



# Priorities and Recommendations for the 19th Session of the International Criminal Court Assembly of States Parties

December 2020

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## 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 19th session of the International Criminal Court Assembly of States Parties (ASP), taking place from 14 - 16 December 2020, in The Hague, and from 17 - 23 December 2020, in New York.

The IBA ICC & ICL Programme monitors issues related to fairness and equality of arms at the ICC and other Hague-based war crimes tribunals. The Programme analyses proceedings and evaluates legal, administrative and institutional issues that could potentially affect the rights of defendants, the impartiality of proceedings and the development of international justice.<sup>1</sup>

The annual ASP session is a platform for States Parties to reaffirm their commitment to the Court, and for States and other stakeholders, including civil society, to reflect on the work of the ICC, to present their views and priorities regarding the Court, and to engage in constructive discussion, with the aim of strengthening the Court and ensuring it can deliver its mandate.

### ***The ICC context in 2020: challenges and opportunities***

The 19<sup>th</sup> session is taking place subsequent to the release of the Final Report by the group of Independent Experts mandated by the ASP to identify ways to strengthen the ICC and the Rome Statute system. Further, at the 19<sup>th</sup> session, elections will take place to fill six judicial vacancies, as well as the position of Prosecutor. The ASP will also determine the 2021 budget for the Court, and discuss a number of operational matters related to the ICC. This will all take place at an unprecedented moment of global crisis caused by the COVID-19 pandemic, and during a moment of crisis for the Court caused by United States sanctions.

The IBA recognises the operational challenges created for the ICC by the pandemic. In line with the IBA ICC & ICL Programme mandate to monitor fair trial issues, the IBA has taken particular note of the challenges created for upholding the rights of the accused in ICC detention. Detention centres and prisons across the world have responded to the pandemic by limiting or banning visits, which has the direct consequence of interfering not only with the right to family visits, but also to effective legal assistance.<sup>2</sup> At the ICC, this has been evidenced by litigation from a number of defence teams on the restrictions in place at the United Nations Detention Unit (UNDU) which do not allow for meaningful interaction between the defence team and the defendant.<sup>3</sup> Further, it has been noted that that a reliance on remote communications could undermine the quality of legal assistance.<sup>4</sup> Privileged telephone conversations, over a protracted period of time, could present issues related to significant discussion, legal advice and strategy.<sup>5</sup> The ability of accused persons to attend all hearings

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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> Fair Trials, [Safeguarding the Right to a Fair Trial During the Coronavirus Pandemic: Remote Criminal Justice Proceedings](#), p 4.

<sup>3</sup> ICC, *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-680-Red2, Public redacted version of "Urgent Defence request for interim release", 23 March 2020, para 37; ICC, *Prosecutor v Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-564-Red, Public redacted version of "Request to allow Defence team in-person visit to Mr Ngaïssona in order to prepare for the Status Conference of 9 July 2020", ICC-01/14- 01/18-564-Conf, 23 June 2020, para 12 – 19.

<sup>4</sup> Fair Trials, *supra* note 2, p 4.

<sup>5</sup> ICC, *Prosecutor v Bosco Ntaganda*, Defence observations pursuant to 'Order to provide information on the impact of COVID-19 measures on operational capacity', 21 April 2020, para 5.

in person, and to interact with their counsel while in the Courtroom, remain of paramount importance. The IBA continues to monitor the impact of COVID-19 restrictions on the fundamental rights of the accused.

In addition to the challenges presented by the pandemic, the ICC Prosecutor and Court personnel are operating under the threat of sanctions imposed by the United States.<sup>6</sup> Executive Order 13928 is an unprecedented escalation to the previous threats levied against the ICC by the United States, and is an obstruction to the ICC's work on behalf of victims of the most serious crimes. The IBA urges States to seize the opportunity presented by the ASP to reiterate their commitment to the work of the Court, both in statement and in action.

The IBA further recognises the exceptional challenges faced by the ASP in convening the 19<sup>th</sup> session, and emphasises the need for States to ensure meaningful engagement with civil society during this session, as with previous sessions. The ASP has recognised the 'involvement of universal civil society in furthering the objects and purposes of the International Criminal Court',<sup>7</sup> and pursuant to Rule 93 of the ASP's Rules of Procedure, non-governmental organizations may attend meetings of the Assembly and meetings of its subsidiary bodies. The IBA welcomes the steps taken by the ASP to ensure civil society has remote access, and limited in-person access, to the 19<sup>th</sup> session.

In the following paper, the IBA ICC & ICL Programme identifies its priorities for ASP action and engagement, including opportunities for immediate cooperation and contribution, as well as issues for longer-term engagement to address persistent challenges faced by the institution.

## **1. Electing the most qualified prosecutor and judges based on merit, with adequate vetting**

At the 19th session of the ASP, States Parties will elect the next Prosecutor, as well as six judges, each of whom will serve a nine-year term. The Rome Statute provides that the ICC Prosecutor, as well as ICC judges, shall be persons of high moral character.<sup>8</sup>

The IBA stresses that merit should be the guiding factor in both prosecutorial and judicial elections. Electing judges and officials with knowledge and experience in criminal law and procedure, as well as substantial experience in managing complex trials, is key to an effective and efficient Court. The qualifications of the Prosecutor and the Judges must not allow doubts as to their professional competence and integrity. The IBA urges States Parties to take all necessary measures to ensure the high moral character of the next ICC Prosecutor, and of the six judges to be elected.

