

## **CHAIRMAN'S COMMENTARY TO THE ICCBA DRAFT CONSTITUTION**

### ***Introduction***

On the 23rd and 24th of March 2015, the ICC Registrar held a conference of experts to discuss the establishment of a Victims Office and a Defence Office and the potential establishment of an association or bar for List Counsel. At the close of the conference, with the support of the Registrar, List Counsel that were present agreed to form an *ad hoc* committee to draft a constitution for an ICC Bar/Association for List Counsel. The following were selected to serve on the committee: Michael G. Karnavas, Ken Gallant, David Levy, Geoff Roberts, Raymond Brown, Emmanuel Altit, Luc Walley, Jens Dieckmann, Ghislain Mabanga, Paolina Massidda and Xavier-Jean Keita. I was then selected to chair the Committee.

I have prepared this commentary to assist List Counsel in their understanding of the efforts and aims of the Committee in preparing this Draft Constitution, and to further guide List Counsel in their deliberations and contributions on this draft. Comments are being solicited to ensure that the Constitution presented to the Registrar is representative of List Counsel's collective view. To that end, the commentary sets out some of the major issues that remain outstanding, requiring input from List Counsel.

Because some issues have not been fully resolved, and because the Committee cannot and does not speak for List Counsel, several questions are posed which List Counsel are invited to answer and forward on to the Committee along with any proposed amendments to the Draft Constitution. Input is essential.

### ***Drafting process***

Since the Drafting Committee was not able to assemble in one place over 2-3 days, we proceeded in a piecemeal approach. First, we focused on establishing the general principles embodied in the preamble before moving on to the overall structure of the Bar, including its committees and other bodies. Once we established the general framework, we tackled more technical issues such as qualification of memberships and voting. The Draft was then reviewed as a whole, fine-tuned for uniformity and harmonized before being distributed for further comments by the Drafting Committee.

Not all comments were incorporated. As can be expected whenever there is a drafting process by a committee, there are some lingering issues requiring further deliberation.

### *Overall purpose of the Construction*

**Bar or Association?** The Committee started its work with the preference of establishing a Bar, as opposed to an Association. A capital idea, though one that requires certain elements and decisions beyond the current reach of List Counsel.

During the drafting process, it became clear that a “BAR” cannot be established at the ICC. What distinguishes a Bar from an Association is: the right to establish standards for mandatory membership, impose examinations for entry, and discipline, including disbarment/de-listing.

The ICC has its own code of ethics and discipline and all licensed counsel are under the code of ethics and discipline of their national bar. Membership to practice before the ICC is determined by the ICC. It controls the standards for qualifying to be on the List of Counsel, or to hold staff positions. Once someone is on the List, an ICC Bar cannot de-list someone or demand payment (membership dues) for the privilege of being on the List or for taking a case.

The ICC also controls the disciplinary regime and there are many lawyers who do not wish for an ICC Bar or Association to have any disciplinary function, save for giving non-binding / non-authoritative advice.

For these reasons, establishing a Bar at the ICC for List Counsel, at this moment is unfeasible. At this stage expectations should be tempered by presenting to the Registrar a constitution for an Association with voluntary membership and with no disciplinary regime. In doing so, List Counsel through its representative (e.g. this Committee) can engage the Registrar to see if the Association could undertake certain matters currently handled by the Registrar, such as the prescreening of applicants to be on the List, and certain disciplinary functions that would not infringe on the disciplinary regime of the ICC. Were the Registrar to delegate these functions, the Association would take on Bar-like features, lending it greater authority and respectability. And were this to occur, the Association could then make membership mandatory.

Because of the significance of this issue, List Counsel are invited to express their views and preference: *Should we settle for just an Association or should we also pursue a strategy for the Association to take on Bar-like features such as the screening the membership and thus making membership mandatory, and discipline?*

**Economical yet flexible or comprehensive but rigid?** Some like a constitution that has everything in it for every eventuality. This allows for certainty, but can also act as a straight-jacket, requiring the amending of the constitution on a periodic basis. This could lead to gridlock, since amending a constitution is not an easy process – and nor should it be. Others like a constitution that is sparse; just the bare essentials. This model tends to elevate uncertainty and discomfort, unless the implementing rules and regulations are thorough and specific.

Recognizing the benefits and detriments of both approaches, the Committee opted for a middle way: a constitution that is economical and flexible, whereby implicitly space is provided for certain matters that are not explicitly stated. Combined with detailed rules and regulations (hopefully to be drafted before the Association is formally registered) the constitution should provide a solid basis for an Association that is poised to expand. As such, the Draft Constitution was distilled to provide a flexible and pragmatic document reflecting the general vision and needs of List Counsel and staff at the ICC.

