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IBA/ICC Monitoring and Outreach Programme

Sustaining the International Criminal Court: Issues for consideration at the 2010 Review Conference and beyond

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Executive Summary

In May 2010, the International Criminal Court (ICC or the Court) and the Rome Statute system will face its first major progress evaluation since the Rome Statute (the Statute) came into force in July 2002. Article 123 of the Statute provides that within seven years of the coming into force of the Statute, a Review Conference shall be convened by the United Nations (UN) Secretary General to consider any amendments to the Statute. Apart from the mandatory issues for review (Article 124 of the Statute and the crime of aggression) the Review Conference is largely expected to be an exercise in stocktaking for the Court.

In Rome there was significant momentum behind the need for a permanent international criminal court which culminated in the signing of the Rome Statute. The 2010 Review Conference scheduled for Kampala, Uganda presents a unique opportunity for all stakeholders – States Parties, civil society, victims from affected communities and the Court itself – to closely examine the ICC’s progress to date in fulfilling its core mandate of putting an end to impunity for egregious crimes through the prosecution of alleged perpetrators. The question is, will the ICC withstand the scrutiny?

The ICC’s success to date will be measured by its impact on victims and affected communities; its ability to conduct fair and impartial proceedings; and its contribution to building and reinforcing a system of international justice. The International Bar Association (IBA) has identified five components critical to sustaining the Court and ensuring its long term success: robust management and internal coordination; the cooperation of States Parties; effective and efficient judicial proceedings; a pragmatic approach to complementarity and a clearly articulated external relations vision and strategy.

This seventh IBA monitoring report examines the current debate and recent developments concerning the first three of the five issues identified. The external relations strategy of the Court is extensively addressed in the IBA/ICC Monitoring and Outreach Programme Report, *The Quest for a Public Face*, and the issue of complementarity will be addressed comprehensively in a subsequent report.

Findings and recommendations

The Review Conference

1. The Review Conference presents a unique opportunity for States Parties to reinforce and strengthen the ICC and the Rome Statute system. In order for the Review Conference to be successful, States Parties will have to lead the process and begin to actively build consensus on the expected outcomes for the event, similar to what was achieved in Rome in 1998. The success of the event will largely depend on effective advanced preparation as well as strong political support from States Parties.

STATES PARTIES

The IBA recommends that States Parties:

- Publicly reaffirm their commitment to the Court in appropriate fora including during meetings at the UN General Assembly and in regional, multilateral and bilateral contexts.
- Consciously and deliberately make efforts to secure the arrest and surrender of indicted persons for whom warrants of arrest remain outstanding.
- Prioritise the adoption of implementing legislation. States Parties that have made some progress in this regard, such as those who have draft bills in parliament, are strongly encouraged to set specific deadlines for the bill to be passed. Other States are encouraged to liaise with the ICC Registry and civil society to obtain information concerning the forms of technical assistance that may be available to facilitate this process.
- Prioritise the implementation of relevant mechanisms to facilitate all forms of cooperation with the Court as noted in the sixty-six recommendations of the Report of the Bureau on Cooperation, including cooperating with the Court on matters related to the defence, witness relocation agreements and enforcement of sentencing agreements.
- Ensure that high-level officials and other delegates attending the eighth Assembly of States Parties (ASP), the resumed session and the Review Conference are sufficiently briefed on the key issues likely to be discussed at the Review Conference in order to ensure a fruitful debate and a successful outcome.
- States that are not yet parties to the Rome Statute are strongly urged to ratify the Statute during this Review Conference.

THE ASSEMBLY OF STATES PARTIES

- The IBA considers that it will be important from the outset to set a realistic agenda of issues to be discussed at the Review Conference. Too broad an agenda is likely to minimise the potential impact of this important event.
- Except for the mandatory review of Article 124 of the Statute and the crime of aggression, proposed amendments to the Statute must command very broad consensual support. As such, amendments to the Court's legal texts that are not broadly supported should be deferred for consideration at subsequent ASP sessions. The ICC is still in the stage of institutional and juridical infancy, and sweeping changes to the Rome Statute at this stage could open a 'Pandora's box' of issues which could ultimately weaken the institution.
- The stocktaking should be a separate and equal portion of the Conference which is allotted its own schedule to avoid conflict with the discussions on proposed amendments. The IBA urges the Assembly to ensure that the scheduling of sessions to consider proposed amendments to the Statute does not conflict with stocktaking sessions.
- Preparations are important to ensure the success of the Review Conference. As such the IBA urges the Assembly to determine at its eighth session the appropriate procedures and mechanisms for

advancing further discussions and preparations and to decide the scope of the stocktaking exercise in order to allow delegations to contribute meaningfully to the debate.

- Going forward it will be important for the Assembly and the Court to follow up on the key achievements and shortcomings of the Court as highlighted during the Review Conference. The IBA encourages the Assembly to prepare an outcomes document detailing the specific areas of concern for follow up after the Review Conference. The Assembly should also propose a mechanism for following up on the issues raised during the Conference. The mandate of the Working Group on the Review Conference may need to be extended to facilitate this process with a view to reporting to the Assembly during its next session.

THE COURT

The Court is urged to capitalise on the opportunity presented by the Review Conference to reiterate its commitment to international criminal justice, as well as to communicate its achievements and challenges to States Parties and other stakeholders. As such, the IBA recommends that prior to and during the Review Conference:

- Court officials, including the President, Prosecutor and Registrar, ensure that there is a consistent and coherent message concerning the Court's view and position on the Review Conference that is disseminated to States Parties and relevant stakeholders;
- during diplomatic briefings and in other relevant regional and other meetings, Court officials should engage with States Parties and civil society to communicate the vision and needs of the institution – in particular, the need for States to cooperate with the Court.

Organisational challenges – management and internal coordination

2. The Court is a unique organisation and faces a range of novel internal and external challenges which underscore the importance of a cohesive vision for the Court as a permanent institution. With the rapid growth of the organisation, it is understandable that there will be some challenges in achieving coordination between the various organs.
3. Internally, the IBA observes that despite the existence of several committees and the 'One Court' principle designed to ensure cohesion among the different organs, lack of internal coordination continues to be one of the Court's greatest challenges. In this regard, the IBA has taken note of the concern of the Committee on Budget and Finance (CBF) – a subsidiary body of the ASP – that the lack of internal coordination presents a real risk of inefficiency for the Court. Where matters of non-judicial administrative coordination are concerned, the Court requires clear leadership from its top officials to transform the 'One Court' principle into reality. The IBA encourages genuine dialogue between ICC organs to ensure efficiency of the Court.
4. One of the main challenges the ICC currently faces is the lack of clarity regarding the appropriate scope of authority and management oversight to be exercised by the Presidency of the Court and the ASP on administrative matters. The issue has been brought into sharp relief by the response of some States to a decision of the Presidency on family visits for an indigent detainee, which States contend addresses budgetary matters for which they have management oversight responsibility.

