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"EQUALITY OF ARMS": CHALLENGES CONFRONTING THE LEGAL PROFESSION IN THE EMERGING INTERNATIONAL CRIMINAL JUSTICE SYSTEM*

*Elise Groulx***

The protection of the rule of law requires that the international criminal justice system focus on two key elements: (i) the substantive objective of ending impunity by bringing war criminals to justice, and (ii) the procedural objective of ensuring a fair trial. The prosecutorial bias inherent in the institutional designs of the international criminal tribunals for the former Yugoslavia and for Rwanda, and the International Criminal Court (ICC), poses a serious challenge to the individual's right to a fair trial. In addition to an independent judiciary and prosecution, the international criminal justice system requires an independent legal profession (including both defence and victims' counsel). The incorporation of a **"third pillar"** will help to legitimize the new justice system and strengthen the rule of law by providing a formal voice for lawyers and enabling the protection of individual rights. In the same vein, the international community's commitment to democracy in post-conflict states should include strong measures to protect the institutional, legal and political independence of lawyers. In a democratic society, lawyers assume the vital role of ensuring that the rights of individuals are protected. The right to a full and answering defence is a fundamental right that contributes to the rule of law, and must be entrenched in the legal texts forming the base of any sound democracy. Weakening this right would undermine the justice system and the freedom it claims to defend. Only the rule of law can enable a fair trial system. Fairness is an essential element of any system of justice and without it, justice cannot be done or be perceived to have been done. A key element of the rule of law is maintaining a system of checks and balances that ensures that no single party, including judges and State agencies, can dominate legal proceedings.

The international rule of law involves two key elements that affect criminal procedure. The first element is the *objective* of bringing suspected war criminals to justice and thus acting to end impunity. The second element concerns the *process* for achieving this objective, which includes ensuring fair trials for the alleged war

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criminals. While the objective is supported by most representatives of the international legal community, there are serious concerns about the process.[1]

At the International Criminal Tribunal for the former Yugoslavia (ICTY),[2] the International Criminal Tribunal for Rwanda (ICTR)[3] and now the International Criminal Court (ICC),[4] there are two very strongly entrenched organs (or institutional pillars): the Judiciary and the Prosecutor.[5] Both have clearly defined powers. However, the institutional basis for a truly independent body of defence lawyers is very much lacking in the Statutes of these courts, even though the *rights of the accused* are clearly articulated on paper.[6] This lack of independence, combined with scarce resources, creates an "inequality of arms" between the Prosecutor and the Defence. Such an institutional weakness can undermine the legitimacy of any criminal court over time and affect its credibility.

I. The Third Pillar: A Basic Concept

A. Overview of the ICTY, ICTR & ICC

The development of international law over the past decade has focused attention on the links between individual criminal liability and international peace and security:

> A new culture of human rights and human responsibility, in which there can be no impunity for such crimes, has gradually taken root and the link between an established system of individual accountability and the maintenance of international peace and security has been confirmed.[7]

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1 The International Criminal Defence Attorneys Association (ICDAA), founded in Montreal in May 1997, has been closely involved in institution building of the International Criminal Court (ICC) for more than eight years. See International Criminal Defence Attorneys Association, online: ICDAA, <http://www.aiad-icdaa.org>; International Criminal Court, online: ICC <http://www.icc-cpi.int>. See also International Criminal Bar (ICB), online: ICB <http://www.bpi-icb.org> (founded in Montreal in June 2002). While both the ICDAA and the ICB support the ICC as an institution, including its independent Chambers and Office of the Prosecutor, they have reservations about the Court's institutional imbalances, and believe that an independent legal profession should be added to the ICC system. Both the ICDAA and the ICB will be discussed in detail in Section 2, below.

2 See *Statute of the International Tribunal*, UN SCOR, 1993, Annex, UN Doc. S/25704, at 36, online: ICTY <http://www.icty.org> [*ICTY Statute*].

3 See *Statute of the International Tribunal for Rwanda*, UN SCOR, 3453rd Mtg., Annex, UN Doc. S/RES/955 (1994) at 3, online: ICTR <http://www.ictr.org> [*ICTR Statute*].

4 See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3 (entered into force 1 July 2002), online: ICC <http://www.icc-cpi.int> [*Rome Statute*].

5 See e.g. *ibid.*, Part IV-V.

6 See e.g. Assembly of States Parties to the Rome Statute, *Rules of Procedure and Evidence*, 1st Sess., ICC-ASP/1/3 (2002) (entered into force 9 September 2002) at Chap. 5 "Investigation and Prosecution", online: <http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf> [*ICC Rules of Procedure and Evidence*].

7 See Ralph Zacklin, "The failings of Ad Hoc International Tribunals" (2004) 2 J. of Intl Crim. Justice 541 at 541.

The ICTY and the ICTR were created by the Security Council[8] in the nineties to help restore peace and security in certain areas covered by their jurisdiction. They were established with the public policy goal of "ending impunity" for the leaders allegedly responsible for genocide and war crimes. These are no ordinary crimes, and a certain "prosecutorial bias" was evident in the very objectives and design of these tribunals. They were created *ex post facto* and thus were not designed as courts of general jurisdiction in the common law tradition. This is patently obvious in their founding documents,[9] which define their special purpose in terms of vigorously prosecuting crimes against humanity.

