor the conduct of its members in the representation of a suspect or accused.¹²³ The ADC was created as an association of legal professionals to promote the highest standards of professionalism and ethics and represent the interests of defence counsel.¹²⁴ Counsel wishing to represent a suspect or accused before the Tribunal are required to become members of the ADC. While external to the ICTY, the ADC is officially recognised by the Court (and the Registry) and has formal reach over all defence counsel. Alleged misconduct can be addressed and sanctions taken by the ADC itself through the Disciplinary Council. The Disciplinary Council does not engage in active monitoring, but investigates allegations of conduct contrary to the legal texts of the ICTY, including the ICTY Code of Conduct.¹²⁵

119 Art 6, Code of Conduct.

120 Arts 8 and 15, Code of Conduct.

121 Regulation 136, Regulations of the Registry.

122 See International Criminal Bar (2011), Objectives, http://bpi-icb.com/index.php?option=com_content&view=article&id=67&Itemid=74&lang=en.

123 *Ibid*, Article 16(1)(a).

124 *Preamble*, Constitution of the Association of Defence Counsel Practising before the ICTY, http://adc-icty.org/Documents/adciety_constitution.pdf.

125 *Ibid*, Article 17.

4.4 IBA comment

Currently, the ICC Disciplinary Board is the only formal mechanism to address alleged misconduct by counsel appearing before the Court. In addition, the legal documents of the Court impose an indirect obligation on the respective Chambers to monitor counsels' conduct and performance in order to safeguard the fairness and expeditiousness of the proceedings.¹²⁶ The question is whether an additional monitoring mechanism risks becoming a parallel process to the established disciplinary regime under the Code of Conduct and to Chamber's oversight functions.

Undoubtedly, the establishment of an external regulatory body requires careful consideration and additional research. Issues such as what kind of institutional safeguards would be needed to ensure the maximum effectiveness of its monitoring function and the nature of amendments that would be required to include such a body in the legal framework of the Court would need to be considered further.

In principle, however, the idea of a proactive monitoring mechanism to review the performance of counsel has some appeal, given its aim to provide an additional quality assurance mechanism to ensure the highest quality of legal representation. Such a mechanism could encourage greater compliance with the Code of Conduct and act as a valuable standard-setting tool. If governed by an independent, neutral body, this mechanism could also provide counsel with a forum in which to obtain guidance and advice from their peers in a neutral, non-contentious and non-litigious setting and alleviate the Chambers from having to rule on ancillary ethical issues.

The mechanism could take the form of a legal advisory body, consisting of a small group of internationally recognised expert legal practitioners from diverse regional and legal backgrounds who possess extensive experience and a depth of understanding of professional and ethical obligation. The body would possess both monitoring and advisory powers, in addition to being an informal forum from which to exchange ideas and seek ethical guidance and advice. This monitoring body should be appointed in the same manner as members of the disciplinary board through nominations by members of the ICC List of Counsel. The scope of its monitoring powers would need to be carefully delineated in the Code of Conduct and decisions of this body would be subject to review.

The IBA recognises that this issue is yet to be finalised. The July 2012 consultations on the proposed Regulations of the Registry provided a useful forum for detailed discussion of a number of key issues, including the proposed monitoring of counsel, but the Registry is yet to promulgate a subsequent version of its amended Regulations that takes into account the comments and feedback received. Nevertheless, the IBA would be very keen to continue to actively engage with the Court in further discussion on this important issue.

¹²⁶ Article 64(3), Rome Statute.

Chapter Five: Ensuring Safe Passage – Privileges and Immunities of ICC Counsel

The shocking four-week detention of four ICC staff members in Zintan, Libya, in June 2012 highlights the vulnerability of ICC staff and external counsel in contexts where applicable privileges and immunities are not respected. The detention sparked outrage within the legal community and prompted extensive diplomatic and political intervention. The IBA was among concerned organisations that responded swiftly and decisively in calling for the immediate release of the detained ICC staff.¹²⁷

The ICC delegation had travelled to Libya on 6 June on a visit arranged by the Registry pursuant to a Court order of 27 April 2012. It included counsel from the OPCD, who had previously been appointed by ICC Pre-Trial Chamber I to represent Saif-Al Gaddafi in the case brought against him in The Hague, as well as Registry staff. The visit was authorised by the Libyan authorities, who had agreed to facilitate the mission pursuant to their obligation to cooperate with the Court by virtue of United Nations Security Council (UNSC) Resolution 1970, which referred the situation of Libya to the ICC.