5. On the one hand, the family visits decision raises the question of the extent to which the Presidency, when exercising its judicial function, is required to take into account policy directives by the ASP. On the other, the ASP's response to the Presidency's perceived trespass on its management role threatens to undermine a core tenet of the institution – judicial independence.
6. The IBA believes that an impasse between the management of the Court and the Presidency on this issue is not only highly undesirable, but unnecessary. A disproportionate response from States Parties to the Presidency's decision risks undermining the judicial aspects of the Court's work and may suggest that the judiciary is being censured by the Court's political body. The ASP must carefully navigate between the need to re-affirm its role as the principal decision-making body for budgetary issues and demonstrating respect for judicial independence. Through continued dialogue between the ASP and the Court a practical solution which takes into account the ASP's budgetary policies but which fully respects the independence of the judiciary can be crafted. While due regard must be given to the practical and political implications of the decision on family visits, every effort must be made to arrive at a feasible solution that takes into account the rights of the indigent detainee.
7. The IBA welcomes the Presidency's initiative to ensure that judicial decisions are informed by the fiscal constraints within which the Court operates. The IBA, however, urges caution. While it is important for judges to be generally aware of the administrative and budgetary framework in which the Court operates, care must be taken not to compromise the independence and impartiality of the judiciary by making judicial decisions subject to budgetary considerations.
8. The IBA considers that there is an obvious need for creating and/or strengthening the mechanism for addressing disputed administrative or governance issues between the ASP and the Presidency of the Court. The ASP is therefore urged to adopt, in consultation with the Presidency, a policy document establishing a clear protocol for addressing disputed issues regarding the management of the Court. The IBA recommends that one of the inter-sessional working groups be mandated to closely examine the matter with a view to submitting a draft proposal for adoption at the tenth session of the Assembly.
9. The IBA considers that given the importance of the administrative as well as judicial role of the Presidency, the office of the President must be strengthened. As such, the IBA considers that it is important for the Office of the Presidency to be adequately staffed with individuals with specific expertise in legal and administrative matters, including significant experience in international diplomatic relations in addition to knowledge and understanding of the Rome Statute.
10. In addition, the IBA considers that more information should be publicly available concerning the full scope of the Presidency's administrative and judicial functions. The IBA recommends that information in this regard be posted on the Court's website in a timely manner.
11. The IBA proposes that Regulation 23 of the Regulations of the Court be amended to include a provision mandating parties to judicial review proceedings to file a public notification of the application for review with confidential annexes. The IBA also recommends that the Legal Text Review Committee considers an amendment to the Regulations of the Court to set out the full powers and scope of the judicial review functions of the Presidency.

12. The IBA reiterates the need for transparency and accountability at the ICC. As such the IBA welcomes the proposal for the establishment of an independent oversight mechanism (IOM). The IBA considers that external, systematic and objective inspection and evaluation of the Court's activities could be an important aid in promoting its efficient operation. It is however essential to ensure the IOM does not become an instrument for interference in the independent functioning of the Court. As such, while it is appropriate that the oversight mechanism report to the Bureau and ASP, it must be operationally independent of both the ASP and the Court to avoid accusations of political interference. The Court is encouraged to fully engage with the ASP concerning the establishment of appropriate regulations for the effective functioning of the IOM.

States Parties' cooperation

13. The IBA is concerned by the continued reluctance of States Parties to fully cooperate with the Court, in particular on matters relating to the defence. The IBA urges the Assembly to take decisive steps during its eighth session towards establishing a Working Group on Cooperation with a clear mandate to examine the obstacles to full implementation of the 66 recommendations contained in the Report of the Bureau on Cooperation as well as to address the procedural framework for the Assembly's response in the event of a finding of non-cooperation by the Court and a referral to the Assembly under Article 87(7) of the Statute.
14. The IBA also calls upon the Court and the Registry in particular, to continue to pursue bilateral arrangements to facilitate effective cooperation between the Court and States.

Effective and efficient judicial proceedings

15. The efficient conduct of proceedings at the ICC will be a significant determinant of the Court's success. The Court has struggled to complete its first trial against Thomas Lubanga which has been hampered by delays in the past and again recently postponed pending an Appeals Chamber ruling on an application to legally recharacterise the facts of the case.
16. The timing and nature of the application to legally recharacterise the facts in the *Lubanga* case has placed the defence in a difficult position and further delayed the proceedings. The expeditious resolution of the appeal is therefore of paramount importance. The IBA has previously expressed concern at the pace at which Appeals Chamber decisions are rendered.¹ However, the IBA has noted a commendable improvement in this regard evidenced by the recent delivery of a ruling by the Appeals Chamber on the admissibility challenge in the case of Germain Katanga within four months of the appeal being filed.² Given that the continuation of the *Lubanga* trial depends on the outcome of the appeal, the IBA urges the Appeals Chamber to expedite its consideration of this matter.
17. The activity level of the ICC is however set to increase significantly in 2010 with the continuation of two trials and the possible commencement of two others. Though a welcome development, the prospect of multiple trials at the ICC will test the adequacy of the Court's technical, logistical and human resources capacity to facilitate several proceedings

¹ IBA/ICC Monitoring and Outreach report, *Balancing Rights: The International Criminal Court at a Procedural Crossroads*, May 2008, page 9.

² Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA8, 25 September 2009.

simultaneously together with the willingness of States to provide the resources to enable the trials to proceed as efficiently as possible.

18. Given that multiple trials for 2010 are clearly foreseeable, the IBA considers that these costs should be reflected in the proposed budget rather than resorting to the Contingency Fund. While it is important to ensure that costs are minimised, every effort should be made within the ICC's programme budget to fund parallel trials.
19. The IBA considers that the determination of the most appropriate mode of representation for victims must be given careful consideration, as the ramifications of such a decision go beyond the cost implications involved. An observation of external counsel in proceedings before the Court to date, demonstrates that there are significant benefits to be gained by the continued involvement of external counsel in the proceedings, particularly those from situation countries with localised knowledge and experience. External counsel representing victims play an important part in the Court's efforts at maximising impact, promoting its work in affected communities, and dispelling notions that it is a distant Western institution. The in-house expertise of the Office of Public Counsel for Victims (OPCV) is important for developing an institutional memory and ensuring that counsel are provided with substantive legal support and advice. An appropriate combination of both at this time appears to be the most feasible option.
20. The IBA is particularly concerned by the potentially adverse impact of the CBF's proposed reduction of the defence legal aid budget by seven per cent. The CBF recommendation does not appear to correspond with the realities of the Court's current trend in expenditure. Given the likely continuation in 2010 of at least two trials involving indigent detainees, the ASP is urged to ensure the Court has adequate resources such that it would not need to resort to the Contingency Fund to supplement the approved budget for legal aid.
21. The permanent assignment of two judges who had previously adjudicated during the pre-trial phase of proceedings to the Appeals Chamber, contrary to the stipulations of the legal texts of the Court was a matter of grave concern and indeed a highly questionable decision. While efforts to minimise the impact of the assignments are welcome, the IBA is concerned that such a decision was made in the first place. Given that judicial elections are scheduled to be held during the eighth meeting of the ASP in November 2010, the Court is urged to ensure that careful consideration is given to the judicial assignments to the respective divisions to ensure the effective functioning of the Court.