In contrast, the ICC is a permanent criminal court based on the idea of putting an end to impunity for genocide, war crimes and crimes against humanity. It was established with a constitutive treaty[10] by contracting States–now numbering 111[11]–not by the Security Council of the United Nations. The treaty entrenches fundamental freedoms and fair trial rights. However, there is still a prosecutorial bias in the *Rome Statute*[12] and, in particular, an institutional imbalance between the prosecution and the defence. This is because the ICC system is similar in structure to that observed in the *ad hoc* tribunals. All three institutions are built with the same architectural defect: the legal profession and the defence are not recognized as an essential organ, or pillar, of the justice system. The judiciary and the prosecution are organs of the Courts, but there is no formal voice and no institution in the system to represent lawyers. Contrary to the common law system, prosecutors coming from the Continental systems are not lawyers, they are magistrates. This is an important distinction that must be made at these early stages of the development of the court.

As explained in more detail below, the legal profession in general and the defence in particular, did not play a central role in the early stages of the process that built the ICTY, ICTR and ICC. The international community was pressing hard to end impunity for the worst violations of international humanitarian law, leading to a focus on the prosecution of alleged perpetrators and compensation of victims. The system was built very rapidly without including the legal profession in an organized and continuous manner, in the design of the system–or looking critically at methods of protecting the rights of individuals accused of committing heinous crimes. The

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8 See *Resolution 827 (1993)*, UN SCOR, 3217th Mtg., UN Doc. S/RES/827 (1993); *Resolution 955 (1994)*, UN SCOR, 3453rd Mtg., UN Doc. S/RES/955 (1994) (ICTY was created by UN Res.827, on 25 May 1993 and ICTR was created by UN Res. 955 on 8 November 1994).

9 *ICTY Statute*, *supra* note 2, online: International Criminal Law Society <http://www.icls.de/dokumente/icty_statut.pdf>; *ICTR Statute*, *supra* note 3, online: International Criminal Law Society <http://www.icls.de/dokumente/ictr_statute.pdf>.

10 See *Rome Statute*, *supra* note 4, online: ICC <http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf>.

11 See The States Parties to the Rome Statute, online: ICC <http://www.icc-cpi.int/Menus/ASP/states+parties> (accessed on 7 April 2010); ICC, Press Release, ICC-CPI-20100324-PR508, "Bangladesh ratifies the Rome Statute of the International Criminal court" (24 March 2010), online: ICC <http://www.icc-cpi.int/Menus/ASP/Press+Releases/Press+Releases+2010/Bangladesh+ratifies+the+Rome+Statute+of+the+International+Criminal+Court.htm> (Bangladesh ratified the *Rome Statute* on 23 March 2010. The Statute entered into force for Bangladesh, the 111st state party, on 1st June 2010).

12 *Supra* note 4.

ICDAA, founded by the author and a network of defence lawyers in 1997, has been working for nearly 13 years to re-establish institutional balance in the international criminal justice system and make the legal profession an equal partner in the ICC.[13]

B. The Three Pillars

The right to a fair trial is fully protected in the statutes of all three courts (ICTY, ICTR and ICC).[14] As criminal law practitioners know, however, the right to a fair trial needs to be grounded not just in legal texts but in institutional reality. This concept of a "fair trial" must be understood to include a strong and independent defence. It must also be seen as a safeguard for fundamental individual human rights such as the right not to be arbitrarily arrested or detained as well as freedom from violations such as torture, inhumane conditions of captivity, and protection from the over-expansion of the executive branch through criminal law, which could impede freedom of speech and religion.[15]

A clear vision is needed to help articulate and organize the rights of the defence. The words of a recognized authority in the field of international criminal law, Professor Cherif Bassiouni, provide some inspiration: "The three main pillars of the international criminal justice system are: an independent judiciary, a prosecuting authority which guards public interests, and *independent and effective defence counsel.*"[16]

Each pillar must be independent and freestanding in order to safeguard the principles of judicial impartiality, balance and "equality of arms." The same principle can apply to the ICC (which amalgamates common and civil law concepts) making adjustments for the fact that the body of Counsel at the court includes lawyers for both the defence and victims. Therefore, the three independent pillars of the ICC are the Judiciary, the Prosecution and the international legal profession (defence and victim counsels[17]).

The importance of these three pillars, and the rationale for their independence, is not equally recognized by policy makers and the public. The importance of the first pillar, "an independent judiciary," is well understood in terms of the democratic separation of powers, the need for impartial judges, and the protection of individual human rights. In many countries, the second pillar is increasingly recognized; prosecutorial independence–meaning freedom from political

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13 The author remains the president of ICDAA.

14 See *ICTY Statute*, *supra* note 2, art. 21; *ICTR Statute*, *supra* note 3, art. 20; *Rome Statute*, *supra* note 4, art. 67.

15 See ICDAA, "Written Statement submitted by the International Criminal Defence Attorneys Association (ICDAA)", 11 March 2005, UN CHR, 61st Sess., Idem 11(d) of the provisional agenda (*Civil and Political Rights, including the Questions of: Independence of the Judiciary, Administration of Justice, Impunity*), UN Doc. E/CN.4/2005/NGO/314.

16 See Stephen Thaman, "General Report. The Planning of the Conference" (1992) 63 Rev. I.D.P. 505 and 516 [emphasis added].

17 See *ICC Rules of Procedure and Evidence*, *supra* note 6, rule 22(1), 90(6) (Rule 90(6) references to Rule 22(1)).

meddling–is increasingly highlighted as a public policy goal. Certainly, both judicial and prosecutorial independence were highly visible issues in the discussions leading to the design of the International Criminal Court. Generally, their independence was viewed as essential to effective prosecutions and convictions, free from political and diplomatic considerations. However, the issue of protecting the independence of the legal profession, and of criminal defence lawyers in particular, does not draw much attention in most countries. It is often taken for granted, or ignored. This was true in the early discussions around the creation of the ICC and the *ad hoc* tribunals.