The Libya developments have sparked debate concerning the issue of the immunities and privileges of ICC staff and counsel under the Rome Statute, including: the scope of the obligation by non-States Parties referred by the UNSC to cooperate and respect immunities under the Rome Statute;¹²⁸ whether such States are also bound by the APIC; and whether counsel are more at risk than other categories of persons covered by the immunity provisions. In light of pending admissibility proceedings in the case, as well as an internal review at the ICC, the discussion will be confined to these issues.

5.1 Background

Article 48 of the Rome Statute sets out the privileges and immunities afforded to ICC officials, staff and counsel.¹²⁹ Under this provision, there is a hierarchical distinction in the type of privileges and immunities provided to different individuals depending on status or position. Thus, under Article 48 (2) judges, the Prosecutor, the Deputy Prosecutors and the Registrar, when engaged on or with respect to the business of the Court, enjoy diplomatic immunity and ‘complete freedom of speech and independence in the discharge of their functions’.¹³⁰ This immunity from legal process for acts performed in their official capacity subsists even after the expiry of their terms of office.

Article 48(3) provides that the Deputy Registrar, staff of the OTP, and staff of the Registry shall enjoy functional privileges and immunities in accordance with the agreement on the privileges and immunities of the Court. By contrast, Article 48(4) provides ‘counsel, experts and witnesses’ with ‘such treatment as is necessary for the proper functioning of the Court’ in accordance with the agreement on the privileges and immunities of the Court. Treatment is undefined in the Statute, but Article 18 of the APIC expands on the scope of immunities to which counsel are entitled.

5.2 Agreement on Privileges and Immunities of the ICC

APIC was established as a separate treaty to the Rome Statute and adopted by the ASP in 2002, entering into force in 2004.¹³¹ Of the 121 States Parties to the Rome Statute, only 71 are parties

127 IBAHRI Press Release, IBAHRI calls for immediate release of four ICC staff detained in Libya, 12 June 2012, www.ibanet.org/Article/Detail.aspx?ArticleUid=4EA2B9BB-8E35-4A2C-B06F-8802F6B5EF1E.

128 There are also similar issues around the obligations on States that grant the ICC jurisdiction under Article 12(3) of the Rome Statute, but this discussion is outside the scope of this report.

129 Privileges refer to special rights or exemption from the laws of the receiving state, whereas immunities provide procedural protection from legal duties, penalties or liabilities imposed by a receiving state.

130 P Mochochoko, ‘The Agreement on Privileges and Immunities of the International Criminal Court’ (2002) Vol 25 *Fordham International Law Journal*, 638–664, at 651. It has been suggested that linking head of mission status to the performance of the ‘business of the Court’ may create something less than diplomatic or head of mission immunity as this does not typically require one to be acting in official capacity (See S Beresford, ‘The Privileges and Immunities of the International Criminal Court: Are they sufficient for the proper functioning of the Court or is there still room for improvement?’ (2002) Vol 3 *San Diego International Law Journal* 83–132, at 111).

131 ICC-ASP/1/3, adopted by the ASP 10 September 2002 and coming into force on 22 July 2004.

to APIC.¹³² The provisions in Articles 15, 16 and 18 are similar and provide broad and expansive protections for ICC officials, staff and counsel.