About the Programme

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies.

The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. The IBA has a membership of 30,000 individual lawyers and over 195 bar associations and law societies spanning all continents. It has considerable expertise in providing assistance to the global legal community.

The IBA is currently implementing a MacArthur Foundation-funded programme to monitor the work and proceedings of the International Criminal Court (hereinafter the Court or ICC) and to conduct outreach activities. The monitoring component follows and reports on the work and proceedings of the ICC. The outreach component of the programme works in partnership with bar associations, lawyers and civil society organisations disseminating information and promoting debate on the ICC in different jurisdictions across the globe.

IBA parameters for monitoring the ICC

The IBA's monitoring of both the work and the proceedings of the Court focuses in particular on issues affecting the fair trial rights of the accused. The IBA also assesses ICC pre-trial and trial proceedings, the implementation of the 1998 Rome Statute, the Rules of Procedure and Evidence (RPE), and related ICC documents in the context of relevant international standards.

In addition to the ICC's normative texts, where appropriate the IBA refers to internationally accepted principles enshrined in various UN and other instruments (such as the 1990 United Nations Guidelines on the Role of Prosecutors, the 1985 Basic Principles on the Independence of the Judiciary and the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power).

With regard to fair trial rights the IBA takes into account specifically:

- the right to be tried by a competent, independent and impartial tribunal;
- the right to a public hearing;
- the presumption of innocence;
- the right to legal counsel;
- the right to be present at the trial;
- the right to equality of arms;
- the right to have adequate time and facilities to prepare a defence;
- the right to call and examine witnesses;
- the right not to be compelled to testify against oneself; and
- the right to be tried without undue delay.

The IBA's monitoring work is not limited to pre-trial and trial proceedings per se, but may also include ad hoc evaluations of legal, administrative and institutional issues that could potentially affect the impartiality of proceedings and the development of international justice.

The IBA also monitors any significant developments in international humanitarian and human rights law, and international criminal law and procedure, which may result from the Court's activities.

Methodology

The ICC monitoring is carried out via a dual process of research and consultation. The IBA monitor engages in high level consultations with key stakeholders both within and outside the ICC. Within the Court, the IBA monitor consults periodically with designated persons in specific organs of the Court, as well as with senior level ICC staff. While at all times preserving its objectivity, the IBA seeks to maintain close contact with the divisions of the Court. External consultations are conducted with non-governmental organisations (NGOs), individual defence counsel, representatives of diplomatic missions and other legal professional organisations. The IBA wishes to express its gratitude to all the persons who graciously participated in consultations for this report.

List of Abbreviations

AC	Appeals Chamber
ASP	Assembly of States Parties
AU	African Union
Bureau	Bureau of the Assembly of States Parties
CBF	Committee on Budget and Finance
CICC	Coalition for the International Criminal Court
DRC	Democratic Republic of Congo
HWG	Hague Working Group
IBA	International Bar Association
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
IOM	Independent Oversight Mechanism
NGO	Non-governmental organisations
OIOS	Office of Internal Oversight Services
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
RoC	Regulations of the Court
RoR	Regulations of the Registry
RPE	Rules of Procedure and Evidence
SWGCA	Special Working Group on the Crime of Aggression
TC	Trial Chamber
UN	United Nations
WGC	Working Group on Cooperation

Introduction

Overview

In Rome in 1998, States Parties witnessed the culmination of the long and arduous process which brought the first permanent international criminal court into being. Following the historic adoption of the Rome Statute creating the International Criminal Court (ICC or the Court), former United Nations Secretary-General Kofi Annan declared:

‘The establishment of the Court is...a gift of hope to future generations and a giant step forward in the march towards universal human rights and the rule of law. It is an achievement which, only a few years ago, nobody would have thought possible.’³

In May 2010 States Parties will again assemble, on this occasion in Kampala, Uganda for the first ICC Review Conference, to assess the Court’s progress to date.

The main priority of the Review Conference, as stipulated by Article 123 of the Rome Statute (the Statute) is to consider any amendments to the Statute. The Assembly of States Parties (ASP or the Assembly) has determined that the Conference should focus on amendments that command very broad, preferably consensual support, address a limited number of key topics, and be an occasion for stocktaking of international criminal justice in 2010.

The 2010 Review Conference presents an important opportunity for all stakeholders to closely examine the ICC’s progress to date in fulfilling its core mandate of putting an end to impunity for egregious crimes through the prosecution of alleged perpetrators. The ICC’s success will be measured by its impact on victims and affected communities, its ability to conduct fair and expeditious proceedings, and its contribution to building and reinforcing a system of international justice. The Review Conference is also an important opportunity for States Parties and other key stakeholders to reaffirm their commitment to the ICC.

This seventh International Bar Association (IBA) monitoring report will examine the ICC’s progress in advance of the 2010 Review Conference. The report will focus in particular on organisational challenges at the Court; challenges of ensuring the cooperation of States; and its progress in fulfilling its core mandate by conducting fair and expeditious proceedings. While all the issues discussed in the report are important, not all merit discussion at the Review Conference. Thus, while a number of the IBA’s findings and recommendations concern the Review Conference itself, the report examines the issues more broadly and proposes some recommendations to be implemented in the medium to long term.

Layout

The report is arranged into four chapters. Chapter one provides an overview of the preparations for the 2010 Review Conference. The chapter briefly discusses the purpose of the Conference and proposes recommendations regarding the conduct and outcome of the event.

³ Speech of HE Kofi Annan, Secretary-General of the United Nations on the occasion of the Ceremony for the Opening of Signature of the Treaty on the Establishment of an International Criminal Court II Campidoglio, Rome, 18 July 1998 in M Cherif Bassiouni, *The Statute of the International Criminal Court, A Documentary History*, at page 13.

Chapter two examines organisational challenges at the ICC. The ICC is a complex institution. It has an intricate management structure, with administrative responsibility vested in both the Presidency and the ASP, as well as an independent Prosecutor. Organisational challenges and lack of clarity regarding the scope of management authority are therefore not surprising. The chapter assesses issues of governance, internal coordination and the establishment of the independent oversight mechanism (IOM) for ensuring transparency and accountability at the ICC.

Chapter three discusses States Parties cooperation with the ICC. The report examines the commitment of States to cooperating with the ICC as mandated by Part 9 of the Rome Statute. In particular, the chapter highlights the continued reluctance of States in cooperating with the Court on matters concerning the defence, as evidenced by recent developments in the case of *The Prosecutor v Jean-Pierre Bemba Gombo*. The chapter concludes by reiterating the importance of the Review Conference as an opportunity for States to recommit to and reinforce the cooperation regime of the Court.

Chapter four discusses the ICC's efforts at conducting effective and efficient proceedings. The chapter focuses on some of the legal and administrative challenges the Court's faces in attempting to ensure the fair and expeditious conduct of proceedings.

Conclusions and recommendations are made in chapter five of the Report.

