Revue québécoise de droit international
Quebec Journal of International Law
Revista quebequense de derecho internacional

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Special Issue, October 2010

Association internationale des avocats de la défense (AIAD)

URI: https://id.erudit.org/iderudit/1068675ar
DOI: https://doi.org/10.7202/1068675ar

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Publisher(s)

Société québécoise de droit international

ISSN

0828-9999 (print)
2561-6994 (digital)

Explore this journal

Cite this document

Groulx, E. (2010). THE NEW INTERNATIONAL JUSTICE SYSTEM AND THE CHALLENGES FACING THE LEGAL PROFESSION. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, 39–73. https://doi.org/10.7202/1068675ar

THE NEW INTERNATIONAL JUSTICE SYSTEM AND THE CHALLENGES FACING THE LEGAL PROFESSION

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Nota: The following document was originally presented as a speech before the General Assembly of the Norwegian Bar Association by Mrs. Elise Groulx on June 7th., 2006. Minor revisions/corrections to the speech have been made but some facts and figures could remain outdated.

First, I would like to express my gratitude to Ms. Berit Reiss Anderson and to the Norwegian Bar association and his president, Mr. Anders Ryssdall, for inviting me to address this distinguished group of lawyers.

I am visiting Scandinavia for the first time and I would be very happy to learn about your perspectives and approaches to the practice of law. The purpose of my address is to "spread the word" about the gradual globalization of the legal world – in this case of criminal law. I am sure you know about the big cases confronting the international criminal justice – Milosevic, Saddam Hussein, Pinochet, most recently Charles Taylor. I will try to explain their legal process and hopefully bring these somewhat "far away" global institutions closer to home and to your legal practice.

For example, some of your firms – or your colleagues – may become involved in an ICC case in the next 5 years or so, directly in The Hague or here in Norway. Under the Rome Treaty, which created the ICC, the Chief Prosecutor may seek assistance from Norway in investigating a suspected genocide, or even trying a genocide case.

Norway – like Canada – has ratified the 1998 Rome Statute and therefore has a duty under international law to include the core crimes of the ICC system (genocide, crimes against humanity and war crimes) in Norwegian law. This will enable your country to try persons suspected of any of these crimes depending on how universal jurisdiction is applied in Norway.

We live in a globally interconnected world where black market companies and international terrorist networks can support civil wars and repressive regimes in Africa, the former Soviet Empire and other seemingly remote countries.

I would like to speak about three main subjects with you, briefing you about key facts, issues and controversies, which abound in the international criminal justice.

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I. International Criminal Justice System: First, I will give you a short report on the ICC and eight other special courts that constitute the international criminal justice system. These courts are processing about 500 cases – and the number will grow. I will summarize both past achievements and future challenges.

II. Vision of the Three Pillars of International Criminal Justice: One of those challenges is to ensure a balanced system that is built on three independent institutional pillars: the judiciary, the prosecution and the legal profession. Here, I will not be able to resist advocating a strong role for an independent International Criminal Bar – the organization that I helped to create in 2002.

III. Report on the Third Pillar (International Legal Profession): Finally, I will quickly review two absolutely critical challenges in building the Third Pillar of international criminal justice. These are, first, ensuring the true structural independence of the bar from the ICC (and other tribunals) and, second, ensuring that the legal profession is truly self regulated, enforcing its own code of ethics. You will notice that the Third Pillar is "under construction".

I. International Criminal Justice System: "The Facts"

A. Key Message – from Ideas to Institutions

We have just lived through an extraordinary period in the history of international law. It will be known as the 15-year period, when the international community of nations transformed the idea of international criminal law and justice into institutional reality. We have gone from UN Security Council resolutions and paper treaties to 9 courts managing more than 500 cases.

B. The Nuremberg Legacy

1. THE INSTITUTIONALIZATION OF INTERNATIONAL CRIMINAL LAW

The Nuremberg Charter is a source of international criminal law.[1] The Nuremberg trials inspired the International Law Commission's proposal to set up a permanent international criminal court and the drafting of international criminal codes. The Conclusions of the Nuremberg trials helped to draft:

The Genocide Convention, 1948.

The Universal Declaration of Human Rights, 1948.

The Convention on the Non-Applicability of Statutory of Limitations on War Crimes and Crimes against Humanity, 1968.

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[1] See International Law Commission, *Report of the International Law Commission on its Second Session, 5 June to 29 July 1950*, UN ILCOR, 2nd Sess., Supp. No. 12, UN Doc. A/1316. online: United Nations <http://untreaty.un.org/ilc/documentation/english/a_cn4_34.pdf>.

The Geneva Convention on the Laws and Customs of War, 1949; its supplementary protocols, 1977.[2]

2. GENERAL PRINCIPLES OF INTERNATIONAL LAW BROUGHT TO THE ICC:

- The role of customary law was expanded and became applicable in the absence of treaty provisions on individual criminal responsibility.[3]
- Although it is formally prohibited in international law, imposing obligations on third parties to the treaty is justified by the delegation of powers from the parties to the IMT Statute.[4]
- Finding collective criminal responsibility rests within the discretionary power of the Tribunal.[5]
- The London Agreement on the Nuremberg Military Tribunal mainly adopted the Anglo-Saxon procedure but without incorporating any jury of laymen. Since then, all ad hoc tribunals have consisted of professional judges only.[6]

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2 See *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951)*; Universal Declaration for Human Rights*, Rés. AG 217 (III), Doc. Off. AG NU, 3e sess. Supp. N°13, Doc. NU A/810 (1948); *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 2 November 1968, 754 U.N.T.S. 73 (entered into force 11 November 1970); *Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field,* 12 August 1949, 75 U.N.T.S. 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,* 12 August 1949, 75 U.N.T.S. 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War,* 12 August 1949, 75 U.N.T.S. 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War,* 12 August 1949, 75 U.N.T.S. 1949, 75 U.N.T.S. 287 (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 3, Can. T.S. 1991 No. 2 (entered into force 7 December 1978) and *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 U.N.T.S. 609 (entered into force 7 December 1978).

3 See *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, Vol. 22 at 445-67, online: Avalon Project <http://avalon.law.yale.edu/imt/09-30-46.asp>.

4 See Tobias Lock and Julia Riem, "Judging Nuremberg: the Laws, the rallies, the Trials" (2005) 6 German Law Journal 1820, online: German Law Journal <http://www.germanlawjournal.org/pdfs/Vol06No12/PDF_Vol_06_No_12_1819-1832_Developments_LockRiem.pdf>.

5 Vladimir-Djuro Degan, "On the Sources of International Criminal Law" (2005) 1 Chinese Journal of International Law, Vol. 4, 45. This article talks about the large discretionary powers of *the ad hoc* tribunals. See also Alexander K.A. Greenawalt, "Justice Without Politics? Prosecutorial Discretion and the International Criminal Court" (2007) 2 International Law and Politics 583 at 648-650. This later article refers to the discretionary powers of the ICC Prosecutor.

