

ICCBA LEGAL ADVISORY COMMITTEE

ANNUAL REPORT TO THE GENERAL ASSEMBLY 2018

INTRODUCTION

The present Report is submitted by the Chairperson of the Legal Advisory Committee (“LAC”) to the General Assembly 2018 (“AGM”) pursuant to Article 5(3)(f) of the ICCBA Constitution and Section 4(5)(a) of the ICCBA’s Internal Directive for the Work of its Committees. It embodies the Annual Report of the LAC for the period running from July 2017 until 30 June 2018 (“the Reporting Period”).

The elected members of the LAC over the Reporting Period were, in alphabetic order, Dr Caroline Buisman, Dr Cyril Laucci, Ms Sophie Menegon, Ms Marie O’Leary and Mr Anand A. Shah. At its first meeting of 5 July 2017, the LAC members elected Dr Cyril Laucci as its Chairperson. Dr Cyril Laucci has served in that capacity over the full year and hereby submits the LAC Annual Report in that capacity.

The LAC Chairperson hereby uses the opportunity of this Annual Report to the AGM to congratulate and thank wholeheartedly his other LAC Members for their commitment and hard work over the year. The below achievements of the LAC are the outcome of the collective effort of all five members of the Committee. The LAC Chairperson especially thanks his fellow LAC-members for their spirit of collegiality, availability and dedication.

LAC WORK PLAN 2017-2018

In July 2017, based on the proposals from its Chairperson, the LAC adopted its Work Plan for the year. This work plan encompassed five pillars: (i) Contribution to the work of the ICC Advisory Committee on Legal Texts (“ACLT”); (ii) Legal Aid; (iii) Cooperation and Witness Protection; (iv) ICC Policies; and (v) ICC Policies and Constitution.

The LAC Work Plan was endorsed by the ICCBA Executive Council on 15 September 2017. In the meantime, the LAC had proactively started implementing it over the Summer 2017, in particular with respect to item (ii) Legal Aid.

What follows is a summary of the LAC’s achievements on each of these items and their impact on ICCBA action.

1/ CONTRIBUTION TO CONSULTATION BEFORE THE ICC ADVISORY COMMITTEE ON LEGAL TEXTS

The current LAC initiated a new approach in its interaction with the elected Counsel Representative before the ACLT, our learned colleague Yaré Fall. Instead of submitting its contributions directly to the ACLT, the LAC provided its timely comments and analysis to Yaré fall, who expressed his deepest appreciation for the support he received and conveyed the ICCBA’s views to the ACLT.

Since July 2017, the LAC in particular provided comments and advice on:

- (i) the appointment of *amicus curiae* in certain Article 70 proceedings;
- (ii) the inclusion of a ‘No case to answer’ application in the proceedings;
- (iii) the inclusion of summary grounds of appeal in applications for leave to appeal;
- (iv) the reference to “indictment” in ICC legal texts; and
- (v) the implementation of Article 15*bis* of the Rome Statute.

The LAC hereby wants to express its full satisfaction for the excellent cooperation received from the elected Counsel Representative before the ACLT and expresses the wish that this excellent cooperation can continue and be reinforced in the future. In particular, the LAC invites the Counsel Representative and the ICCBA to explore together the possibility of having one LAC elected member physically present in The Hague to be appointed as Secretary to the Counsel Representative before the ACLT. This would mirror the representation of Counsel compared to the representation of other organs of the Court in the ACLT, where every ICC organ representative has a staff of the Court fulfilling the function of secretary to assist him or her. This would make the work of the Counsel Representative and his/her voicing of the Counsel's views easier, by ensuring a physical presence at every ACLT meeting.

2/ LEGAL AID

The LAC successfully served as the core drafting team for the submission of the [ICCBA's proposals on legal aid to the Committee on Budget and Finance](#) ("CBF") in July-August 2017.¹ The LAC Chairperson accompanied the ICCBA President in his presentation before the CBF on this issue on 22 September 2017.² The CBF Submission was followed by a second submission to the 16th session of the Assembly of States Parties on the same topic, which was annexed to the [ICCBA's Report on its constitution and activities to the Assembly of States Parties](#) ("ASP"). The ICCBA Report on its constitution and activities to the ASP³ and the annexed submission on Legal Aid⁴ were also drafted by the LAC Chairperson, with the active support from other LAC members.