The ASP established a Committee on the Election of the Prosecutor (CEP),<sup>9</sup> which shortlisted four candidates on 30 June 2020. On 13 November 2020, following a lack of consensus around any of the four candidates, the Bureau of the ASP reverted to the longlist of candidates sent to the CEP, and initiated a further process of consultation around the expanded list of candidates.<sup>10</sup> On 25 November

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<sup>6</sup> United States, Executive Office of the President. [Executive Order 13928](#), 11 June 2020.

<sup>7</sup> ASP, Resolution ICC-ASP/2/Res.8.

<sup>8</sup> Article 36(3)(a) and Article 42(3).

<sup>9</sup> ICC-ASP/18/INF.2, Bureau of the Assembly of States Parties: Election of the Prosecutor - Terms of Reference, 11 April 2019.

<sup>10</sup> Bureau of the Assembly of States Parties, Election of the Prosecutor - Way Forward, 13 November 2020.

2020, the CEP submitted its appraisal on five additional candidates, bringing the total number to nine.<sup>11</sup>

ICC elections to date have not included comprehensive procedures for vetting candidates for high moral character. In its report, the CEP stated that it had limited authority and resources within its existing mandate and terms of reference to fully vet candidates' high moral character.<sup>12</sup> Nevertheless, the CEP 'undertook the unprecedented step to include a vetting process,' while acknowledging that it was 'set in motion *ex post facto* and with limited scope', and therefore could not 'lay claim to comprehensiveness, nor will it offer all desirable guarantees'.<sup>13</sup> The CEP recommended that 'future processes for the election of candidates, including candidates nominated for a position by States Parties, include a provision for the vetting of candidates *ab initio*, with clearly outlined parameters and modalities as well as an indication at which point vetting would be triggered'.<sup>14</sup>

The judicial nomination procedure was also amended in 2019.<sup>15</sup> Stakeholders have previously found that 'important gaps in the Advisory Committee's assessment methodology remain' including *inter alia*, poor assessment of candidates' high moral character, integrity and impartiality.<sup>16</sup> In this regard, and following the example set by the CEP, the Advisory Committee on Nominations of Judges (ACN), took note of the vetting process advanced by the CEP, and agreed that 'a request should be made for similar assistance in respect of the 20 candidates for the judicial elections'.<sup>17</sup> A similar vetting process was thus implemented.

The IBA notes these advances but stresses the need for improved vetting to ensure that the high moral character requirement can be adequately assessed. The IBA also calls for a thorough review of lessons learned in the 2020 elections, and for States Parties to put in place appropriate robust vetting for future elections. Stakeholders have identified a number of concrete ways to improve the process. These include the 'need for an agreed upon, comprehensive, and meaningful definition of "high moral character"' and that a 'rigorous assessment of ethical character should start from the beginning of a vetting process, through setting up procedures... that test a person's ethical outlook and decisions throughout their career'.<sup>18</sup>

Establishing a robust and up-to-date framework for vetting allegations of bullying and sexual harassment by candidates for ICC positions will safeguard the ICC in the future, and enable the Court

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<sup>11</sup> ICC-ASP/19/INF.2.Add.3, Report of the Committee on the Election of the Prosecutor, Addendum, Appraisals of additional candidates, 25 November 2020.

<sup>12</sup> ICC-ASP/19/INF.2, Report of the Committee on the Election of the Prosecutor, 30 June 2020, para 26.

<sup>13</sup> *Ibid*, paras 27, 31.

<sup>14</sup> *Ibid*, para 32.

<sup>15</sup> ICC-ASP/18/Res.4 Resolution on the review of the procedure for the nomination and election of judges, Adopted at the 9th plenary meeting, on 6 December 2019.

<sup>16</sup> Open Society Justice Initiative, [Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court](#), October 2019, 46 – 47.

<sup>17</sup> ICC-ASP/19/11, Report of the Advisory Committee on Nominations of Judges on the work of its seventh session, 30 September 2020, para 22.

<sup>18</sup> Coline Schupfer and Taegin Reisman, '[Electing the Next ICC Prosecutor: Assessing Sexual Misconduct as Part of the "High Moral Character" Requirement](#)', International Justice Monitor (13 November 2019); see also Angela Mudukuti, '[Searching for the next ICC Prosecutor: Where to From Here?](#)', International Justice Monitor (15 September 2020).

to lead by example as the legal profession confronts an acknowledged problem within its institutions and workplaces.<sup>19</sup>

Noting the recommendations made by the Experts on the procedure for the nomination and election of Judges<sup>20</sup>, the IBA also highlights the need to elect qualified female judges, in keeping with the requirements of the Statute and to ensure a fair representation of women on the ICC bench.