This state of affairs contrasts with the increasing focus of international experts on the independence and professional competence of lawyers as a critical institutional tool for enforcing and protecting human rights. In the words of an international committee of experts of the *Association Internationale de Droit Pénal* in 1982:

> A fair and equitable system of administration of justice and the effective protection of human rights and fundamental freedoms *depend as much on the independence of lawyers as on the independence and impartiality of the judiciary*. The independence of lawyers and the judiciary mutually complement and support each other as integral parts of the same system of justice.[18]

The committee of experts went on to say: "Adequate protection of human rights and fundamental freedoms … requires that all persons have effective access to legal services provided by an independent legal profession."[19] The independence of Counsel as a basic principle was reasserted by the Council of Europe in a recommendation, adopted by the Committee of Ministers on 25 October 2000. It points to the importance of guaranteeing "the *independence of lawyers* in the discharge of their professional duties *without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason*."[20] In a background-information document supporting this ministerial recommendation, a group of experts offers the familiar argument that defence independence plays a key role in protecting the individual human rights and the integrity of the justice system as a whole:

> A fair and equitable system of administration of justice and the effective protection of human rights and fundamental freedoms, depend both on the independence and impartiality of the judiciary … and on the independence

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18 Association Internationale de Droit Pénal, *Draft principles on the independence of the judiciary and on the independence of the legal profession: prepared by a committee of experts at the International Institute of Higher Studies in Criminal Sciences* (N.p.: Érès, 1982) at 68 [emphasis added].

19 *Ibid*. at 69.

20 See Council of Europe, Committee of Ministers, 727th Mtg., *Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer*, R(2000)21 (2000) at para. 7, online: Council of Europe, <https://wcd.coe.int/ViewBlob.jsp?id=380771&SourceFile=1&BlobId=533749&DocId=370286> [emphasis added]. See also, *ibid* at "Principle I – General principles on the freedom of exercise of the lawyer profession".

> of lawyers. The independence of the judiciary and of lawyers is essential in any system of justice.[21]

To illustrate this principle, consider several hypothetical cases where lack of institutional independence threatens the integrity of the criminal justice system. The obvious case would be that of a judge who pressured to resign by the Security Council based on an unpopular decision. Another case that would arouse controversy in the media might be when a senior prosecutor routinely consults his political masters about the filing of charges and motions in individual cases. Yet another case–equally serious–would be when a defence lawyer is disciplined or loses his or her professional certification after vigorously representing an unpopular client. All these scenarios illustrate the importance of professional independence. In the case of defence counsel, freedom from outside influence including improper influence from judges, prosecutors and court officials. How credible is a lawyer whose income, or right to practice, can be cut off by the judge hearing the case, a prosecutor whom she has offended, or a court official that believes the case is dragging on?

C. The Third Pillar

According to all the authorities cited above, the international criminal justice system needs an independent third pillar. What is meant by the third pillar is not only the legal profession in a corporate sense, as it relates to the court, but lawyers who relate to individual victims and accused persons. These persons need lawyers to guarantee their effective right of access to full and complete representation in ICC court proceedings. It is lawyers acting in individual cases who provide an institutional gateway to justice for their clients. This raises two important questions: first, how can the independence of the legal profession be defined? Then, how can the international legal profession be organized to safeguard independence?

"Independence" is defined by the authorities in a variety of ways, including the independence of a self-governing legal profession (and individual lawyers) from supervision by judges or court officials. It is imperative to guarantee the basic principle that individual lawyers not be disciplined or supervised by judges, court officials, prosecutors or the police with whom they deal regularly in the conduct of individual cases. For example, recent exceptions to professional confidentiality in cases of money laundering and international terrorism are viewed as seriously jeopardizing the professional independence of lawyers. In the ICC system this principle is not consistently respected, especially in the field of professional ethics. For example, Rule 8 of the *ICC Rules of Procedure and Evidence* states the following:

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[21] Council of Europe, European Committee on Legal Co-operation, 710th Mtg., *Draft Recommendation of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer and Explanatory memorandum*, CM(2000)56add (2000) at "Part B", para. 20, online: <https://wcd.coe.int/ViewDoc.jsp?Ref=CM%282000%2956&Language=lanEnglish&Ver=add&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>.

> 1. The Presidency, on the basis of a proposal made by the Registrar, shall draw up a draft Code of Professional Conduct for counsel, after having consulted the Prosecutor. In the preparation of the proposal, the Registrar shall conduct the consultations in accordance with rule 20, sub-rule 3.
> 2. The draft Code shall then be transmitted to the Assembly of States Parties, for the purpose of adoption, according to article 112, paragraph 7.
> 3. The Code shall contain procedures for its amendment.[22]

The Code of Professional Conduct for *Defence Counsel* is to be drafted by the Registrar in consultation with the *Prosecutor*–a party that is institutionally responsible for opposing the defence in individual cases. This is certainly a lack of independence under the Council of Europe guidelines. This process fails to assure the independence of defence counsel. It leaves room for potential conflicts of interest where defence rights are overwhelmed by the dual judicial and prosecutorial assault. In the ICC system, there are two regimes of ethical standards. The Prosecutor will compile and apply its own Code of Professional Conduct, while the Defence and the legal profession will have to comply with a Code proposed by the Registrar, a non-judicial organ of the court which is also responsible for managing the legal aid system and therefore the payment of professional fees to lawyers.