While there is no specific section related to victims' counsel, the definition of 'counsel' in APIC includes 'defence counsel and legal representatives of victims'.¹³³ Under Article 18, counsel enjoys, *inter alia*, immunity from personal arrest or detention and from seizure of his or her personal baggage; immunity from legal process of every kind in respect of words spoken or written and all acts performed in his or her official capacity; inviolability of papers and documents, in whatever form, and materials relating to the exercise of his or her functions; and the right to receive and send papers and documents in whatever form for the purposes of communications in pursuance of his or her functions as counsel. These privileges also extend to members of the counsel's team. Witnesses, victims and experts are given similar immunity as that provided in Article 18(1) in connection with their appearance in Court.¹³⁴

It is imperative for all States Parties to the Rome Statute to also ratify APIC, which sets out in more detail the applicable privileges and immunities. Ratification of the separate agreement is clearly what is contemplated in Article 48. To bind parties to a separate agreement they have not ratified goes against basic principles of treaty law. Nevertheless, given their general obligation to cooperate, States Parties cannot opt out of providing immunities and privileges solely on the basis that they have not ratified APIC. Even non-States Parties to the Rome Statute are able to accede to APIC, thereby indicating a willingness to facilitate the work of the Court within their borders.¹³⁵

5.3 The obligation of non-States Parties

While States Parties' obligation to respect privileges and immunities under the Rome Statute framework is clear, a more difficult question is the scope of non-States Parties' obligations. More specifically, are States subject to a UNSC referral obliged to cooperate with the Court including by extending privileges and immunities to Court staff, officials

and counsel? International law experts argue that they are. The determining factor appears to be the referral itself, which mandates the State to fully cooperate with the ICC.¹³⁶ Professor Kevin Jon Heller suggests that there is a persuasive argument in favour of immunity based on paragraph 5 of UNSC Resolution 1970, referring the situation in Libya to the ICC, that the 'Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'.¹³⁷ International law expert, Dapo Akande, has opined that the UNSC referral to Libya and mandate to cooperate effectively imposes the Rome Statute on Libya.¹³⁸ Professor Akande argues that if the Rome Statute is imposed on Libya by virtue of the referral, then Libya is legally obligated to respect all provisions, including Article 48.

Admittedly, Article 48 falls outside of Part 9 of the Rome Statute, which deals with cooperation. However, Article 86 places a general obligation on States to cooperate 'in accordance with the provisions of the Statute'. The scope of the cooperation obligation would obviously depend on the terms of the referral, which, in the case of Libya and Darfur, clearly mandate the authorities in those countries to cooperate with the ICC.

It is less clear whether such States are also bound by APIC. Libya is neither a party to the Rome Statute nor APIC. Professor Akande feels that this is irrelevant and Libya is equally bound by the provisions of APIC in that it 'simply spells out the immunities that are covered by Art 48.' This view, though seemingly logical, leads one to question the efficacy of APIC itself if States Parties to the Rome Statute can opt not to ratify APIC and non-States Parties can be bound by virtue of a UNSC Resolution.

5.4 The vulnerability of counsel

The Libyan developments have also sparked debate concerning the vulnerability of defence counsel. Despite the clear provisions on immunities and privileges, external counsel are not necessarily seen as part of the machinery of the Court and may not receive the same level of support and cooperation. The perception that defence counsel is sympathetic to suspects and therefore contrary to the established interests of the State may result in greater willingness to cooperate with the

132 For a list of States Parties and Reservations to APIC see: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-13&chapter=18&lang=en last accessed 5 November 2012.

133 Art 1, APIC.

134 Arts 19, 20 and 21, APIC (respectively).

135 Ukraine signed the Rome Statute on 20 January 2000, but has not yet ratified it; however, it acceded APIC on 29 January 2007. South Africa ratified the Rome Statute on 27 November 2000 and passed the 'Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002' on 18 July 2002, giving effect to the provisions of the Rome Statute in the domestic law of South Africa. South Africa has not ratified APIC on the basis that its obligations under the Rome Statute already require it to respect the privileges and immunities of the Court and its officials and staff.

136 The argument of course presumes the legality of UNSC referrals.

137 UNSC Res 1970(2011); See KJ Heller, 'Why I Think the Detained ICC Personnel Are Entitled to Diplomatic Immunity', (Opinio Juris, 15 June 2012), <http://opiniojuris.org/2012/06/15/why-are-the-detained-icc-personnel-entitled-to-diplomatic-immunity>.