One issue that preoccupied the Committee was the extent to which the Constitution should explicitly state that its membership is open to counsel and staff from other international, internationalized and national tribunals (STL, ECCC, Kosovo, BiH State Court, etc.), and that this Association upon request may act on their behalf before those courts.

This is a significant issue and one that merits serious consideration. It certainly would give added weight and importance to the Association, while also providing a valuable service to our colleagues who have little or no voice in those other tribunals.

There are, however, appreciable risks that merit attention. For the Association to take root and bear fruit, it must first be recognized by the ASP. Without formal recognition, the Association is just another NGO with no formal voice in any of the

important matters that impact List Counsel: legal aid policy, greater participation in drafting regulations and directives related to the work of List Counsel, greater participation in proposed amendments to the rules, and official access to the ASP so that pressing issues to Defence Counsel and Counsel representing victims are properly and forcefully presented. There is also the issue of the financing of the Association. Presently, it cannot be established and sustained without the Registrar's/ASP financial assistance.

The ASP is not obligated to establish an association. Rule 20(3) does not read that the ASP *shall establish* an association, but that it *may facilitate* the establishment of an association. Thus it behooves List Counsel to present to the ASP a constitution of an association that it would be willing to *facilitate* its establishment, and in so doing, recognize it as the authoritative voice of all List Counsel.

Because of the significance of this issue, List Counsel are invited to express their views and preference: *Should the constitution explicitly set out the intentions of the Association, if requested, to act as the Association for counsel before other tribunals?*

#### *Name*

**An Association by any other name.** The name tentatively selected for the Association is: *The International Criminal Court Bar Association* ("ICCBA"). It reflects that it is ICC-centric. It also reflects that it is an association and not a bar. Would dropping the word "association" elevate *this* Association to something more than it really is? Improbable. However, were the Association take on the sort of responsibilities discussed above so that it has bar-like features, including mandatory membership, then it is an issue worth pondering.

Because of the significance of this issue, List Counsel are invited to express their views and preference: *Should the name of the association remain as is, should it be "The International Criminal Court Bar" or are there other preferences?*

## *Preamble*

The general principles of the Association should be embodied in the preamble of the Draft Constitution. Less is more. Much of the detailed day-to-day functioning of the Bar Association will be regulated by rules and regulations. Since a constitution is difficult to amend, it is best to keep it vibrant but flexible.

The preamble has been organized starting with the general and moving to the specific. The emphasis was placed on Counsel's important role and functions. The focus is on Counsel coming together to establish the Bar Association.

As with any constitution, the objectives need to be clearly stated, though not every detail needs to be explicitly provided. The document should be flexible enough to avoid the need for amendments down the road. The objectives of the Association should be aspirational, yet rational. The Association should aspire to:

- support the functions, efficiency and independence of Counsel practicing before the ICC;
- promote professional standards and ethics of Counsel;
- promote and facilitate the proficiency and competence of Counsel relevant to the representation of their clients before the ICC;
- facilitate Counsel in having the necessary support, assistance and information from the Organs of the ICC to enable them to provide effective legal representation to their clients;
- enhance the quality of justice at the ICC required under the provisions of the Rome Statute and other recognized texts;
- assist in resolving legal issues impacting Counsel;
- ensure independent representation of the interests of Counsel and their staff;
- advocate for the enhancement of the rights of clients and Counsel before the ICC;
- promote equality of arms between the parties before the ICC;
- represent the interests of Counsel and the profession before the Assembly of States Parties;

- assist in resolving incidents between Counsel, and between Counsel and the Organs of the ICC; and
- provide any other reasonable and necessary services as a Bar might provide to its members.

Explicit provisions regarding tasks assignable by the Registry and ASP, and representation at other international tribunals were omitted. Were the ASP or the Registry to assign tasks to the Association, it could potentially bring into question its independence. It is implicit that the Association would interact with various ICC organs including the ASP. Also, when appropriate, and by agreement, it is implicit that the Association may engage in activities before other tribunals. As noted, explicit language was omitted, though depending on the responses from List Counsel (see question above) the Draft Constitution can be amended so that it is more explicit.

### ***Qualifications and Membership***

The number of List Counsel is large and diverse, coming from different legal traditions and different experiences. The Association needs to be inclusive in its membership, while at the same time it must function efficiently, and must accommodate the needs of those who are actually practicing at the ICC.

Generally, those who have active cases and those who are primarily engaged in international criminal law tend to serve on committees, which, in practice, do the majority of the work in such associations. They are also likely to be the major consumers of services provided by the Association.