**The IBA calls on States Parties to ensure that the selected candidates for both prosecutorial and judicial positions are elected on the basis of merit, possess high moral character, and the highest legal competency.**

**States Parties should conduct a thorough review of the procedures to nominate and elect the Prosecutor and the judges as soon as possible following the election.**

**States Parties should institute rigorous vetting as a standing procedure for all future elections for the posts of Prosecutor and judges of the Court.**

**States Parties should promote vacancies for the Prosecutor and Judges nationally so that a greater number of highly qualified candidates can apply, and should establish or strengthen procedures for assessing candidates at the national level, to ensure the most highly qualified candidates are put forward.**

## **2. Strengthening political support for the Court, pushing back on US sanctions and protecting the ability of the Court to perform its mandate**

The ICC continues to operate in a challenging climate, most recently marked by the issuance of the United States (US) Executive Order 13928.<sup>21</sup> This Executive Order is an unprecedented escalation of previous US threats levied against the ICC, and allows the blocking and seizure of assets of ICC personnel involved in investigating the possible commission of crimes by US forces and its allies.

Threats against the ICC not only undermine the rule of law, but ultimately affect all areas of the Court's functioning. The blocking and freezing of assets of any person, including legal entities, found to be 'materially assisting' a designated official, risks decreased cooperation which will harm the operations of the Court and obstruct justice for victims of serious crimes. Furthermore, the sanctions exacerbate risks for Court staff and officials who are performing their regular duties.

The IBA has condemned the sanctions<sup>22</sup>, and welcomes other statements condemning the sanctions, including the joint statement by over 60 States Parties reconfirming their unwavering support for the

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<sup>19</sup> IBA, [Us Too? Bullying and Sexual Harassment in the Legal Profession](#) (May 2019).

<sup>20</sup> Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report ('IER Final Report'), 30 September 2020, p 324 – 325.

<sup>21</sup> United States, *supra* note 6.

<sup>22</sup> IBA, [IBA calls on states to push back against US sanctions on ICC Prosecutor and official](#), 3 September 2020; IBA, [IBA condemns US President's Executive Order authorising sanctions against International Criminal Court personnel](#), 12 June 2020.

Court and calling on all States to cooperate fully with it.<sup>23</sup>

**The IBA calls on States Parties to actively engage with Court officials and staff to assess the impact of US sanctions on their work. States Parties must increase practical support to the ICC's operations to ensure the institution can continue to perform its duties and fulfill its mandate. States Parties should publicly endorse the Court and continue efforts for greater ratification of the Rome Statute.**

**The IBA calls on States Parties to advocate for the revocation of the Executive Order by the Biden Administration once in office; to continue to publicly condemn the Executive Order and sanctions and express support for the ICC; and to work with the Court to mitigate the impact of the sanctions.**

### **3. Enhancing domestic legislation for facilitating state cooperation and increasing state cooperation for interim and final release**

State cooperation is vital in order to protect the rights of the defendants and to guarantee equality of arms and fairness of proceedings. The IBA notes the recent Report of the Court on Cooperation which states that out of 37 defence requests for cooperation transmitted by the Registry, only 9 received positive replies (a 24.3% execution rate).<sup>24</sup> This is concerning, particularly when contrasted with a 100% execution rate for requests by legal representatives for victims, 100% execution rate for Trust Fund for Victims requests, 75% execution rate for witness protection requests and 88.8% for support to judicial proceedings' requests.<sup>25</sup>

In October 2019, the IBA ICC and ICL programme convened an Experts' Roundtable on 'Seeing justice through: long-term issues in international justice', a high-level discussion aimed at discussing and addressing legal and political barriers to certain forms of essential cooperation for international Courts.<sup>26</sup> At the Experts' Roundtable, it was noted that certain requests are vital to defence teams such as visa requests and access to investigate and meet with witnesses.<sup>27</sup>

Regrettably, in 2020 it is clear that the lack of cooperation persists. The Registry, tasked with transmitting defence teams' requests, has noted that state cooperation with defence teams is 'not easily forthcoming, even though they do not often involve complex requests'.<sup>28</sup> The Registry has observed that the challenges it experiences regarding state cooperation with the defence teams is most specifically linked to privileges and immunities.<sup>29</sup> The Registry has an important role in ensuring that defence team members 'enjoy privileges and immunities, which are fundamental for the performance of their duties in the territory of States where they operate' but has noted a lack of

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<sup>23</sup> [Joint Statement in Support of the International Criminal Court following the release of the US Executive Order of 11 June 2020](#), 23 June 2020.

<sup>24</sup> ICC-ASP/19/25, Report of the Court on Cooperation, 28 October 2020, p 4.

<sup>25</sup> *Ibid.*

<sup>26</sup> IBA, [Report on 'Seeing justice through: long-term issues in international justice: An Experts' Roundtable Discussion'](#), June 2020.

<sup>27</sup> *Ibid.*, p 25 - 26.

<sup>28</sup> ICC-ASP/19/25, *supra* note 23, para 16.

