



# **Priorities and Recommendations for the 21st Session of the International Criminal Court Assembly of States Parties**

**November 2022**

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## Overview of recommendations

### 1. Promoting effective state cooperation with the Court

#### *Strengthening national frameworks for cooperation*

- All States Parties, if they have not done so, should put in place effective national frameworks to cooperate fully with the ICC, including:
  - Developing and enacting national implementing legislation and reviewing it every 10-15 years, taking into account the evolving experience and recommendations of the ICC.
  - Ratifying or acceding to the ICC Agreement on Privileges and Immunities and incorporating it into national law.
  - Entering into cooperation agreements with the Court on enforcement of sentences, victim and witness relocation, interim release, final release and air transport.
- States Parties should support a review of the ASP's Plan of Action to achieve universality and full implementation of the Rome Statute to re-energise its efforts to promote implementing legislation, the Agreement on Privileges and Immunities and cooperation agreements.

#### *Reporting on state cooperation*

- The ASP should encourage the Court to further develop its annual report on cooperation, providing more detailed and consistent data on cooperation requests and States' responses.

#### *Promoting state cooperation*

- States Parties should support greater efforts by the ASP to promote cooperation agreements.
- States Parties should support the establishment of a coordinating mechanism of national authorities on cooperation.
- States Parties should support the Independent Expert Review's recommendations to establish a focal point on arrests and a rewards program.
- The ASP should support the Court's recommendation for States Parties to appoint national focal points on freezing of assets and establish a network of experts in the field.
- States Parties should support the establishment of a periodic review process at the ASP to strengthen national cooperation frameworks, as well as to promote and review the implementation of the 66 recommendations on cooperation and the Court's recommendations in its annual report on cooperation.

### 2. Ensuring effective decision-making on the annual budget of the ICC and allocating sufficient resources for the Court to fulfil its mandate

#### *Considering and deciding the 2023 budget*

- States Parties should support a significant increase in the ICC's budget for 2023 to implement its increased workload effectively. They should fully review the recommendations of the Committee on Budget and Finance considering the views of the Court and oppose any initiatives to impose further cuts to the Court's request beyond those recommended by the Committee.

#### *Addressing arrears in assessed contributions*

- States Parties in arrears should pay their outstanding assessed contributions in full without further delay.
- The ASP should, as recommended by the Committee on Budget and Finance and the Independent Expert Review, urgently explore additional means of encouraging the timely payment of assessed contributions.

#### *Assessing the Independent Expert Review's recommendations on the budget process*

- States Parties should support the implementation of the Independent Expert Review's recommendations requiring detailed reasons for the Committee on Budget and Finance's recommendations and providing the Court with the opportunity to present its position on the Committee's proposals.

#### *Scheduling the annual budget decision*

- In considering proposals to reschedule the ASP's annual session, States Parties should ensure that the process of considering and deciding the annual budget of the Court is accessible and allows for the participation of all States Parties.

#### *Electing members of the Committee on Budget and Finance*

- In future elections, more States Parties should search for and nominate candidates for the Committee on Budget and Finance with expertise in financial matters at the international level, especially relating to the funding and operation of justice systems.
- States Parties should support a review of the election procedures for the Committee to ensure that there is a competitive process for membership of this vital subsidiary body of the ASP, as well as gender balance.

#### *Developing a 10-year strategic vision for the ICC*

- States Parties should support and participate in a constructive dialogue on the strategic vision of the ICC for the next ten years during commemoration of the 25<sup>th</sup> anniversary of the Rome Statute. They should promote an ambitious vision for strengthening the work of the ICC and its impact in the fight against impunity, including supporting sufficient resources to meet demands for international justice.

### **3. Promoting geographical representation and gender balance and ensuring a safe working environment**

- The ASP should welcome the initiatives taken by the Court this year to strengthen its systems to achieve geographical representation and gender balance, while recognizing the need for significant improvements in future years.
- States Parties should support adequate resources for the Court to implement these systems and new initiatives in 2023. In particular, States Parties should review the Committee on Budget and Finance's recommendation not to convert the Gender Equality Focal Point to an established post this year and, at a minimum, support the conversion of the Focal Point to an established post in 2024.

- More States Parties should make contributions to the Trust Fund for the development of Interns and Visiting Professionals to increase paid internship and visiting professional positions, as recommended by the Independent Expert Review, as a means of supporting geographical representation in the staff of the Court.
- The ASP should request the Bureau to work with the ICC to develop more detailed guidance for States Parties to promote ICC vacancy announcements and disseminate them widely.
- The ASP should request the Bureau to develop, in consultation with States Parties, the Court and civil society, a permanent vetting mechanism for all elections of ICC officials, including ensuring that sufficient resources and time for vetting are incorporated into the ASP's election budgets and timeframes.

#### **4. Strengthening the voice of the defence in the Court, improving administration and increasing support to defence teams**

- The ASP and the Court should ensure that the Independent Expert Review's recommendations to transform the Office of Public Counsel for Defence into a Defence Office with additional responsibilities are given detailed consideration without further delay, including full consultation with all stakeholders.

#### **5. Ensuring the urgent revision of the ICC Legal Aid Policy to establish a comprehensive system of legal aid that is accessible, sustainable, and credible**

- The ASP should commit to adopting a new Legal Aid Policy in 2023 that will enter into force on 1 January 2024.
- Recognizing that defence and victims' teams are being paid at levels defined in 2013, the ASP should consider urgent temporary measures to increase their remuneration in 2023.
- The ASP should mandate the Bureau to continue consultations on the draft Policy in order to finalise and adopt it in 2023, including to ensure remuneration for defence and victim representation teams equivalent to the remuneration of relevant staff in the Office of the Prosecutor; define the proposed contracts and working conditions of persons assisting counsel; and resolve issues of taxation.
- States Parties should oppose efforts to set arbitrary budgetary limits on the process of revising the ICC's legal aid system. They should consider the draft Legal Aid Policy on its merits ensuring that the Court's legal aid system is accessible, effective, sustainable and credible.

#### **6. Ensuring a sustainable source of funding for family visits**

- States Parties should make voluntary contributions to the Trust Fund for family visits for indigent detainees in ICC detention.
- States Parties should support the proposal to allow the Court, exceptionally where the resources of the Trust Fund are depleted, to use its regular budget to fund family visits for indigent detainees.

#### **7. Strengthening the process of nominating and electing ICC judges and ensuring a thorough vetting process for all candidates**

- States Parties should support the Independent Expert Review's recommendations for strengthening the process of nominating and electing ICC Judges and ensure that the measures are implemented prior to the 2023 election of six judges.
- States Parties should further support Belgium's proposals to amend the procedures for nominating and electing ICC judges to ensure that the Assembly always elects judges from a pool of highly qualified candidates.
- States Parties should ensure that a thorough vetting process of all candidates for the election of judges in 2023 is conducted and that a permanent vetting mechanism is established as soon as possible.

## Introduction

This paper sets out the priorities and recommendations of the International Bar Association (IBA) International Criminal Court and International Criminal Law (ICC & ICL) Programme for the 21st session of the International Criminal Court Assembly of States Parties (ASP), taking place from 5- 10 December 2022 in The Hague.

The ICC & ICL Programme, based in The Hague, acts as the interface between the ICC and the global legal community. Through engagement with IBA members around the world, the organisation works to increase cooperation with and support for the ICC and other accountability efforts, with the goal of globally strengthening the Rome Statute system and achieving fair, effective, and accessible justice for victims of atrocity crimes.<sup>1</sup>

In 2021, the IBA ICC and ICL Programme published [\*Strengthening the International Criminal Court and the Rome Statute System: A Guide for States Parties\*](#)<sup>2</sup> containing a comprehensive set of recommendations for States Parties individually and collectively through the ASP to support the effective functioning of the Court, and specifically to strengthen domestic legislation and cooperation with the ICC.

