

THE LEGAL PROFESSION BEFORE THE INTERNATIONAL CRIMINAL COURT

Dear AIJA friends, cher amis,

The Rome Statute of the ICC entered into force on July 1, 2002 and in March and April 2003 the 18 judges of the Court and the Chief-Prosecutor, respectively, were elected.

Regarding the system of defence before the ICC, the third pillar of the international justice, two models have been proposed. The Spanish, Portuguese and Iberian-american bars and law societies follow the characteristic of their national systems and promote a system of the legal profession before the ICC based on a corporate and collegially historic structure. This position is defended by amongst others the General Counsel for the Spanish Legal Profession („*Consejo General de la Abogacía Española*“) and by the Iberian-american Union of Bars and Groupings of Lawyers (*Unión Iberoamericana de Colegios y Agrupaciones de Abogados (UIBA)*), and may be summarised in the following inspiring or guiding principles:

1. The legal profession and the defence of the accused before the ICC must be professional, efficient and independent

Professionalism has two aspects: i) in criminal procedural subject matter, by means of technical-legal qualification, prestige, sufficient academic credentials, attendance of capacitating and qualifying courses of the Lawyers; and ii) in linguistic capability both in the mother-tongue of the accused

and/or victims and in one of the working languages of the ICC.

Efficiency guarantees the balance of arms or resources available to prosecution and defence counsel, bearing in mind the nature of the crimes and the extremely high economic interests to be judged and decided by the ICC. In particular, it should be guaranteed that defence counsel enjoys sufficient authority and means (i) to monitor the investigation, (ii) to open new lines of enquiry, (iii) to propose evidence, (iv) to rely on institutional protection from within the professional body in case of interference and (v) to guarantee the payment of counsel by the ICC as well as the foreseeably high defence costs. The reversal of the burden of proof introduced by the Rome Statute requires by necessity that the defence carries out an investigative role, which is an additional aspect of the question of the balance of resources.

The independence of the defence should be guaranteed in the appointment, by means of a system of free assignation of a defence lawyer from the defendant's own country or, at least, from the same cultural world of the accused, the victims and/or the persons responsible, with the aim of achieving between them and the defence counsel, a degree of linguistic, legal and social tuning necessary for there to exist absolute confidence in the lawyer-client relationship. If the accused declines the free and personal election of counsel, a neutral system for the automatic

designation of a duty-lawyer has to be established. By forcing the accused to accept the defence of a country that has suffered aggression or of an allied country is to ignore the system of historical alliances and relations of friendship and enmity that exist in the United Nations, seat of the ICC. In this way the reality would be ignored and may imply an unnecessary depletion in the independence of defence counsel.

On the other hand, the independence of defence counsel should be inherent in the responsibility undertaken. The absence of interference and pressures on defence counsel, whether from the prosecution, or from the ICC itself, whether political, from public opinion or media, shall be guaranteed if there is an professional and ethical control with a seat outside the ICC, namely based on the collegial framework.

2. The collegial structure, only system which guarantees the professionalism, the efficiency and the independence of the Lawyer before the ICC

The collegial structure, supported by the Regional Associations of Lawyers or by the Regional Sections of international organisations (e.g. associations of Bars and of Lawyers), should be represented before the ICC.

This system will undertake and guarantee the control of incorporation of the listed lawyers to a body of the legal profession, the accreditation before the ICC

of the qualification and availability (no sanctions, no suspensions) of the lawyers listed, the organisation of the system of substitutions of Lawyer, the rota system of lawyers on duty, the collegial protection for the lawyer, guarantee of his maximum freedom in the task of defending, in case of interference or any pressures (within ICC walls, from the Prosecution, media pressure, or of public opinion or political), the disciplinary and ethical control of the lawyer (only possible within the collegial framework) and finally the payment of fees and of defence costs, whether an individual agreement exists or whether as a result of legal aid.

3. Structure of the legal profession before the ICC

Starting with the maintenance of a system based on the collegial structure, the presence of the bodies of the legal profession before the ICC would be managed at two levels.

On one hand, through the Office of Defence, which would assume functions of representations of the associations, orders, colleges and bars before the ICC, the keeping of lists of qualified lawyers and the proof of total availability (lack of sanctions, suspensions, conflicts of interest, etc....), the notification to the Lawyer of Court communications, the management of the relations between Lawyer and Commission (collegial protection, remuneration, etc....) and the notification to the Commission of information as regards sanctions. The Office of Defence would have a direct link with the Assembly of the States Parties and with the Registry of the Court.

Oh the other hand, the Commission of Bars, Councils and Associations, composed of persons appointed by the large international associations of Lawyers will represent the regions and legal systems of the world. Assisted by the Office of the Defence, the Commission will

safeguard the above mentioned general principles of defence and authorise the bars, college or associations of countries which currently lack a collegial system that fulfils the requirements of an entity of public interest.

This model of defence system, briefly described in this report, proposed by the above mentioned countries and associations seeks to be an open system, in order to guarantee the free access of every Lawyer to the ICC and, above all, the right to a defence of the accused by means of an independent system.

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