6 Degan, *ibid*.

3. CHANGES TO THE NUREMBERG LEGACY IN THE ICC

- Victims receive more awareness and representation today, while the IMT was `largely victim-free`.[7]
- While the principle of non-retroactivity was a point of contention at Nuremberg, this is not the case with the ICC, as it only has jurisdiction over crimes committed after it entered into force.[8]
- Since the ICC will have to deal with a multitude of conflicts, it can be argued that it will be less likely for the Court to be accused of executing victor's justice (as opposed to Nuremberg or the localized *ad hoc* tribunals).
- The International Military Tribunal (IMT) provided some definitions of the crimes punishable under the ICC statute. However, in the Nuremberg judgment, the charge of crimes against humanity related to an armed conflict. Today, this condition is no longer necessary as the ICC statute follows the seminal *Tadic* decision by the ICTY.
- With respect to command responsibility the consensus now is that civilians can also be held responsible. When it comes to raising the defence of superior orders however, such a possibility is argued to be a step back from Nuremberg. The fact that the death penalty is not available as a means of punishment is considered a great achievement, even regarded as evidence of developing customary international law in that respect.[9]

The development of international law over the past decade has seen more attention focused 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 immunity 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.[10]

Since the Nineties, we have seen the creation of a true international criminal justice system under a record time period:

- Two UN *ad hoc* tribunals (the International Criminal Tribunal for the Ex-Yugoslavia and for Rwanda/ ICTY and ICTR).
- The Special Court for Sierra Leone.
- The newly constituted Cambodian Court.

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7 Lock and Riem, *supra* note 4.
8 *Ibid.*
9 *Ibid.*
10 Ralph Zacklin, "The failings of Ad Hoc International Tribunals" (2004) 2 Journal of International Criminal Justice 541.

- Hybrid courts for Kosovo, East Timor and Bosnian War Crimes.
- The Iraqi Special Court.
- The new International Criminal Court (ICC).
- Lately, the Security Council created an ad hoc tribunal to prosecute the individuals involved in the assassination of Mr. Rafik Hariri, former Prime Minister of Lebanon [11]. This Statute constitutes a significant breakthrough in the evolution of fair trials in international criminal law, since it creates an independent office for the defence[12], in full equality to that of the Prosecution – a organ similar to the one ICDAA advocated for during the 1998 Rome Conference[13] that led to the creation of the ICC.

C. Brief History of the last 100 Years

Phase 1: The principles of the laws of war and international humanitarian law were elaborated in a series of international conventions such as the Hague conventions of 1899 and 1907, and the Geneva Conventions after the 2nd World War. Some international organizations, notably the Red Cross, were created to overlook the respect of these conventions. Enforcement was far form formal and left to nation states. It certainly was not effective.

Phase 2: The Second World War & the Cold War: With the Nuremberg and Tokyo trials, an international criminal justice system rose from the ruins of the Second World War. But the plan to create a permanent world court stalled at the start of the Cold War and then disappeared until the end of the Cold War in 1989.

Phase 3: Fast Breakthrough – 1990-1995: With the fall of the Berlin Wall, an international network of countries, NGOs and legal idealists revived the world court project and moved it quickly from paper to reality. By 1995, two temporary tribunals had been created by the UN Security Council to hear war crime and genocide cases perpetrated under two brutal civil wars – the break-up of the former Yugoslavia and the extraordinarily violent Hutu-Tutsi conflict in Rwanda.

Phase 4: "Perfect Storm" – 1995-2005: Then came what Bill Pace, leader of the Coalition for the International Criminal Court (CICC), calls "a perfect storm". While the first cases were heard by ICTY and the ICTR, the Rome Treaty was negotiated in 1998, creating the ICC despite opposition from the US and other big powers. The treaty was then ratified in record time and the court started operating in 2003-2004. At the same time, the other special tribunals mentioned above were created.

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[11] See *Resolution 1664*, SC Res. UN SCOR, 2006, UN Doc. S/RES/1664.

[12] *Statute for the Special Court for Lebanon*, CS Res. UN CSOR, 2007, UN Doc. S/RES/1757, Attachment, art. 7 (d).

[13] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June-17 July 1998 (Rome Conference).

Such judiciary activism prompted a number of national initiatives as well:

- Spanish and Chilean officials took steps to prosecute Augusto Pinocohet.
- Action was taken in Belgium and Senegal to prosecute the former dictator of Chad, Hissene Habre.
- The Iraqi special tribunal was created to hear the Saddam Hussein case.
- Bosnia has seen the establishment of a special chamber, The Bosnian War crimes Court, to hear the flow of cases that the ICTY cannot handle.
- An ad-hoc human rights tribunal for East Timor was established to try those responsible for the post-independence massacres.
- All these cases fall outside the jurisdiction of the ICC.

D. Where We Stand

Where do we stand today? It seems that hardly a week goes by without international justice making the headlines in the media. When it all started over 13 years ago, we hardly ever heard about international criminal law, except in specialized circles. There is a lot happening.

1. CASELOAD

From a lawyer's perspective, there is a growing caseload:

- Almost 250 cases are heard or scheduled to be heard before three special tribunals: Rwanda, ex-Yugoslavia and Sierra Leone.
- More than 380 cases are pending before the East Timor tribunal.
- Five arrest warrants and one arraignment have been ordered by the ICC.
- The judicial system is active in Kosovo and in Bosnia.
- An active international criminal tribunal in Cambodia is now established to adjudicate alleged atrocities committed under the regime of the Red Khmers.

2. OUTCOMES

Here are some of the legal outcomes to date:

- 66 convictions and 11 acquittals before the ICTR and ICTY.
- 82 convictions before the East Timor tribunal and 3 acquittals.
- More than 400 cases are divided between all the tribunals: 43 before the ICTR, 50 before the ICTY, 11 before the Sierra Leone Special Court (SLSC), 300 in East Timor, 8 before the ICC.

3. ACQUITTALS

There were 3 acquittals in Nuremberg, 5 at the ICTR, 8 at the ICTY (2 following appeals) and 3 in East Timor. Some commentators express their surprise, others even find such acquittals scandalous. But acquittals illustrate that the justice system is working – not failing.

Amongst such a voluminous caseload, there are a few high profile cases – Taylor, Saddam Hussein, Milosevic – but many are simply not noticed. This is why the ICC, NGOs and my organization are engaged in outreach programs. The legal profession needs to be more involved in the new system and help shape the development of law practise. The legal profession also needs to push for high standards of justice and assert itself against excessive bureaucratization.

E. Achievements to Date

1. ENDING IMPUNITY

The public policy goal for the creation of new international tribunals was to bring an end to impunity. This goal is gradually being achieved. Following the tragic genocides of the early 1990s, the consensus was to end the impunity of the political and military leaders who organize civil wars, genocides, ethnic cleansing and war crimes. In this regard, there has been substantial progress.

2. FILING CRIMINAL CHARGES – RADICAL CHANGE OF STATUS

Hardly noticed, and certainly not appreciated by the general public, the prosecution of powerful leaders is a historical achievement. Their legal and political status is altered in a profound way. Their impunity has ended.

Consider the change. Traditionally, when losing power, leaders would simply seek shelter in another country. They would often live comfortably with the status of "former dictator in residence." They might have had to live with travel restrictions – and special security arrangements – but they could manage their personal fortunes and live comfortably, knowing they were immune from prosecution. Sometimes they even enjoyed legal immunity in their own country as part of a negotiation towards political transition. Such was the case with Pinochet.

The possibility of a trial puts an end to such comfortable "arrangements." Charging them with an internationally recognized offense immediately transforms these people into either fugitives from justice or criminally accused individuals – forced to mount a complex legal defence and usually to be jailed while awaiting trial (often for years). Milosevic is the emblematic example of a fallen ruler who was moved from the presidential palace in Serbia to a cell at the ICTY in The Hague. Also, Saddam Hussein was forced to hide from the US Army in Iraq. Finally, Charles Taylor was arrested and charged after negotiating "protection" from Nigeria.

"Ending impunity" does not start or even end with a conviction. It starts with the filing of charges, the arrest and, especially, with pre-trial detention. Even my ordinary clients suffer serious consequences and stigmas when charged and tried – and the penalty is even greater for leaders. A criminal trial can be a life-changing experiences for anyone – but especially for the leaders who held the jailor's keys in their earlier career.