The 21st ASP session is an important opportunity for States Parties to reflect on the progress that is being made in the fight against impunity, to reaffirm their commitment to the Court and to take concrete action to support and strengthen its work, taking into account the recommendations of the Court, the 2020 Independent Expert Review of the Court,<sup>3</sup> the IBA's Guide for States Parties and other submissions by civil society.

### ***The ICC context in 2022: challenges and opportunities***

The 21<sup>st</sup> session of the ASP is being held 20 years after the ICC was established at a critical moment when the effectiveness of the Court hangs in the balance.

The Court is facing a capacity crisis following a significant increase in its workload in recent years. Important decisions by Prosecutor Bensouda and Prosecutor Khan to open investigations in new situations, including Palestine, Philippines, Ukraine, and Venezuela, means that the Court will conduct active investigations in at least ten situations in 2023.<sup>4</sup> At the same time, its caseload is expected to grow in 2023 with one case in the pre-trial phase (*Mokom*), four trials (*Abd-Al-Rahman, Said, Al Hassan and Yekatom and Ngaïssona*), and reparations proceedings in five cases (*Lubanga, Katanga, Al Mahdi, Ntaganda and Ongwen*). However, this rise in workload has not been matched by a commensurate increase in the Court's budget. Earlier this year, the Prosecutor resorted to seeking voluntary

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<sup>1</sup> For more information about the IBA Hague Office and ICC & ICL Programme, see [https://www.ibanet.org/ICC\\_ICL\\_Programme/Home.aspx](https://www.ibanet.org/ICC_ICL_Programme/Home.aspx).

<sup>2</sup> IBA, *Strengthening the International Criminal Court and the Rome Statute System: A Guide for States Parties* ('IBA Guide for State Parties'), October 2021, available at: <https://www.ibanet.org/document?id=ICC-Report-Rome-Statute-October-2021>.

<sup>3</sup> Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report ('IER Final Report'), 30 September 2020, available at: [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf)

<sup>4</sup> Afghanistan, Bangladesh/Myanmar, Burundi, Côte d'Ivoire II, Darfur, Libya, Palestine, Philippines, Ukraine, and Venezuela I.

contributions to enhance the technological tools used to collect, process and store evidence, as well as secondments of state officials to support investigations.

Successive reports submitted by the Court to the ASP in the last three years also highlight concerning shortfalls in state cooperation, which jeopardise the effective and efficient functioning of the Office of the Prosecutor and the Court, the rights of the accused to prepare a defence, victims and witness protection and even the ability of the Court to release acquitted persons.

On a positive note, the Court and the ASP are at a crucial stage of assessing and implementing the recommendations of the 2020 Independent Expert Review of the Court to strengthen the performance of the ICC. Important progress is being made in a number of areas. However, some important recommendations still require detailed consideration and implementation. Progress that is being made will be undermined and have limited impact unless the Court's capacity and cooperation crises are also addressed.

In this context, this paper draws on the IBA's 2021 Guide for States Parties to identify priorities and recommendations for States Parties and the ASP to take immediate action to address the capacity and cooperation challenges that the Court is currently facing, as well as measures to ensure that the Review of the Court succeeds in its aim of strengthening the performance of the Court.

## **1. Promoting effective state cooperation**

All States Parties have an obligation to provide full and effective cooperation to the ICC, in accordance with Part IX of the Statute. They should also strive to support the effective functioning of the Court with other forms cooperation, when requested. Regrettably, two decades since its establishment, many States Parties have failed to establish national frameworks providing for cooperation and the Court is facing a significant shortfall in cooperation in important areas of its work.

### ***Strengthening national frameworks for cooperation***

An overview of national frameworks illustrates that most States Parties have yet to put in place effective mechanisms and processes to provide prompt, full and effective cooperation with the ICC. Of the 123 States Parties to the Rome Statute:

- Only 57 have enacted or amended their laws providing for cooperation with the Court.<sup>5</sup> A closer examination of many of those laws identifies flaws that could obstruct cooperation. So far, no state has enacted cooperation legislation in 2022.
- Only 78 and one non-state party have ratified or acceded to the Agreement on Privileges and Immunities of the ICC. Despite the Court's efforts to promote the Agreement, which increases

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<sup>5</sup> Albania, Argentina, Australia, Austria, Belgium, Benin, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Canada, Central African Republic, Comoros, Costa Rica, Croatia, Democratic Republic of Congo, Denmark, Ecuador, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Ireland, Italy, Japan, Kenya, Latvia, Liechtenstein, Lithuania, Luxembourg, North Macedonia, Malta, Mauritius, Montenegro, The Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Korea, Romania, Samoa, Senegal, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Uganda, UK and Uruguay. This information has been gathered from publicly available sources. States Parties are encouraged to contact the IBA if any information is not accurate.

legal clarity and security by specifying in detail the scope of the Court's privileges and immunities,<sup>6</sup> Mongolia has been the only State Party to ratify the Agreement so far in 2022.

- The vast majority have yet to enter into cooperation agreements with the ICC:
  - Only 14 States Parties – Argentina, Austria, Belgium, Colombia, Denmark, Finland, France, Georgia, Mali, Norway, Serbia, Slovenia, Sweden and the UK - have entered into agreements demonstrating their willingness to cooperate with the enforcement of ICC sentences of imprisonment in their national prison facilities. Even though Article 103(3)(a) of the Statute confirms that this is a shared responsibility of States Parties and should accord with principles of equitable distribution, so far, no state has signed an agreement in 2022.
  - Only 25 States Parties have entered into agreements demonstrating their willingness to cooperate with relocating victims and witnesses at serious risk to their territory. So far, no state has signed an agreement in 2022. The Registry has reported that sometimes states that have entered into agreements on relocation have refused to accept witnesses in need of relocation.<sup>7</sup>
  - Only two States Parties – Argentina and Belgium – have entered into agreements demonstrating their willingness to accept persons granted interim release by the ICC on their territories. So far, no state has signed an agreement in 2022. The Registry has reported that, as a result of the lack of agreements, it is facing challenges in implementing the Chambers' decisions.<sup>8</sup>
  - Only one State Party – Argentina – has entered into an agreement demonstrating their willingness to cooperate with the final release of persons following acquittal or the termination of proceedings. So far, no state has signed an agreement in 2022. The Registry has reported that following the acquittals of Laurent Gbagbo and Charles Blé Goudé, it took more than two years to finalize Mr Gbagbo's release and subsequent return to Côte d'Ivoire in July 2022.<sup>9</sup> Meanwhile, the Court is still unable to implement the release of Mr Blé Goudé.
  - Only one State Party entered into a new model agreement with the Court for air transport to facilitate the transfer of arrested persons to The Hague.<sup>10</sup>

**All States Parties, if they have not done so, should put in place effective national frameworks to cooperate fully with the ICC, including:**

- **Developing and enacting national implementing legislation and reviewing it every 10-15 years, taking into account the evolving experience and recommendations of the ICC.<sup>11</sup>**

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<sup>6</sup> Report of the Court on cooperation, ICC-ASP/21/24, 20 October 2022 ('ICC Report on Cooperation 2022'), paras 43-44.

<sup>7</sup> ICC Report on Cooperation 2022, para. 46.

<sup>8</sup> ICC Report on Cooperation 2022, para. 48.

<sup>9</sup> ICC Report on Cooperation 2022, para. 49.

<sup>10</sup> ICC Report on Cooperation 2022, para. 33.

<sup>11</sup> For further information, see: IBA Guide for State Parties, Part 2.3.

