



ANNUAL REPORT 2016-2017

The Professional Standards Advisory Committee comprises:

Caroline Buisman
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Duties of the Professional Standards Advisory Committee

1. The duties of the Professional Standards Advisory Committee ("Committee" or "PSAC") are set out in Article 20 of the ICCBA constitution, the relevant parts of which provide as follows:
 4. Counsel and staff may request advisory opinions from the Professional Standards Advisory Committee on the ICC's Code of Professional Conduct for Counsel, the ethical and conduct code of the ICCBA, and all related directives and regulations and the interpretation of the rules, regulations and codes governing the conduct of Counsel at the ICC or of this Constitution. Any advisory opinions, if not confidential, shall be distributed to the Members.
 5. The Professional Standards Advisory Committee may perform any other duties which may be requested by the ICC or the ASP. Any additional duties, and terms thereof, must be approved by a Resolution of the General Assembly.

Proposed work of the Committee 2016-2017

2. On 14 July 2016, the Committee held its first meeting at the International Criminal Court. Four members were in physical attendance. Iain Edwards was elected Chair.

3. The result of this first meeting was a detailed proposal of work for the year, annexed hereto. This proposal was forwarded to the Executive Council for consideration at its meeting of 25 August 2016.
4. The proposal document included a number of preliminary matters relating to provisions contained in Article 20 of the constitution which the Committee considered were ambiguous or otherwise required clarification. The other concrete proposals were as follows:
 - (i) The creation of a dedicated ICCBA email address to which (non-urgent) requests for advisory opinions can be sent;
 - (ii) The creation of a database of *in abstracto* professional standards advisory opinions accessible to members on the Association's website;
 - (iii) The creation of a database of suitably redacted advisory opinions that have been provided on request, also accessible to members on the Association's website;
 - (iv) The creation of an emergency ethics hotline which counsel or staff could call in the event of an urgent professional conduct query;
 - (v) Collation and study of decisions of the disciplinary boards of other international criminal tribunals.
5. On 26 September 2016, a draft directive for the work of ICCBA committees was circulated containing comments relating to whether PSAC confidential advisory opinions should or might be exempted from the proposed general rule that any report, note, memo, correspondence or other "deliverable" must be addressed to the Executive Council, prior to it being communicated to the individual requesting the advisory opinion. After discussion within the Committee the view was expressed that any confidential advisory opinion could be shared with the President of the Association only, subject always to the proviso that the requesting individual consents.
6. On 28 September 2016, a rapporteur of the Executive Council produced a response to some of the preliminary matters that the Committee considered ambiguous or which required clarification. The rapporteur did not, however, consider that any clarification was required. To date, no other response to the Committee's proposals has been received.

Summary of activities and work undertaken by the Committee

7. Regarding the creation of a dedicated email address to which (non-urgent) requests for advisory opinions could be sent, this proposal has been

overtaken by events in that the ICCBA website incorporates a “Contact us” link by which users can contact members of any committee with a query.

8. No requests for an advisory opinion from counsel or staff, whether urgent or otherwise, have been received by the Committee. There is therefore no database of such opinions.
9. However, since it is important for the Committee to be familiar with how the Code, and similar codes at other international criminal tribunals, are interpreted in practice by those institutions’ disciplinary boards, a database has been created of:
 - (i) public decisions of the Disciplinary Board of the International Criminal Court (six in total, relating to three cases);
 - (ii) summaries of confidential advisory opinions of the Disciplinary Committee of the ADC-ICTY (18 in total);
 - (iii) summaries of both confidential and public decisions of the Disciplinary Board and Disciplinary Panel of the ICTY/MICT (15 in total, relating to 14 cases).
10. Outstanding work for the next Committee will be to obtain access to confidential decisions of the Disciplinary Board of the ICC for the purposes of preparing summaries of the cases.
11. The creation of an emergency ethics hotline can be achieved fairly easily (at most it requires the purchase of an inexpensive mobile telephone and a SIM card) although it will now be for the next Committee to establish the modalities for assuring the manning of the hotline. Further, questions remain about the weight a Trial Chamber or a Disciplinary Board or Panel would attach to an advisory opinion of the Committee.
12. Finally, the Committee has been asked to produce written guidance in the context of Article 70 “Offences against the administration of justice” proceedings. Notably the Committee has been asked to address the following points:
 - (i) What powers do the OTP and other bodies have when investigating the activities of defence counsel/team members?
 - (ii) What advice can be given as to what to do when the Dutch police enter a team's office?

