

International Bar Association Comments on the Mandate of the Group of Independent Experts (February 2020)



the global voice of
the legal profession

The International Bar Association International Criminal Court & International Criminal Law Programme (IBA ICC & ICL Programme), was established in 2005. The programme monitors issues related to fairness and equality of arms at the ICC and other Hague-based war crimes tribunals and encourages the legal community to engage with the work of these Courts. The IBA ICC & ICL Programme recognises the importance of the Independent Expert Review process as a means to ‘identify ways to strengthen the International Criminal Court and the Rome Statute system’¹, and welcomes the opportunity to provide input to the Group of Independent Experts on their mandate.

The IBA is strongly committed to supporting the work of the ICC, including through the activities of its Hague Office. The organisation urges the Experts to make all efforts to ensure that the review process is consistent with and upholds the fundamental and guiding principles of the Rome Statute system. The requirement of a fair trial is one such principle that cuts across all clusters of the review and must be respected.

The concept of a fair trial in international criminal law dates as far back as the Nuremberg Tribunal. The Nuremberg Principles recognise that ‘[a]ny person charged with a crime under international law has the right to a fair trial on the facts and law.’² The report of the Secretary-General containing the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), stated that ‘[i]t is axiomatic that the international tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages.’³

The foundational importance of fair trials is reflected throughout the Rome Statute system. In the discussions for establishing the ICC, there was ‘virtual unanimity’ among delegations at the Rome Conference for the Court to adhere to human rights standards in exercising its functions.⁴ The Rome Statute has comprehensive provisions that address the rights of suspects and accused persons. The Court is required to interpret and apply the law consistent with internationally recognised human rights. The core of this commitment to fair trials lies in Article 67, which establishes minimum guarantees for the accused to be entitled to a fair hearing.

To ensure that fair trials are respected, the Rome Statute contains further provisions that establish obligations for the Office of the Prosecutor and the judiciary. These include Article 54(1)(a), which requires the Prosecutor, in order to establish the truth, to investigate incriminating and exonerating circumstances equally, and Article 64(2)

¹ ICC-ASP/18/Res.7, Review of the International Criminal Court and the Rome Statute system. P. 4.

² Report of the International Law Commission to the General Assembly, Yearbook of the International Law Commission, 1950, vol II, p 375 (Principle V).

³ United Nations Security Council (UNSC), Report of the Secretary-General Pursuant to Para 2 of the Security Council Resolution 808 (1993), para 106.

⁴ Margaret M deGuzman, ‘Article 21: Applicable law’ in Otto Triffterer and Kai Ambos (eds) Rome Statute of the International Criminal Court: A Commentary (3rd edn, C H Beck-Hart-Nomos 2016) 947.

which imposes a duty on the trial chamber to ensure that a trial is fair and expeditious and conducted with full respect for the rights of the accused. The common value of fair trials is thus evident in the provisions addressing governance, judiciary, investigations and prosecutions. Experts should therefore analyse all issues addressed during the review taking into account any potential impact on the rights of the accused and the fairness of proceedings.

While the specific legal and technical issues to be covered within each cluster are set out in the Matrix, it has been stated that it ‘is not a fully exhaustive list of issues to be covered, and each cluster may modify the content in the course of its work and findings...’.⁵ Fair trial and defence issues have been placed under the Governance cluster, and while challenges within the current structure exist, it is clear that fair trial issues are not confined to governance considerations. Other issues related to fair trials and the defence arise during the judicial process, as well as in the investigations and prosecutions phase.

With this in mind, the IBA has identified a number of important fair trial and defence related issues within each of the three clusters. These will be discussed in detail in our later submissions and include: the need to reflect the importance and independence of the defence in the structure of the court; long-overdue changes to the legal aid system; improvements in language and translation services provided to the defence; as well as a number of serious fair trial concerns arising in the Court's cases, that should form part of the review of the judicial process as well as investigations and prosecutions.

The IBA welcomes the invitation for input that has been extended to external counsel including both defence and victims representatives, which may raise other issues for consideration during the review.⁶ Consultations with counsel are essential for ensuring their interests are represented in a process that will impact their work, and to ensure that the review takes into account the particularities of legal representation and fair trial issues.

Efforts to identify ways to strengthen the ICC and Rome Statute system, including to improve efficiency, are very important. The IBA hopes that the recommendations of the Review will strengthen the work of the Court and efforts to end impunity, with a strong emphasis on ensuring fair trials and respecting the rights of the accused. In particular, the IBA urges the Experts to ensure that its recommendations are evidence-based and that any potential fair trial concerns are fully considered and resolved. Further, the IBA urges the Experts to make their interim report available for comments by civil society and external counsel, so that any fair trial concerns can be raised for the Experts’ consideration before finalising their report.

⁵ ICC-ASP/18/Res.7, Review of the International Criminal Court and the Rome Statute system. P. 4.

⁶ Statement at the end of the first meeting of the Independent Expert Review of the International Criminal Court, 23 January 2020.