- Ratifying or acceding to the ICC Agreement on Privileges and Immunities and incorporating it into national law.<sup>12</sup>
- Entering into cooperation agreements with the Court on enforcement of sentences,<sup>13</sup> victim and witness relocation,<sup>14</sup> interim release,<sup>15</sup> final release<sup>16</sup> and air transport.<sup>17</sup>

States Parties should support a review of the ASP's Plan of Action to achieve universality and full implementation of the Rome Statute to re-energise its efforts to promote implementing legislation, the Agreement on Privileges and Immunities and cooperation agreements.<sup>18</sup>

### ***Reporting on state cooperation***

ICC reports indicate that it is facing a consistent shortfall in state cooperation. The Court's latest Report on cooperation in October 2022 states that between 16 September 2021 and 15 September 2022:

- 46.43% of requests for cooperation by the Office of the Prosecutor in support of preliminary examinations, investigations, prosecutions and judicial proceedings were executed.
- 35% of requests for cooperation from defence teams transmitted by the Registry were executed.
- 33% of requests for cooperation relating to arrest and surrender received positive replies.
- None of the two requests by the Office of the Prosecutor and only one of four requests by the Registry for cooperation with the identification, seizing and freezing of assets were fully executed.<sup>19</sup>

Other reports indicate that in some situations, the challenges of obtaining cooperation are even greater. For example, the Prosecutor's most recent report to the UN Security Council on the Darfur situation stated that only two of the 17 requests for assistance transmitted to the government of Sudan between January and August 2022 have been fully executed and more than ten outstanding requests from the previous reporting period remain to be executed.<sup>20</sup> The Prosecutor has also reported difficulties in the issuance of visas and in establishing a field office in Khartoum.<sup>21</sup> In addition, the Defence has complained regarding non-cooperation by the government of Sudan with its requests in the Abd-Al-Rahman case.<sup>22</sup>

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<sup>12</sup> For further information, see: IBA Guide for States Parties, Recommendation 74.

<sup>13</sup> For further information, see: IBA Guide for States Parties, Recommendation 100.

<sup>14</sup> For further information, see: IBA Guide for States Parties, Recommendation 89.

<sup>15</sup> For further information, see: IBA Guide for States Parties, Recommendation 87.

<sup>16</sup> For further information, see: IBA Guide for States Parties, Recommendation 88.

<sup>17</sup> For further information, see: IBA Guide for States Parties, Recommendation 82.

<sup>18</sup> For further information, see: IBA Guide for States Parties, Recommendation 104.

<sup>19</sup> ICC Report on Cooperation 2022.

<sup>20</sup> Thirty-Fifth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to Resolution 1593 (2005), 25 August 2022, available at: <https://www.icc-cpi.int/sites/default/files/2022-08/20220823-otp-report-darfur-sudan-eng.pdf>.

<sup>21</sup> *Ibid.*

<sup>22</sup> *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Version publique expurgée de la Requête relative à la non-coopération du Soudan, ICC-02/05-01/20-557-Red, 18 January 2022.

Regrettably, despite improvements in the Court’s reporting on cooperation since 2020, the full extent of the cooperation challenges it faces remains unclear. For example, the 2022 Report on Cooperation does not:

- Account for unanswered requests sent to states towards the end of the reporting period, which have not had a reasonable amount of time to respond.<sup>23</sup>
- Report on cooperation with all requests. For example, the Report states that requests by the Registry for cooperation are issued by headquarters, as well as by country offices and the New York Liaison Office, but it only reports on cooperation with headquarters requests.<sup>24</sup>
- Report consistently on the number of requests executed and the overall percentage of positive replies. For example, the Court reports that 34 requests for cooperation with witness protection were made in the last year, but it does not state how many of the requests received positive replies and were executed.<sup>25</sup>
- Breakdown further the types of cooperation requested or the stage of the process at which they are made.
- Document the number of requests that received no replies.
- Provide an overview of the reasons for negative responses received to requests.

This additional data could no doubt be valuable in further identifying the full extent of the cooperation challenges, pinpointing priority areas where cooperation needs to be strengthened and understanding some of the macro challenges faced by states.

Although there is room for improvement in the Court’s reporting, its latest Report on cooperation nonetheless provides an informative overview of many challenges that the Court is facing in obtaining cooperation and its efforts to engage with states. The Report also contains clear recommendations for states on the way forward. Notably, the challenges and recommendations contained in the 2022 report are largely consistent with the Court’s reports on cooperation to the ASP in 2020<sup>26</sup> and 2021<sup>27</sup> and align with the ASP’s 66 recommendations on cooperation adopted in 2007.<sup>28</sup>

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<sup>23</sup> Court Report on Cooperation 2022, footnote 12 states:

It is normal that all RFAs sent during a specific time period are not executed during the same time period, given the time needed to receive, process, consult, execute the requests. In addition, the closer to the end of the period it is sent, the least likely an RFA will be executed within the same time period. The choice was made here to only include the RFAs that were sent AND recorded as executed during the period of reference, i.e., this excludes all those RFAs executed during the period of reference but sent before it and all those sent during the period of reference but executed after it.

<sup>24</sup> ICC Report on Cooperation 2022, p.3.

<sup>25</sup> ICC Report on Cooperation 2022, p.4.

<sup>26</sup> Report of the Court on cooperation, ICC-ASP/19/25, 28 October 2020, available at: [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP19/ICC-ASP-19-25-ENG-Cooperation-Report-%2028oct20-1830.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/ICC-ASP-19-25-ENG-Cooperation-Report-%2028oct20-1830.pdf).

<sup>27</sup> Report of the Court on cooperation, ICC-ASP/20/25, 29 October 2021, available at: [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP20/ICC-ASP-20-25-ENG-ICC%20Report%20Cooperation.%20-%20ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/ICC-ASP-20-25-ENG-ICC%20Report%20Cooperation.%20-%20ENG.pdf).

<sup>28</sup> Resolution ICC-ASP/6/Res.2, annex II. See also, a flyer on the 66 Recommendations produced in 2015: “Recommendations on States’ Cooperation with the International Criminal Court (ICC): Experiences and Priorities” available at: <https://www.icc-cpi.int/sites/default/files/2022-04/66-Recommendations-Flyer-ENG.pdf>

**The ASP should encourage the Court to further develop its annual report on cooperation, providing more detailed and consistent data on cooperation requests and states' responses.**

### ***Promoting state cooperation***

Through its Bureau, including co-facilitators on cooperation (France and Senegal), the ASP has taken important measures to promote state cooperation. The ASP regularly calls on States Parties to enact implementing legislation, enter into cooperation agreements and fully implement the 66 recommendations on cooperation. It has played a key role in promoting specific forms of state cooperation, including arrest and surrender and cooperation with financial investigations and asset recovery.<sup>29</sup> The ASP has also established Procedures relating to non-cooperation, albeit formal measures have yet to be implemented despite referrals of non-cooperation by States Parties from the Court.<sup>30</sup>

This year, the Bureau has been tasked with a number of important tasks that can contribute to ensuring state cooperation, which it shall report on in advance of the 21<sup>st</sup> Session.<sup>31</sup>

Firstly, the Bureau has been requested to continue discussions on cooperation agreements.<sup>32</sup> In light of the extremely low number of certain types of cooperation agreements (in particular, agreements on interim and final release), ensuring that more States Parties enter into agreements and accept a shared responsibility for such cooperation should be a priority for the ASP.

Secondly, the Bureau has been invited to continue discussions on the feasibility of establishing a coordinating mechanism of national authorities.<sup>33</sup> This important initiative was originally proposed by Belgium at the 13<sup>th</sup> session of the ASP. However, it has yet to progress. Belgium recommended that the coordinating mechanism would meet once a year to discuss technical aspects relating to cooperation and judicial assistance, and to share knowledge and know-how in this area.<sup>34</sup> Given the concerning level of state cooperation with the Court in many areas of its work, the coordinating mechanism should be established without further delay.