Chapter I: Arrangements for the 2010 Review Conference

1.1 Background

Article 123 of the Rome Statute⁴ (the Statute) provides that seven years after the Statute enters into force the Secretary General of the United Nations (UN) shall convene the first Review Conference to consider any amendments to the Statute. The review may include, but is not limited to, crimes contained in Article 5 of the Statute regarding crimes within the International Criminal Court's (ICC or Court) jurisdiction.

The Review Conference is scheduled to be held between 31 May and 11 June in Kampala, Uganda. This event is a significant milestone for the ICC. It constitutes a unique opportunity for States Parties to reflect on the achievements of the Court since the entry into force of the Statute and to reaffirm their commitment to combating impunity for the most serious crimes of concern to the international community.⁵

1.2 The format of the Review Conference: amendments and stocktaking

The Assembly of States Parties (ASP) has determined that the conference should focus on amendments that command very broad, preferably consensual support, address a limited number of key topics, and be an occasion for 'stocktaking' of international criminal justice in 2010.

The Bureau of the ASP, at its tenth meeting held on 9 July 2009, suggested that 30 September 2009 should be the deadline for the formal submission of amendment proposals to the UN Secretary General in accordance with Article 121, paragraph 1, of the Statute. Substantive proposals for amendments have to date been submitted by Belgium, Leichenstein, Trinidad and Tobago, Mexico, Norway and the Netherlands.⁶

Civil society has suggested that the stocktaking portion of the Review Conference should include consideration of the following issues: the impact of international criminal justice on affected communities; state cooperation with the ICC; complementarity; universality of the Rome Statute and the impunity gap; and the impact of international criminal justice on peace processes and peace building.⁷

It is clear that while textual revision of the Statute is mandated by Article 123, the inaugural Review Conference will more broadly evaluate the progress of the Court to date and examine its impact on international criminal justice. According to the ASP focal point on the Review Conference:

'The Review Conference will play an important role in projecting to the outside world an image of the present stage of the Court's development and the continued consensus among States Parties with regard to international criminal justice. The key success criteria for the conference may

4 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90, (entered into force 1 July 2002).

5 Letter dated 15 September 2009 from the President of the Assembly of States Parties, ASP/2009/139

6 These may be viewed at <http://www.icc-cpi.int/Menus/ASP/ASP+Events/ASP+Calendar+2010/Review+Conference.htm>.

7 Proposals for the 2010 Review Conference, Coalition for the International Criminal Court, on file with the IBA.

therefore have less to do with amendments to the Statute than with what kind of overall message is conveyed to the international community at large about international justice.⁸

1.3 Preparations for the Review Conference

The Review Conference is likely to be a very high profile event with the attendance of States Parties and observer states, and possibly the UN Secretary General himself.⁹ It will therefore be a unique opportunity to showcase the work of the ICC, reiterate its importance in the landscape of international justice and promote universal ratification of the Rome Statute. The success of the Review Conference will depend on extensive advanced preparation and a realistic agenda.

a) The role of the Assembly of States Parties

One of the priorities of the ASP during its eighth session in November 2009 is to finalise the agenda for the Review Conference. With the Review Conference scheduled for May 2010, limited time remains for States to fully determine how the event should be structured. The Assembly will have to determine the format for the Review Conference, including whether to have a general debate which includes elements of stocktaking during which amendments are also considered. The ASP and the Secretariat of the ASP will play a crucial role in ensuring adequate advanced preparation, including the timely dissemination of relevant information. Following the event, the ASP will also need to have a formal mechanism for follow-up.

In this regard the IBA recommends that:

- The Assembly ensures that there is timely dissemination of relevant information about the Review Conference to States Parties and other stakeholders. In this regard, the IBA welcomes the creation of a separate website for the conference that can be accessed via the ICC's website. The ASP Secretariat is urged to ensure that States are aware of the existence of this website.
- The structure and format of the Review Conference is conducive to meaningful and inclusive debate. It is important for both stocktaking and amendments to be allocated sufficient time and priority during the Review Conference. The Assembly is therefore urged to ensure that the scheduling of sessions to consider proposed amendments to the Statute does not conflict with stocktaking sessions, in order to maximise the full attendance and participation of delegates.
- During the eighth ASP, the Assembly determines the appropriate procedures and mechanisms for advancing further discussions and preparations for the Review Conference between November 2009 and the commencement of the event in May 2010.
- The Assembly ensures that an outcomes document is prepared for the Review Conference which clearly sets out the concerns raised and suggestions noted during the event. The Assembly should also propose a mechanism for following up on the issues raised during the Conference. The mandate of the Working Group on the Review Conference may need to be extended to facilitate this process with a view to reporting to the Assembly during its next session.

⁸ Review Conference: Scenario and Options, Progress Report by the focal point, Mr Rolf Einar Fife, ICC-ASP/6/INF.3-4 December 2007.

⁹ Letter dated 7 August 2009 from the Secretary General of the United Nations, <http://www.icc-cpi.int/NR/rdonlyres/74DAA899-94EA-4301-9ACC-742F886E2AC1/0/ICCUNReviewConference2010InvitationENG.pdf>.

1.4 States Parties

The IBA considers that the sustainability of the ICC depends significantly on the continued commitment of States Parties. The adoption of the Rome Statute in 1998 and its subsequent ratification by 110 States Parties to date definitively affirm the commitment of the international community to a permanent institution dedicated to combating impunity. States Parties must reiterate their commitment to the ICC prior to and during the 2010 Review Conference.

As such, prior to and during the Review Conference, States Parties are encouraged to:

- Publicly reaffirm their commitment to the Court in appropriate fora – including during meetings at the UN General Assembly – in regional, multilateral and bilateral contexts;
- Consciously and deliberately make efforts to secure the arrest and surrender of indicted persons for whom warrants of arrest remain outstanding;
- Prioritise the adoption of implementing legislation. States Parties that have made some progress in this regard, such as those who have draft bills in parliament, are strongly encouraged to set specific deadlines for the bill to be passed. Other States are encouraged to liaise with the ICC Registry and civil society to obtain information concerning the forms of technical assistance that may be available to facilitate this process;
- Prioritise the implementation of relevant mechanisms to facilitate all forms of cooperation with the Court as noted in the 66 recommendations of the Report of the Bureau on Cooperation, including cooperating with the Court on matters related to the defence, witness relocation agreements and enforcement of sentencing agreements;
- Ensure that high-level officials and other delegates attending the eighth ASP, the resumed session and the Review Conference, are sufficiently briefed on the key issues likely to be included in the Review Conference in order to ensure a fruitful debate and a successful outcome;
- States that are not yet parties to the Rome Statute are strongly urged to ratify the Statute during this Review Conference.

1.5 The Court

The 2010 Review Conference is convened by the UN Secretary General and organised by the ASP. As such there is no specific role for the Court. However, under the draft rules of procedure for the Review Conference, the Court will also have the opportunity to propose amendments for consideration at the Conference. In addition, Court officials such as the President of the Court, the Prosecutor and the Registrar will be able to intervene during the debates.