Debates and doubts have emerged about the effectiveness of international criminal justice, especially since the premature death of Slobodan Milosevic. But the usual criticism overlooks the fact those prosecutions are being noticed by dictators and generals around the world. They understand that old power plays are being reversed and that the tables are turning. Raising such an awareness is a big legal and political achievement. Acquitting a leader – after a long criminal trial – does not make him "immune" from justice in the traditional sense. Ending impunity does not require a 100% conviction rate.

Another measure of progress is the high profile of some of the dictators who have been charged: Milosevic, Pinochet, Charles Taylor, Hissene Habre, Saddam Hussein to name a few. They constitute a wider and more varied group of leaders than the defeated leaders of Nazi Germany and Imperial Japan – they were all leaders of different countries and conducted half a dozen wars, not a single world war.

The trials are not over and the results are mixed – this is especially the case of the Milosevic trial, since he died in detention in The Hague before the verdict was announced.

There will always be limits of resources and the number of prosecutions before international courts will always be a fraction of all the crimes committed in genocide. Ultimately, impunity will only be eliminated when legitimate national governments "share the load" with the ICC, similarly to the follow-up trials that took place in Germany and elsewhere after the Nuremberg trials.

F. NORWAY and the ICC

1. ROLE OF NATION STATES IN THE ICC SYSTEM

The ICC operates under the principle of, which prevents conflicts between the ICC and national criminal jurisdictions. The complementarity principle ensures the ICC serves as a last resort to bring justice to victims of genocide, war crimes and crimes against humanity. The Court's jurisdiction is limited to the crimes that occurred after the entry into force of the Statute, i.e. after 1st July, 2002. The ICC is currently investigating those crimes that occurred in the republic of Uganda, the Democratic Republic of Congo (DRC), the Central African Republic, and Darfur (Sudan).

2. THE SITUATION IN NORWAY

Norway signed the Rome Statute of the ICC on 28 August 1998 and ratified it on 16 February 2000. It was the first country to sign the Privileges and immunities agreement of the ICC on 10 September 2002. Regarding the immunity granted to the King of Norway by the Constitution, Norway favored an interpretative approach instead of modifying its Constitution such as the Netherlands, the United Kingdom, France and Brazil did. Many European States found it useless to modify their Constitution to abolish the immunity of Heads of State. They preferred to make a statement declaring that any Head of State who committed a crime falling within the jurisdiction of the ICC could no longer claim the protection of the Constitution. Norway was the first nation to use this approach.

3. THE CASE OF MICHEL BAGARAGAZA

Michel Bagaragaza was a close partner of former Rwandan President Juvenal Habyarimana, before his assassination in 1994. On 13 February 2006, the Prosecutor of the ICTR proposed to transfer his case to Norway following the established procedure of article 11 bis of the Rules of Procedure and Evidence of the ICTR. If the transfer had occurred, this would have represented the first case to apply such a provision at the ICTR. These dispositions have been commonly used in the recent past by the ICTY and cases have been sent to the Bosnian War Crime Chamber in Sarajevo to help unclog the docket (roll) of the ICTY.

Following a judgment rendered on 19 May 2006, in Norway, the ICTR refused to grant such a transfer [14] because Norwegian criminal law does not cover the crime of Genocide:

> …the Chamber has concluded that the Kingdom of Norway does not have any provision against genocide in its domestic criminal law. …the Accused may be prosecuted as an accessory to homicide or negligent homicide, for which the maximum sentence is 21 years.

There is no direct legislation on the crime of genocide in Norwegian national law, but article 1 of the Convention on the prevention and punishment of the crime of genocide ratified by Norway on 9 December 1948 states:

> The contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law, which they undertake to prevent and to punish.

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[14] See *Prosecutor v. Michel Bagaragaza*, IT-2005-86-R11bis, Decision on Defence Application for Modification of Detention Conditions of the Accused (29 August 2007) (International Criminal Tribunal for Rwanda), online: ICTR <http://www.ictr.org/ENGLISH/cases/Bagaragaza/decisions/070829.pdf>.

In connection with Norway's ratification of the Genocide-convention, the Justice Department expressed the opinion that genocide was supposed to be punished as murder in accordance with §233 of the Penal Code[15] :

> **§ 233**. Any person who causes another person's death, or is accessory thereto, is guilty of homicide and shall be liable to imprisonment for a term of not less than six years.
>
> If the offender has acted with premeditation or has committed the homicide in order to facilitate or conceal another felony or to evade the penalty for such felony, imprisonment for a term not exceeding 21 years may be imposed. The same applies in cases of repeated offences and also when there are especially aggravating circumstances.
>
> **§ 233a**. Any person who enters into an agreement with another person to act the ways that are described in § 231 or § 233, shall be liable to imprisonment for a term not exceeding 10 years.

Therefore, it should be possible to pursue a case of genocide against an individual in Norwegian courts. Since there is a penal provision in the domestic laws, it may be employed to prosecute individuals acting on behalf of business entities and impose a penalty on the business entity. The provision would apply to any individual or company established in Norway, who might be guilty of such actions carried out abroad[16]. However, this has not been done and there is no case law upon which to base an analysis of the effect of this form of integration.

4. METHODS OF IMPLEMENTATION OF THE ROME STATUTE IN NORWAY

Norway adopted an implementation legislation of the Rome Statute to meet its cooperation obligations on June 15, 2001. This legislation[17] reaffirms Norway's obligation to cooperate with the ICC, while permitting Norwegian authorities to grant financial assistance to the Court. However, no amendment of the Constitution is contemplated.

There is no process of incorporating the ICC core crimes (Genocide, Crimes against Humanity and War Crimes) into national Norwegian legislation yet, but Norway will continue to apply international standards regarding fair trial rights and due process. Norway has also opened the door to accepting convicted persons to serve their sentence on Norwegian territory.

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15 St prp, No. 56, 1948, page 6.

16 See Section 8, below, for more on this topic.

17 Norway, *Act No. 65 of 15 June 2001 relating to the implementation of the Statute of the International Criminal Court of 17 July 1998 (the Rome Statute) in Norwegian law*. Online: <http://www.legal.coe.int/criminal/icc/docs/Consult_ICC(2001)/ConsultICC(2001)43E.pdf>.

G. International Criminal Justice System: Challenges

1. MAJOR CHALLENGES

While the ICC and other tribunals are making substantial progress, the work is not easy and is surrounded by controversy and criticism. The ICC faces five challenges in the future:

- Extending jurisdiction and international power politics
- Establishing policies governing investigations and prosecutions
- Management of very complex trials
- Management of political trials
- Ensuring the right to a fair trial

The ICC – and lawyers practising before the court – must meet these challenges with courage and grace in order to build international political legitimacy.

a) Challenge 1: Jurisdiction & the International Power Politics

The US under the Bush administration has been the most publicized opponent of the ICC – but we need to remember that other holdouts are Russia, China, India and most Arab and Muslim countries.

In effect, the ICC is sometimes described as a European, African and Latin American court because its territorial jurisdiction over the 3 core crimes already stated is limited to the territories of nations who have ratified the Rome treaty (or the nationality of accused individuals coming from those same states). Even though the ICC has been blessed with strategic support from "like minded" middle powers like Norway, other Baltic countries, Canada and Australia, it falls short from making its jurisdiction universal.

There is also an important debate under way about the crime of aggression which remains outside the ambit of the ICC for lack of agreement over a legal definition. One can easily imagine how important this issue is if the ICC is to become an instrument of conflict prevention.