Thirdly, the Bureau has been requested to continue assessing the Independent Expert Review's recommendations relating to cooperation,<sup>35</sup> including to consider appointing a focal point on arrests and a rewards program to facilitate access to information from the general public for the location and arrest of fugitives.<sup>36</sup> Both recommendations, which promise to support one of the most challenging aspects of state cooperation to date, should be supported, implemented and adequately resourced.

Fourthly, the Bureau has been mandated to continue discussions on cooperation with financial investigations and the freezing and seizing of assets, including further developing a secured digital

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<sup>29</sup> See for example, Resolution on Cooperation, ICC-ASP/16/Res.2, 14 December 2017, Annex: Declaration of Paris.

<sup>30</sup> For recommendations that States Parties and the ASP should take to strengthen its efforts to prevent and respond to non-cooperation see: IBA Guide for States Parties, 3.3.2.

<sup>31</sup> At the time of writing the Bureau's Report on cooperation has not been issued.

<sup>32</sup> Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/20/Res.5, Annex I: Mandates of the Assembly of States Parties for the intersessional period, para. 3(b).

<sup>33</sup> *Ibid.*, para. 3(c).

<sup>34</sup> Report of the Bureau on Cooperation, ICC-ASP/13/29, 21 November 2014, Annex II: Report on the feasibility study on the establishment of a coordinating mechanism dealing with cooperation, para. 4.

<sup>35</sup> Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/20/Res.5, Annex I: Mandates of the Assembly of States Parties for the intersessional period, para. 3(h).

<sup>36</sup> IER Final Report, R284 and R289.

platform.<sup>37</sup> Given low levels of cooperation in this area this year (only one out of six cooperation requests were executed), the ASP should support the Court's recommendation for States Parties to appoint national focal points on freezing of assets and to establish a network of experts in the field.<sup>38</sup>

Finally, the Bureau has been encouraged to continue its review of the implementation of the 66 recommendations on cooperation.<sup>39</sup> In light of the Court's recent reports on cooperation, which align and build upon the 66 recommendations, as well as the lack of progress by States Parties in establishing effective national frameworks for cooperation, it is important that the ASP consider a more structured process for reviewing and promoting cooperation. In particular, as recommended in the IBA's Guide to States Parties, consideration should be given to establishing a periodic review process at the ASP which requests 8-12 States Parties each year to report on and receive feedback on their national frameworks.<sup>40</sup>

**States Parties should support greater efforts by the ASP to promote cooperation agreements.**

**States Parties should support the establishment of a coordinating mechanism of national authorities on cooperation.<sup>41</sup>**

**States Parties should support the Independent Expert Review's recommendations to establish a focal point on arrests and a rewards program.**

**The ASP should support the Court's recommendation for States Parties to appoint national focal points on freezing of assets and establish a network of experts in the field.**

**States Parties should support the establishment of a periodic review process at the ASP to strengthen national cooperation frameworks, as well as to promote and review the implementation of the 66 recommendations on cooperation and the Court's recommendations in its annual report on cooperation.<sup>42</sup>**

## **2. Ensuring effective decision-making on the annual budget and allocating sufficient resources for the ICC to fulfil its mandate**

The widespread commission of crimes under international law around the world and continued trends of impunity in national jurisdictions has resulted in a significant increase in the Court's workload. Regrettably, the ICC's budget had not increased commensurately, and the Court is now facing a serious capacity crisis.

In recent years, the Office of the Prosecutor has cited lack of resources for delaying or deprioritizing vital investigative activities (including delaying investigations in Ukraine and Nigeria in 2020 after

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<sup>37</sup> Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/20/Res.5, Annex I: Mandates of the Assembly of States Parties for the intersessional period, para. 3(j).

<sup>38</sup> Court Report on Cooperation 2022, Recommendations 25 and 26.

<sup>39</sup> Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/20/Res.5, Annex I: Mandates of the Assembly of States Parties for the intersessional period, para. 3(f).

<sup>40</sup> For further information, see: IBA Guide for States Parties, Recommendation 111.

<sup>41</sup> For further information, see: IBA Guide for States Parties, Recommendation 108.

<sup>42</sup> For further information, see: IBA Guide for States Parties, Recommendation 111.

concluding preliminary examinations and restricting the scope of investigations in Afghanistan).<sup>43</sup> The 2020 Independent Expert Review found that the Office’s investigations are under-resourced.<sup>44</sup> Lack of resources also threatens the effectiveness of many of the ICC’s other core functions, including adequate legal aid for defence and victims representation (see section 5 below), victim and witness protection and outreach.

To partially meet the shortfall in resources for investigations, at the same time as announcing his decision to open an investigation in Ukraine in February 2022, the Prosecutor called for voluntary contributions and secondments of government officials from states. Although the Prosecutor has clarified that the resources sought are for all situations and cannot be earmarked for specific investigations, a number of states have made contributions indicating that they are intended to support the Ukraine investigation.

### ***Considering and deciding the 2023 budget***

In addition to the Prosecutor’s call for voluntary contributions and secondments, the Court has requested an increase of €32 million in its annual budget request for 2023. The ASP’s Committee on Budget and Finance has reviewed the request and recommended that the ASP reduce the additional resources to €25.5 million.<sup>45</sup> However, there are reports that some States Parties, including the biggest funders of the Court, are insisting on further reductions to the 2023 budget to be approved by the ASP.

Considering the challenging financial climate and substantially increased workload, the IBA is concerned that significant reductions in the 2023 budget request could seriously undermine the effectiveness of the ICC’s work in 2023 and undermine the independence of the Court. There is a real danger that the Court could be forced to rely on voluntary contributions and secondments for additional resources, which may only be provided by a small pool of states. To ensure that the Court implements the mandate in the Rome Statute consistently, effectively and efficiently, the ICC’s core activities across all situations must be adequately funded in a sustainable way by all States Parties through the annual budget process.

**States Parties should support a significant increase in the ICC’s budget for 2023 to implement its increased workload effectively. They should fully review the recommendations of the Committee on Budget and Finance considering the views of the Court and oppose any initiatives to impose further cuts to the Court’s request beyond those recommended by the Committee.**

### ***Addressing arrears in assessed contributions***

In recent years, the Committee on Budget and Finance has reported that a growing trend in arrears of

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<sup>43</sup> See: Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria, 11 December 2020; Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine, 11 December 2020; Statement of the Prosecutor of the International Criminal Court, Karim A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation of Afghanistan, 27 September 2021.

<sup>44</sup> IER Final Report, para. 178, “The ID [Investigation Division] is the most severely under-resourced Division, having 87 less full-time staff than estimated to provide the basic needs of the Division.”

<sup>45</sup> Report of the Committee on Budget and Finance on the work of its thirty-ninth session, ICC-ASP/21/15/AV, 15 October 2022.

assessed contributions threatens to seriously jeopardise the daily operations of the Court.<sup>46</sup> The Independent Expert Review also emphasized that the failure of States Parties to pay their assessed contributions on time represents an emerging liquidity crisis.<sup>47</sup>

The Committee on Budget and Finance's most recent report in October 2022 observed "with great concern that the outlook for the liquidity of the Court due to the outstanding contribution payments has significantly worsened."<sup>48</sup> The Committee noted that, as of 31 August 2022, a grand total of €44.9 million in contributions was outstanding, of which €30.3 million belong to the years prior to 2022.<sup>49</sup> The Committee predicted that, if payment patterns of the past prevail, a significant cash shortfall will occur in December 2022 and the Working Capital Fund may not suffice.<sup>50</sup> The Committee reiterated the recommendation of the Independent Expert Review for the ASP to openly consider additional means of encouraging the timely payment of contributions in full by States Parties in arrears.<sup>51</sup>

**States Parties in arrears should pay their outstanding assessed contributions in full without further delay.**

**The ASP should, as recommended by the Committee on Budget and Finance and the Independent Expert Review, urgently explore additional means of encouraging the timely payment of assessed contributions.**

#### ***Assessing the Independent Expert Review's recommendations on the budget process***

In addition to the 2023 Budget, the ASP is considering recommendations by the Independent Expert Review to improve the annual budget process, including requiring the Committee to provide sufficiently detailed reasons for its recommendations<sup>52</sup> and to include the Court's position on recommendations in its report to the ASP.<sup>53</sup> The IBA agrees that these measures would further inform the ASP's decision-making on the budget and should be implemented.