The IBA understands that the Court is unlikely to propose any amendments to the Court's legal texts on the basis that it has not undergone a full judicial cycle. Nevertheless, the IBA considers that the Review Conference is an appropriate forum for the Court to engage with States Parties, civil society and victims to present its perspective on what is required for the successful implementation of the vision and mandate of the Rome Statute. Indeed, it is important that the Court does not take a back seat at the event, but takes ownership by ensuring that its achievements and challenges are made known to all stakeholders.

The Court is urged to capitalise on the opportunity presented by the Review Conference to demonstrate its commitment to international criminal justice. As such, the IBA recommends that prior to and during the Review Conference:

- The chief Court officials capitalise on the opportunity presented by the Review Conference to formulate a clear, consistent and coherent message concerning the Court's views and position on the Review Conference, the Court's achievements and challenges to date and prospects for the future.
- The Court should also use the Review Conference as an opportunity for further engagement with States, civil society and persons from affected communities.

1.6 Conclusion

The success of the Review Conference will be measured by the extent to which it has facilitated a meaningful debate on the work of the ICC; strengthened the Rome Statute by the adoption of amendments that command broad, consensual support; raised the profile of the Court among States Parties, victims of affected communities and the public; and galvanised additional support for the universality of the Rome Statute.

The key to achieving these goals is a clear plan of action and the commitment of all concerned. Time is short. Realistically, the ASP may need to convene a resumed session prior to the Review Conference in order to address outstanding issues from its eighth session. While divergent views and constructive criticism is welcome and strongly encouraged, it is important that discussions and plans for the event proceed along one trajectory with the same objective – namely, reinforcing and strengthening the ICC in the international justice landscape.

The Review Conference is however a single event in the Court's calendar. Going forward it will be more important for the Assembly and the Court to follow up on the key achievements and shortcomings of the Court as highlighted during the event, to ensure that the first ICC Review Conference is not recorded in the annals of history as an event of mere talk with limited substance.

Chapter II: Organisational Challenges at the ICC

2.1 Introduction

The ICC faces a variety of organisational challenges as it matures from multilateral treaty into a fully functional and increasingly large and complex international organisation. Both the ASP and the Presidency are vested with management responsibilities for the ICC; however, the respective scope of authority is unclear.

While the Presidency's dual role as administrative managers and judges presents unique challenge, internally, there have also been challenges of inadequate cooperation and coordination between different organs. To remedy this, the Court has pronounced a 'One Court' principle and adopted a Court-wide strategy, but there remains evidence of a considerable coordination deficit.

In order to sustain public confidence in the ICC, the establishment of clear and robust governance structures, effective coordination between different organs, and clearly articulated organisational policies are crucial. In addition, the timely establishment of an independent oversight mechanism by the ASP will play an important role in ensuring the accountability of the Court, including its senior officials.

Matters of governance and administrative coordination have important implications for the efficiencies of the Court, and are likely to also be included in the stocktaking segment of debates during the 2010 Review Conference.¹⁰ The manner in which the tensions are resolved may serve as a telling precedent for the future.

2.2 The 'One Court' principle and challenges of coordination

As early as March 2004, the Committee on Budget and Finance (CBF) 'expressed concern over a certain fragmentation between the organs of the ICC', and encouraged the Court to develop a common strategy.¹¹ While the separation of the Presidency, Chambers, Registry and Prosecution at the ICC was designed to ensure judicial neutrality and prosecutorial independence, it has also generated significant coordination challenges for the Court.¹² These issues are nothing new, with similar internal conflicts appearing at the ad hoc tribunals. Former International Criminal Tribunal for the former Yugoslavia (ICTY) Registrar, Hans Holthuis, has commented that:

'generally speaking, there is a lack of communication within the institution, perhaps due to the rapid growth of the organisation. The "one-big-happy-family" culture, characteristic of the first years after inception, is no longer sufficient and there is a need to adopt a corporate culture suitable for a large international non-profit organisation with a very specific goal and one which is operating in a specific historical and political context.'¹³

¹⁰ Japan has proposed that the issue of governance and structure be included in the general stocktaking exercise including the consideration of specific amendments to the provisions governing the mandates and responsibilities of the ASP and the Presidency of the Court. See *Japan's contribution paper on the 2010 Review Conference*, on file with the IBA.

¹¹ Report of the Committee on Budget and Finance, ICC-ASP/3/22, 19 August 2004, para 25.

¹² See Benjamin N. Schiff, *Building the International Criminal Court* (2008), 134-143.

¹³ Han Holthuis, Operational Aspects of Setting up the International Criminal Court: Building on the Experience of the ICTY (2002) 27 *International Legal Practice* 41, 43.

The ICC's coordination challenges may, however, be inherently structural. Article 38 vests responsibility for the proper administration of the Court in the Presidency but excludes the Office of the Prosecutor (OTP), which is functionally independent. In discharging its administrative oversight the Presidency is required to 'coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.'¹⁴ The Registrar is responsible for the non-judicial aspects of the administration and services of the Court, under the authority of the Presidency, and without prejudice to the Prosecutor's powers under Article 42(2). Thus the Presidency has administrative authority over the Registrar, but not the Prosecutor. Depending on the personalities involved, it may be difficult to achieve consensus on important issues affecting the Court's function.

In an effort to address these concerns, the ICC committed to a 'One Court' principle, which prioritises increasing cooperation and coordination on administrative issues while respecting the independence of the various organs.¹⁵ Further, the Court formalised meetings of the Coordination Council, comprised of the President, Prosecutor and Registrar, as was the practice of the ICTY.¹⁶ Finally, under the urging of the CBF,¹⁷ the Court developed a Court-wide Strategic Plan, providing a common framework for the Court's activities over the coming decade to ensure internal coordination of the Court's operations.¹⁸

Despite these efforts to enhance coordination, in the report of its thirteenth session the CBF commented that divisions among the organs and a lack of clarity of roles represented a significant risk of inefficiencies at the Court, and requested that the Presidency prepare a report on measures to improve clarity on the responsibilities of the different organs.¹⁹ One notable example is the apparent impasse between the OTP and the Registrar on the enhancement of the Court's field operations. The IBA understands that the OTP was concerned that the consultation process for the Registry's planned improvements to the field operations was not conducted in a sufficiently timely manner to allow its position to be fully taken into account before a formal report on the matter was drafted. This is a matter of some concern given the importance of field offices in promoting and supporting the Court's work, particularly in affected communities.

The Court is a unique organisation and faces a range of novel internal and external challenges. With the rapid growth of the organisation, it is understandable that there will be some challenges in achieving coordination between the various organs. However, this rapid growth also serves to underscore the importance of a cohesive vision for the Court as a permanent institution. Functional independence of the Court's organs is essential to the performance of their mandates; however, it is equally clear that a fractured Court characterised by rivalries and duplication is unsustainable and inefficient.

