



Address to the Committee on Budget and Finance of the ICC ASP by Kate Orlovsky, Director of the IBA International Criminal Court and International Criminal Law Programme, The IBA Hague Office

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Honourable members of the Committee on Budget and Finance, I am grateful for this opportunity to address you today on behalf of the International Bar Association (IBA) International Criminal Court and International Criminal Law (ICC & ICL) Programme¹.

The IBA is a strong and steadfast supporter of the ICC and the Rome Statute system. We work to strengthen States Parties' support for the Court, together with our members, including by promoting the adoption of legislation at a national level, and through providing recommendations on effective oversight of the ICC, national frameworks for domestic prosecutions of Rome Statute crimes, cooperation, and universality.² Since 2005 our office in The Hague has monitored fair trial and equality of arms issues at the ICC. Today I would like to share some general comments on the budget and budgetary process, address the importance of the budget to ensuring fairness and equality of arms, and the importance of funding the Trust Fund for Family Visits.

A sufficient, sustainable and predictable budget and budgetary process

As a general matter the IBA places importance on the sufficiency, sustainability, and predictability of ICC's budget and budgetary process. Decisions made by States Parties under the provisions of Article 112(2)(d) to consider and decide the budget of the Court must be made in good faith and ensure that the ICC has the resources it needs to conduct its mandate in accordance with the requirements of the Rome Statute, including the judicial and prosecutorial independence of the Court. All States Parties have an interest in this given the importance of the budget to the Court's ability to perform its mandate.

To date, there has not been full participation in the ICC's budgetary process, with only a minority of States Parties participating in the consideration of the budget. We also note that the sufficiency and predictability of the budget has at times been undermined by the underfunding of the Court's annual budget request and a zero nominal growth approach, regardless of increases in the ICC's workload. The contingency fund, a vital mechanism that allows the ICC to launch investigations

¹ The IBA ICC & ICL 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's work includes thematic legal analysis of proceedings, and ad hoc evaluations of legal, administrative and institutional issues which could potentially affect the rights of defendants, the impartiality of proceedings and the development of international justice. <https://www.ibanet.org/ICC-ICL-Programme>

² See, IBA, Strengthening the ICC and the Rome Statute System: A Guide for States Parties, October 2021, available at <https://www.ibanet.org/document?id=ICC-Report-Rome-Statute-October-2021>

promptly and respond effectively in situations when unforeseen circumstances arise, has been reduced and in some years not been fully replenished. These are all matters that affect the ICC's efficiency and effectiveness, and which must be addressed. In this regard, we support IER recommendation 363, for a discussion of stakeholders on a ten-year strategic vision for the Court, to support the medium and long-term planning required to improve the performance of the court, including with respect to the budget.

The impact of voluntary resources

Turning to the issue of voluntary funding, it is encouraging to see increased state support and engagement with the ICC and its mandate at this moment, and the voluntary support and resources that are currently being pledged in response to the Prosecutor's call. We welcome all support that will strengthen the OTP's work and in turn the legal proceedings before the Court.

However, we are concerned about the potential of voluntary and ad hoc provision of funding and resources to undermine the stability and predictability that the Court needs to function effectively and fairly over the long term. We note that the OTP did not receive all resources requested in the 2022 budget. We are concerned about perceptions of selectivity and politicisation that may follow voluntary contributions.

In addition, the provision of exceptional voluntary funding, resources, and gratis personnel to the Prosecution, in the context of a zero-growth approach to Legal Aid Policy reform and the underfunding of the Court's regular budget, may exacerbate an imbalance between prosecution and defence resources at the Court, and impact fairness and equality of arms in the long run. As noted by the Registrar, the short and long-term impacts of such exceptional voluntary provision of resources are as yet unknown. Any analysis of the impact on the Court must include analysis of impact on equality of arms and the legal aid system, and actions should be taken to address any impact found.

An operational and realistic approach to legal aid reform

Turning now to Legal Aid, following IER recommendation 328, the Registry and ASP are now working on a reform of the Legal Aid Policy (LAP). The IBA places particular importance on the IER's call for a full reform of the Policy, not only updating numbers, taking into account past assessments and consultations to achieve a legal aid policy that is accessible, effective, sustainable, and credible.

The IBA is disappointed that the mandate given by states parties to the Registry requests the Court to reform the LAP within existing resources³. This will create constraints that will undermine the long-term viability of the revised LAP and the fairness of proceedings, and is inconsistent with the IER recommendation that the reform process not begin within budgetary limitations. Prior efforts at reforms of the LAP within existing resources resulted in drafts that did not address concerns and issues expressed by experts and stakeholders including the IBA, and ultimately resulted in prolongation of the reform process.

Budgeting for the defence should be informed by a defence perspective, and by the accumulated expertise of practitioners and the Registry, based on the actual needs of teams to effectively represent clients in ICC proceedings. In addition, it will be essential to use this LAP reform process to address long-standing issues – including the composition and administration of defence and victims teams, workplace conditions in particular establishing minimum standards and workplace protections, and taxation. It is in the interest of all States Parties to find a solution to these issues.

³ ICC-ASP/20/Res.5, Annex 1, para 8

Trust Fund for Family Visits

Finally, the IBA calls for a re-evaluation of the sustainability of the voluntary Trust Fund for Family Visits.⁴ As you know, the ICC Presidency has confirmed the Court's obligation to fund a limited number of family visits for indigent detainees. However, in the twelve years since the Trust Fund for Family Visits was created, only six States Parties have made donations. The Fund has been depleted on some occasions, and the Court has had to rely on an ad-hoc approach, including donations from non-State Party sources.⁵ This lack of participation underlines the fragile nature of this system as well as the resources the Court must expend to seek funding.

As the Court has made clear, family visits support the efficiency of the judicial process, by contributing to the wellbeing of detainees, and may prevent the delay of proceedings due to issues related to a detained person's mental or physical health. Without a predictable source of funding, the ICC can't ensure the requisite number of family visits for detainees.

The inability to provide for family visits is more than a logistical concern: it calls into question the ICC's human rights record. Based on the low level of participation in the Trust Fund, it is time to reconsider funding family visits from the regular budget of the Court. In the short term, States Parties should make donations to the Trust Fund for Family Visits to protect the rights of those currently in ICC detention.

I thank you for your time.

⁴ ICC, *The Trust Fund for Family Visits*, available at: <https://www.icc-cpi.int/Publications/20190919-tffvisits-eng.pdf>; <https://www.icc-cpi.int/get-involved/Pages/Trust-Fund-for-family-visits.aspx>

⁵ ICC-ASP/20/25, *Report of the Court on Cooperation*, 29 October 2021, para 17.