In our opinion, the ICC needs to get full international support and determined diplomatic action by ICC supporters to reach out to its detractors and opponents. The long-term objective of true universality will require excellent performance by the court itself as a credible judicial institution.

b) Challenge 2: Choice of Investigations & Prosecutorial Policy

The ICC Office of the Prosecutor (OTP) is a fully independent organ who can trigger the jurisdiction of the court *proprio motu*. The OTP is responsible for conducting investigations, bringing charges and very importantly deciding who will be prosecuted. Following the principle of complementation, the OTP also works with national prosecutors to decide whether charges can be brought before the ICC or before national courts.

The task of the Prosecutor at the ICC has been described as one of the most important and difficult legal offices in the world today. While it is not diplomatic to say so, the job is necessarily political, or is at least deeply affected by politics. Controversies abound:

- Uganda & the Lords Resistance Army (LRA). The government of Uganda worked with the ICC to bring charges against the LRA. Some opponents have claimed that this may have jeopardized the peace process and that it constituted a diversion to shield Ugandans officials from prosecutions regarding their involvement in Ituri (East Congo).
- Charles Taylor & African opinion. His arrest led to the same kind of controversies regarding the peace process in Sierra Leone and the security of the region.
- Pinochet: The same arguments were put forth regarding the political stability of Chile after Pinochet was defeated and a new government was put in place.
- Milosevic: At the time of the issue of an arrest warrant against Slobodan Milosevic (end of May 1999), detractors of the ICTY feared that the peace process in Kosovo would be jeopardized by the prosecution of a powerful head of state.

The critics and supporters of OTP can debate the validity of a particular prosecution for hours. The decision to prosecute will inevitably be controversial in some cases. A credible prosecution policy will be critical in establishing the credibility of the ICC.

c) Challenge 3: Managing Complex Trials

The trials of Nuremberg, Slobodan Milosevic and Saddam Hussein are not ordinary criminal trials. They reconstruct entire periods of history. They deal with wars in which armies on both sides use terror against civilians; where the political goals are to dominate ethnic groups and economic resources; where civilians are the main casualties.

These major ICC cases are similar to the major corruption cases inhabiting the American legal landscape such as Enron or Worldcom, or to the major civil law

suits involving tobacco and asbestos industries. The ICTY and ICTR trials are similar in length and complexity, even when deciding on the cases of middle-level people.

Most people assume that genocide and war crimes create clear-cut court cases. In fact, the trials are not simply about acts of murder, kidnapping and rape – but also address the systems that allowed for these crimes to be committed on a mass scale. They address the political and military leaders who organize these systems and are alleged to organize and lead them without actually killing anyone themselves.

There are several complexities involved in such trials. To start with, evidence is often weak and hard to gather. In some cases, defendants have been convicted based on the testimony of anonymous witnesses. The difficulty to collect evidence and for the defence to conduct on-site investigation has opened the door to the possibility of arbitrary convictions, because the ability to test the evidence presented by anonymous witnesses or without proper investigations is limited.

It can also be hard to trace lines of accountability and leadership. In this regard, the cases often involve complex legal concepts such as conspiracy, joint criminal enterprise and command responsibility.

d) Challenge 4: Political Trials

Differences in political opinion lead to passionate debates. Some opinion leaders depict the tribunals as examples of victors' justice. Consider the funeral of Milosevic in March 2006 and the polls showing that more than 65% of the local population still saw the Tribunal as an anti Serb-court. The Serb mentality is at odds with the international community, which considers Milosevic to have been a ruthless war criminal.

Other ad hoc tribunals are often criticized for regional, racial or cultural inconsistencies. This is certainly the case of the ICTR, where Hutus have claimed that the Tribunal for Rwanda has been biased against them and has not prosecuted the opposite Tutsis for their alleged exactions.

Over time, the protection of the right to a fair trial will be crucial for the system to be perceived as fair by all concerned. Defence lawyers need to ensure that all the perspectives and versions of history are presented to the court. They must play the visible role of barking watchdogs to protect the presumption of innocence and guarantee the right to be heard.

The rule of law should guarantee a fair trial for all. Not only must justice be rendered but it must be perceived as such. This is the ideal captured by the British judge, Lord Hewart, and quoted by Canadian lawyers in their pleas every day: "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."[18]

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[18] *R.* v. *Sussex Justices*, Ex p. McCarthy [1924] 1 K.B. 256 at p. 259.

Over time, ensuring fair trials will increase the chances that all parties, including the groups supporting the individuals accused of war crimes, will accept both the trial process and the ultimate verdicts. It is our only chance to close the public opinion gap perceived in the Milosevic case.

e) Challenge 5: Protecting Fair Trial Rights & the Presumption of Innocence

To end impunity, it is vitally important to arrest and prosecute alleged war criminals. To ensure a strong ICC, it is equally important to ensure that they receive a fair trial. This is the task of the defence lawyers, whose mantra is: "A trial worth conducting is worth conducting fairly".

It is not easy work. Defence lawyers start with the challenge of enforcing the presumption of innocence in cases where few people presume that the accused are innocent. They press for the respect of fair trial procedure, although most people might think it be a waste of resources.

Giving Charles Taylor the benefit of a fair trial is not only important for his own sake, but it is also vital to preserve the legitimacy and credibility of the court.

2. ROUGH JUSTICE VS. JUSTICE UNDER LAW

Think of the difference between, on one hand, the trial of Benito Mussolini, and the Nuremberg and Tokyo trials on the other hand. Mussolini was hung by a mob – the Americans would say lynched – after a "hearing" that probably lasted a few minutes. The Nazi leaders who were captured alive were tried legally, benefited from defence counsel, and had a chance to take the stand. The trials lasted months and cost a lot of money. A few of those accused leaders were acquitted of some charges at least. Many were executed. Such outcomes were therefore identical to the case of Mussolini. But the process was entirely different and presented an alternative to "rough justice": "justice under law."

3. JUSTICE UNDER LAW AND THE DEFENCE

"Justice under law" is primarily about the process and not about results. However since perception is so crucial, due process bolsters the credibility of any judicial institution. A long strand of convictions obtained quickly and cheaply, with a biased process, ultimately undermines the cause of "justice under law", because courts become instrumentalized as conveyers of "rough justice." The defence is there to remind the court – and the community of nations – that you cannot have it both ways.

4. JUSTICE JACKSON – TRYING CASES

Conducting a criminal trial of political and military leaders is not a routine task. In 1945, US Justice Robert Jackson discussed proposals to try the Nazi leadership. He noted that a political and military decision could be taken simply to execute them. Then, he said:

> […] if good faith trials are sought, that is another matter …. all experience teaches that there are certain things you cannot do under the guise of judicial trial. *Courts try cases but cases also try courts.* You must put no man on trial before anything that is called a court …. under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty […] [emphasis added].[19]

In other words, a court of law should not be used to rubber stamp convictions. This method is already used by political channels. A properly defined court must conduct a judicial trial, based on the presumption of innocence and on the possibility of acquittal. Some controversial cases can be expected to "try the court." If the main role of judges and prosecutors is to try the case, the main role of defence lawyers is to ensure the case tries the court. In other words, defence lawyers do more than represent the accused individual. They also test the system – in particular the ability of the system to treat the accused fairly and give them a full hearing. In short, defence lawyers play the role of fair trial watchdogs.

Some lawyers from civil law countries find this statement too aggressive, but in our opinion it captures a key part of our role, which is well worth debating.