<sup>29</sup> *Ibid.*, para 15.

internal mechanisms, including appropriate legislation and procedures in the relevant states to provide such privileges and immunities.<sup>30</sup>

The IBA has noted that domestic legislation is central for facilitating cooperation, and should continue to be a priority for states as part of their commitment to fair and effective international justice and the rule of law.<sup>31</sup> The existence and quality of domestic legislation to that end is an important factor for ensuring timely and effective state cooperation. The IBA calls on states to increase efforts towards drafting and passage of legislation, and to include specific provisions or agreements that will allow for increased cooperation with international Courts and tribunals.<sup>32</sup>

In February 2020, the IBA initiated the 'ICC Implementing Legislation Pilot Project' (Pilot Project) aimed at broadening the group of countries that have adopted implementing legislation for the Rome Statute, and at improving state cooperation with the ICC through adopting or improving domestic legislation. The Pilot Project will culminate in 2021 with the release of a 'Guide for States Parties', intended to assist states in drafting and adopting implementing legislation. In addition to promoting the enactment of implementing legislation, the IBA urges states to enter into cooperation agreements with the ICC. The establishment of such agreements often involve less complex national processes and are vital to strengthening national frameworks to cooperate with the ICC.

The IBA is increasingly concerned by the inadequate number of cooperation agreements, particularly those that pertain to interim and final release. As of 2020, there are **two** framework agreements concerning interim release and **one** agreement concerning final release, while there are 24 agreements concerning witness relocation, and 11 agreements concerning enforcement of sentences.<sup>33</sup> This imbalance in voluntary cooperation agreements threatens the viability of some of the Court's basic functions and risks violations of the human rights of detained persons.

The Court has noted that 'the absence of States Parties willing to accept released persons are serious. For example, individuals who cannot be successfully relocated may remain de facto detained, despite having been released'.<sup>34</sup> Further, the lack of agreements can result in delays to trial proceedings, protracted pre-trial detention for defendants and the inability of the Court to implement judicial orders.

The rate of concluding voluntary cooperation agreements for interim and final release remains inadequate to meet the operational needs of the Court, as underscored by the Registry's reporting that it did not conclude any new cooperation agreements with States Parties during 2020.<sup>35</sup>

**The IBA urges States Parties that have not concluded voluntary agreements to respond to the Court's call for this crucial form of cooperation, in particular with respect to interim release and relocation of persons released by the Court.**

**The IBA calls on States Parties to review, and if necessary, amend domestic legislation for facilitating cooperation, giving additional attention to specific provisions that will allow cooperation with the Court, including with defence teams. Further, as recommended by the Registry, States could consider specific discussion on the challenges and impediments**

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<sup>30</sup> *Ibid.*

<sup>31</sup> IBA, *supra* note 25, p 29.

<sup>32</sup> *Ibid.*

<sup>33</sup> ICC-ASP/19/25, *supra* note 23, para 35.

<sup>34</sup> ICC, 'Cooperation Agreements', August 2017, p 13.

<sup>35</sup> ICC-ASP/19/25, *supra* note 23, para 35.

**(whether legal, technical, logistical or financial) faced by States to answer Defence requests for cooperation.<sup>36</sup>**

**States should increase efforts to raise awareness and share technical information, as well as identify tools to improve cooperation on a domestic level, such as the establishment of a central authority for cooperation with the Court.**

**States should ratify the Agreement on Privileges and Immunities,<sup>37</sup> and should have clear and agreed procedures at the domestic level regarding privileges and immunities for ICC staff and for defence teams.<sup>38</sup>**

#### **4. Prioritising an inclusive, timely, and thorough implementation of the recommendations of the Independent Expert Review of the International Criminal Court and the Rome Statute System**

The IBA welcomes the Final Report of the Independent Expert Review (IER) of the ICC and the Rome Statute System. As an organisation strongly committed to supporting the work of the ICC, the IBA engaged in the consultation process with the Independent Experts (hereafter ‘Experts’), and provided detailed recommendations aimed at ensuring that the review process was consistent with, and upheld, the fundamental and guiding principles of the Rome Statute system.<sup>39</sup>

The Final Report includes 384 recommendations that are ‘both short and long-term, with varying degrees of complexity, and urgency of implementation’.<sup>40</sup> The Experts have included a summary of recommendations they advise should be prioritised for implementation.<sup>41</sup> With regard to implementation, the Experts advise that ‘a standing coordination or working group be established to follow-up on the implementation of the recommendations, work on the development of concrete plans for such purpose, as well as to assign tasks and follow-up on completion of intermediary steps’.<sup>42</sup>

In anticipation of the adoption of the Resolution on the IER at the 19<sup>th</sup> Session, the IBA ICC & ICL Programme highlights two areas of particular importance for strengthening the ICC’s ability to ensure fair trials and equality of arms.

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

In their final report, the Experts have included defence institutional representation and legal aid as priority recommendations for implementation.<sup>43</sup> The IBA has previously noted that the current

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<sup>36</sup> *Ibid.*, recommendation 6, para 20.

<sup>37</sup> *Ibid.*, recommendation 9, para 20.

<sup>38</sup> *Ibid.*, recommendation 10, para 20.

<sup>39</sup> IBA, [International Bar Association Comments on the Mandate of the Group of Independent Experts](#) (February 2020); IBA, [Recommendations of the International Bar Association ICC & ICL Programme to the Independent Expert Review of the International Criminal Court](#) (April 2020), accessed 27 October 2020.

<sup>40</sup> IER Final Report, *supra* note 20, Annex 1, para 23.

<sup>41</sup> *Ibid.*, Annex 1, p 331.

<sup>42</sup> *Ibid.*, para 25.