138 D Akande, 'The Immunity of the ICC Lawyers and Staff Detained in Libya', (EJIL Talk!, 18 June 2012), www.ejiltalk.org/the-immunity-of-the-icc-lawyers-and-staff-detained-in-libya/#more-5042.

prosecution than the defence. The need for the provisions of Article 48 and the APIC principles to be scrupulously respected resonates even more forcefully in the case of counsel. Regrettably, concerns about the safety and security of counsel practising before international criminal tribunals are not new.¹³⁹

To facilitate travel on mission, defence and victims' counsel are provided with a certificate issued by the Registrar pursuant to Article 18(2) of APIC. The certificate is withdrawn if the power or mandate is terminated before its expiry. It has been suggested that this certificate is insufficient to make defence counsel and their materials less vulnerable with respect to the actions of State authorities, and that a document more closely resembling the Laissez-Passer issued to UN staff would be more appropriate.¹⁴⁰

A Court official indicated that the ICC's response would have been the same had counsel or support staff and not ICC staff been detained. However, it is unclear what specific mechanisms have been put in place by the Court in the event of a recurrence and whether counsel have been made sufficiently aware of these procedures. Is there, for example, an emergency number for counsel to call in such circumstances?

5.5 IBA comment

The detention of the ICC staff is a frightening wake-up call for the Court and the international community concerning the potential risks faced by its staff and counsel in seeking to fulfil their mandates. The issue of the scope of the immunities provision and its application to non-States Parties is currently under consideration by The Hague Working Group facilitator on cooperation.

The IBA considers that non-States Parties referred by the UNSC must respect Article 48 of the Rome Statute and guarantee immunities and privileges of ICC staff and counsel before the Court. It is critical for staff and counsel working for or on behalf of the Court to be able to enjoy all the privileges and immunities associated with their position. The ASP is encouraged to make this a priority issue for discussion at the level of the Security Council to ensure that there is concerted condemnation of any attempts to violate privileges and immunities of Court personnel or counsel.

139 Peter Erlinder, lead Defence Counsel for Aloys Ntabakuze, was arrested and detained in May 2010 by Rwandan authorities on charges of 'genocide denial' in part due to statements he made in connection with his client's defence. (See *Prosecutor v Bagosora, Ntabakuze and Nsengiyumva*, ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Injunctions against the Government of Rwanda regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 6 October 2010, at paras 19–26, www.unict.org/Portals/0/Case/5CEnglish/5CBagosora/5Cdecisions/5C101006.pdf). See also A Pinto, 'Peter Erlinder arrest a blow to international law: Rwanda's detention of a defence lawyer has undermined the basic authority of the international genocide tribunal' *The Guardian*, (London, 30 June 2010): www.guardian.co.uk/law/2010/jun/29/peter-erlinder-arrest-international-law.

140 S Beresford, 'The Privileges and Immunities of the International Criminal Court (n 150) at 127.

Chapter Six: Summary of Key Findings and Recommendations

This report addresses a number of pertinent issues affecting counsel practising before the ICC in different capacities. The report underscores the important contribution of counsel to the work of the Court and highlights the importance of ensuring that legal and support structures are in place to support counsel's work. Additionally, the report envisages a broader role for counsel in supporting the work of the ICC that goes beyond representing individual victims and defendants. The key findings of the report may be summarised as follows:

6.1 IBA findings

The role of counsel

Counsel at the ICC play a variety of divergent roles, some of which have evolved to meet the demands of the Court. The issue of whether victims and defendants should be represented by internal counsel from the OPCs or through external counsel from the ICC List of Counsel has generated much debate during the past few years of the Court's operation. The issue is a sensitive and difficult one. Both the OPCs and external counsel play an important role in ensuring that victims and defendants enjoy quality, effective representation at the Court. The legal representation of victims has seen the most fractious debate amid perceptions that changes to the representation of victims is being driven by budgetary considerations. In addition, judicial decisions reflect a major divergence in the approach of different Chambers on the respective functions of the OPCV and legal representatives of victims. The issue merits thoughtful review and transparent discussions, as well as judicial clarity at the appellate level.

While the effective representation of victims and defendants must be a priority for counsel appearing before the ICC, counsel has a much broader mandate. The principle of complementarity, which places the primary obligation on national governments to investigate and prosecute serious international crimes, creates opportunities for counsel that are far greater than possibilities that lie in The Hague. Looking ahead, it is important for the legal profession to begin to reflect on the range of possibilities that exist for contributing to the success of the ICC.