The LAC Chairperson also joined the ICCBA Working Group on Tax and provided advice on the finalization of its [report and proposals on income tax](#)⁵ which is also relevant in the ongoing discussion on legal aid.

The ICCBA President and Executive Director met with the ICC Registrar in May 2018. They provided to the Registrar a portfolio containing, *inter alia*, the ICCBA contributions on Legal Aid and Income Tax and advocated for the prompt implementation of the measures identified in these documents.

These include:

- (i) Pending completion of a full review of the ICC Legal Aid Scheme, the professional uplift for compensation of charges provided under the current scheme shall be paid automatically on a monthly basis together with the fees of Counsel and support staff, without need to submit supporting documentation or shall be paid in advance on a monthly basis together with the fees of Counsel and support staff, subject to *pro forma* verification of supporting documentation at the end of the year;
- (ii) The ICC Budget Structure or financial rules shall be amended so that legal aid funds can no longer be reallocated by the ICC Registrar for other non-legal aid purposes pursuant to rule 104.3 of the ICC Financial Rules and Regulations ("FRR"). This could be achieved by an amendment to the budget structure, insulating the legal aid budget as a separate budget or special account, or by inserting a special caveat to the ICC Registrar's authority to reallocate funds in the FRR, whichever way is deemed most appropriate by the ASP;

¹ https://docs.wixstatic.com/ugd/ff5a5e_34693d7558a74cfbb0b8fa6c1d5fc2d5.pdf, August 2017.

² <https://www.iccba-abcp.org/single-post/2017/09/29/Update-from-ICCBA-President-and-Executive-Council>

³ https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-30-ENG.pdf, ICC-ASP/16/30, 13 November 2017.

⁴ https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-30-ENG.pdf, ICC-ASP/16/30, 13 November 2017, pp. 13-15.

⁵ https://docs.wixstatic.com/ugd/ff5a5e_c67834ca811c42659721927282c4a6c5.pdf, 29 January 2018.

- (iii) Issuing an interpretative declaration of the ICC Headquarters Agreement with the Host State (“HQA”) and Agreement on Privileges and Immunities of the Court (“APIC”) extending the exemption from income tax under Articles 15(1) of the HQA and 11(2) of the APIC to Legal Aid fees paid to Counsel and support staff by the Court.

By advising the implementation of these proposals, the LAC and Tax Committee aimed at providing concrete, realistic and immediate improvements to the current financial situation of Counsel and support staff. The LAC can only express its regret that, in spite of all the efforts made and the full support of the ICCBA President and Executive Council, no progress was achieved in the implementation of the proposed measures under the tenure of the former Registrar.

The current LAC hereby recommends that the new LAC elected at the 2018 AGM shall continue its efforts and push for the immediate implementation of the three above measures by the Court.

3/ ICC POLICIES

The LAC endeavoured to provide tools and analysis adapted for Counsel’s and Support staff’s consumption in relation to the administrative framework of the Court relevant for their activities. Three documents have been finalized and published on the ICCBA website:

- (i) an [Index of ICC Administrative Issuances](#) relevant for the daily work of Counsel’s legal teams, which provides a mapping of the ICC administrative framework on a variety of topics running from the protection of information to the ICC internal disciplinary framework, financial administration, privileges and immunities and security;⁶
- (ii) a [Legal Analysis on the applicable ICC Information Protection Policy](#): this analysis aims at assisting Counsel and support staff in understanding the legal and policy framework of the Court regarding the protection of information. The analysis also identifies major gaps and inconsistencies in the ICC Information Protection Policy and actual instances of perceived non-compliance by, in particular, the Office of the Prosecutor with the provisions governing the protection of information in the Court. These are identified as a matter of serious concerns, as they have the potential of negatively impacting witnesses, victims and other persons at risk on account of their interaction with the Court.⁷ By this analysis, the LAC aims at contributing to enhance the quality of justice at the ICC pursuant to Article 2(5) of the ICCBA Constitution; and
- (iii) a [Legal Analysis on ICC internal accountability mechanisms](#), including the ICC whistle-blower policy: this analysis aims at assisting Counsel and support staff in understanding the legal and policy framework of the Court regarding internal accountability of its elected officials and staff members. The analysis also identifies major gaps in the implementation of the mandate of the Independent Oversight Mechanism (“IOM”) and of the ICC Anti-Fraud and Whistle-blower protection policies.⁸ By this analysis, the LAC aims at contributing to enhance the quality of justice at the ICC pursuant to Article 2(5) of the ICCBA Constitution;