<sup>43</sup> *Ibid.*, Annex 1, para 61 – 63.



structure and framework of the ICC restrict 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 limit its standing to raise matters at the ASP.<sup>44</sup> The Office of Public Counsel for the defence (OPCD), which has consistently sought to advocate for the general interests of the defence inside and outside the Court, has limited or no access to important institutional mechanisms and processes, including the Coordination Council and the Advisory Committee on Legal Texts (ACLT). And while the creation of the International Criminal Court Bar Association (ICCBA) is a positive development, to date the ICCBA has not consistently been given the access, institutional standing, or resources to ensure that counsel have a strong internal voice at the Court.

The Experts addressed the institutional voice of the defence, and offered recommendations to ‘redress what could have been perceived as an institutional imbalance regarding the Defence’.<sup>45</sup> Regarding the ICCBA, the Experts recommended for its role in the annual training for counsel to be formally recognised, and consideration given to having an elected ICCBA representative as a member of the ACLT.<sup>46</sup>

With regard to the internal structures of the Court, the Experts recommended bringing under the OPCD’s management and governance the Counsel Support Section’s defence services, as well as legal aid.<sup>47</sup> According to the Experts, this new Defence Office would be independent and represent defence interests in the ACLT as well as the Coordination Council.<sup>48</sup> Further, the Defence Office would be responsible for oversight, capacity building and strategic development for defence representatives before the Court.<sup>49</sup>

To increase institutional equality of arms, the Experts further recommended defence-generated press releases on the Court’s website, as well as consultation with the Defence Office while developing public information and outreach strategies, ‘to ensure such communication efforts respect the principles of fair trials and presumption of innocence’.<sup>50</sup>

The IBA commends the Experts for providing detailed recommendations on these essential defence issues and for providing this opportunity to address longstanding problems. As the Experts recognise, these issues should be addressed as a matter of priority.

***Supporting the urgent revision of the ICC Legal Aid Policy to establish a comprehensive system of legal aid that is accessible, effective, sustainable, and credible***

The ICC’s Legal Aid Policy (LAP) has been under revision since 2012, and the IBA has participated in several rounds of consultations and provided detailed input to the ongoing review.<sup>51</sup> In 2020, no new consultations took place with external stakeholders, and a new policy is yet to be adopted. The IBA, in its recommendations to the IER, expressed serious concern that a long overdue revision of the ICC’s legal aid system has been repeatedly delayed and that several important issues remain

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<sup>44</sup> IBA, Recommendations, *supra* note 38, p 4.

<sup>45</sup> IER Final Report, *supra* note 20, p 269, R327.

<sup>46</sup> *Ibid.*, p 269, R321.

<sup>47</sup> *Ibid.*, p 269, R323.

<sup>48</sup> *Ibid.*, p 269, R323.

<sup>49</sup> *Ibid.*, p 269, R324.

<sup>50</sup> *Ibid.*, p 269, R325 and R326.

<sup>51</sup> See, IBA, [IBA Comments on ICC Draft Legal Aid Policy](#), December 2018; IBA, [IBA Comments on ‘Concept Paper: Review of the International Criminal Court Legal Aid System’](#), 9 June 2017.

unresolved.<sup>52</sup> These issues include taxation by the host state, team composition during various stages of proceedings, and minimum employment standards for team members. Some of these issues, such as taxation and employment conditions, arise from the non-staff status of external counsel team members and require that the employment status of team members be further evaluated. These issues were also identified by the former ASP facilitator on legal aid, who concluded that the existing draft LAP was not ready for consideration at the 18<sup>th</sup> session of the ASP.<sup>53</sup>

In their final report, the Experts 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>54</sup> The Experts recommended a full reform of the LAP, carried out and finalised with the help of a working group ‘composed of individuals with specific experience working with defence and victims and legal aid policies before international Courts, nominated by the Registrar, OPCD, OPCV and ICCBA’.<sup>55</sup> The Experts stressed that the working group ‘should not begin its work within confined limits (e.g. budgetary limitations)’.<sup>56</sup>

Further, the Experts recommended ‘elaborating scales of professional fees for legal staff working in external victims’ teams, especially young professionals and women’ which would include a minimum rate.<sup>57</sup> ‘The relationship between the Court and support staff assisting external counsel for Defence and Victims should be formalised by granting them SSA contracts or consultant status’.<sup>58</sup> The IBA emphasises that scales of professional fees for legal staff should include defence teams as well.

The IBA notes that the ASP is yet to appoint a legal aid facilitator. The appointment of a legal aid facilitator is crucial to renewing efforts towards a reform of the LAP.

With respect to current legal aid requirements, the Court has estimated that up to 11 defence teams and up to 9 teams of legal representatives of victims will need to be financed by legal aid in 2021.<sup>59</sup>

**The IBA urges the ASP to establish an implementation process for the IER Final Report that is genuine, inclusive and transparent. The process should be accountable, with clear timelines and benchmarks for assessing progress on implementation.**

**For all IER recommendations that may impact the rights of the accused or equality of arms, the standing coordination or working group should include all organs of the Court, the OPCD, the ICCBA, ASP representatives, and civil society representatives.**

**The implementation of the Experts’ recommendations should have the full support of the ASP, and should seek to assess and implement recommendations taking into account the**

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<sup>52</sup> IBA, Recommendations, *supra* note 38, p 7.

