**Kate Mackintosh**

**Answers to ICCBA Questionnaire**

**Introduction:**

I started my career as a criminal Defence lawyer, and I take it as fundamental that a strong and capable Defence is indispensable to justice and a fair trial. As Deputy Registrar of the ICTY, responsible for Legal Aid and Defence matters, I benefited from regular consultation with the ICTY Association of Defence Counsel. These interactions were sometimes smooth, sometimes heated, but always professional and without a doubt indispensible to the development of robust and fair policies concerning the Defence.

Over the last few years of the ICTY, I also enjoyed the legacy planning committee on which I was joined by representatives of Chambers, the Prosecution and the Defence, and which produced numerous first-rate Defence contributions to outreach and reflections on the life and work of the ICTY.

I am delighted that the ICCBA has been created to fill this lacuna in the structure of the ICC, and I would expect the same level of excellent cooperation and rigorous discussion with the ICCBA were I to be elected Registrar of the court.

**Question 1:**

The creation of the ICCBA has filled a lacuna in the ICC structure, giving the Registrar the representative body of Counsel with whom s/he shall consult, as appropriate, under Rule 20(3) RPE. Rule 20(3) directs that this consultation be undertaken on such issues as legal aid and professional conduct. Clearly there are other issues that could benefit from discussion between the Registrar and the ICCBA, such as outreach and cooperation. The role of the OPCD is also relevant here. As Registrar I would set up a regular meeting with the President of the ICCBA to discuss any issues of mutual concern. It may be that the establishment of temporary joint working groups on particular issues arising from these meetings would be helpful.

**Question 2:**

The existing legal scheme is based on the right principle, namely equality of arms. I note however the recommendations of the January 2017 external assessment of the legal aid system, including that lead Counsel be given more authority and flexibility in the distribution of funds (movement to a lump sum system), and that options to exempt ICC Counsel remuneration from income tax be explored, both of which appear sensible and could increase Counsel and support staff compensation without inflating the hard-pressed ICC budget. I also note that the ICCBA itself has commented on problems in the implementation of the scheme, suggesting that 30% of the funds allocated are not reaching Defence teams, resolution of which could further assist.

I am open for discussion with the ICCBA on these and any other constructive suggestions to ensure that accused and defendants at the ICC receive an optimal Defence.

**Question 3:**

1. It is somewhat hard to answer this question without knowing the content of the existing OTP-VWU Protocol. However, prima facie, and without the benefit of inside information about specific problems that have or have not arisen for witnesses associated with the Defence or with victims’ representation, I believe it is logical that a similar protocol be elaborated for these groups. Teams representing defendants or victims have a professional responsibility to ensure their clients are not put at risk, and to alert relevant protection agencies should risks appear. They will need to collaborate in this regard with the VWU, and protocols regulating these interactions may assist. As well as helping to ensure that solutions envisaged accurately address the needs of Defence witnesses or victims, such protocols can regulate contact with national protection agencies and avoid duplication or confusion in these crucial relationships.
2. Defence and victims representatives should certainly be consulted in the drafting of any such protocol. With regard to the Defence, I consider that this would fall within rule 20(3) of the RPE and that the ICCBA would be a natural interlocutor.

I would be happy to discuss the process of any consultation, but my preliminary thoughts are that the VWU would be asked to prepare a draft or two drafts, which would be circulated to the victims’ and Defence representatives for comment. I would see a role for both the OPCD and OPCV in this process. I would need to think further about other stakeholder involvement.

**Question 4:**

Victims’ representatives are already involved in outreach, which is appropriate and must continue. They can give important information to victims on the scope of participation, help manage expectations and raise awareness generally of the role of victims in the ICC processes. Outreach should be a two-way process, and it is also important for the ICC staff working on victims’ issues to hear from a wide range of victims and affected communities on their needs and expectations.

I am interested to learn that Defence has no current role in ICC outreach, and I see significant scope for enriching the ICC dialogue with Defence participation. Defence Counsel are best placed to answer certain questions, and may, for example, be able to address challenges to the impartiality of the prosecutions, as well as to strengthen the perception of due process and fair trial at the ICC. I would also see targeted Defence outreach as important to attract a geographically diverse and gender balanced pool of Counsel.

Again, I would see the ICCBA as a natural partner in this project.

**Question 5:**

I believe that a strong and effective association of Defence Counsel is crucial to the operations of the court, and fully understand the ICCBA interest in having membership become compulsory for all Counsel. However, the added value to the ICC as a whole would have to be clearly demonstrated, as this is not currently envisaged in the regulatory texts and would require amendment of the Rules of Procedure and Evidence by the ASP, as well as of the Regulations of the Court by the Plenary of Judges. I am mindful here also of the fundamental freedom of choice of Counsel enjoyed by Defendants and Victims.

**Question 6:**

I have no information about the availability of offices within the ICC building, however, providing facilities for the ICCBA would be consistent with the provisions of the Rules of Procedure and Evidence requiring the Registrar to provide support, assistance, and facilities to defence counsel and victims’ representatives. It would also facilitate consultations on matters of mutual interest. Were I to be elected Registrar, I would suggest consultations on this matter could be undertaken before the summer recess, in conjunction with the OPCD and the OPCV.