The defence lawyers have no right to provide input into the Prosecutor's Code, but the Prosecutor has the right to provide input on the Code of Professional Conduct for Counsel.[23]

The institutional bias embedded in Rule 8 has been moderated through a three-year advocacy effort in 2002-2005 by legal associations, including the ICDAA and the International Criminal Bar (ICB). In September 2004, the Registrar of the ICC presented the Assembly of States Parties with a proposed Code of Professional Conduct for Counsel as required by Rule 8 of the *ICC Rules of Procedure and Evidence*. This Code did not guarantee the independence of Counsel and did not recognize the principle of self-regulation championed by the ICB. On 11 September 2004, at the end of their assembly, the States Parties recognized the problem and only adopted provisionally the Code of Professional Conduct presented by the ICC Registrar. The States announced that they would redraft the Code of Professional Conduct for Counsel, to better protect the independence of the legal profession. From September 2004 until the fourth session in November 2005, the States Parties

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22 *ICC Rules of Procedure and Evidence*, *supra* note 6, rule 8.

23 In order to correct this structural defect, the ICB ethics committee, formed in the fall of 2002, reached out to lawyers from all regions of the world–and all of its legal traditions–and drafted a Code of Professional Conduct for international criminal lawyers. This Code of Professional Conduct, partially drafted as a practitioner's manual, was meant to ensure full accountability of the legal profession while giving lawyers at the international level equality of status with the Prosecutor. The Code was also an attempt to entrench the independence of counsel by creating a disciplinary regime based on self-regulation.

redrafted the Code of Professional Conduct and held extensive consultations with legal organizations.[24] A particularly controversial issue, in the draft Code of Professional Conduct, concerned Article 22(3)-(5) which required Counsel to notify the Registrar of any communications with a client regarding fee-splitting. Although the legal profession fully supported the prohibition on fee-splitting between counsel and clients, the obligations created by Article 22(3)-(5) were in clear conflict with Counsel's obligation to respect professional secrecy and confidentiality, and also violated Article 67(1)(b) of the *Rome Statute* which guarantees the right of an accused to communicate freely with Counsel of his own choosing, in confidence. More generally, it jeopardized the establishment of a relationship of trust and confidence that needs to exist between Counsel and client. After intense lobbying led by the ICB and the Coalition for the International Criminal Court (CICC), this provision, requiring counsel to notify the Registrar regarding fee-splitting, was withdrawn.[25] As a result, the independence of the legal profession and the rights of the accused, in particular confidentiality, are better protected in the ICC system.

The final version of the Code of Professional Conduct for Counsel was adopted, by consensus, by the States Parties at the end of their fourth session, on 2nd December 2005.[26] Furthermore, in the new Code of Professional Conduct, the disciplinary regime binding the defence and the legal profession is no longer managed by the Registrar. Instead, independent commissioners will be responsible for the prosecution of lawyers, enabling the establishment of a more independent legal profession before the ICC. Self-regulation, through a disciplinary regime guaranteeing independence and confidentiality is one of the sure ways to give the legal profession equality of standing and status with the prosecution. Such a system is essential to ensure the freedom of exercise of the legal profession and to make lawyers full partners of the new international justice system. This, in turn, will enhance the perception of fairness and increase the credibility of the court.

"Organization" is what translates the ideal of an independent legal profession into institutional reality. Historically, it is bar associations that have guaranteed the independence of the legal profession. To earn that independence, bar associations hold individual lawyers accountable for meeting professional standards of competence, knowledge and ethical conduct. The bar association itself can be held accountable to the law as well as to the public. However, the legal profession is generally *not* held accountable to the executive and legislative branches of government. In some countries, the profession may be governed by judges, but only with carefully constructed safeguards, and usually with participation of the legal profession. Bars are traditional, time-tested institutions that handle discipline, ethical standards and standards of professional competence. Conventional wisdom dictates

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24 Throughout the process, the ICB commented extensively on the protection of confidentiality.

25 In their lobby, the ICB and the CICC were also supported by the Council of Bars and Law Societies of Europe (CCBE), the Union Internationale des Avocats (UIA), the Union Iberoamericana de Colegios y Agrupaciones de Abogados (UIBA), the American Bar Association (ABA), and the Inter-American Bar Association (IABA or FIA).

26 See online: ICC <http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf>.

that bars, while far from perfect, do a better job than judges, prosecutors and court officials.

To bridge the gaps of the new international justice system the ICDAA has been lobbying to establish the third pillar and has participated in the creation of the ICB, a global institution for an independent legal profession. One specific problem encountered in organizing a global bar is the differences between the common and civil law approaches to criminal justice. This problem was particularly obvious during the drafting of the ICB Code of Conduct.[27] In common law countries, the legal pillar is constituted of criminal defence attorneys, who are treated as officers of the court and full partners in the so-called adversarial system. In civil law countries, the legal profession includes both defence lawyers and lawyers representing victims; they belong to an "order" that is a recognized pillar of the legal system.

Despite the real differences between national legal systems though, there is one point they share: the independence of the legal profession is viewed as vital to its very existence and to a healthy criminal justice system. The institutional details are always complex, but the central idea is simple. In a vibrant democracy all citizens–including those accused of serious crimes–must "have effective access to legal services provided by an independent legal profession."[28] Therein is the balancing act. The ICC needs strong support from the legal profession as an important stakeholder of the international legal community. At the same time, however, the profession must manage its affairs at arm's length from the court. An independent legal profession will strengthen the court–a subordinate profession will weaken its legitimacy.

D. The Institutional Reality: Two-pillared Courts

The ideal vision of the Third Pillar is not reflected in the institutional reality. As pointed out above, none of the major courts created in the nineties provided for the legal profession. They have been built around two pillars: (i) independent judges' chambers and (ii) independent prosecutors. The legal profession–in particular defence lawyers–was not included in the institutional structure of these courts. It appears that the legal profession was virtually "forgotten" (or ignored) in the early stages of institution building.[29] Support for this view emerges from a quick review of the development of the international criminal justice system in the nineties.