<sup>53</sup> ASP, Report of Bureau on Legal Aid, Annex Facilitator’s report: Consultations on the Court’s revised legal aid policy, ICC-ASP/18/11, 12 November 2019, p 2, para 3.

<sup>54</sup> IER Final Report, *supra* note 20, para 821.

<sup>55</sup> *Ibid.*, p 269, R328.

<sup>56</sup> *Ibid.*, p 269, R328.

<sup>57</sup> *Ibid.*, p 269, R333.

<sup>58</sup> *Ibid.*, p 270, R334.

<sup>59</sup> ICC-ASP/19/10, Proposed Programme Budget for 2021 of the International Criminal Court, 10 September 2020, para 20.

**permanent nature of the ICC, and without being unduly restricted by budgetary considerations.**

**The IBA recommends that the ASP renew the facilitation on legal aid, to ensure that due consideration continues to be given to the operational and technical aspects of legal aid.**

**The IBA calls on the ASP to ensure it provides full resources for legal aid to ensure equality of arms and a fair trial.**

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

### ***Gender and geographical balance***

The Rome Statute sets out that the Court shall ensure the highest standards of efficiency, competency and integrity, while taking into account gender and geographical balance.<sup>60</sup> In its 2020 report, the Bureau reported ‘the chronic nature of the imbalanced representation in the Court in respect to some countries and regions, in particular from Asia-Pacific and Latin American and the Caribbean’.<sup>61</sup> Similarly, the Bureau noted ‘a severe imbalance of women in the upper echelons’.<sup>62</sup>

The IER addressed the need for reform 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’.<sup>63</sup> Further, the Experts noted the need for panels to have ‘at least one woman and, where possible, a representative of an under-represented region. This would be calculated to help address gender and geographical representativeness concerns’.<sup>64</sup>

The IBA notes that gender and geographical balance have been marked as a priority for the Court and welcomes the recent Report of the Court on Human Resources Management which notes several initiatives undertaken to promote gender equality and improve geographical representation.<sup>65</sup> In particular, the IBA notes the Mentoring Programme for Women aimed at supporting the objective to achieve equitable gender balance,<sup>66</sup> as well as the commitment by the President, the Prosecutor and the Registrar to establish an ICC Focal Point for Women Mechanism.<sup>67</sup>

Further, the IBA notes the activities undertaken to increase awareness of the Trust Fund for development of interns and visiting professionals in under- and non-represented countries.<sup>68</sup> The lack of financial resources is a major impediment to candidates from developing countries, including under- and non-represented countries, taking up internship and visiting professionals positions. Due to the small amount of voluntary contributions made to the Trust Fund, only 23 interns and visiting

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<sup>60</sup> Rome Statute, Articles 44(2) ad 36(8).

<sup>61</sup> ASP, [Draft] Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court, 25 November 2020, para 19.

<sup>62</sup> *Ibid.*, para 33.

<sup>63</sup> IER Final Report, *supra* note 20, p 26.

<sup>64</sup> *Ibid.*, para 221.

<sup>65</sup> ICC-ASP/19/4, Report of the Court on Human Resources Management, 30 October 2020, para 12.

<sup>66</sup> *Ibid.*, para 61.

<sup>67</sup> *Ibid.*, Annex II, p 37.

<sup>68</sup> *Ibid.*, p 4.

professionals were funded between 2016 and 2019.<sup>69</sup> The Human Resources Unit notes that the consequence of limited funding is that ‘large numbers of placements [62%] continue to be filled from WEOG regions’.<sup>70</sup> It is therefore important to recognize that the Trust Fund can play a definitive role in realizing a more equitable geographical representation, which would further reflect on professional posts.

### ***Ensuring a safe working environment***

In line with the IBA’s work to address bullying and sexual harassment in the legal profession, the IBA, together with the ICC, the International Labour Organisation and the Municipality of The Hague, co-convened a roundtable in November 2019 to discuss the legal framework to address bullying and harassment in international organisations. The event was supported by all organs of the Court, which reaffirmed their commitments to a safe working environment made in the Strategic Plans for 2019-2021.<sup>71</sup>

The IBA welcomes the recent annual report of the Head of the Independent Oversight Mechanism (IOM) which provides details of the IOM activities.<sup>72</sup> The IBA in particular notes that the IOM processed 33 potential reports of misconduct, whereby 14 did not proceed to a Preliminary Review by the IOM.<sup>73</sup> Of the 14, two harassment cases could not be reviewed for lack of capacity, others ‘did not fall within the IOM’s mandate as they did not constitute misconduct, were not serious enough to warrant an investigation, or were more suitable for an informal resolution’.<sup>74</sup> The IBA further notes that the penalty for the cases amounting to harassment or sexual harassment, was a written reprimand/censure.<sup>75</sup>

The IBA notes the need to re-evaluate the threshold for a harassment case to rise to the level of misconduct, as well as the penalties imposed for the cases that do rise to that threshold. The IBA also notes that the grievance structure of the Court, namely the IOM and the current Administrative Instruction on Sexual and Other Forms of Harassment (ICC/AI/2005/005), does not apply to external defence and victims counsel and support staff, which creates a gap in regulating sexual harassment and abuse amongst external legal teams.