**States Parties should support the implementation of the Independent Expert Review's recommendations requiring detailed reasons for the Committee on Budget and Finance's recommendations and providing the Court with the opportunity to present its position on the Committee's proposals.**

#### ***Scheduling the annual budget decision***

This year, the Bureau has been requested, in consultation with all States Parties, the Court and civil society, to assess the benefits and challenges with regard to the scheduling of the ASP at the end of the year and to consider a proposal to hold future ASP meetings in the first six months of each year.<sup>54</sup> One option being considered is to separate the annual budget from the rest of the ASP's agenda and

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<sup>46</sup> See for example, Report of the Committee on Budget and Finance on the work of its thirty-third session, ICC-ASP/18/15, 13 November 2019, para. 68.

<sup>47</sup> IER Final Report, para. 350.

<sup>48</sup> Report of the Committee on Budget and Finance on the work of its thirty-ninth session, ICC-ASP/21/15/AV, 15 October 2022, para. 208.

<sup>49</sup> *Ibid.*, para. 209

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, para. 214; IER Final Report, R140.

<sup>52</sup> IER Final Report, R136.

<sup>53</sup> IER Final Report, R136.

<sup>54</sup> Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/20/Res.5, Annex I: Mandates of the Assembly of States Parties for the intersessional period, para. 11(i).

decide the budget at a resumed session at the end of the year.

Although the IBA sees merit in continuing to decide the annual budget as close as possible to the start of the next financial year so that the workload of the Court and its budgetary needs can be accurately estimated, it would be concerning if a resumed session solely on the budget meant that only a small subset of States Parties with sufficient resources to attend the session ultimately decide the budget. Especially at this moment in time, when the Court is facing a serious capacity crisis, the budget is one of the most important decisions on the ASP's agenda and it is important that all States Parties are engaged in making this decision each year.

**In considering proposals to reschedule the ASP's annual session, States Parties should ensure that the process of considering and deciding the annual budget of the Court is accessible and allows for the participation of all States Parties.**

### ***Electing members of the Committee on Budget and Finance***

At this session, the ASP will elect six members of the Committee on Budget and Finance. The Committee plays a vital role in reviewing the Court's annual budget request and making recommendations for the ASP's consideration before a final decision is taken. It is therefore important that the ASP elects highly qualified candidates to the Committee. Regrettably for the election at the 21<sup>st</sup> session, it appears that the ASP will continue its practice of electing candidates uncontested. Only seven candidates have been nominated for the six vacancies, including two candidates from Africa for one vacancy for the region. Rather than promoting more nominations to ensure a contested election for all positions on the Committee, the Bureau has encouraged its members from the African Group to consult with the two States Parties that presented candidates to reach an agreement on one candidate in advance of the session, so that they can also be elected uncontested.<sup>55</sup>

**In future elections, more States Parties should search for and nominate candidates for the Committee on Budget and Finance with expertise in financial matters at the international level, especially relating to the funding and operation of justice systems.**

**States Parties should support a review of the election procedures for the Committee to ensure that there is a competitive process for membership of this vital subsidiary body of the ASP, as well as gender balance.<sup>56</sup>**

### ***Developing a 10-Year strategic vision of the ICC***

Acknowledging the need for a clear and shared vision of the ICC and its resource needs, the IBA welcomes that, separate from the annual budget process, the Bureau has decided to implement the Independent Expert Review's recommendation to convene a discussion among the Court, States Parties and civil society on the strategic vision of the Court for the next ten years, including its resource needs.<sup>57</sup> The Bureau has decided to hold this dialogue during the commemoration of the 25<sup>th</sup> anniversary of the Rome Statute on 17 July 2023.<sup>58</sup>

**States Parties should support and participate in a constructive dialogue on the strategic vision of the ICC for the next ten years during commemoration of the 25<sup>th</sup> anniversary of the Rome Statute. They should promote an ambitious vision for strengthening the work of the**

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<sup>55</sup> Decisions of the Bureau, 19 October 2022.

<sup>56</sup> For further information, see: IBA Guide for States Parties, Recommendation 13.

<sup>57</sup> IER Final Report, R363.

<sup>58</sup> Decisions of the Bureau, 19 October 2022.

**ICC and its impact in the fight against impunity, including supporting sufficient resources to meet demands for international justice.**

### **3. Promoting geographical representation and gender balance and ensuring a safe working environment**

The Rome Statute sets out that, in the employment of Staff, the Court shall ensure the highest standards of efficiency, competency and integrity, and shall have regard to the representation of principal legal systems of the world, equitable geographical representation and a fair representation of female and male staff.<sup>59</sup> The Bureau has stressed that geographical representation and gender balance benefits the Court by ensuring diversity of perspective which, internally, increases the creativity in the work and environment and, externally, remains crucial to address perception challenges and advance the universality of the Rome Statute.<sup>60</sup>

However, in practice, female staff are severely under-represented at senior levels and a chronic geographical imbalance exists with nationals of the Western European and Other Governments' group<sup>61</sup> over-represented at all professional levels, while staff from other regions – in particular, Asia-Pacific and Latin America and the Caribbean – are under-represented.<sup>62</sup> The 2020 Independent Expert Review recommended reforms in the Court's recruitment system, noting the need for decisive action in order to achieve gender equality and ensure "the dignity, wellbeing, safety and inclusion of all individuals affiliated with the Court, regardless of gender or sexual orientation" and to address barriers to geographical representation.<sup>63</sup>

Data issued by the Court this year demonstrates that gender imbalance at senior levels continues to exist. Female staff remain under-represented at grades P-3 (46%); P-4 (37.6%), P-5 (26.3%) and D-1 (11.1%), which marks only a "slight improvement in gender parity" at grades P-3 (1%), P-4 (1.6%) and P-5 (2.3%) on the previous year.<sup>64</sup> Although full data on the current status of geographical representation has yet to be released, the over-representation of staff from the Western European and Other Governments' group and under-representation of staff from other geographical regions persists.

Despite the clear need for more progress, in recent years, the Court has made geographical representation and gender balance of staff a priority,<sup>65</sup> including establishing an ICC Gender Equality Focal Point. The IBA welcomes a number of important initiatives undertaken by the Court in 2022, including:

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<sup>59</sup> Rome Statute, Articles 44(2) and 36(8).

<sup>60</sup> Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court, ICC-ASP/20/29, 29 November 2021, para. 29.

<sup>61</sup> For a list of states in the Western European and Other Governments' group see: <https://www.un.org/dgacm/en/content/regional-groups>

<sup>62</sup> See for example, Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court, ICC-ASP/20/29, 29 November 2021, paras 12 and 19.

<sup>63</sup> IER Final Report, R15 and R91-96

<sup>64</sup> Report of the Court on Human Resources Management, ICC-ASP/21/7, 28 October 2022, para. 34.

<sup>65</sup> See for example: Report of the Court on Human Resources Management, ICC-ASP/19/4, 30 October 2020, para. 3.