II. Vision of the Three Pillars of International Criminal Justice

It is important to point out that the right to a fair trial is fully protected in the statutes of all four courts (ICTY, ICTR, Sierra Leone and ICC).[20] hey guarantee the presumption of innocence, the right to counsel, the right to be heard and other procedural safeguards. But these rights exist on paper only. They must be enforced through vigorous advocacy by the defence lawyer in each case.

The effective right to a fair trial must be understood to include a strong and independent defence. In the ICC and civil law countries, this concept needs to be extended to include effective representation by the victims' counsel.

In the adversarial systems of Canada, England and the US, professional defence attorneys quickly learn that the effective right to a fair trial is not widely accepted. It all depends on the popularity of your client. For example, fair trial rights are passionately advocated for political prisoners in oppressive regimes – they have a

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

[20] See Lock and Riem, *supra* note 4; Degan, *supra* note 5.

heroic story to tell. But it is not a serious issue for other types of defendants whose stories are less appealing, such as alleged rapists, child abusers, wife beaters, brutal gang leaders, drug lords and war criminals. Frankly, if these people are inadequately represented by counsel and summarily convicted, most voters and politicians will rise up and cheer, "You got what you deserved."

Such an attitude seriously undermines the presumption of innocence. The mission of the professional defence lawyer is to spoil the prosecution's party and ensure that guilt is determined after listening to the story of the accused in a fair hearing, not before.

War crimes test the will of the international community to ensure that all accused persons benefit consistently from the presumption of innocence, the right to counsel and the right to be heard in full.

A. Equality of Arms

In such cases, the will and emotional strength of the defence lawyers are put to the test. Playing the role of watchdog is lonely and unpopular. They need to work from a position of institutional strength. In this regard, it is more and more widely recognized that defence counsel must have "equality of arms" with the prosecution. This includes equal access to information, evidence and resources. They must also be institutionally independent from both the prosecutors and the judges.

B. Three Pillars

When the International Criminal Defence Attorneys Association (ICDAA) started 12 years ago, we drew inspiration from the words of an authority in the field of international law, Professor Cherif Bassiouni, who wrote:

> The three main pillars of the criminal justice system are: an independent judiciary, a prosecuting authority which guards public interests, and *independent and effective defence counsel* [emphasis added].[21]

The first pillar is the independence of the judiciary. Its importance is more and more accepted in terms of the role of impartial judges in enforcing the rule of law. The second pillar is the prosecution. In Canada and many other countries, prosecutorial independence – freedom from political meddling – is increasingly accepted as a public policy goal. The third pillar is the defence and victims' counsel – the legal profession. However, the independence of criminal defence lawyers does not draw much attention.

This uneven focus certainly was true of the diplomats and judicial policy makers who led the creation of the ICC and the ad hoc tribunals. Certainly, both

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[21] Stephen Thaman, "General Report: The Planning of the Conference" (1992) 63 Rev. I.D.P. 505 at 516.

judicial and prosecutorial independence were highly visible issues. The defence – and lawyers in general – were virtually forgotten. While it is not diplomatic to use these words, many acknowledge this fact today.

We experienced this personally over many years. In 1996, not long after the ICTY was created, I was invited to attend a conference organized by the Office of The Prosecutor (OTP). Mrs Louise Arbour had just been appointed Chief Prosecutor of the ICTY and the ICTR. I spent two days listening to all participants of what was at the time the field's inner circle of international criminal law. Nobody spoke about the defence, except for mentioning the issue of low fees for defence attorneys. I was pretty alarmed at the end of the meeting. Was it possible that a new criminal justice system was being built without regards for the defence? How could the new system be fair and seen to be fair if the defence was ignored?

I spoke about it to Mrs Arbour, now the High Commissioner for Human Rights at the UN, and she strongly encouraged me to look into the issue if I felt so strongly about it.

It became clear that we needed two imperatives. (1) An international organization. (2) A vision, with intellectual foundations.

The organization, founded in Montreal, was the ICDAA. We eventually founded a new organization, the International Criminal Bar (ICB).

C. Intellectual Foundations – Council of Europe

From the early days we were concerned about trying to make a case that the ICC defence should be built on the Anglo common law model. But no matter which legal system we are talking about – inquisitorial or adversarial – neither a judge nor a prosecutor should claim to present the story of the accused. This is the appropriate role of the defence attorney.

Happily, in the year 2000, the Council of Europe provided a good foundation for international law, which spanned common, civil and various mixed systems. In that year, the Council issued guidelines concerning the legal profession. Here are two key points:

- The guidelines underline "the fundamental role that lawyers and professional associations of lawyers play in ensuring the protection of human rights and fundamental freedoms" and link this role to their independence from government and other external influences.[22]
- A Recommendation, adopted by the Committee of Ministers on 25 October 2000, points to the importance of "the *independence of lawyers* in the

[22] Council of Europe, Committee of Ministers, *Recommendation of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer* R (2000)21E (2000), online: Council of Europe <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage =533749&SecMode=1&DocId=370286&Usage=2>.

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* [emphasis added].[23]

- The Recommendation stresses that "all necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and *without improper interference* from the authorities or the public […] [emphasis added]."[24]

In a background information document supporting the ministerial Recommendation, an international group of experts claimed:

> 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 of lawyers. The independence of the judiciary and of lawyers are essential elements of any system of justice.[25]

1. THE INTERNATIONAL COMMITTEE OF EXPERTS

The Council of Europe guidelines appear to have been inspired by an earlier draft written by 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 [emphasis added].[26]

The Committee of Experts went on to say:

- "Adequate protection of human rights and fundamental freedoms … requires that all persons should have effective access to legal services provided by an independent legal profession."[27]

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23 *Ibid.*

24 *Ibid.*

25 Council of Europe, European Committee on Legal Co-operation, *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 para. 20, online: Council of Europe <https://wcd.coe.int/ViewDoc.jsp?Ref=CM%282000%2956&Language=lanEnglish&Ver=add&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

26 Association Internationale de Droit Pénal, *Draft principles on the independence of the judiciary and on the independence the legal profession*, (Paris: Érès, 1982) at 68.

27 *Ibid*. at 69.

- "Lawyers must be able to counsel and represent their clients…in accordance with their *established professional standards and judgment without any restriction, influences, pressures, threats or undue interferences from any quarter* [emphasis added]."[28]

To understand the significance of the three "independent" pillars, let us consider three imaginary scenarios:

- An ICTY judge is pressured to resign by the members of the UN Security Council based on an unpopular decision.
- A senior prosecutor routinely consults his political masters on the filing of charges and motions in individual cases.
- A defence lawyer is disciplined or loses his or her professional certification after vigorously representing an unpopular client.

These scenarios illustrate the importance of professional independence in protecting the integrity of the criminal justice system. In the case of defence counsel, freedom from outside influence includes 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 he or she has offended, or a court official that believes the case is dragging on?

D. Institutional Reality: Two-pillared Courts

An ideal vision of the Third Pillar is not reflected in the institutional reality. None of the major courts created in the 90's – including the ICC – provide for the legal profession. They have been built around two pillars with independent judges' chambers and independent prosecutors.

This leads to two problems – experienced to date mainly at the ICTY and the ICTR. The first problem is that the lawyers end up being paid by a court official, the Registrar, who is in place to service judges and prosecutors. The management of defence cases is therefore audited and even supervised by the Registrar – even in the middle of long cases. Frankly, such a practice seems to violate the spirit – and the letter – of the Council of Europe guidelines.

The second problem is the inequality of arms. The Prosecutor works on a case with a team for years before the arrest, and has a very detailed knowledge of it. Defence lawyers on the other hand become involved in cases on an individual basis only after an indictment is produced or disclosed and someone is in custody. Initial contacts between prosecution and defence lawyers are therefore very imbalanced.