Conflicts which result from overlapping and contested administrative responsibilities that potentially affect judicial proceedings can and will be resolved by judges and are likely to be less frequent with the accumulation of experience. However, where matters of non-judicial administrative coordination are concerned, the Court requires clear leadership from its top officials to transform the 'One Court' principle into reality. In this regard, genuine dialogue between the organs is essential to sustaining the efficiency of the Court.

14 Article 38(4) of the Rome Statute.

15 Judge Philippe Kirsch, Fourth Diplomatic Briefing (Speech delivered at Information Session for Diplomatic Representatives, Brussels, 8 June 2005).

16 ICTY Rules of Procedure and Evidence, rule 23 *bis*.

17 Report of the Committee on Budget and Finance, ICC-ASP/3/18, 13 August 2004, para 12

18 Strategic Plan of the International Criminal Court, ICC-ASP/5/6, 4 August 2006.

19 Report of the Committee on Budget and Finance on the work of its thirteenth session, ICC-ASP/8/15 Advance Version, 15 September 2009, para 25-6.

2.3 Management oversight

The role of the Assembly of States Parties and Presidency of the Court

a) *Assembly of States Parties*

The ASP is composed of representatives of the States Parties to the Rome Statute, and is charged with a range of administrative responsibilities, such as approval of the Court's budget,²⁰ as well as amending powers in respect of the Court's statutory documents.²¹ Under Article 112(2) of the Rome Statute, the ASP provides management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court. The ASP also has the authority to consider and decide the Court's budget.²² The ASP, being a political body of States Parties' representatives which meets infrequently, is not expected to be involved in the routine administration of the Court. As Christian Wenaweser, President of the ASP, succinctly notes: 'micromanagement of the Court should be avoided, and the ASP's management should be limited to issues having an impact on the effective functioning of the Court, in particular that have budgetary implications.'²³

b) *The Presidency*

The Presidency has both judicial and administrative responsibilities within the legal framework of the Court. As noted above, under Article 38 of the Statute, the Presidency is responsible for the 'proper administration of the Court, with the exception of the Office of the Prosecutor'. Article 38 does not elaborate on the scope of the Presidency's administrative functions. These can only be understood by reference to other normative provisions in the Statute and the subsidiary texts of the Court. In particular, Article 43 provides that the Registrar is the principal administrative officer of the Court, but her functions are exercised under the authority of the President. In this respect, the Presidency functions as an appellate court and conducts judicial review of the Registrar's decisions on a range of issues as provided by various provisions of the Rules of Procedure and Evidence (RPE),²⁴ Regulations of the Court (RoC),²⁵ and Regulations of the Registry (RoR).²⁶

Overlapping roles

Recently the question of the Court's obligation to fund family visits for indigent detainees, apart from being an important issue in respect of defendant rights, has squarely raised concerns about the scope of the respective roles and overall governance structures at the Court in terms of management and administrative oversight of the Presidency and the ASP.

²⁰ Rome Statute, Article 112(2)(d).

²¹ See for example: Rome Statute Article 9(2) regarding Elements of Crimes; Article 51(2) regarding Rules of Evidence and Procedure; and Article 121 regarding Rome Statute.

²² Rome Statute, Article 112(2)(d).

²³ Christian Wenaweser, 'The Assembly of States Parties of the Rome Statute: Perspectives on the Years Ahead', 2009-2011 (Discussion paper, Consultative Conference on International Criminal Justice, 9-11 September 2009, United Nations Headquarters, New York), 2.

²⁴ See for example rule 21 regarding assignment of legal counsel.

²⁵ See for example regulation 85(3) regarding decisions on payment of legal assistance.

²⁶ See for example regulation 221(1) regarding detention centre complaints.

a) Family visits decision

Since September 2006, the Registrar of the Court has applied a policy of funding visits by the families of indigent detained persons.²⁷ This initiative was debated in 2007 by the Committee on Budget and Finance (CBF) – a subsidiary body of the ASP – which decided that, in view of the potentially costly nature of such visits, the States Parties would need to decide on the practical, legal and financial implications.²⁸ The issue has since been the subject of considerable comment by the ASP,²⁹ the CBF³⁰ the Bureau of the Assembly of States Parties (Bureau),³¹ and the Court itself.³²

On 10 March 2009, the Presidency of the Court issued a decision granting the application of the detained Mr Ngudjolo Chui for judicial review of the decision of the Registrar concerning the number and frequency of funded family visits (the Decision).³³ Whilst acknowledging that no general obligation to fund family visits could be inferred from the legal texts of the Court or from international law in general, the Presidency determined that ‘in the case under consideration, a positive obligation to fund family visits must be implied in order to give effect to a right which would otherwise be ineffective in the particular circumstances of the detainee.’³⁴ In this regard, the Presidency decided that the primary responsibility for funding lies with the Court.³⁵ Thus, the Registrar was instructed to ensure that provision is made for the funding of family visits for indigent detainees in the budget of the Court.³⁶

The Presidency’s decision is in stark contrast to the ASP’s stance on this issue. While acknowledging that detained persons are entitled to receive visits and that specific attention should be given by the Court to visits by family members, the ASP has explicitly recalled that according to existing law and standards, the right to family visits does not comprise a co-relative right to have such visits paid for by the detaining authority.³⁷ The appropriate mechanism for funding family visits was therefore a policy decision to be determined following extensive dialogue between the Court and the ASP. Pending a final policy decision on the issue, in the context of the Court’s budget for 2009, the ASP agreed, on an exceptional basis and limited to 2009 only, to allow the Court to fund family visits up to the amount of €40,500 in accordance with the 2009 programme budget.³⁸

27 Report of the Court on family visits to indigent persons, ICC-ASP/7/24, 5 November 2008, 1.

28 Report of the Committee on Budget and Finance on the work of its ninth session, ICC-ASP/6/12, 28 September 2007, para 67.

29 See *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, The Hague, 30 November – 14 December 2007*, ICC-ASP/6/20, vol. III, paras 28-9; *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14 – 22 November 2008*, ICC-ASP/7/20, vol III, paras 15-6.

30 See Report of the Committee on Budget and Finance on the work of its ninth session, ICC-ASP/6/12, 28 September 2007, para 67; Report of the Committee on Budget and Finance on the work of its eleventh session, ICC-ASP/7/15, paras 66-9; Report of the Committee on Budget and Finance on the work of its twelfth session, ICC-ASP/8/5, 13 May 2009, paras 86-94.

31 See Report of the Bureau on family visits for detainees, ICC-ASP/7/30, 6 November 2008.

32 See Report of the Court on family visits to indigent detained persons, ICC-ASP/7/24, 5 November 2008; Report of the Court on the financial aspects of enforcing the Court’s obligation to fund family visits to indigent detained persons, ICC-ASP/8/9, 6 May 2009.

33 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 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-RoR-217-02/08, 10 March 2009.

34 *Ibid.*, para 37.

35 *Ibid.* para 39.

36 *Ibid.*, para 41. However, the Presidency clarified that this obligation could not create an entitlement to unlimited family visits, and that the obligation to fund could be legitimately restricted by the resource constraints of the Court, provided that the right to family visits is still rendered effective.