The laws governing counsel

The IBA notes that the laws governing counsel were sometimes incongruent with the Court's practice. The recent amendments to the Regulations of the Court are an important step forward in this regard, which must be further supplemented by the finalisation of the amendments to the Regulations of the Registry and the initiation of a review of the ICC Code of Professional Conduct for Counsel (the Code). In relation to the latter, a review is timely as some provisions are vaguely defined, poorly articulated or inconsistently applied and/or are now inconsistent with the amended Regulations of the Court. The Registry should ensure that there is full consultation with legal professional organisations, counsel and other relevant stakeholders with a view to its revision.

The existing Code should also be amended to include the prosecution, or a separate Code of Conduct for the Prosecution should be promulgated in order to ensure uniformity and consistency in the normative framework governing the ethical standards applicable to all counsel at the ICC. Furthermore, a Code of Conduct for the Prosecution will only serve to enhance the existing normative framework by providing greater clarity on certain ethical matters not expressly addressed in the other legal texts.

Monitoring counsel

The IBA considers that, in principle, the idea of a proactive monitoring mechanism to review the performance of counsel has some appeal, given its aim to provide an additional quality assurance mechanism to ensure the highest quality of legal representation. Such a mechanism could encourage greater compliance with the Code of Conduct and act as a valuable standard-setting tool. If governed by an independent, neutral body, this mechanism could also provide counsel with a forum in which to obtain guidance and advice from their peers in a neutral, non-contentious and non-litigious setting and alleviate the Chambers from having to rule on ancillary ethical issues. The question is whether an additional monitoring mechanism risks becoming a parallel process to the established disciplinary regime under the Code of Conduct and to Chamber's oversight functions. The Registry is urged to continue to engage in dialogue with counsel, representative associations of counsel including the IBA and other relevant concerned stakeholders regarding the establishment of this proposed monitoring mechanism.

Support for counsel

The IBA acknowledges the important supportive role played by the CSS and commends the Registry in its continued organisation of training initiatives for counsel, in particular the Annual Seminar for Counsel. External partners, such as the European Commission, are urged to continue supporting this important initiative. However, the IBA found that counsel were not always consulted regarding the preparation of the agenda for the seminars, thus the sessions were not always practical or relevant for counsel.

In general, counsel face numerous challenges in carrying out their mandate before the ICC, including: difficulties in fully utilising the Court's e-Court system while away from the seat of the Court; difficulties conducting investigations in situations countries, in particular non-States Parties such as Sudan, which were referred by the United Nations Security Council; as well as challenges arising from significantly delayed judicial and policy decisions. More fundamentally, counsel are challenged by the persistent failure of the Court to engage in timely and meaningful consultations on issues affecting their work.

For example, the process of reviewing the legal aid system in 2012 was rushed and very focused on budgetary considerations. It was not the comprehensive, transparent process that such an important mechanism deserves. Nevertheless, while decidedly late in the process, it is heartening that the views of civil society and the legal profession appear to have been considered in the formulation of the second set of Registry proposals and were given audience by The Hague Working Group, but it remains unclear to what extent their views will impact the final decisions when the issue is ultimately determined by the ASP during the eleventh ASP meeting in November 2012.

The IBA also welcomes the very encouraging judicial decisions on legal aid in the *Lubanga* and *Katanga* cases, which reflect the fact that while mindful of the financial strictures under which the Court is currently operating, ICC judges consider that their primary duty in interpreting policy decisions is to safeguard the rights of defendants and victims and the overall fairness of proceedings, without seeking to micro-manage the Registrar.

Ensuring safe passage – privileges and immunities for ICC counsel

The detention of ICC staff, one of whom was acting as counsel on behalf of a detained person charged before the Court, has raised awareness concerning immunities and privileges under the Rome Statute and in particular the scope of the obligation by non-States Parties referred by the UNSC to cooperate and respect immunities under the Rome Statute, and whether such States are also bound by APIC. The IBA considers that non-States Parties referred by the UNSC must respect Article 48 of the Rome Statute and guarantee immunities and privileges of ICC staff and counsel before the Court. It is critical for staff and counsel working for or on behalf of the Court to be able to enjoy all the privileges and immunities associated with their position. The ASP is encouraged to make this a priority issue for discussion at the level of the Security Council to ensure that there is concerted condemnation of any attempts to violate privileges and immunities of Court personnel or counsel.