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[28] *Ibid*.

For years, defence counsel did not have the benefit of a centralized defence office with administrative, management, secretarial and translation facilities. Defence lawyers had limited opportunities for mentoring and limited negotiating and lobbying power. Fortunately, the International Criminal Bar (ICB) and the Association of Defence Counsel (ADC/ICTY) have been established.

1. STATUS REPORT

Our advocacy campaigns have put the defence and the legal profession "on the map" at the ICC. There are rules of procedure that formally oblige the Registrar to respect and protect "the right of the defence." However, defence and victims' lawyers certainly do not constitute – collectively – an independent Third Pillar of the ICC. It would be fair to say that the Third Pillar is about half built.

III. Building the Third Pillar

What is the blueprint of the third pillar and where do we stand in the construction project?

A. Institutional Independence

How is the key feature of all three pillars – independence – defined and applied in the case of the legal profession?

"Independence" is defined in terms of a self-governing legal profession, free from supervision by judges, court officials, prosecutors and members of the executive branch of government.

Historically, bar associations guaranteed the independence of the legal profession. To earn their 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 and to the public. But 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.

As a basic principle, lawyers must not be disciplined or supervised by judges, court officials or prosecutors with whom they deal regularly in the conduct of individual cases.

The tradition of an independent self-governing legal profession is shared by the civil and the common law countries. It helps to ensure that accusation and defence lawyers are equal partners in the criminal justice system. The judiciary and prosecution are each backed by two powerful state hierarchies, while the lawyers are supported by independent bar associations.

In practical terms, two key requirements for building an independent Third Pillar in the international criminal system are:

- Structural independence from the ICC (and other courts)
- Self regulation, notably in the field of professional ethics

This "work in progress" has been the focus of our advocacy work in the last decade.

B. Structural Independence: From the Defence Unit to the ICB

The ICB is more than a national or provincial bar with individual members. As the first global bar, it needed to bring together ICC legal practitioners with major legal institutions from around the world:

- Bar associations and law societies such as UIA, ABA, IBA, CCBE, IABA/FIA and many national bar associations
- Independent associations of lawyers
- Non-governmental organisations (NGOs) in the field of international law
- Defence and victims counsels.

We have brought together individual and institutional members from all continents and many legal systems, to support the work of the ICC and the international criminal justice system.

1. HISTORY OF ADVOCACY[29]

From the start, we noticed that lawyers needed to become far more visible, stand up and assert their independence as full partners of the new system. Such was the purpose of my international advocacy campaign.

- I started by attending the preparatory meetings leading to the Rome conference through 1997 and early in 1998, at the United Nations in New York. Coming into this forum, which first appeared like a jungle, to talk about the defence and the legal profession, while so many NGOs were competing to seek justice for victims, was not popular. The whole experience was far from easy.
- My intervention was seen as disruptive, because the unpopular issue of legal defence was what everybody wanted forgotten.

[29] See also Chronology – Annex A.

- I proposed in Rome the establishment of an additional organ of the ICC system: an independent office for the defence. The idea was turned down and I was told that it was too late in the game for its addition and that I should come back when the rules would be negotiated.
- Very few representatives of bars attended the Rome conference or participated significantly in the process at this early stage. I made important contacts and decided to pursue the idea of ensuring an independent legal profession in the new system.
- In 1999 and 2000, advocacy for a defence office continued. A small but influential group of countries (the Netherlands, Canada, Germany, and France) began to support the idea of creating a defence office at the ICC.
- On 30 June 2000, the UN Preparatory Commission adopted the ICC Rules of Procedure and Evidence, which mentioned the defence and legal profession for the first time. The goal of explicitly linking the independence of the legal profession to fair trial rights was realized. The ICC Registrar was explicitly given responsibility for protecting the professional independence of defence counsel[30].
- In November 2000, a consensus emerged about the creation of an international criminal bar to protect the independence of lawyers at the ICC. Further discussions led to the conclusion that a single bar was needed – including both defence lawyers and victims' lawyers. Two bars would have weakened 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.
- In December 2001, 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, more than 350 people from 48 states of all continents, including representatives of 68 bars, associations of counsel, and representatives of non-governmental organizations, attended the Montreal conference. They unanimously declared that the ICB be founded.
- In March 2003, the first ICB General Assembly was held in Berlin (Germany). 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. I was elected first executive president of the ICB.

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[30] See *Rules of Procedure and Evidence*, 9 September 2002, Doc. off. ICC, Doc. ICC-ASP/1/3 (entered into force: 9 September 2002), rules 20-22, online: International Criminal Court <http://www.icc-cpi.int/basicdocs/rules.html> [Annex B].

- On July 22, 2003, the ICB was granted full legal status under Dutch law.

Through this transparent and open process, there has been vigorous discussion and debate. A strong consensus on all issues has not been attained. 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 (the legal profession) is essential to ensure the legitimacy of the new international justice system.

To date, the ICB has not been able to obtain formal recognition as a truly independent bar within the ICC system under Rule 20 paragraph 3 of the ICC Rules of Procedure and Evidence[31]. Such an institutional arrangement is not yet accepted by all 100 governments of the Assembly of States parties to the ICC. The ICC Registrar has not supported the ICB applications.

The ICB will need to work hard for a number of years in order to win true global recognition. It can, however, happen more quickly if lawyers get together and make their voices heard in a unified way.

C. Professional Ethics & Discipline

Self-regulation of the legal profession, which abides to a set of highly demanding standards, 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 free exercise of the legal profession and make lawyers become full partners of the new international justice system.

Such a regime is the norm in many countries. In the case of the ICC, the ICB has faced three challenges:

- Authorship of the Ethics Code was the responsibility of the Registrar, not that of the lawyers.
- Lawyer-Client Confidentiality (Professional Secrecy) would have been infringed by proposals from the Registry to stop a claim of "fee splitting" between lawyers and clients.
- Disciplinary Regime would have been managed directly by the Registry's Office under the initial set of proposals.

In the fall of 2002, the ICB moved to meet these challenges by proposing its own model code to the Registrar, the Assembly of States Parties and other legal associations. The consultation process was open and transparent.

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[31] *Ibid.*

In the end, many key sections of the ICB code were retained, resolving many of the problems. A new Code of Conduct for Counsel was adopted on 3 December 2005 by the Assembly of States Parties. It gave ICC lawyers some authority to manage their own regime of professional ethics. Here is a summary of how the three issues were resolved.

1. AUTHORSHIP OF THE ETHICS CODE

The ICC rules gave the responsibility for preparing the code of conduct for *Defence Counsel* to the Registrar in consultation with the *Prosecutor,* a party that is institutionally responsible for opposing the defence in individual cases.

In September 2004, the Registrar appeared before the ICC Assembly of States Parties with a proposed Code of Conduct for Counsel as required by Rule 8 of the Rules of Procedure and Evidence of the ICC[32]. This Code did not guarantee the independence of Counsel and did not recognize the principle of self-regulation championed by the ICB[33].

- September 11, 2004: The States Parties recognized the problem and only adopted provisionally the Code of Conduct presented by the ICC Registrar. They said they would redraft the Code for Counsel, to better protect the independence of the legal profession[34].
- From the fall of 2004 to November 2005, the States parties redrafted the code of conduct and held extensive consultations with legal organizations[35], including the ICB.
- A key contribution through the entire process was the ICB model code.

2. LAWYER-CLIENT CONFIDENTIALITY (PROFESSIONAL SECRECY)

A critical point of controversy, in the draft code of conduct concerned article 22 (sections 3, 4, and 5) which required counsel to notify the Registrar of any communications with a client regarding fee-splitting.