37 *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14 – 22 November 2008*, ICC-ASP/7/20, vol III, para 15.

38 *Ibid.*

b) Issues arising from the decision

The family visits decision raises a number of sensitive issues. Firstly, the decision highlights a lack of clarity in the legal texts of the Court regarding the scope of the respective management roles of the ASP and the Presidency, both having legitimate interests in this area. Some States Parties were concerned that the Presidency had acted outside the scope of its judicial power, by purporting to make an administrative decision for which there was no legal basis. It was felt that in light of the previous statements of the ASP, and the continuing deliberations of the Bureau, the decision did not properly take account of the role of the ASP in exercising management and policy oversight of the Court. Other State Parties were troubled by the legal and policy implications of the decision.

The decision also placed the Registrar in a conflicted position. Under the relevant legal provisions, the Registrar is answerable to both the Presidency and the ASP in respect of non-judicial aspects of the Court's work. On budgetary matters, the ASP appears to have the last word; however, decisions taken by the Registrar that have budgetary implications may be reviewed by the Presidency as part of its judicial function. Compliance with the decision would force the Registrar to act contrary to the instructions of the ASP.

Finally, the decision raises issues as to the extent to which policy decisions should inform the judges in arriving at a decision. This is a difficult question as States Parties undoubtedly have a legitimate interest and role in the formulation of general policies affecting the Court.³⁹ On the other hand, as independent judges, the Presidency's primary obligation in conducting judicial review is to make decisions based on the law rather than policy.

c) Resolving the matter

The ASP's response to this matter must be carefully weighed given the potential impact on the Court's legitimacy. A disproportionate response by States Parties to the Presidency's decision risks undermining the judicial aspects of the Court's work. Managing the effect of the decision demands a pragmatic approach rather than an attempt to challenge the Presidency's competency and reasoning.

Indeed, an impasse on this issue is not only highly undesirable, but unnecessary, and through continued dialogue between the ASP and the Court a practical solution which balances the obligations of the Registry enunciated in the Presidency decision with the ASP's budgetary policies can be crafted.

The Bureau of the ASP has proposed a draft resolution for adoption at the eighth session of the ASP.⁴⁰ The draft resolution expressly refers to the impugned decision and proposes language reiterating the absence of a positive legal obligation on the part of States to fund family visits.⁴¹

While the IBA welcomes efforts by States Parties to arrive at a practical and principled resolution of the issue, we caution against language in the ASP resolution that suggests that the judiciary is being censured by the Court's political body. The ASP must carefully navigate between the need to re-affirm its role as the principal decision-making body for budgetary issues, and demonstrating respect for judicial independence.

³⁹ Dominic Raab and Hans Bevers, 'The International Criminal Court and the Separation of Powers' (2006) 3 *International Organizations Law Review* 93, 135.

⁴⁰ Report of the Bureau on family visits for detainees, ICC-ASP/8/42.

⁴¹ *Ibid*, Annex 1 page 10.

In the resolution, States Parties have also requested that the Court consider amending the relevant parts of the Regulations of the Registry to reflect the ASP's resolution and to engage in continued dialogue with the Court. The IBA cautions, however, against amending the Court's legal texts until a final decision has been agreed on this issue.⁴²

However the IBA welcomes the decision by States Parties to continue to approve either partial or full funding of family visits within the programme budget albeit 'on purely humanitarian grounds' and based on certain pre-established criteria such as a full or partial determination of indigence.

The IBA also welcomes the positive and practical efforts made by the Registry to manage the impact of the decision. The Registry has proposed ways of decreasing the costs of funding family visits to detainees, including through reviewing the current method used to calculate indigence for the purposes of family visits; reducing some of the associated personal costs such as telephone calls previously covered by the Court; and utilising the financial investigators to verify financial information provided by detainees.⁴³

Ultimately, it must be recalled that the family visits decision was delivered in response to a legitimate request from an indigent detainee. While the discussion around the issue has institutional and policy dimensions, it concerns the rights of individuals in pre-trial detention who are presumed innocent until proven guilty. While due regard must be given to the practical and political implications of the decision on family visits, every effort must be made to arrive at a feasible solution that takes into account the rights of the indigent detainee.

2.4 Reinforcing governance structures

The debate surrounding the decision on family visits points to a much broader management challenge at the ICC, and highlights the tension between law and politics in the operation of the Court. On the other hand, the decision has provided a unique opportunity for the issue of governance to be debated among States Parties and by the Court. Japan has proposed that governance be discussed as part of the general stocktaking deliberations at the Review Conference, including consideration of possible amendments to the Statute to clarify the respective administrative roles of the Presidency, ASP and Registrar.⁴⁴

a) Oversight by the Assembly of States Parties

As managers of the Court's budget, States Parties demand accountability of its officials. The ASP has previously challenged administrative decisions that have been made by the Presidency or judges; a notable example being the letter sent by the Bureau of the ASP to the Presidency of the Court expressing the ASP's concern at the composition of the Appeals Chamber and the broader implications for the efficiency of the Court.⁴⁵ However, the appropriate modalities for expressing concerns about judicial decisions of the Presidency that have administrative implications are less clear. In the context of the family visits decision, the ASP Bureau has proposed the adoption of a

⁴² Ibid.

⁴³ Report of the Court on the financial aspects of enforcing the Court's obligation to fund family visits to indigent detained persons, ICC-ASP/8/9, 6 May 2009, para 9-11.

⁴⁴ See note 10, above.

⁴⁵ Eighth ICC-ASP Bureau Meeting, Agenda and Decisions, 5 May 2009, at para 5 <http://www.icc-cpi.int/NR/rdonlyres/7CCDACBA-C5E2-4FF9-B253-8FB27C85E405/0/ICCASP2009Bureau0605May2009ENG.pdf>.

resolution clearly iterating the ASP's position on the issue. This is a statement of policy which the Court may take into consideration but which is not necessarily binding.

The IBA considers that there is an obvious need for creating and/or strengthening the mechanism for addressing disputed administrative or governance issues between the ASP and the Presidency of the Court. The governance issues arising from the family visits decision were addressed via The Hague Working Group and an ad hoc facilitator; this is not ideal. While the current working group, its coordinators and facilitators make every effort to adequately address issues as they arise, they operate with minimal support, limited resources and within an informal structure. This approach is not consistent with the pace of the Court's development and may not adequately be able to address the issues arising in a timely and coherent manner.