6.2 IBA recommendations

To the Registry

- The IBA recommends that the Registry initiates a principled discussion regarding the role of the OPCs and external counsel with relevant stakeholders and not exclusively from the perspective of cost efficiencies. In this regard, the IBA suggests that particular attention is paid to the system of legal representation of victims, given the number of inconsistent judicial decisions and the significant changes implemented within a relatively short period of time and the potential impact on the work and perception of the Court.
- The IBA urges the Registry to complete the proposed amendments to the Regulations of the Registry and initiate a review of the Code of Conduct in order to standardise the normative framework governing counsel. The Registry should ensure that there is full consultation with legal professional organisations, counsel and other relevant stakeholders, with a view to its revision. At the outset, in light of the amendments to the Regulations of the Court, revision of the following provisions should be considered:

Current provisions in the Code	Proposed amendments
Article 1 (scope)	Include standby counsel in the definition
Article 2 (use of terms)	Redefine associate counsel; Change defence team to legal team
Articles 11, 12, 14 (representation agreement)	Modify to take into account particular situation of victim representatives.
Article 15 (communication with client)	Modify to take into account particular situation of victim representatives.
Article 17 (termination of representation agreement)	Modify to take into account particular situation of victim representatives.

- The IBA recommends that in the context of the Annual Seminar, the Registry organises a ‘Best practises, lessons learnt’ exercise, during which counsel who have appeared or are currently appearing before the Court can share their experiences with colleagues and relevant stakeholders. The Registry is also urged to ensure that the training sessions are practical and relevant for counsel attending the seminar.
- The IBA continues to encourage the Registry to establish an Expert Commission comprised of representatives from the Court, representatives of independent associations of counsel and members of the legal profession, and experts from civil society organisations to conduct a comprehensive review of the Court’s legal aid system. Such an expert commission would, in our view, allow for a considered and holistic review by those with the requisite expertise and understanding of the complex issues involved in devising a legal aid system.
- The IBA also recommends that the Registry continues the dialogue regarding the establishment of a monitoring mechanism for counsel at the ICC. The discussion forum on this issue should include relevant stakeholders and should include a detailed review of the legal framework necessary for establishing this mechanism, including congruence with the disciplinary regime of the Code of Conduct.

To the Office of the Prosecution

- In order to standardise the normative framework governing all counsel appearing before the ICC, and consonant with the practise at other international tribunals, the IBA recommends that the existing Code of Conduct should be amended to include the prosecution or a separate Code of Conduct for the Prosecution should be promulgated.