The Draft Constitution has two tiers of membership: Full and Associate. All List Counsel acting as independent Counsel and Counsel who directly represent individuals, such as assigned Counsel working for the OPCD/OPCV, are Full Members. Associate membership is open to all support staff who are assigned to a case and who lack the qualifications to be List Counsel, as well as any individual who supports the objectives of the ICCBA.

Because the ICC has set a high standard for Counsel to become List Counsel, some insist that only List Counsel should be Full members, qualified to serve on the Executive Council or be members of any committees, except for the one relevant to

the work of Support Staff. Some, however, disagree, supporting the idea that anyone with a bar license from a national jurisdiction, even without any experience, that may be working on a case (and this would also include interns), qualifies to be a Full member with full rights and qualifies to sit on the Executive Council and Committees. Then there are some that support the idea that members of the Office of the Prosecution and Legal Officers working for the Chambers and the Registry should also be eligible for Full membership.

These are differences that cannot be glossed over. Some call for maximum inclusiveness while others prefer a modicum of exclusivity, keeping in mind the purpose and objectives of the Association.

Is a newly minted lawyer with little or no experience qualified to be on equal footing with List Counsel? Were the Registrar to permit the Association to be in charge of screening the applications to be on the List, can someone lacking List Counsel qualifications be sitting on the Membership Committee? And then there is the issue of impermanence: few staff members and virtually no interns stay with a case from start to finish; they tend to move on when a case drags on for years, which is the norm for cases before the ICC. Assigned Counsel do not have the luxury of just moving on; they are expected to remain in the case until its completion.

Should prosecutors be sitting in the Defence Committee where matters directly impacting Defence Counsel are discussed and advocated? Should prosecutors or legal officers sit on the Legal Advisory Committee, where proposed amendments to the rules are made that may cut against the interests of the OTP or Chambers or the Registry? And if membership is voluntary – as it is likely to be at least for the immediate future – would not including prosecutors into this Association, that is specifically designed to give voice to List Counsel acting as independent Counsel, discourage List Counsel to join the Association?

Because of the significance of this issue, List Counsel are invited to express their views and preference:

- a. *Should the Association have two categories of membership as currently reflected in the Draft Constitution – Full, for List Counsel, and Associate, for support staff assigned to cases who do not qualify to List Counsel?*
- b. *Should the Association just have one category for all counsel practicing before the ICC, regardless of their lack of experience and qualifications to be List Counsel?*
- c. *Should members of the ICC OTP, Chambers and Registry who are on the List of Counsel be qualified to be Full members of the Association?*

### ***Membership Fees***

The Draft Constitution calls for all members to pay an annual fee, though allowance should be made for fees to be waived for some members on a showing of good cause. The amount of the fee is to be determined by the General Assembly.

One matter related to the fees that is not in the Draft Constitution is whether those who are “Active” members (List Counsel who are currently with cases before the ICC) should pay an increased monthly fee. This was the case with the ADC – the association for the ICTY – which proved to be essential and necessary for the viability and sustainability of the ADC. The reasoning for the increased fee was because members with cases are the major consumers of the services provided by the Association. They are *in situ*, often demanding assistance and interventions. And because these members are also earning fees from the cases, it is only natural that they pay an increased fee; a levy of sorts.

This issue is not without controversy. Some List Counsel object to the notion that they should shoulder a heavier financial burden than the rest of the members. A fair observation, though it does not account for the added services consumed by these members on matters that are case specific and not necessarily universally beneficial to all members.

But also, those who are with a case (or have recently been in cases) enjoy greater representation, if you will, by being automatically allotted memberships to the Executive Council and the two committees dedicated to the Defence and Representatives of Victims. An argument can be made that with added representation comes added taxation. The flip side of this argument is that however more the taxation, it would not suffice in meeting the financial needs of the Association, and is it equitable to impose a levy when the legal aid scheme is ridiculously inadequate? So, why bother?

And of course there is the issue of the Staff; presumably they will need to also pay, and if they are Full members should they not pay an equal amount as List Counsel? Equal taxation for equal representation.

But then, what of the members from the OTP, Chambers and Registry, should they qualify to be Full members? Should they not also pay the increased fee, since they are working on cases, enjoy a salary with full benefits and presumably will also be availing themselves of the services of the Association? Never mind the issue of actually collecting the fee, if membership were to be made mandatory.