"A Forgotten Pillar": As mentioned earlier the system was built rapidly with the primary focus on putting an end to impunity following the atrocities witnessed in the former Yugoslavia and in Rwanda in the early nineties. As illustrated by the mandate creating the ICTY and the ICTR, these tribunals were "established for the prosecution of persons responsible for genocide and other serious violations of

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[27] See Code of Conduct and Disciplinary Procedure of the International Criminal Bar, online: BPI-ICB <http://217.148.84.127/bpi-icb/files/Code_of_Conduct_en2.pdf>.

[28] Association Internationale de Droit Pénal, *supra* note 18 at. 69.

[29] The expression that the "defence was forgotten" was employed by a number of participants in ICC preparatory commissions conferences in conversations with the author in the period between 1998-2001.

international humanitarian law"[30] committed in the territories of the former Yugoslavia and of Rwanda. The mandate establishing these tribunals shows the bias in favour of the prosecution and weakens the effective presumption of innocence from the start. While international legal and humanitarian law experts were involved in creating the tribunals, there is no record that defence lawyers and legal practitioners were consulted in a sustained and organized way by the law commissions at the UN.

After the ICTY and ICTR began operating, the Prosecutor (the same for both tribunals) launched investigations and prosecutions without consulting the "targets" or their defence counsel (as is normal in any criminal justice system.) Often the investigations and preparation of charges lasted months (even years). The cases were quite complex, dealing with controversial segments of the military, social and political histories of countries torn by civil wars. The indictments were notorious for their broad scope and complexity. By the time arrests were made and charges laid, serious inequality of arms had developed between a cohesive prosecution team (which had worked together for months or even years) and defence teams that were assembled much later, often consisting of lawyers from different countries and legal traditions, without a common base. It should be noted that virtually all accused persons awaited trial (for years) in prison and that many lawyers were paid from UN legal aid funds–administered by the Registrars of the ICTY and ICTR.

Once arrests were made, the pressure from the international community and the media was intense and the attention was obviously on the victims of these crimes. The defence was not popular. The Prosecutor was an independent organ of the court with detailed knowledge of the cases. Defence lawyers, on the other hand, became involved on an individual basis–under court supervision. Initial contacts between prosecution and defence lawyers were therefore very imbalanced. Defence counsel did not have the benefit of a centralized defence office with administrative, management, secretarial and translation facilities. They had limited opportunities for mentoring and limited negotiating and lobbying power. The prosecutorial bias has been noted both by academic observers and legal practitioners at the ICTY and the ICTR.[31]

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[30] *ICTY Statute*, *supra* note 2, Preamble; *ICTR Statute*, *supra* note 3, Preamble.

[31] See "Developments in the Law – International Criminal Law" (2001) 114 Harv. L. Rev. 1982 "Fair Trials and the Role of International Criminal Defence" (a collective of authors went so far as to note that "[e]ven a fully professional and well trained defence bar would not be sufficient to counter the institutional bias toward the prosecution that defence counsel have reported at international prosecutions from Nuremberg to the ICTY and the ICTR … A permanent defence unit, however, would provide defence attorneys and their administrative arm with an organizational voice, accurate and up-to-date information, and a social presence in the host city to rival and mingle with that of the other branches" at 2005). That is not all, however, and one can cite numerous examples of problems defence lawyers encounter. A client's defence may be undermined by the refusal to grant defence lawyers access to the funds they need to consult expert witnesses. There is also a real problem surrounding access to legal documents, which in turn raises the question of transparency. Defence attorneys simply do not have access to the documents produced by ad hoc tribunals. The websites of these tribunals do not have a satisfactory database for defence counsel working in different parts of the globe. The electronic versions of the documents are available in the tribunal's library, but only judges and prosecutors have unlimited access to this rich mine of information that is indispensable to the legal profession. Another problem is remuneration for defence attorneys and their teams, since the

In the early phases of the ICC, it was natural to build from the operating models of the two *ad hoc* tribunals. It was only in 1996-97 that some lawyers began to notice that the defence had been "forgotten" when the *Rome Statute* was being drafted.

II. History and involvement of the legal profession in the institution-building process

A small group of lawyers (led by author) realized that the defence had been forgotten–that the ICTY and the ICTR had been created with only two Pillars and that the same model was proposed for the ICC. This network (mainly from Canada, France, the Netherlands and the US) created the ICDAA in 1997 and set out to remedy this serious architectural defect. The two main achievements of the ICDAA have been the inclusion of Rules 20-22 in the *ICC Rules of Procedure and Evidence* in 2000 and, second, the creation of the ICB in 2002.

Rules 20-22 of the *ICC Rules of Procedure and Evidence*: Initially, the key areas of focus were defence issues, an effective presumption of innocence and fair trial rights. The ICDAA advocated the creation of an independent defence office at the ICC–mirroring the Office of the Prosecutor–in negotiations leading to approval of the *Rome Statute* in July 1998. In 1998, the treaty was approved without any mention of a "defence unit" but with full recognition of a Victims and Witnesses' Unit in the Statute. At the time, the ICDAA did not represent a real force and the lobby was limited to a handful of individuals.[32] Today, the *Rome Statute* is completely silent as to institutional support for defence lawyers.

In 1999 and 2000 intense advocacy for a defence office continued. Slowly, a small but influential group of countries (The Netherlands, Canada, Germany, and France) began to support the idea of creating a defence office in the ICC. Finally, on June 30 2000, the UN Preparatory Commission, also known as "PrepCom," adopted the finalised draft of the *ICC Rules of Procedure and Evidence*. The goal of explicitly linking the independence of the legal profession to fair trial rights was realized, and the ICC Registrar was explicitly given responsibility for protecting the professional independence of defence Counsel. These principles were adopted in the form of Rules 20, 21 and 22 of the *ICC Rules of Procedure and Evidence*.