To States Parties

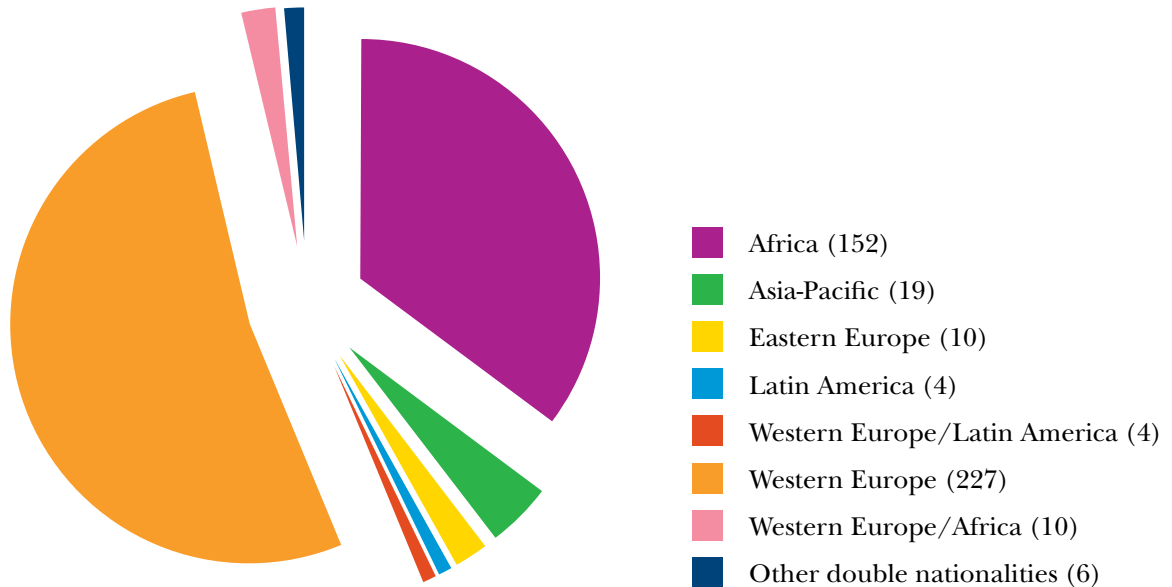
- States Parties are urged to respect the legal requirement for the Registry to meaningfully consult with the legal profession and associations of counsel prior to the finalisation of policy decisions on legal aid. As such, the IBA recommends that sufficient time is given to the Registry to organise such consultations before submitting a report to the Bureau of the ASP.
- The IBA recommends that States to support a comprehensive review of the legal aid system which takes into account the input of all relevant stakeholders.
- The IBA urges the ASP to call upon all States Parties who have not yet done so to ratify the APIC. Concerning non-States Parties referred by the Security Council, the IBA urges the ASP to continue to have discussions with the Security Council to ensure that there is concerted condemnation of any attempts to violate privileges and immunities of Court personnel or counsel.

To counsel

- The IBA urges counsel to ensure full respect for, and adherence to, the normative provisions governing effective representation of victims and defendants before the Court.
- Counsel are encouraged to envisage their role and mandate at the ICC as broader than the representation of individual clients. The principle of complementarity demands that counsel’s involvement with and support for the ICC is not limited to its work in the Hague.

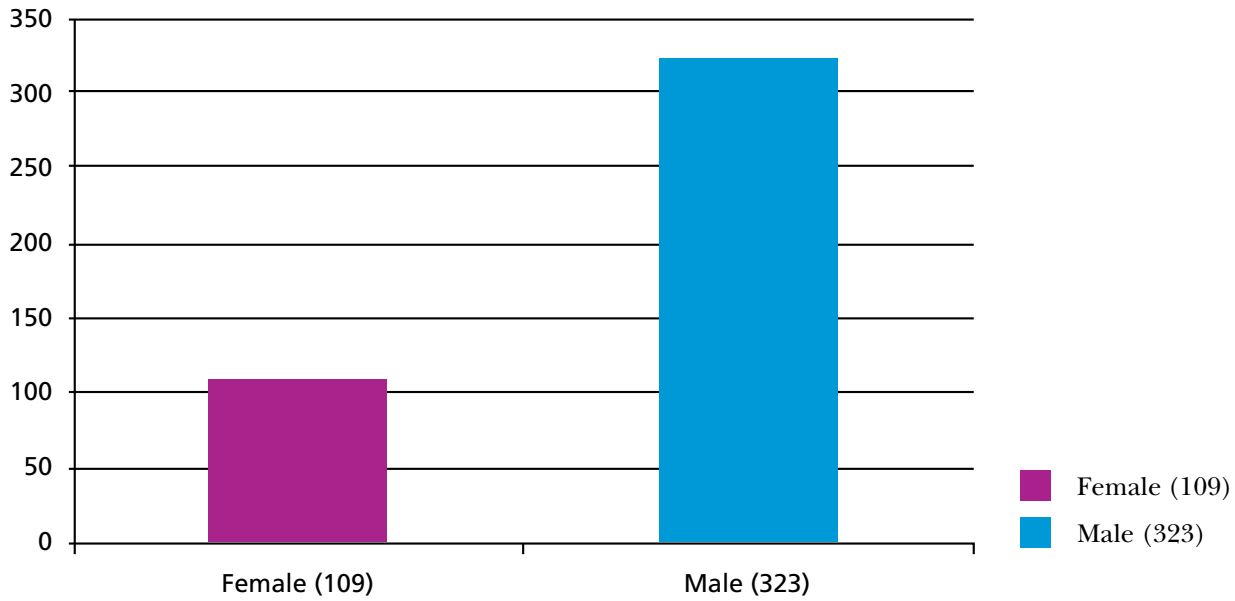
Annex I: Counsel Statistics

Regional distribution of counsel 2012 (432 in total)

