



Barreau Pénal **International** Criminal Bar  
Colegio de Abogados penal Internacional

[www.bpi-icb.com](http://www.bpi-icb.com)

## **Position paper of the International Criminal Bar (ICB)**

1. R. 20.3 of the rules of procedure and evidence provides that the ASP would some day facilitate the establishment of an independent representative body of counsel.

The Court has been functioning for almost 10 years and an independent representative body of counsel has not been established. This issue was not even on the agenda of the review-conference in Kampala. Unfortunately other major defence-issues that need to be addressed were also not on the agenda of this conference.

In most democratic justice systems the authorisation to practice as a lawyer or to accede to this profession is given by an independent body, such as a bar association, to enable the legal profession to meet the international standards of required independence. The UN basic principles on the role of Lawyers, 1990, state, inter alia, that :

**Bar associations or other professional lawyer's associations should be self governing bodies, independent of the authorities and the public,**

**The role of Bar associations or other professional lawyer's associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected.**

Rule 21.2 gives the Registrar the power to "create" and "maintain" a list of counsel who meet the criteria set forth in rule 22. ICB is of the view that this is not consistent with international standards relating to independence of counsel. ICB is of the view that the fairness of trials can best be guaranteed by the interaction of an independent judiciary, an independent prosecutor's office and counsel acting on behalf of accused persons whose independence cannot be questioned because they belong to an independent self-governing body.

Regulation 83.1 provides that the Registrar determines the scope of the legal aid assistance that will be needed for an effective and efficient defence. It is thus the Registrar, not an independent body, who determines the contents and the limits of the rights provided to an accused person by art. 67.1 (b).

Both duties should be performed by an independent body or by different **independent** bodies. There are cases known to ICB where, before ICTR, defence counsel were "dismissed" by the Registrar, without any form of appropriate and independent proceedings. In certain cases the cause of "dismissal" was their freedom of speech. Any justice system should make this impossible.

Barreau Pénal International Criminal Bar  
Barcelona Secretariat:

Avenida Diagonal 529, 1º2ª 08025 Barcelona, España

Tel.+34 +93 405 14 24, Fax: Tel.+34 +93 405 14 24/ E-mail: [nuria\\_bpi@icab.es](mailto:nuria_bpi@icab.es), [erinda\\_bpi@icab.es](mailto:erinda_bpi@icab.es)

ICB suggests that, as long as there will not be an independent Bar at the ICC, with the legal functions which are entrusted to such a Bar in all democratic systems, the ICC will not meet the required international standards of a fair and independent criminal justice system. This matter should be of urgent and continuous concern for the Court and the ASP.

One of the consequences of the absence of an independent Bar is, inter alia, that counsel at the ICC are deprived of any mode of quick arbitration in case of conflicts amongst each other or with Court officials. Incidents which arise during the hearing are to be resolved by the presiding judge, who could be part of the problem and becomes thus party and judge. There are at present no mechanisms which can provide independent and confidential ethical advice to counsel, which could help preventing conflicts. The Presidency has already asked the Registrar to provide for such a mechanism but nothing has been done so far. These duties are normally fulfilled by an independent Bar that is an integrated part of any democratic legal system.

In this context ICB proposes, while awaiting a proper decision of the ASP as to the mandatory creation of an independent Bar, intermediary solutions for conflict resolution, ethical advice and even suspension of counsel, that were provided on 16 th may 2011 to the Registrar and the Court. The issue paper is available on the ICB website [www.bpi-icb.com](http://www.bpi-icb.com).

2. Cases before the ICC are of extreme complexity and defence-counsel face a Prosecutor with enormous means and with the advantage of preparation time already spent on the case from the prosecution perspective. Defence counsel must also contend with the victim's counsel, a phenomenon that did not occur before the ad hoc Tribunals, and yet the means at the disposal of the defence are reduced in comparison to what is provided, for example, at the ICTR. It is an illusion to think that the Court will be a more cost effective operation if unreasonable limitations are placed on the legal assistance provided to accused persons. On the contrary, providing defence counsel with reasonable means to represent their clients properly will promote a more expedient system of justice with fewer delays. ICB is of the opinion that a co-counsel should be added to the defence team from the very first stage of the pre-trial phase. Experience moreover has shown that the Prosecutor cannot be expected to fulfil his obligation to investigate both incriminating and exonerating circumstances equally, and that at times there have been failures in the duty to disclose exonerating evidence. The defence has the duty to conduct its own investigations, reason why it needs at least one full-time investigator for the full duration of pre-trial and trial, together with sufficiently skilled legal assistants. A properly composed defence-team should thus include at least 7 professionals, from the very beginning of the pre-trial phase onwards, in order to meet the standard of equality of arms.

NewYork, 25<sup>th</sup> november 2011.

International Criminal Bar. Secretary General j.flamme@telenet.be

tel 0032475713254

Barreau Pénal International Criminal Bar  
Barcelona Secretariat:

Avenida Diagonal 529, 1<sup>o</sup>2<sup>a</sup> 08025 Barcelona, España

Tel.+34 +93 405 14 24, Fax: Tel.+34 +93 405 14 24/ E-mail: [nuria\\_bpi@icab.es](mailto:nuria_bpi@icab.es), [erinda\\_bpi@icab.es](mailto:erinda_bpi@icab.es)