In addressing bullying and sexual harassment at the Court, the Experts reported ‘many accounts of bullying behaviour amounting to harassment in all Organs of the Court, though particularly in the OTP’.<sup>76</sup> The Experts ‘also heard frequent complaints that the culture of the Court’s workplace was adversarial and implicitly discriminatory against women. They heard a number of accounts of sexual harassment, notably uninvited and unwanted sexual advances from more senior male staff to their female subordinates. Female interns seemed to be particularly vulnerable to such approaches.’<sup>77</sup>

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<sup>69</sup> *Ibid.*, para 119.

<sup>70</sup> *Ibid.*, para 124.

<sup>71</sup> ICC, [‘ICC hosts event on legal framework to address bullying and harassment in international organisations’](#), Press Release (6 November 2019); IBA, [Global organisations gather at The Hague to discuss solutions to bullying and sexual harassment](#) (6 November 2019).

<sup>72</sup> ICC-ASP/19/26, Annual report of the Head of the Independent Oversight Mechanism, 30 October 2020.

<sup>73</sup> *Ibid.*, para 16.

<sup>74</sup> *Ibid.*, para 16.

<sup>75</sup> *Ibid.*, para 20 and 22.

<sup>76</sup> IER Final Report, *supra* note 20, para 209.

<sup>77</sup> *Ibid.*

In addressing the internal grievance procedures at the ICC, the experts concluded that the existing procedures were inadequate to deal with complaints of bullying and harassment.<sup>78</sup> With regard to the IOM, the Experts found ‘a general negative perception of the Court’s internal grievances procedures’ with Court Staff viewing these procedures as ‘too legalistic’ in their approach and thus dissuading staff from complaining.<sup>79</sup>

The Experts recommended new grievance procedures ‘open to all, including non-staff, former staff and elected officials’ which include the establishment of an Ombudsperson to deal with disputes and conflict in an informal way, and an Ethics and Business Conduct Office (EBCO) to deal with disciplinary proceedings including serious misconduct.<sup>80</sup> In particular, the Experts recommended that the ASP consider ‘enabling the IOM to provide support to the EBCO, staffed with outside professionals (investigator, legal officer)’.<sup>81</sup> The Experts also noted the need for ‘appropriate training for all managers so they understand the impact and cost of bullying, harassment and discriminatory behaviour on the individual and the organisation’.<sup>82</sup>

The IBA welcomes the IER recommendations and supports the efforts undertaken by different parts of the Court. In particular, the Registry’s revision of the 2005 ‘Administrative Instruction on Sexual and Other Forms of Harassment’ is crucial in aligning the experts’ findings with Court policy. In the re-assessment and revision of the Court’s framework for addressing bullying and harassment, the IBA stresses the recommendation made by the Experts that internal disciplinary procedures, including the revised Administrative Instruction, should be extended to defence and victims teams.<sup>83</sup>

**The IBA calls on the ASP to support the Court’s efforts to address imbalances in geographical representation and gender balance, including by appointment of a gender focal point/focal point for women as soon as possible.**

**The IBA urges States Parties to make contributions to the Trust Fund for Interns and Visiting Professionals, as a means of supporting the geographical balance of the Court.**

**States should prioritise the implementation of the IER recommendations aimed at improving the internal institutional culture of the Court, by establishing the Ombudsperson position and the EBCO, and by mainstreaming a gender perspective through the creation of gender focal points.**

**States should continue to provide financial and human resources for training of all persons involved with the ICC on bullying and sexual harassment, and should support the Registry to complete a revised policy on harassment as a matter of priority.**

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

The right to family visits has been established at the ICC since 2009, following a decision of the ICC Presidency. In this decision, the Presidency noted that this right ‘fundamentally affects the well-being of the detained person; his connection to his family being a central component of his

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<sup>78</sup> *Ibid.*, para 210.

<sup>79</sup> *Ibid.*, para 294.

<sup>80</sup> *Ibid.*, p 102, R115 – 131.

<sup>81</sup> *Ibid.*, p 102, R115 – 131.

<sup>82</sup> *Ibid.*, para 213.

<sup>83</sup> *Ibid.*, p 270, R335.

identity.<sup>84</sup> The Presidency further noted that maintaining family ties through family visits is an essential part of the detained person's re-integration into society.<sup>85</sup>

Reinforcing this decision, the ASP in the same year invited the Court to continue to address the well-being of detainees in its custody, paying particular attention to the maintenance of family contacts.<sup>86</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, and 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>87</sup>

Since the establishment of the TFFV, state participation has been remarkably low. Since its establishment, the TFFV has received a total of 290,000 Euros from six states.<sup>88</sup> In 2019, the Registry noted that the TFFV had been depleted and the Registrar, at the 17<sup>th</sup> session of the ASP, stressed the necessity of 'sustainable and adequate funding' so as to 'avoid potential negative outfalls on the integrity of the proceedings and the legitimacy of the ICC'.<sup>89</sup> The Court's Detention Centre has stated that, 'the facilitation of family visits for indigent detained persons through the TFFV has played a critical role in promoting psychosocial well-being. This, in turn, has had a significant, positive impact on how judicial proceedings have progressed'.<sup>90</sup> Consequently, 'facilitating the maintenance of family contacts can save the Court valuable time, as well as human and financial resources, for example, by preventing the delay of proceedings due to issues related to a detained person's mental or physical health'.<sup>91</sup>