These rules meant that the defence was no longer invisible–a silent partner with no official status in the system. But their adoption was only a partial victory in the recognition of the independence of defence lawyers. It did not create a formal structure but was nevertheless an improvement on the *ad hoc* tribunals. Independence of the legal profession was explicitly recognized[33] and linked directly to the right to a fair trial. The Registrar was made responsible for taking measures to protect the

bureaucratic nature of the system makes fee payment a cumbersome, drawn-out process. Sometimes, fees are outstanding for more than six months.

32 This is the personal opinion of the author, which is based on years of negotiating experience.

33 *ICC Rules of Procedure and Evidence*, *supra* note 6, rule 20(2).

independence of defence lawyers. Specifically, Rule 20 of the *ICC Rules of Procedure and Evidence* imposed a duty on the Registrar to "organize the staff of the Registrar in a manner that promotes the rights of the defence, consistent with the principle of fair trial as defined in the Statute."[34] For this purpose, the Registrar was given the responsibility (a) to facilitate the protection of confidentiality; (b) to provide support, assistance, and information to all defence counsel appearing before the Court; (c) to assist arrested persons and persons subject to questioning pursuant to Article 55(2), as well as the accused, in obtaining legal advice and the assistance of legal counsel; (d) to advise the Prosecutor and Chambers on relevant defence-related issues; (e) to provide the Defence with the necessary facilities; and (f) to facilitate the dissemination of information and case law of the Court to defence counsel and promote training of defence counsel. Rule 20(2) of the *ICC Rules of Procedure and Evidence* made specific mention of the responsibility of the Registrar to ensure the professional independence of defence counsel. Rule 20(3) of the *ICC Rules of Procedure and Evidence* opened the door to the establishment of an international criminal bar.

The International Criminal Bar (ICB): Subsequently, the ICDAA joined forces with other key partners amongst bar associations from around the world to lead a movement that enabled the creation of a global bar. This new bar, the ICB, established in 2002, brought together, under the same umbrella, individual practitioners, bars and professional legal organizations as well as non-governmental organizations (NGOs) with a focus on legal issues.

The effort began with a meeting in The Hague in November 2000, where a consensus emerged that an international criminal bar should be created to protect the independence of lawyers at the ICC. Further discussions lead to the conclusion that a single bar was needed–including both defence lawyers and victims' lawyers. Two bars, one for the defence and another for victims' representatives, would weaken the institution from the outset. The idea of creating a bar was to ensure that the legal profession could be made a full partner in the new criminal justice system created by the ICC and that it would have a strong voice. After a year of advocacy and organization, a larger conference was convened jointly by the Paris Bar and the ICDAA at which the idea of creating an international criminal bar for the ICC received strong international support.

In June 2002, after months of intensive effort, more than 350 people from forty eight states of all continents, including representatives of sixty eight bars, associations of counsel, and representatives of non-governmental organizations, attended the Montreal conference. They unanimously declared that the ICB be founded to correct the structural defect of the system and to become an institutional cornerstone of the Third Pillar of the ICC–and the international criminal justice system. The representatives also proposed that the Constitution be finalized by spring of 2003, with official recognition by the Assembly of States Parties in time for the opening of the ICC. The first ICB General Assembly was held in Berlin (Germany)

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[34] *Ibid*., rule 20(1).

on 21 and 22 March 2003. More than 400 Counsel, delegates of bars and law societies, and NGOs from over 50 countries elected the members of the first ICB Council and Executive Committee. The Assembly also selected Regional Coordinators for many international regions. Finally on 22 July 2003, the ICB was granted full legal status under Dutch law.

Through this transparent and open process, there has been much vigorous discussion and debate. Even today, there is no neat or perfect consensus on all issues, however, there is a broad consensus on the fundamental purposes and principles leading to the establishment of the ICB and especially on the idea that a third pillar, that of the legal profession, is essential to ensure the legitimacy of the new international justice system. The ICB is attempting to become a body that provides a framework within which the legal profession (which, once again refers to both defence and victims' counsel) can operate, acting as both a regulatory body and one that provides logistical and institutional support (support staff, databases, legal expertise, training, ethical guidelines, research facilities, financial help and legal networking). The ICB is trying to promote self regulation of the legal profession at the international level. However, for the time being, the ICB is looking for formal recognition as a truly independent bar within the ICC system under Rule 20(3) of the *ICC Rules of Procedure and Evidence*.

This institutional arrangement has not yet been accepted by all 100 governments of the Assembly of States Parties to the ICC. There is still debate around the issue of establishing a truly independent bar in the ICC system. The key issues are: (i) ensuring representation of national bars, legal cultures and world regions in a global bar; (ii) structuring sound relationships between a global bar and "sovereign" national bars; (iii) structuring the relationship between the bar and the ICC. Leaders in the ICC system still have to realize that the credibility and legitimacy of the ICC as an independent deliberative body on the international scene will only be enhanced by the presence of a really free standing bar. For its part, the ICB still needs to work hard, for a number of years, in order to win true global recognition. This will happen more quickly if lawyers get together and make their voices heard in a unified way.

In summary, there has been a significant transition from an institutional void to a set of institutional possibilities, defined by Rule 20 of the *ICC Rules of Procedure and Evidence*, to establish the third pillar of the International Criminal Court and make the defence an equal partner of the system. One of these possibilities has been realized by creating the ICB, with the ambitious mission of building the legal profession on an international level. We hope it will be an independent and respected criminal bar, ruled by its own Code of Conduct.