Because of the significance of this issue, List Counsel are invited to express their views and preference:

- a. *Should List Counsel and Staff, if they are full members assigned to cases, pay an increased monthly fee during the duration of their representation?*
- b. *Should List counsel employed by OTP, Chambers and Registry qualified as Full members pay an increased monthly fee for the duration of their employment with the OTP, Chambers and Registry?*

### *The Organs*

The Draft Constitution envisages an Association composed of various committees, which are expected to most of the work. The Association is expected to have the following organs:

- General Assembly;
- Executive Council;
- Executive Committee;
- Disciplinary Council;
- Defence Committee;
- Victims Representatives Committee;
- Counsel Support Staff Committee;
- Legal Advisory Committee;
- Membership Committee;
- Training Committee; and
- Amicus Committee.

### *The General Assembly*

The General Assembly is the supreme body with the Executive Council reporting to it. Annual meetings are held to adopt rules and regulations, discuss reports on the activities of committees, conduct elections and adopt the budget, etc. *Ad hoc* Special Assembly meetings can be permitted subject to specified criteria.

There should be no need for a special election committee. Normally, all of the work is done on the particular day of the election. The voting process must allow for all members to directly participate to the extent possible, irrespective of their location or time zone. The Election Chair will monitor the election process. Rules and procedures can be developed which go into detail and establish protocols to provide full transparency.

Since no constitution can include all details for every eventuality, the Draft Constitution provides for the General Assembly to adopt the rules of procedure and to appoint a member to serve as a Parliamentarian. The main role of the Parliamentarian would be to highlight to the General Assembly any matters that are inconsistent with the letter or spirit of the Constitution or applicable rules and procedures.

### ***The Executive Council and Executive Committee***

The Executive Council represents a larger group, consisting of 15 Members. Within the Executive Council there is an Executive Committee, consisting of five members: a President, two Vice-Presidents, a Treasurer and Secretary.

Members of the Executive Committee should have no more powers than any of the members of the Executive Council. For practical purposes, the Executive Committee should be allowed to undertake, in a much more efficient manner, the day-to-day affairs of the Bar Association that do not necessarily require the full attention of the Council. Considering that the Council is comprised of a large number of members, it may be rather difficult to reach a consensus given the geographical locations, time differences, etc.

To ensure equity, consideration should be given to the type of legal representation (Victims/Defence), geographic representation, common and civil law, and the different languages existing among members. One seat should be reserved for Counsel native to each of the following regions: Eastern European States, Asian-Pacific States, Latin American and Caribbean States, North American States, North African States, Sub-Saharan African States, Western European States and other States. Five seats on the Executive Council should be reserved for Counsel actively engaged in cases before the ICC, or who have been in the three years prior to an election.

The Executive Council is responsible for preparing the agenda of the General Assembly meetings, submitting the Bar Association program for approval to the General Assembly, implementing approved programs by the General Assembly, executing decisions of the General Assembly, preparing the annual budget, monitoring matters related to the annual budget, and submitting an annual report of activities and an audited financial report to the General Assembly for its approval.

### *The Committees*

The permanent committees of the ICCBA are:

- Defence Committee;
- Victims Representatives Committee;
- Counsel Support Staff Committee;
- Legal Advisory Committee;
- Membership Committee;
- Training Committee; and
- Amicus Committee.

Article 4 of the Draft Constitution stipulates that all committees may consult with other committees, the Executive Council or other members. This means that a committee does not need to work in isolation and can elicit experience/expertise from others. The General Assembly can form any other standing committee created by Resolution.

Considering the Defence and Victim Representatives' opposing interests, the Draft Constitution provides for two separate committees to represent the interests of the two groups. It is expected that these committees will be coordinating with and providing assistance to the Legal Advisory Committee and to the Executive Council to ensure that the respective interests of the accused and victims are fully addressed.

Some are of the opinion that issues confronting the accused and victims are diametrically opposed and divisive and that it is not sufficient to have committees, and that what is actually needed are two semi-autonomous sections within the Association (one for the Defence and one for Victims Representatives) with their own committees, sub-committees, etc. While this may be appropriate for very large associations and bars that are not dedicated to one particular court such as the ICC, for an association that is trying to establish itself with modest support and virtually no financial resources, this model could be crippling. This could realistically lead to having two mini-associations within one association, working against each other. When balancing the benefits of having two semi-autonomous sections versus any detriments resulting from having two committees, one needs to consider the associated risks.

Because of the significance of this issue, List Counsel are invited to express their views and preference: *Should the Association establish two committees for the Defence and Representatives of Victims, or should it be divided into two semi-autonomous sections?*

*Conclusion*

Much deliberation was put into this draft. Nothing is etched in stone. This Draft Constitution is a work in progress. It should serve as a solid basis for discussion and as a point of departure in drafting and adopting a constitution that gives birth to a professional Association for List Counsel and others practicing before the ICC. Contributions from List Counsel are now necessary for the drafting process to continue effectively and expeditiously.



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