The Registrar has conveyed to the ASP that 'it remains necessary to stress the importance of sustainable and adequate funding for this activity, so as to avoid potential negative outfalls on the integrity of the proceedings and the legitimacy of the ICC'.<sup>92</sup>

**The IBA calls on states to make contributions to the Trust Fund for Family Visits during the 19<sup>th</sup> session of the ASP. Given the consistently low level of contributions to the Trust Fund, the IBA further calls on the ASP to allocate funds for family visits as part of the regular budget of the Court in order to ensure a reliable source of funding.**

## **7. Ensuring adequate resources for the Court to fulfil its mandate**

In 2021, the Court expects to operate in 12 situations: Afghanistan, Bangladesh/Myanmar, Burundi, the Central African Republic, Côte d'Ivoire, Darfur, the Democratic Republic of the Congo, Georgia,

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<sup>84</sup> ICC, *Prosecutor v. Katanga & Ngudjolo*, Decision on "Mr Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008", ICC-RoR217-02/08-8, 10 March 2009, para 35.

<sup>85</sup> *Ibid.*

<sup>86</sup> ICC-ASP/8/Res.4, Family visits for indigent detainees, 26 November 2009, para 3.

<sup>87</sup> ICC-ASP/9/Res.4, Family visits for indigent detainees, 10 December 2010, p 33.

<sup>88</sup> ICC-ASP/19/25, *supra* note 23, para 17.

<sup>89</sup> Peter Lewis, Registrar, International Criminal Court, Plenary Session on Cooperation, Court's priorities and challenges in terms of cooperation: focus on arrest and voluntary cooperation agreements, 5 December 2019.

<sup>90</sup> ICC-ASP/18/16, Report of the Court on cooperation, 21 October 2019, para 32.

<sup>91</sup> *Ibid.*

<sup>92</sup> ICC-ASP/19/25, *supra* note 23, para 17.

Kenya, Libya, Mali and Uganda.<sup>93</sup> In addition, the OTP is currently carrying out preliminary examinations in nine situations, some of which are expected to be concluded during the remainder of 2020 or in 2021.<sup>94</sup> To cater for this, which includes *inter alia*, investigations and prosecutions, trials, witness protection, language services, legal aid, reparations and assistance to victims, the ICC has requested €144.91 million, a decrease of 0.5 per cent from the approved budget for 2020.<sup>95</sup>

The Committee on Budget and Finance (CBF) has however recommended that the Assembly approve a budget of €144.67 million.<sup>96</sup> The CBF also notes that ‘the Court had become stable and achieved near zero growth in the most recent five years (2017-2021)’.<sup>97</sup> The IBA is concerned by the continued emphasis on zero growth. The Registry has for instance noted that ‘to present a proposed budget similar to last year’s while ensuring proper support for increases in judicial and prosecutorial activity has led management to implement short-term solutions, weighing operational and strategic risks for 2021. Such short-term solutions are nevertheless not sustainable in the long term’.<sup>98</sup>

Similarly, the Investigation Division within the OTP notes that insufficient resources lead to ‘reliance on interns and visiting professionals for significant tasks; diminished capacity to conduct lessons learned exercises, develop standards and ensure adequate training; limited capacity to track and monitor fugitives and develop arrest strategies; and highly diminished capacity to deal with cases in “hibernation”, in particular the necessary maintenance of contact with witnesses and identification of opportunities to gather new evidence’.<sup>99</sup>

While the OTP seeks to maintain the same level of contributions, noting the circumstances presented by the COVID-19 pandemic and its impact on the global economy,<sup>100</sup> the Registry seeks an increase in its budget for *inter alia*, the trial hearings of *Al Hassan and Yekatom and Ngaissona*, as well as the pre-trial of *Abd-Al-Rahman*; including to fund legal aid.<sup>101</sup> As noted, up to 11 defence teams and up to 9 teams of legal representatives of victims will need to be financed by legal aid in 2021.<sup>102</sup> Furthermore, the Registry has noted that it will maintain its country offices in seven locations: Kinshasa, Bunia, Bangui, Abidjan, Tbilisi, Bamako and Kampala.<sup>103</sup>

**The IBA urges the ASP to provide the full amount requested by the Court to allow it to fulfil its mandate in 2021.**

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<sup>93</sup> ICC-ASP/19/10, *supra* note 58, para 3.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, para 5.

<sup>96</sup> ICC-ASP/19/15, Report of the Committee on Budget and Finance on the work of its thirty-fifth session, 13 October 2020, p 5, para 13.

<sup>97</sup> *Ibid.*, p 8, para 11.

<sup>98</sup> ICC-ASP/19/10, *supra* note 58, para 367.

<sup>99</sup> *Ibid.*, para 314.

<sup>100</sup> *Ibid.*, para 119 – 120.

<sup>101</sup> *Ibid.*, para 423 and 510.

<sup>102</sup> *Ibid.*, para 20.

<sup>103</sup> *Ibid.*, para 370.