The ICB fully supported the prohibition on fee-splitting between counsel and clients but strongly objected to sections that were in clear conflict with counsel's obligation to respect professional secrecy and confidentiality. These sections also violated article 67 (1) (b) of the Rome Statute[36], which guarantees the right of an accused to communicate freely and in confidence with counsel of his own choosing.

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32 *Ibid.,* Rules 8.

33 See <http://www.bpi-icb.org/en/>.

34 *Rules of Procedure and Evidence*, *supra* note 30, Rules 20(2).

35 See <http://www.icc-cpi.int/library/defence/ICC-ASP-4-32_En.pdf>**.** Throughout the process, the ICB commented extensively on the protection of confidentiality.

36 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 R.T.N.U. 3, art. 67 (entered into force: 1st July 2002).

More generally, they jeopardized the establishment of the relationship of trust and confidence that needs to exist between counsel and client.

After intense lobbying led by the ICB with the help and support of the Coalition for the ICC (CICC) and many international and national bar associations and legal organizations, the provision requiring counsel to notify the Registrar regarding fee-splitting was withdrawn[37]. As a result, the independence of the legal profession and the right to confidentiality between the accused and its legal representative are better protected in the ICC system.

3. DISCIPLINARY REGIME

The Registrar proposed to manage the disciplinary process from the stage of investigation and complaint, through hearings, and up to final judgment. The ICB objected and made counter-proposals. The revised Code of Conduct provides that independent commissioners are responsible for the prosecution of lawyers, enabling the establishment of a more independent legal profession before the ICC. This system of self-regulation is essential to ensure the freedom of exercise of the legal profession and to include lawyers as full partners of the new international justice system.

A Code of Conduct for ICC Counsel preserving the independence of defence lawyers was finally adopted, by consensus of the States Parties, at the end of the fourth session of their Assembly, on December 3rd, 2005.

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An independent legal profession in international criminal justice can contribute to the broader cause of democracy and the international rule of law.

A. Separation of powers and the three Pillars

It is an almost universally accepted principle that any democracy must have three separate powers of government: the executive, the legislature, and the judiciary. They are each meant to hold an exclusive area of power, while keeping each other in check.

Within the judicial branch, the same principle of the separation of power should apply to the Three Pillars of the justice system: judges, prosecutors and the legal profession. They, too, are meant to function within a framework of checks and balances.

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[37] 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).

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. The ICC must therefore abide to the highest standards of ethics. The legal profession plays a key role inside and outside the courtroom.

1. ROLE INSIDE THE COURT ROOM

As an international organization, the ICC needs to set the highest standards in all areas, since it will be viewed as a model by many nations. These standards must uphold:

- the rights of the criminal suspect to fair treatment
- the right of any person to protection against arbitrary arrest and detention
- the right to a fair trial, effective equality of arms and the independence of the defence.

Criminal procedure is the barometer of the health of a democracy, and ensures the legitimacy of any court system, whether national or international.

There is a misconception – held by many people today – that a strong defence and potential acquittals will weaken a court. Another version of this misconception is that granting criminals a fair trial indicates weakness or a lack of resolve.

Holding such an opinion is to misconstrue the dynamics of criminal trials and the principle of "justice under law." According to the working principle, "if the trial is worth conducting, it is worth conducting fairly." Courts which apply this principle rigorously become stronger, not weaker. By contrast, courts which compromise the principle lose their credibility and legitimacy as independent deliberative bodies. Courts must set an example and demonstrate that they are governed by law, rather than by passions or politics. Such was the opinion of Justice Jackson at Nuremberg when he spoke of "cases trying courts."

A Third Pillar is needed by defence lawyers in order for them to play three key roles in the international criminal justice system:

- First, vigorously enforcing the fair trial rights of accused individuals by protecting their presumption of innocence and giving them the effective opportunity to tell their stories in full.
- Second, acting as fair trial watchdogs, who safeguard the system against the arbitrary exercise of judicial and prosecutorial power.

- Third, becoming, through professional associations, active participants in building the institutions of the international criminal justice system.

2. ROLE OUTSIDE THE COURT ROOM

The Council of Europe and the Committee of Experts do not only refer to court cases in their reports and recommendations. They also stress the need for legal services– advice, counsel, support, various forms of representation in a democratic society – offered to all democratic citizens when dealing with large organizations. The International Committee of Experts states: "Adequate protection of human rights and fundamental freedoms … requires that all persons have effective access to legal services provided by an independent legal profession."[38]

Lawyers protect individual rights, property and income. They safeguard individual human rights, the right not to be arbitrarily arrested or detained as well as the freedom from violations such as torture, inhumane conditions of captivity, and protection from the over-expansion of criminal law, which could also impede freedom of speech and religion.[39]

B. Rule of Law: Impunity vs. Presumption of Innocence

The convictions and the acquittals at the ICC are proof that the Court is succeeding in ending impunity. As watchdogs of the international criminal justice system:

- We are passionate advocates of the rule of law and the end of "impunity."
- We believe that forcefully, sometimes even aggressively, defending an accused, and the presumption of innocence, contributes to the reinforcement, not the weakening, of the rule of law.
- We believe there is a world of difference between impunity and the legal presumption of innocence.
- Defence lawyers do not oppose the ICC. On the contrary, we are among the most passionate advocates of the ICC and the international rule of law.

No system is perfect. All war criminals will not be caught. Fair trials can never be taken for granted. So, let us act together as lawyers – and lawyers' associations – to meet the challenges confronting the ICC and the establishment of an international justice system. In order to support the rule of law as an alternative to the

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38 *Supra* note 25.

39 ICDAA, *Agenda Item 11(d), Paragraphs 146-149 of the Provisional Agenda. Civil and Political Rights: Independence of the Judiciary, Administration of Justice, Impunity* (report submitted and defended orally to the United Nations Commission on Human Rights, Sixty-First Session, April 2005).

resolution of violent conflicts and to hopefully one day prevent wars, we must engage collectively in such a task. We have our work cut out for us!

Annex A

Chronology

The history of advocacy for the defence at the ICC and the global legal profession started in 1997, when a group of lawyers, from Canada, France, the Netherlands and the US created the International Criminal Defence Attorneys Association (ICDAA). They realized that the ICTY and the ICTR had been created with only two Pillars of Justice and that the same model was proposed for the ICC. The ICDAA set out to remedy this serious architectural defect.

The process had been active and visible at the United Nations even before the Rome Conference and in The Hague for more than five years.

The two main achievements of the ICDAA have been:

- the inclusion of Rules 20 to 22 in the ICC Rules in 2000
- the creation of the International Criminal Bar in 2002.[40]

Initially, the key areas of focus were defence issues, an effective presumption of innocence and fair trial rights. After more than three years, the lobbying efforts led to the adoption of Rules 20, 21, 22 of the ICC Rules.[41]

The adoption of Rule 20 into the ICC Rules of Procedure and Evidence 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 (Rule 20.2) as a guarantee of the right to a fair trial. The Registrar is responsible for taking measures to protect the independence of defence lawyers: the defence is no longer invisible or without any official status.

Specifically, Rule 20 imposes 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." For this purpose, the Registrar has the tasks (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 (Art. 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

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[40] Elise Groulx, "'Equality of Arms': Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System" (2006) 3 Oxford University Comparative Law Forum at <http://ouclf.iuscomp.org/articles/groulx.shtml#fn15sym>.