III. ICC Legal Community as part of institution-building

One key reason for creating a bar at the ICC was to develop a vibrant international legal community around the court. Building this community is particularly important today. The ICC needs the political support of the international legal profession with its bar associations and leading legal organizations throughout

the world. Already, powerful elites are challenging the political legitimacy of the court and its sister tribunals. This is not only a reference to dictators like the late Slobodan Milosevic or Charles Taylor but also–sadly–to the recent leadership of a major democracy and the world's only superpower. The US administration has had a policy of undermining the ICC and of promoting war as a policy instrument to deal with what some consider crimes against humanity. It has tried hard to convince other countries to join in this questionable enterprise. The Bush administration interpreted Article 98 of the *Rome Statute* to secure immunity for its nationals through bilateral agreements with over eighty states, many of which have ratified the *Rome Statute*.[35] By creating a bar, lawyers and national bars declared their support for the ICC and committed to help it operate in a professional way. This was the rationale for lawyers in Montreal to vote unanimously to create an International Criminal Bar in June of 2002. It is noteworthy that representatives of two prestigious US legal associations were among those casting votes. The American Bar Association (ABA) and the National Association of Criminal Defence Lawyers (NACDL) thus reinforced a policy position on the ICC that was directly opposed to official U.S. policy. The ICB was designed explicitly to bring together not only individual legal practitioners but also bars and NGOs from many countries. There were practical reasons for seeking institutional support, but there were also major political advantages. One is the ability to mobilize support for the ICC from well-established institutions in all regions of the world. The national bars provide bridges from the ICC, in The Hague back to many home countries.

Individual Cases: supporting lawyers. An international criminal bar is also designed to help individual lawyers play their role as challengers to institutional power, or what is known in democracies as the loyal opposition. The defence is there to offer safeguards and ensure that the prosecutor and the judges do not exercise their power arbitrarily. The role of the defence is very often viewed as unpopular; lawyers will seldom get sympathy when representing very unpopular accused persons. To play their role effectively, especially in emotionally charged cases like war crimes, they need an institution to support their work as guardians of the presumption of innocence. Furthermore, most people assume that defence is not really needed except as a façade since genocide, war crimes, and large-scale terrorist acts create clear-cut court cases. The last ten years have shown that the reality is very different. It is one of (a) factual ambiguity, (b) procedural and jurisdictional complexity, (c) political controversy, and (d) potential arbitrary use of power. With respect to ambiguity, problems of evidence are a concern. Very few cases are clear-cut; there are often many shades of grey and controversial issues; there is much ambiguity as to who is actually responsible. With respect to complexity, the accountability of leaders in complex situations create challenges (military chains of command, the media and public opinion, economic support for war) and there are also problems of jurisdiction. (e.g.: the Pinochet case.) Political controversy is also a reality; there are passionate differences of political opinion, leading some opinion leaders to depict the tribunals as examples of victors' justice. (e.g.: late Milosevic in the former Yugoslavia, Taylor

[35] See *Bilateral Immunity Agreements*, online: CICC <http://www.coalitionfortheicc.org/?mod=bia>.

in Liberia, Pinochet in Chile and many others.) The *ad hoc* tribunals have also been criticized for regional, racial or cultural inconsistencies. Finally, arbitrary use of power is also a potential danger. The legal profession needs to hold in check and balance the other organs of the court (the Prosecutor and the Judiciary) to ensure the legitimacy and the credibility of the system. The defence must be given the full opportunity to challenge and test the evidence presented by the Prosecutor.

Furthermore, major ICC cases will try to reconstruct entire pieces of history. They will deal with wars in which armies on both sides use terror against civilians; their political goals are to dominate ethnic groups and economic resources; civilians are the main casualties. These are not ordinary criminal trials. In this process defence lawyers need to ensure that the court gives full consideration to all the perspectives and versions of history presented to it. They must play the role of watchdogs to protect the presumption of innocence and guarantee the right to be heard. As the expression goes, "Courts try cases, but Lawyers try the courts."[36]

IV. Equality of Arms for the Defence

The ICC and the *ad hoc* tribunals can become models for post-war and transitional countries. In rebuilding these societies, there should also be concern with rebuilding the criminal justice system in the right way. Without a properly independent defence and a strong legal profession, the courts risk turning into kangaroo courts and the attempt at establishing a democratic state will likely fail. These societies need a freestanding bar or a similar institution to protect the political independence of lawyers which can only be ensured through self-regulation. Of course, lack of resources is a major problem in transitional countries. Lawyers are viewed as wasting time and delaying the process. However, certain key questions must be asked: what are the true costs of conducting one-sided trials and creating a weakened legal profession? What is the goal of conducting trials in the first place? Will one-sided trials promote the rule of law, peace and reconciliation in transitional countries or post-conflict societies? The reconstruction of these societies also requires a strong defence for unpopular accused persons, as well as a legal profession capable of promoting and enabling individual rights. In an emerging democracy this means ensuring the protection of fundamental rights such as freedom from arbitrary arrest, torture, cruel and unusual punishment and the right to be competently represented in fair trials. These rights may also touch upon freedom of speech, freedom of thought and religion.

People argue that resources are too limited to support the defence. They appear to assume that the Prosecution and the Judiciary should have priority. If those who oppose funding defence institutions are right then why try to build a justice system? Based on the deliberations surrounding the development of the Nuremberg trials Justice Jackson's firm belief can be deduced and is one that we share, that if

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[36] Telford Taylor, *The Anatomy of the Nuremberg Trials*, (New York: Alfred A. Knopf, 1992) at 44-45.

trials are worth conducting, they are worth conducting fairly.[37] If we do not want to help "transitional countries" to build a fair system of justice for lack of resources then why not concentrate scarce resources on more political solutions including Truth and Reconciliation Commissions or other dispute resolution mechanisms?