Analyses (ii) and (iii) were formally transmitted to ICC Officials, CBF and ASP with the aim of triggering a constructive dialogue and the fruitful resolution of identified current gaps in the ICC

⁶ https://docs.wixstatic.com/ugd/ff5a5e_397599689cb1473f87bc49ce7ec0a2d5.pdf, October 2017.

⁷ https://docs.wixstatic.com/ugd/ff5a5e_8c0661bc595545d7bf79d449b374b72d.pdf, February 2018.

⁸ https://docs.wixstatic.com/ugd/ff5a5e_0a84bc4caabf42eca73e4c2357f2f3f8.pdf, February 2018.

policy framework. The only reaction from the Court to date was the invitation of the ICCBA President and the LAC Chairperson to a meeting with the ICC Office of Internal Audit on 16 March 2018.

The LAC reiterates its invitation to the ICC management, in particular the Prosecutor, to undertake as a matter of priority the steps identified in its two Legal Analyses in order to clarify, properly implement and enhance compliance with the relevant policies governing the protection of information and internal accountability schemes. It also recommends that the new LAC and ICCBA management elected at the 2018 AGM shall continue to insist on the need for the Court to undertake the measures identified in its two Legal Analyses.

4/ ICCBA POLICIES AND CONSTITUTION

The LAC Chairperson also drafted, with the support of other LAC members, a number of ICCBA policy documents over the year, such as the [ICCBA Procedure on Affiliations](#),⁹ the [Affiliation Agreement between ICCBA and the African Bar Association](#),¹⁰ and the [ICCBA's Report on its constitution and activities to the ASP](#).¹¹ These three documents constitute major achievements of the ICCBA over the year. The LAC is proud of having had an opportunity to contribute thereto.

In May 2018, further to the decision of the Executive Council, the LAC also prepared on behalf of the Executive Council certain draft amendments to the ICCBA Constitution, which have been submitted to the General Assembly for consideration and a vote thereon at the 2018 Annual General Assembly.

5/ COOPERATION AND WITNESS PROTECTION

The LAC was not able to make progress on this topic because the ICC Registry, under the former Registrar, declined to provide access to relevant information needed for the LAC's work on this item, such as the OTP-VWU Joint Protocol on Witness Protection and the existing agreements and memoranda of understanding between the Court and Situation countries' authorities regarding the status, activities and privileges and immunities of the Court in these Countries. The LAC Chairperson wrote to the Immediate Office of the Registrar on 28 August 2017 and had several contacts thereafter. The ICCBA President addressed letters to the then ICC Registrar on 23 August 2017 and 29 November 2017.

The then ICC Registrar declined to disclose the relevant information requested on the ground of its alleged confidentiality and offered no alternative solutions in order to allow the LAC to perform its functions with respect to these important topics. The ICC Registry did invite the ICCBA to submit observations on a draft document related to the functioning of the Victims and Witness Section that is currently classified as 'restricted'. This invitation was acted upon, but falls short from providing a satisfactory alternative in order to allow the LAC to fully carry out its work plan and mandate with respect to these important topics. It also proves that the restricted classification of documents is no valid ground for denying access to LAC.

The current LAC hopes that the future LAC elected by the General Assembly in 2018 will be more successful in securing access to relevant information and documents of relevance for its works.

⁹ https://docs.wixstatic.com/ugd/ff5a5e_d8c85811f1a742cd899bb7200f8bfa27.pdf, April 2017, published in September 2017.

¹⁰ https://docs.wixstatic.com/ugd/ff5a5e_01daca4fde0a474ebed0a09cb1cc55c0.pdf, October 2017.

¹¹ https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-30-ENG.pdf, ICC-ASP/16/30, 13 November 2017.