[41] *Ibid.* See also *Rules of Procedure and Evidence*, *supra* note 30, art. 20-22.

defence counsel. Rule 20(2) makes specific mention of the responsibility of the Registrar to ensure the professional independence of defence counsel.

Rule 20(3) opened the door to the establishment of an international criminal bar. Subsequently, 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 Montreal in June 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.

Here is a detailed chronology of the ICDAA advocacy campaign:

- **1997: The International Criminal Defence Attorneys Association (ICDAA)** was founded to promote discussion and debate of defence issues and fair trial rights in international criminal tribunals. It was designed to help support lawyers practising before the ad hoc tribunals and help build the institutions of the ICC. This was not popular work, nor easy to fund.
- **1998:** An ICDAA delegation proposed to the Rome Conference that an independent defence office, parallel to that of the Prosecution, be created in the ICC to protect defence independence. The vision was to create a defence pillar as strong and free standing as the ICC judiciary and prosecutor. This battle was lost. The Rome Statute is completely silent as to the legal profession and institutional support for defence lawyers.
- **1999-2000:** Intense advocacy for a defence office continued during the negotiations leading to the Rules of Procedure and Evidence of the ICC. These negotiations were held by the Preparatory Commission (PrepCom), which met at the United Nations. A small but influential group of countries (the Netherlands, Canada, Germany, and France) began to support the idea of creating a defence office at the ICC. Other nations, however, questioned whether the Rules could be used to establish a new office of the Court. A conference was held in The Hague to debate the issue.
- **July 2000:** The UN PrepCom adopted the finalised draft Rules of Procedure and Evidence. Rule 20 marked a partial victory, but it did not establish an independent defence unit. Nevertheless, the independence of the legal profession was explicitly linked to fair trial rights, and the ICC Registrar was explicitly given responsibility for protecting the professional independence of defence counsel. The door was left open to create a semi-autonomous defence unit within the Registry and to create an international criminal bar. This was indeed a big step from the total silence of the Rome Statute – but much was left to do.
- **November 2000:** A second conference was held in The Hague to discuss defence issues and how to implement the new Rule 20. A strong consensus emerged that an international criminal bar should be created to protect the independence of lawyers at the ICC. It was obvious, however, that this group

was not broad and representative enough to announce on the spot, as many wanted, that the new International Criminal Bar be thereby established. It was essential to look for a consensus that would encompass the main geographical areas of the world and the major legal systems. The Hague Conference of November 2000 was sponsored by the ICDAA, a few Bars, Dutch universities, and funded mostly by the Dutch government.

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 the victims' representatives, would weaken the institution from the outset.

- **December 2001:** After a year of advocacy and organization, a larger conference convened jointly by the Paris Bar and the ICDAA was held in Paris. It was attended by more than 300 lawyers, including representatives from 110 Bars and 60 countries. The conference supported the pursuit of the idea of creating an international criminal bar for the ICC. A broadly representative steering committee was created and it was later proposed that Montreal, the site of the ICDAA, would host the next meeting.

June 2002: After another six months of intensive effort and a decisive meeting of the steering committee in The Hague (May 2002), more than 350 people from forty eight states of all continents, including representatives of sixty eight international, regional and national Bars and associations of counsel, individual legal practitioners, and representatives of non-governmental organizations, attended the Montreal conference. They vigorously debated basic questions about the ICB, formed a consensus on the answers to those questions and unanimously voted to adopt a draft constitution as a basis for discussion. Most importantly, they declared:

- The International Criminal Bar was founded.
- The decision to create the International Criminal Bar was unanimous.
- They also agreed that the Constitution should be finalized and the organization be prepared by spring of 2003, with official recognition by the Assembly of States Parties, in time for the opening of the ICC.
- **March 2003:** The first ICB General Assembly was held in Berlin (Germany) on 21-22 March, 2003. More than 400 counsel, delegates of Bars and Law Societies, and representatives of NGOs from over 50 countries from the five continents elected the members of the first ICB Council and Executive Committee. The Assembly also selected Regional Coordinators for Asia, the Arab World, Sub-Saharan Africa, Latin America and the Caribbean.
- **July 2003:** The ICB was established with full legal status on 22 July, 2003 under Dutch law. It has its statutory seat in The Hague (the Netherlands) but in its first year, the ICB Secretariat was hosted in Montreal (Canada).

In sum, we have filled an institutional void by creating the ICB. With the ambitious mission of representing the legal profession on an international level, an independent and respected criminal bar will hopefully be ruled by its own Code of Conduct.

Annex B
ICC RULES 20-22

United Nations PCNICC/2000/1/Add.1

Preparatory Commission for the International Criminal Court

Distr.: General
2 November 2000
Original: English

New York
13-31 March 2000
12-30 June 2000

Report of the Preparatory Commission for the International Criminal Court

Addendum

Part I

Finalized draft text of the Rules of Procedure and Evidence*

* Incorporating document PCNICC/2000/INF/3/Add.1 and corrections to the Arabic, French and Spanish versions pursuant to paragraph 16 of the Introduction.

Rules of Procedure and Evidence

Subsection 3
Counsel for the defence

Rule 20
Responsibilities of the Registrar relating to the rights of the defence

1. In accordance with article 43, paragraph 1, the Registrar shall organize the staff of the Registry in a manner that promotes the rights of the defence, consistent with the principle of fair trial as defined in the Statute. For that purpose, the Registrar shall, *inter alia*:

(a) Facilitate the protection of confidentiality, as defined in article 67, paragraph 1 (b);

(b) Provide support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence;

(c) Assist arrested persons, persons to whom article 55**,** paragraph 2, applies and the accused in obtaining legal advice and the assistance of legal counsel;

(d) Advise the Prosecutor and the Chambers, as necessary, on relevant defence-related issues;

(e) Provide the defence with such facilities as may be necessary for the direct performance of the duty of the defence;

(f) Facilitate the dissemination of information and case law of the Court to defence counsel and, as appropriate, cooperate with national defence and bar associations or any independent representative body of counsel and legal associations referred to in sub-rule 3 to promote the specialization and training of lawyers in the law of the Statute and the Rules.

2. The Registrar shall carry out the functions stipulated in sub-rule 1, including the financial administration of the Registry, in such a manner as to ensure the professional independence of defence counsel.

3. For purposes such as the management of legal assistance in accordance with rule 21 and the development of a Code of Professional Conduct in accordance with rule 8, the Registrar shall consult, as appropriate, with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties.

Rule 21
Assignment of legal assistance

1. Subject to article 55, paragraph 2 (c), and article 67, paragraph 1 (d), criteria and procedures for assignment of legal assistance shall be established in the Regulations, based on a proposal by the Registrar, following consultations with any independent representative body of counsel or legal associations, as referred to in rule 20, sub-rule 3.

2. The Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list.

3. A person may seek from the Presidency a review of a decision to refuse a request for assignment of counsel. The decision of the Presidency shall be final. If a request is refused, a further request may be made by a person to the Registrar, upon showing a change in circumstances.

4. A person choosing to represent himself or herself shall so notify the Registrar in writing at the first opportunity.

5. Where a person claims to have insufficient means to pay for legal assistance and this is subsequently found not to be so, the Chamber dealing with the case at that time may make an order of contribution to recover the cost of providing counsel.

Rule 22
Appointment and qualifications of Counsel for the defence

1. A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise.

2. Counsel for the defence engaged by a person exercising his or her right under the Statute to retain legal counsel of his or her choosing shall file a power of attorney with the Registrar at the earliest opportunity.

3. In the performance of their duties, Counsel for the defence shall be subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct for Counsel adopted in accordance with rule 8 and any other document adopted by the Court that may be relevant to the performance of their duties.