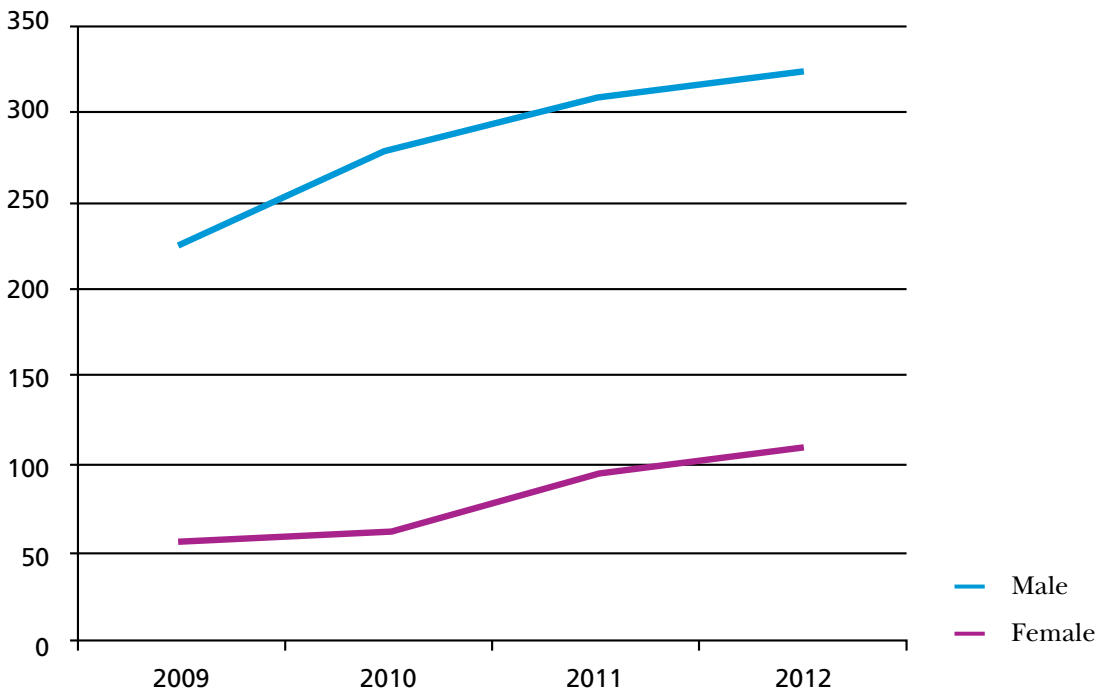


As of 26 June 2012, there are 432 counsel on the List of Counsel of the ICC. The majority of them (227) are from Western Europe or Northern America (the 'Western European and Others' region in ICC terminology). African counsel (152) form the second-largest group. Ten counsel have double nationality from Western European and African countries. Latin American counsel form the smallest group, with only four counsel; however, four other counsel possess double nationality from Western European and Latin American countries. The remaining double nationalities are Western European and Asian (four), Western European and Eastern European (one) and Asia-Pacific and Eastern Europe (one).

Gender distribution of counsel 2012



Rise in gender distribution of counsel 2009–2012



Sources:

- 2009 Report of the Registry, 'Facts and Figures':
www.iccnw.org/documents/Facts_and_figures_30_April_2009_ENG2.pdf.
- 2010 Gender Report of the Women's Initiatives for Gender Justice:
www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf.
- 2011 Gender Report of the Women's Initiatives for Gender Justice:
www.iccwomen.org/documents/Gender-Report-Card-on-the-International-Criminal-Court-2011.pdf.
- 2012 List of Counsel on the ICC website:
www.icc-cpi.int/NR/rdonlyres/2048474C-CBC2-4FAC-A190-84926CDDAE01/284673/WebListOfCounsel26062012Eng1.pdf.



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