- The forthcoming launch at the ASP's 21<sup>st</sup> session of a *Strategy on Gender Equality and Workplace Culture for the International Criminal Court*.<sup>66</sup>
- The implementation of new recruitment practices, including increasing promotion of vacancies on social media; ensuring geographical and gender diversity on all recruitment panels; mandatory training for all panel members on unconscious bias in recruitment; using video interviews to screen a greater pool of candidates; and consideration of geographical representation and gender balance for all types of appointments.<sup>67</sup>
- Incorporation of gender balance and geographical representation into the strategic plans of the Court.<sup>68</sup>
- Intensification of the Court's fundraising efforts for the Trust Fund for the development of Interns and Visiting Professionals to fund candidates from under- and non-represented countries to take up such positions in the Court and potentially apply for staff positions in the future.<sup>69</sup>
- Development of a victim oriented Administrative Instruction on discrimination and harassment, including sexual harassment and abuse of authority.<sup>70</sup>
- Review of other Administrative Instructions on disciplinary proceedings and investigations, and flexible working arrangements.<sup>71</sup>
- Establishment of an Ombudsperson tasked to promote prevention and provide mediation.<sup>72</sup>

Many of these initiatives go to implementing the Independent Expert Review's recommendations for reforms and will hopefully contribute to greater progress towards geographical representation and gender balance in the next years. It is also encouraging that the Court is developing other initiatives, including relaunching its mentoring program with a gender focus, developing a new Recruitment Administrative Instruction and redesigning vacancy announcements to be more appealing to applicants from under- and non-represented states and female applicants.<sup>73</sup>

In addition to these initiatives by the Court, States Parties have a critical role in achieving geographical representation and gender balance. As recommended in the IBA's Guide to States Parties, States Parties from geographical regions that are not represented or are under-represented in the staff of the Court should work with the ICC to disseminate vacancy announcements to qualified candidates in their countries.<sup>74</sup> All States Parties should assist the ICC with disseminating vacancy announcements, particularly P-4 and above, to qualified female candidates in their countries.<sup>75</sup> To assist States Parties

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<sup>66</sup> ICC presentation to New York Working Group on 7 November 2022.

<sup>67</sup> ICC presentation to New York Working Group on 7 November 2022.

<sup>68</sup> ICC presentation to New York Working Group on 7 November 2022.

<sup>69</sup> Report of the Court on Human Resources Management, ICC-ASP/21/7, 28 October 2022, para. 73.

<sup>70</sup> ICC presentation to New York Working Group on 7 November 2022.is

<sup>71</sup> Report of the Court on Human Resources Management, ICC-ASP/21/7, 28 October 2022, para. 40.

<sup>72</sup> ICC presentation to New York Working Group on 7 November 2022.

<sup>73</sup> ICC presentation to New York Working Group on 7 November 2022.

<sup>74</sup> For further information, see: IBA Guide for States Parties, Recommendation 21.

<sup>75</sup> For further information, see: IBA Guide for States Parties, Recommendation 22.

in this process, the IBA has recommended that practical guidance on disseminating and promoting vacancies should be developed by the ASP and the Court.<sup>76</sup>

Vetting of candidates for ICC staff and elected officials (including for bullying and sexual harassment) is an essential element of ensuring a safe working environment. The IBA has called for vetting of all candidates for elected officials, including judges, to ensure high moral character, noting that vetting in most elections to date has either not occurred or it has been inadequate.<sup>77</sup> The IBA therefore welcomes the Report of the Bureau’s facilitators on Lessons Learnt from the Third Election of the Prosecutor of the ICC, which emphasised that, during its consultations, there was “great support for the establishment of a permanent vetting mechanisms for all elected officials of the Court.”<sup>78</sup> Rather than continue with ad hoc vetting processes, the IBA urges States Parties to support the development of a permanent vetting mechanism as soon as possible, ensuring that it is fair, independent, professional and thorough. It should include a mechanism for third parties to share information regarding inappropriate conduct (including bullying and sexual harassment), with full protection for the confidentiality of persons providing information and candidates, and procedures that reflect due process, including prior notice to all candidates that vetting will take place.

**The ASP should welcome the initiatives taken by the Court this year to strengthen its systems to achieve geographical representation and gender balance, while recognizing the need for significant improvements in future years.**

**States Parties should support adequate resources for the Court to implement these systems and new initiatives in 2023. In particular, States Parties should review the Committee on Budget and Finance’s recommendation not to convert the Gender Equality Focal Point to an established post this year<sup>79</sup> and, at a minimum, support the conversion of the Focal Point to an established post in 2024.**

**More States Parties should make contributions to the Trust Fund for the development of Interns and Visiting Professionals to increase paid internship and visiting professional positions,<sup>80</sup> as recommended by the Independent Expert Review,<sup>81</sup> as a means of supporting geographical representation in the staff of the Court.**

**The ASP should request the Bureau to work with the ICC to develop more detailed guidance for States Parties to promote ICC vacancy announcements and disseminate them widely.<sup>82</sup>**

**The ASP should request the Bureau to develop, in consultation with States Parties, the Court and civil society, a permanent vetting mechanism for all elections of ICC officials, including ensuring that sufficient resources and time for vetting are incorporated into the ASP’s election budgets and timeframes.**

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<sup>76</sup> For further information, see: IBA Guide for States Parties, Recommendations 21 and 22.

<sup>77</sup> For further information, see: IBA Guide for States Parties, Recommendations 24.

<sup>78</sup> Third Election of the Prosecutor of the ICC – Lessons Learnt, Report by the facilitators, 13 October 2022, para. 134,

<sup>79</sup> Report of the Committee on Budget and Finance on the work of its thirty-ninth session, ICC-ASP/21/15, 15 October 2022, para. 81(a).

<sup>80</sup> For further information, see: IBA Guide for States Parties, Recommendation 23.

<sup>81</sup> IER Final Report, R96.

<sup>82</sup> For further information, see: IBA Guide for States Parties, Recommendation 22.

#### 4. Strengthening the voice of the defence in the Court, improving administration and increasing support to defence teams

Despite being listed as priorities for implementation,<sup>83</sup> the Independent Expert Review's recommendations to strengthen and empower the Office of Public Counsel for Defence (OPCD) to represent the Defence on an institutional level, by transforming it into a Defence Office,<sup>84</sup> have yet to be fully assessed.

To redress "what could be perceived as an institutional imbalance regarding the defence",<sup>85</sup> the Experts recommended that the Defence Office should retain its functional independence,<sup>86</sup> whilst being entrusted with additional responsibilities such as: (i) management and governance of defence services and legal aid;<sup>87</sup> (ii) representing the Defence on an institutional level;<sup>88</sup> (iii) oversight, capacity building and strategic development for defence representatives before the Court;<sup>89</sup> (iv) generating defence press releases "in the spirit of institutional equality of arms";<sup>90</sup> and (v) providing input to the Court's public information and outreach strategies "to ensure such communication efforts respect the principles of fair trials and presumption of innocence".<sup>91</sup>

In response to the Expert's recommendations, the ICC committed to give them careful consideration acknowledging the importance of institutionally endowing Defence with sufficient and adequate support structures to ensure its independence, full implementing the principle of equality of arms and giving the defence a more prominent organisational weight.<sup>92</sup> The Court stated options will be explored, involving all relevant actors and stakeholders, with the objective of identifying relevant functions that could be transferred to a Defence Office, their legal, policy, structural or budgetary implications, as well as consideration to ensure synergies and efficiency in the provision of the services.<sup>93</sup>

The IBA supports full consideration of the Expert's recommendations to strengthen the voice of the defence, improve administration and increase support to defence teams. In particular, it notes that the current structure and framework of the ICC restricts the ability of the defence to engage in discussions and institutional processes that affect its work, including the development of policies and budgetary requests, and limits its standing to raise matters at the ASP.<sup>94</sup> The OPCD, which has consistently sought to advocate for the general interests of the defence inside and outside the Court,

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<sup>83</sup> IER Final Report, Annex 1, para. 61.