- (iii) What rights do counsel/the client have in respect of documents, computers, hard drives etc. when the OTP/Dutch police/the Court itself want to seize and review them?
 - (iv) Was the President of the Court right to grant his consent to such wide powers in the Bemba case?
 - (v) What review can be carried out into defence teams' rights and arguments made concerning investigations into counsel/team members?
 - (vi) What are the powers of arrest and detention, and what are their limits?
 - (vii) What steps should be taken to bring the consideration or commencement of article 70 investigations to the attention of the main case team? Should defence counsel be informed, or is it acceptable for the trap to be laid?
 - (viii) To what extent should the Trial Chamber be involved? Should there be some kind of firewall?
 - (ix) Should the ICCBA be involved? Should the President be informed?
13. In preparation for the production of this guidance, three counsel with first-hand experience of Article 70 proceedings before the Court, as well as the former *bâtonnier* of the Bar of The Hague have been consulted. The written guidance is close to being completed, and a full first draft will be with the new Committee by the end of the first week of its mandate.

How often the Committee has met, and contact between members

14. The Committee has met four times over the course of the year. Three times have been “face-to-face” albeit with one or two members attending via Skype.
15. However, outside of these meetings, the members have engaged in many, regular and extensive email exchanges.

The extent to which the Committee’s original proposals were realised

16. It has already been noted above that no requests for an advisory opinion from counsel or staff, whether urgent or otherwise, were received during the year. The principal activity of the Committee, therefore, has not been undertaken. However, good progress has been made in putting in place the database referred to at paragraph 9 above. This tool will be of assistance to the new Committee.
17. Similarly the written guidance relating to Article 70 proceedings is completed in large part.

Proposals for the future

18. Although the Committee is content with the work that has been achieved in this first year, it recognises that this can be usefully built upon in the future. It is recommended that members of the Association who are faced with professional standards and other ethical/deontological queries are encouraged to contact the next Committee for advisory opinions.
19. Similarly, it is recommended that members of the Association are encouraged to suggest professional standards topics of interest to them upon which *in abstracto* opinions might be prepared.
20. It is further recommended that the next Committee put in place a mechanism for urgent advice to be sought and given, such as an emergency ethics hotline.
21. Finally, and on a separate note, it is recommended that the Executive Council provide very clear guidance on the extent to which its approval is required for the Committee to carry out its activities, or whether the Committee can act with a greater degree of autonomy.

Iain Edwards, Chair

Outline of proposed work of Professional Standards Advisory Committee **2016-2017**

I. Summary of proposals

1. On 14 July 2016 the Professional Standards Advisory Committee ("PSAC") had its first meeting at the ICC and discussed proposals for work to be undertaken over the next 12 months. There were a number of preliminary matters that were raised. In summary, we propose that:
 - (i) it is the Executive Council ("EC") that should carry out the necessary steps to adopt the Code of Professional Conduct for Counsel of the ICC ("Code");
 - (ii) Article 20(1) of the ICCBA Constitution be amended so that the Code is correctly defined as the "Code of *Professional* Conduct for Counsel";
 - (iii) Article 20(2) of the Constitution be deleted for being superfluous;
 - (iv) it be clarified that it is for the EC to exercise its discretion to adopt sanction provisions related to membership (Article 20(3)), but that the EC does not adopt any such provisions at this stage;
 - (v) the relationship between Article 20(3) and Articles 32 and 33 be clarified in consultation with the EC and the Membership Committee;
 - (vi) a dedicated ICCBA email address be created to which (non-urgent) requests for advisory opinions can be sent;
 - (vii) the PSAC be authorised to create a database of *in abstracto* advisory opinions;
 - (viii) a sensible balance be struck between maintaining the confidentiality of advisory opinions and the public interest in ensuring maximum transparency and accessibility;
 - (ix) a dedicated searchable section of the ICCBA website containing all publicly available advisory opinions be created;
 - (x) consideration be given to the establishment of an emergency ethics hotline for use in the event of an urgent professional conduct query;
 - (xi) the disciplinary boards of the Court and other international criminal tribunals be contacted to request access to their decisions and materials.