A related question that raises very difficult issues is whether poor countries feel they have the resources to build properly functioning criminal justice systems. Are resources better spent on other options–such as health, economic development and less formal types of reconciliation and conflict resolution? The answer must be that the international legal and political communities will decide what they truly want. If the goal is to build a justice system worthy of the name, a strong defence–and an independent legal profession–are needed. Choosing between the institutions which most require funding may be a legitimate choice, but the global community must be clear about what goals it is hoping to accomplish. In post-conflict states with transitional justice situations, the need for legal representation and fair defence for all is even greater. These situations are not only about bringing evil leaders to justice. They must also be about establishing the rule of law for all people. Unless there are lawyers for all those accused of serious crimes, the people will tend to see the new regime as unfair. It will appear as a replication of the old tyranny. One example occurred in Germany in 1945 when it was a post-conflict State. The Nuremberg trials took great pains to ensure fairness. The Prosecutor's–Justice Jackson's–attitude to the proceedings epitomized this approach. Hutchison, in an essay on international criminal tribunals, noted:

> [...] Jackson feared that summary executions would erode the moral high ground the Allies then enjoyed, and he also worried that as time passed the Third Reich's sympathizers would be able to deny Nazi atrocities absent concrete documentation: "Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible accusatory generalities uttered during the war. We must establish incredible events by credible evidence." By insisting on documentary evidence and by requiring scrupulous attention to procedural fairness, Jackson created a nightmare for his prosecution team and prolonged what he and others hoped would be a month's exercise into a year-long affair.[38]

It may have been a nightmare for his prosecution team, but Jackson's approach has stood the test of time, and left the Nuremberg trials as credible international legal precedents and models for future global institutions. Since the creation of the United Nations,[39] the international community has repeated its strong commitment to the *Universal Declaration of Human Rights*,[40] the *International*

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37 *Ibid*. at 43-55.

38 Dennis J. Hutchinson, "Tribunals of War: A History Lesson in Mass Crimes" *Chicago Tribune* (18 November 2001) C21 [footnote omitted].

39 *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7.

40 GA Res. 217(III), UN GAOR, 3rd Sess., UN Doc. A/810 (1948).

Covenant on Civil and Political Rights,[41] other human rights instruments, and to the principle of fairness as well as the perception of a fair justice system. It also seeks peace, stability and acceptance of a new rule of law and democracy in post-conflict societies. When the new order in criminal justice does not include a strong, vigorous, independent defence, the choice is made to abandon, at least in part, these great goals.

It is an almost universally accepted principle that a true democracy must have three separate powers of government: the executive, the legislative, and the judiciary. They are meant to each hold an exclusive area of power, and also to keep each other in check. Within the judiciary, the same principle of the separation of power should apply. There should be the judges, the prosecutor and finally the legal profession. They, too, are meant to check and balance each other. It is thus imperative for the credibility of international justice to ensure the full participation of defence lawyers as key actors of the third pillar. The third pillar must be represented by a highly qualified, independent legal profession that guarantees the right of access and fair representation for individuals (accused or victims) appearing before the ICC. In Canadian law, this ideal of defence independence is captured in the current standard for prosecutorial disclosure, as stated in *R. v. Stinchcombe*.[42] In *Stinchcombe*, the Supreme Court of Canada held that the prosecution had a fundamental legal duty of disclosure, even if the information was harmful to the prosecution's case. Such an approach illustrates how highly valued the defence's independence and its ability to mount a full and answering defence, are valued in one national legal system. That high priority is not unique to Canadian law, though it does seem to differ markedly from the current international hierarchy of legal values. In the types of cases typically pursued in international justice, the impartiality of the court cannot be taken for granted.

As Justice Robert Jackson of the United States Supreme Court perceptively noted during the Nuremberg tribunals, it is imperative for the credibility of a system of international criminal justice to meticulously adhere to procedural fairness. When the case is a high-profile one and the international community is crying out for justice, the prosecution will be aggressive. Defence lawyers will have the critical but unpopular job of challenging, poking holes and acting as the individual's voice in challenging the charges put forth by the prosecutor. At stake is not only a win or loss in one case, but also the right to a fair trial, the presumption of innocence and the institutional legitimacy of the court. To quote Justice Jackson again, "courts try cases … but cases try courts."[43]

The global network of lawyers involved in the advocacy efforts within the ICB and the ICDAA also vigorously support the goal of ending impunity and the creation of the ICC. These lawyers also vigorously support the new institution with its independent Chambers and its independent Office of the Prosecutor. What must be done–equally vigorously–is to complete the job of institution building by adding an independent legal profession to the ICC system. As previously noted, international

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41 19 December 1966, 999 U.N.T.S. 171.
42 [1991] 3 S.C.R. 326 [*Stinchcombe*].
43 Hutchinson, *supra* note 38.

organisations are trying to set a global standard and act as a model for transitional justice systems. A strong and independent defence, to prevent arbitrary use of power, is an essential component of the justice system in healthy democratic societies. Post-conflict societies need to be guarded against the arbitrary use of power even more vigorously and vigilantly. A key step of democratization in post-conflict societies is the establishment of a third pillar that is strong, effective, independent, and vibrant. A completely independent legal profession with adequate resources to fulfil its mandate, the protection and promotion of individual rights, is essential to strengthen democracy and the international rule of law.