<sup>84</sup> IER Final Report, R322-327.

<sup>85</sup> IER Final Report, R327.

<sup>86</sup> IER Final Report, R323.

<sup>87</sup> IER Final Report, R323.

<sup>88</sup> IER Final Report, R323.

<sup>89</sup> IER Final Report, R324.

<sup>90</sup> IER Final Report, R325.

<sup>91</sup> IER Final Report, R326.

<sup>92</sup> Overall Response of the International Criminal Court to the "Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report" Preliminary Analysis of the Recommendations and information on relevant activities undertaken by the Court, 14 April 2022, para. 627.

<sup>93</sup> *Ibid.*

<sup>94</sup> For further information, see: Recommendations of the International Bar Association ICC & ICL Programme to the Independent Expert Review of the International Criminal Court, April 2020, p 4, available at: <https://www.ibanet.org/document?id=2020-IBA-submission-IER>.

has limited or no access to important institutional mechanisms and processes, including the Coordination Council and the Advisory Committee on Legal Texts (ACLT).

Although the Experts' recommendations were initially scheduled to be considered in the second half of 2021,<sup>95</sup> the Review Mechanism reported to the ASP at the end of 2021 that assessment of the recommendations was pending.<sup>96</sup> The IBA understands that consideration of the recommendations have now been postponed to 2023. The IBA is concerned by the delays in assessing these critical recommendations and by reports that some states have expressed opposition to the establishment of a defence office before the recommendations have even been fully considered.

**The ASP and the Court should ensure that the Independent Expert Review's recommendations to transform the Office of Public Counsel for Defence into a Defence Office with additional responsibilities are given detailed consideration without further delay, including full consultation with all stakeholders.**

## **5. Ensuring the urgent revision of the ICC Legal Aid Policy to establish a comprehensive system of legal aid that is accessible, sustainable, and credible**

As the 2020 Independent Expert Review emphasised:

Legal aid is an "essential element of a functioning criminal justice system that is based on the rule of law." UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems require that effective legal aid is provided promptly at all stages of the criminal justice process and that every person charged with a criminal offence has adequate time, facilities, and technical and financial support, in case they do not have sufficient means, to prepare their defence. It is one of the duties States Parties have undertaken when becoming bound by the Rome Statute.<sup>97</sup>

An effective ICC legal aid system is fundamental to ensuring fair trials and the rights of the accused,<sup>98</sup> as well as the rights of victims to participate in Court proceedings and present their views and concerns at appropriate stages.<sup>99</sup>

Regrettably, the current Legal Aid Policy adopted in 2013 is outdated, inadequate and needs to be tailored to meet the needs of the defence and victims' teams at the ICC. Despite participating in several consultations to revise the Legal Aid Policy since 2016,<sup>100</sup> the IBA is dismayed that progress has been too slow and a new Policy has yet to be adopted. A number of key issues in revising the Policy remain to be resolved and the process has been persistently undermined by unrealistic demands by

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<sup>95</sup> Review Mechanism: Comprehensive action plan for the assessment of the recommendations of the Group of Independent Experts, including requirements for possible further action, as appropriate.

<sup>96</sup> Report of the Review Mechanism submitted pursuant to ICC-ASP/19/Res.7, ICC-ASP/20/36, 7 December 2021, paragraph 9.

<sup>97</sup> IER Final Report, para. 821.

<sup>98</sup> See in particular, Rome Statute, Article 67(1)(b).

<sup>99</sup> Rome Statute, Article 68(3).

<sup>100</sup> See for example, [IBA Comments on ICC Draft Legal Aid Policy](#), December 2018; [IBA Comments on 'Concept Paper: Review of the International Criminal Court Legal Aid System'](#), 9 June 2017.

the ASP and the Committee on Budget and Finance that the review of the policy must be within existing resources.<sup>101</sup>

The 2020 Independent Expert Review identified legal aid as a priority issue and noted that “further matters need to be urgently addressed before it can truly be said that the Defence is accorded the respect and fair treatment that its important role in the Court merits”.<sup>102</sup> The Experts recommended renewed efforts to finalise a full reform of the Legal Aid Policy, ensuring that it is accessible, effective, sustainable and credible, including ensuring equality of arms.<sup>103</sup>

This year, the Registry and the Legal Aid Facilitator, Ambassador Gallardo, have prepared a revised Legal Aid Policy following consultations with a broad range of stakeholders, including the dissemination of a Questionnaire on the Review and Reform of the Legal Aid Policy and holding a Legal Aid Seminar on 30-31 May. Although the latest draft Policy reflects progress on some issues, the IBA considers that the Policy should be further developed to, at a minimum:

- ensure equivalent remuneration of counsel and associate counsel (who continue to be paid at the level set in 2013) with the relevant staff levels at the Office of the Prosecutor (P5 and P4 respectively).
- define the proposed contracts and working conditions of persons assisting counsel, ensuring that they provide equivalent remuneration, employment protections and benefits to the staff of the Court.
- resolve issues of taxation.

Given that the draft Policy states that it should enter into force on 1 January 2024, the Court and the ASP should continue their efforts in 2023 to resolve these and other concerns raised by stakeholders in order to adopt and implement a comprehensive and effective policy from the start of 2024 onwards.

Although the budgetary impact of the draft Legal Aid Policy must be considered, it is important that States Parties consider the Policy on its merits and do not impose arbitrary limits which would undermine the new Policy or its implementation. The 2023 Budget proposal of the Court allocates approximately 2.7% of the Court’s total request to legal aid for the defence and 1.25% to legal aid for victims, compared to 33.5% for the Office of the Prosecutor. Given the significant increase proposed in the budget of the Office of the Prosecutor for 2023, as well as voluntary contributions and secondments committed to the Office this year, it is essential that the ASP provide equal consideration to well justified increases in legal aid, including to ensure that the Court’s system meets international standards and is consistent with the principle of equality of arms.

**The ASP should support the adoption of a new Legal Aid Policy in 2023 that will enter into force on 1 January 2024.**

**Recognizing that defence and victims’ teams are being paid at levels defined in 2013, the ASP should consider urgent temporary measures to increase their remuneration in 2023.**

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<sup>101</sup> See for example: Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/21/Res.5, paras. 89-90; Report of the Committee on Budget and Finance on the work of its twenty-ninth session, ICC-ASP/16/15, para. 182.

<sup>102</sup> IER Final Report, para. 821.

<sup>103</sup> IER Final Report, R328.

**The ASP should mandate the Court to continue its review of the legal aid policy in consultation with all stakeholders in order to finalise it in 2023, including to ensure remuneration for defence and victim representation teams equivalent to the remuneration of relevant staff in the Office of the Prosecutor; define the proposed contracts and working conditions of persons assisting counsel; and resolve issues of taxation.**

**States Parties should support effective solutions and oppose efforts to set arbitrary budgetary limits on the process of revising the ICC's legal aid system. They should consider the draft Legal Aid Policy on its merits ensuring that the Court's legal aid system is accessible, effective, sustainable and credible.**

## **6. Ensuring a sustainable source of funding for family visits**

The right to family visits was confirmed by a decision of the ICC Presidency in 2009, which noted that this right “fundamentally affects the well-being of the detained person; his connection to his family being a central component of his identity.”<sup>104</sup> It further noted that maintaining family ties through family visits is an essential part of the detained person's re-integration into society.<sup>105</sup> The Presidency decided that the ICC has a positive obligation to fund a limited number of family visits for indigent detainees to give effect to the right to family visits which would otherwise be ineffective.<sup>106</sup>