II. Duties of the PSAC - clarifications

2. These are set out in Article 20 of the Constitution. There are a number of ambiguities in the wording of Article 20 that require clarification from the EC.
3. Article 20(1) provides that “[T]he ICCBA shall adopt the Code of Conduct for Counsel of the ICC (sic.) (“Code”) to regulate the ethical duties and the professional conduct of Counsel and staff.” It is not clear if reference to *the ICCBA* here means the membership of the Association, or the EC as its executive organ, or something else.
4. It is proposed that it is the EC that should carry out the necessary steps to adopt the Code.
5. It is further proposed that Article 20(1) should be amended so that the Code is correctly defined as the “Code of *Professional* Conduct for Counsel”. This more accurately reflects the title of the document, and creates consistency with how Articles 2(2), 2(10), 5(6), 10(6) 20(4) and 32(3) of the Constitution refer to the Code.
6. Moreover, if the Code is adopted in conformity with Article 20(1), and given that the disciplinary regime and procedures that apply to counsel subject to the Code are set out in Chapter 4 of the Code itself, it seems to the PSAC that Article 20(2) is otiose. Adoption of the Code necessarily includes adoption of the disciplinary procedures contained therein.
7. Consequently, it is proposed that the Constitution be amended by the deletion of Article 20(2).
8. Regarding Article 20(3), the use of the word “may” as opposed to “shall” in 20(1) and 20(2) suggests that the ICCBA can exercise its discretion to adopt sanction provisions related to membership.
9. As with Article 20(1) it is proposed that it ought to be the EC that exercises its discretion in this regard as the Association’s executive organ, but that the EC *does not* adopt any such provisions at this stage. Membership of the ICCBA not being mandatory for list counsel, there is a legitimate interest in building membership to the greatest extent possible. It may be counter productive if one of the first acts taken by the Association is the adoption of provisions for suspending or terminating membership. It is proposed that this might be revisited next year.

10. In any event, the relationship between Article 20(3) and Articles 32 and 33 is not clear. It is proposed that this should be clarified in consultation with the EC and the Membership Committee.

III. Duties of the PSAC – advisory opinions

11. It is proposed that a dedicated ICCBA email address be created to which (non-urgent) requests for advisory opinions can be sent.
12. It is currently unclear whether the PSAC has jurisdiction to provide advisory opinions only on request from counsel or staff, or whether a body of *in abstracto* advisory opinions might be produced for future reference. The PSAC proposes that it be authorised to create a database of *in abstracto* opinions that can be amended and added to over time. This will have an additional benefit of allowing for continuity of advice for future committees.
13. Unless the EC has any particular suggestions about the first opinions that should be prepared over the course of the year, it is proposed that the PSAC should determine this itself, focussing on what it considers might be the most commonly encountered ethical and conduct related issues.
14. Regarding the final sentence of Article 20(4), “Any advisory opinions, if not confidential, shall be distributed to the Members”, it is understood that this refers to advisory opinions that have been specifically requested. The PSAC considers that there must be clarity in terms of establishing who decides whether an advisory opinion is confidential or not. The preliminary view is that an advisory opinion should be considered confidential if so requested by the person asking for the opinion. If the PSAC were to overrule a request that an advisory opinion be kept confidential, this would risk deterring counsel and staff from asking for opinions in the future, thereby undermining the whole *raison d’être* of the Committee. It is to be expected that the vast majority of requesting persons would ask that an advisory opinion remain confidential.
15. There is, however, a public interest in such opinions being as transparent and as accessible as possible. Consideration will need to be given to redacting such opinions before they are promulgated in the event the requesting person asks that the opinion be classified as confidential. A practical problem identified is that, given the small number of cases at the ICC, the identity of the person requesting an opinion, and the case involved, may be very easy to infer. Care therefore will have to be taken in adequately redacting a confidential opinion. Alternatively, a part of any confidential advisory opinion could be drafted in a general way such that it could be publicly circulated.

16. There would, of course, be no need to keep *in abstracto* opinions confidential.
17. It is proposed that there should be a dedicated searchable section of the ICCBA website containing all publicly available advisory opinions. It is further proposed that members of the PSAC will consult other international criminal tribunals' defence offices and national Bars for inspiration. The Bar Standards Board's catalogue of advisory opinions in England is a useful model for study.

IV. Ethics hotline

18. It is proposed that consideration should be given to the establishment of an emergency ethics hotline which counsel or staff could call in the event of an urgent professional conduct query. Such hotlines exist in many national jurisdictions. Either a dedicated mobile phone could be acquired for which members of the Committee take responsibility on a rota basis, or the hotline could be the ICCBA's office at the Court with calls being forwarded on to that week's/month's duty member.
19. A challenge that can be envisaged is that it may well be difficult for members to guarantee availability for urgent requests for advice since most will be in court during the day. Nevertheless, the Committee considers that this is a useful initiative to propose to the EC.

V. Liaising with the Court's and other Tribunals' disciplinary boards

20. The PSAC considers that it will be important for it to be familiar with how the Code, and similar codes at other international criminal tribunals, are interpreted in practice by those institutions' disciplinary boards. Some decisions are publicly available. Many are not. The Committee proposes to contact these disciplinary boards to request access to their decisions and other materials on a confidential basis.
21. Once again, inspiration might be obtained from researching how disciplinary bodies operate in national jurisdictions.

VI. Next steps

22. It is understood that the Executive Council will contact the Chair in order to set up lines of communication and to discuss the proposals set out above.