Subsequently, in 2010, the ASP established the Trust Fund for Family Visits (TFFV) for the purpose of funding family visits for indigent detainees entirely through voluntary donations. It charged the Court with “promoting the special fund and collecting contributions from States Parties, other States, non-governmental organizations, civil society, individuals and other entities”.<sup>107</sup>

However, despite the ICC's fundraising efforts, the TFFV has received only a small number of contributions. The resources provided have not been sufficient or sustainable for the Court to give effect fully to the rights of indigent accused persons to a reasonable number of family visits.<sup>108</sup> The Court reported in October that, despite intensified fundraising efforts, the TFFV reached zero contributions level in 2019 and it is close to reaching the same situation by the end of 2022, should there be no additional funds coming in.<sup>109</sup> The Court has urged States Parties to intensify efforts towards sustainable and adequate funding, which will ensure the integrity of the proceedings, the proper management and administration of the ICC Detention Centre and avoid the Court incurring additional costs.<sup>110</sup>

Significantly, in the lead up to the 21<sup>st</sup> session, a proposal has been made for the ASP to adopt a new paragraph of the omnibus resolution that, in addition to calling for more contributions to the TFFV:

*Notes that the recurrent inability of the Court to meet the qualifying needs for family visits for indigent detainees can lead to more onerous situations, financially and legally, and decides that the Court may, within existing resources, subsidize family visits for indigent*

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<sup>104</sup> ICC, Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, ICC-RoR217-02/08-8, Decision on ‘Mr Mathieu Ngudjolo's Complaint under Regulation 22(1) of the Regulations of the Registry against the Registrar's Decision on 19 November 2008’, Situation in the Democratic Republic of Congo, 10 March 2009, para. 35.

<sup>105</sup> *Ibid.*, para. 35.

<sup>106</sup> *Ibid.*, para. 37.

<sup>107</sup> ICC-ASP/9/Res.4, Family visits for indigent detainees, 10 December 2010, p. 33.

<sup>108</sup> For further information on the funding of the TFFV, see: IBA Guide for States Parties, Recommendation 10.

<sup>109</sup> Report of the Court on cooperation, ICC-ASP/21/24, 20 October 2022, para. 19.

<sup>110</sup> Report of the Court on cooperation, ICC-ASP/21/24, 20 October 2022, para. 19.

detainees using its regular budget in the exceptional and unavoidable situations where the Trust Fund for the Family Visits is depleted or its available resources are insufficient to do so, in a manner fully consistent with all applicable administrative and judicial criteria.

The IBA has repeatedly called on the ASP to ensure that sustainable and adequate systems are in place to fund a reasonable number of family visits for indigent detainees in ICC detention.<sup>111</sup> The organisation strongly supports this proposal because it provides a vital back up mechanism that will allow the Court to continue to provide a reasonable number of family visits for indigent detainees if the resources of the TFFV are depleted.

**States Parties should make voluntary contributions to the Trust Fund for family visits for indigent detainees in ICC detention.**

**States Parties should support the proposal to allow the Court, exceptionally where the resources of the Trust Fund are depleted, to use its regular budget to fund family visits for indigent detainees.**

## **7. Strengthening the process of nominating and electing ICC judges and ensuring a thorough vetting process for all candidates**

In advance of the next election of six ICC judges in 2023, the ASP is considering a number of recommendations by the Independent Expert Review to further develop the nomination and election procedures, including:

- Amending the procedure requiring that candidates attend an interview with the Advisory Committee and the roundtable discussions with States Parties and other relevant stakeholders, or be disqualified from the election, barring exceptional circumstances.<sup>112</sup>
- Mandating the Advisory Committee to assess the ability of each candidate to manage and conduct complex international criminal trials fairly and expeditiously.<sup>113</sup>
- Leading a process to harmonize the nomination procedures followed by States Parties<sup>114</sup> and compiling before the next election in 2023 a set of criteria which should be applied in national level nomination processes along with guidelines on the conduct of the nomination process.<sup>115</sup>
- Requiring the nominating State Party to submit a certificate setting out the nomination procedure it followed.<sup>116</sup>
- Reviewing the criteria applicable to candidates from List B, having regard to the significance of criminal trial experience to the work of the Court.<sup>117</sup>

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<sup>111</sup> See for example, IBA Guide for States Parties, Recommendation 10.

<sup>112</sup> IER Final Report, R371.

<sup>113</sup> IER Final Report, R374.

<sup>114</sup> IER Final Report, R376.

<sup>115</sup> IER Final Report, R377.

<sup>116</sup> IER Final Report, R376.

<sup>117</sup> IER Final Report, R379.

- Considering whether the presence of distinguished international judges should be a requirement of the membership of the ACN.<sup>118</sup>

As reflected in the IBA's Guide to States Parties, the IBA supports these important measures to strengthen the nomination and elections process<sup>119</sup> and welcomes the efforts by the New York Working Group this year to develop amendments to the existing procedures, which should seek to achieve the improvements recommended by the Experts.

In addition, the Assembly is considering a further proposal by Belgium to amend the procedures for the nomination and election of judges to:

- address the situation where only one candidate remains for one position to ensure that there is a vote to ensure sufficient support for the candidate and to avoid the automatic election of the candidate.
- Increase the pool of candidates that is proposed by each region and create a large pool of candidates to select from without creating a bigger minimum voting requirement.

The IBA sees merit in these proposals to ensure that the Assembly is able to select ICC judges from a pool of highly qualified candidates and encourages States Parties to work with Belgium to advance the proposal.

Finally, to ensure that those elected in 2023 meet the requirement of high moral character, the IBA reiterates its calls for a thorough vetting process for each candidate and a mechanism for third parties to share information regarding inappropriate conduct (including bullying and sexual harassment), with full protection for the confidentiality of the information provider and candidates, and procedures that reflect due process. As set out in section 3 above, a permanent vetting mechanism for the election of all ICC officials should be preferred and established as soon as possible. If the ASP decides to establish an ad hoc vetting process for the 2023 election of judges, it should ensure that the process is effective, including allocating sufficient resources and time for vetting in the ASP's election budgets and timeframes. In particular, if the Independent Oversight Mechanism (IOM) is tasked to continue its role in recent elections of conducting a due diligence process with regard to candidates,<sup>120</sup> the Assembly should ensure that the IOM is allocated sufficient resources, including reviewing cuts to its budget request that have been recommended by the Committee on Budget and Finance.<sup>121</sup>

**States Parties should support the Independent Expert Review's recommendations for strengthening the process of nominating and electing ICC Judges and ensure that the measures are implemented prior to the 2023 election of six judges.**

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<sup>118</sup> IER Final Report, R380. The Experts explained in para. 977 'it may be appropriate to consider whether the presence of distinguished international judges should be a requirement, possibly by adding to the requirements: '(...) and of whom at least five members have established experience and competence as a judge of an international criminal court or tribunal'.'

<sup>119</sup> For further information, see: IBA Guide for States Parties, Recommendation 25.

<sup>120</sup> See Annual Report of the Head of the Independent Oversight Mechanism, ICC-ASP/21/8, 31 October 2022, paras 59-61.

<sup>121</sup> Report of the Committee on Budget and Finance on the work of its thirty-ninth session, ICC-ASP/21/15, 15 October 2022, paras. 188-203. In particular, at para. 196-197, the Committee recommended a reduction in the IOM's budget request for consultants in 2023 to conduct possible due diligence process because a decision had yet to be taken on whether the IOM would conduct due diligence for judicial elections.

**States Parties should further support Belgium's proposals to amend the procedures for nominating and electing ICC judges to ensure that the Assembly always elects judges from a pool of highly qualified candidates.**

**States Parties should ensure that a thorough vetting process of all candidates for the election of judges in 2023 is conducted and that a permanent vetting mechanism is established as soon as possible.**