The ASP is therefore urged to adopt, in consultation with the Presidency, a policy document establishing a clear protocol for addressing disputed issues regarding the management of the Court. These issues should not be addressed at this first Review Conference. Instead, the IBA recommends that one of the inter-sessional working groups be mandated to closely examine the matter with a view to submitting a draft proposal for adoption at the tenth session of the Assembly.

b) The Presidency's position

Although the dual role of the Presidency – judicial and administrative – creates its own challenges, judges are legitimately concerned by any attempt on the part of States Parties to encroach on their independence. Policy decisions by States often have political dimensions, and while the ICC as an international court operates in a political context, it must remain functionally independent and free from political interference. The independence of the judiciary is not only an essential element of the rule of law, but also a fundamental human right of accused persons.⁴⁶

The current Presidency has taken a consultative approach to the issue of budgetary implications of judicial decisions. In its Status Report on the Court's investigations into efficiency measures for 2010, the Court indicated that at the direction of the Presidency, 'a judge is leading an informal working group reviewing among other things, the financial implications of judicial decisions in consultation with the Registrar.'⁴⁷

The IBA welcomes the Presidency's initiative to ensure that judicial decisions are informed by the fiscal constraints within which the Court operates. The IBA, however, urges caution. While it is important for judges to be generally aware of the administrative and budgetary framework in which the Court operates, care must be taken not to compromise the independence and impartiality of the judiciary by making judicial decisions subject to budgetary considerations.

c) Strengthening the Presidency

Given the frequently mentioned lack of clarity in the Court's text, the most obvious solution may appear to be an amendment to the relevant statutory provisions, in particular to Article 38 of the

⁴⁶ See for example: Universal Declaration of Human Rights, GA Res 217 A (III), UN Doc A/810 (1948), Article 10; International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Article 14; and Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), Article 6.

⁴⁷ Status Report on the Court's investigations into efficiency measures for 2010, ICC-ASP/8/6, para 14.

Statute which sets out the Presidency's administrative role. While this approach may be the most feasible solution in the long term, the IBA considers that it is too early in the life of the Court to propose such a drastic institutional amendment. The current Presidency has been in office for only eight months (up to the time of writing in October 2009). As such, the new Presidency needs to be allowed an opportunity to positively and proactively engage with States Parties on issues of mutual concern regarding the management of the Court.

d) Staff

While amendment of the Court's legal texts may be premature at present, there is an obvious need for the office of the President to be strengthened. The IBA considers that it is a challenge for the Presidency to carry out the dual role of administrator and judge, given that most judges are unlikely to have management experience. Despite a significant administrative mandate, in addition to its judicial role, the immediate Office of the Presidency has limited staff. The IBA considers that it is important for the Office of the Presidency to be staffed by individuals with specific expertise in legal as well as administrative matters, including significant experience in international diplomatic relations in addition to knowledge and understanding of the Rome Statute.

Furthermore, information regarding the judicial and administrative role of the Presidency must be publicly known. The IBA notes that despite the breadth of the Presidency's oversight functions and powers of judicial review, the Court's website refers only to its powers under Article 38 of the Statute.

e) Judicial review decisions

In addition, there is very little information regarding judicial review decisions of the Presidency. This may be attributed to the fact that under the Regulations of the Court matters concerning detention of persons before the Court, legal aid and certain other administrative matters are treated confidentially and are normally filed as such by the parties.⁴⁸ The IBA understands that the Presidency has made several important rulings reviewing the exercise of the Registrar's powers in relation to legal aid and other administrative matters, many of which are not public. The decision may later be reclassified as public if requested by the parties or at the discretion of the judges; however, public notification is often further delayed by the slow process of uploading the reclassified document to the Court's website.

The IBA reiterates the importance of public proceedings for the credibility of the Court; confidentiality should be the exception not the rule. While there is need to protect the integrity and security of persons and information, the IBA considers that the public must be notified of the existence of such filings in a timely manner.

As such the IBA proposes that Regulation 23 of the Regulations of the Court be amended to include a provision mandating parties to judicial review proceedings to file a public notification of the application for review with confidential annexes. This approach is routinely practised by the Registrar in relation to confidential correspondence from States Parties.

⁴⁸ See for example Regulation 130 of the Regulations of the Court which provides that the Registrar shall manage the legal assistance paid by the Court with **due respect for confidentiality** and the independence of counsel. Where the Registrar has made an adverse decision concerning legal assistance, the person against whom the decision was made may apply to the Presidency for review of the decision pursuant to Regulation 85(3) of the Regulations of the Court. Regulation 23 *bis* of the Regulations of the Court provides that any document filed by the Registrar or a participant and marked 'ex parte', 'under seal' or 'confidential', shall state the factual and legal basis for the chosen classification and, unless otherwise ordered by a Chamber, shall be treated according to that classification throughout the proceedings.

The IBA also recommends that the Legal Text Review Committee considers an amendment to the Regulations of the Court to set out the full powers and scope of the judicial review functions of the Presidency. The relevant amended provision(s) may be included under section 4 of the Regulations which deals with the procedure for appeals and revisions.

2.5 Independent oversight mechanism

An important corollary of effective management of any institution is transparency and accountability of its senior officials. The ASP does have the power under Article 112(4) of the Rome Statute to create an independent mechanism by which the Court (including its leadership) can be held accountable. This is an independent oversight mechanism for inspection, evaluation and investigation of the Court in order to enhance its efficiency and economy. In April 2009, the Bureau of the ASP issued its report on the establishment of an independent oversight mechanism, recommending that the ASP establish such a mechanism as a matter of priority.⁴⁹ Initially the mechanism will only extend to the establishment of an independent professional investigative capacity to respond to alleged misconduct, with the understanding that additional elements of oversight such as inspection and evaluation as envisioned by Article 112(4) of the Rome Statute will be added in time.

The independent oversight mechanism will report directly to the Bureau and ASP. The proposed oversight mechanism is similar to the UN Office of Internal Oversight Services (OIOS), which is an operationally independent office that assists the Secretary General in fulfilling his internal oversight responsibilities in respect of the resources and staff of the UN.⁵⁰

An external, systematic and objective inspection and evaluation of the Court's activities could be an important aid in promoting its efficient operation. Although initially the scope of the independent oversight mechanism will be limited to investigations of misconduct, as it expands to fill the role anticipated by Article 112(4), the same mechanism could also provide general management consulting, similar to the OIOS. The establishment of such an independent oversight mechanism might also assist to prevent confrontation between the Presidency and the ASP. Assistance and advice from an independent expert body might assist in preventing later controversy and potential judicial censure.⁵¹

However, it is essential to ensure that the establishment of the oversight mechanism does not become an instrument for interference in the independent functioning of the Court. As such, while it is appropriate that the oversight mechanism report to the Bureau and ASP, it must be operationally independent of both the ASP and the Court to avoid accusations of political interference.

Furthermore, in developing the operational mandate of the mechanism, it is important to prescribe precise regulations and procedures for its functioning. In this regard, in order to ensure a transparent, objective and consultative process, the IBA urges the Presidency to fully engage with the ASP concerning the establishment of appropriate regulations for the effective functioning of the independent oversight mechanism.

49 Report of the Bureau on the establishment of an independent oversight mechanism, ICC-ASP/8/2, 15 April 2009. The establishment of an independent oversight mechanism is consistent with Article 112(4) of the Rome Statute which provides that 'The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.'

50 S Rama Rao, 'Assembly of States Parties' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed, 2008) 1687, 1688.

51 Thordis Ingadottir and Cesare Romano, 'The Financing of the International Court' in Thordis Ingadottir (ed), *The International Criminal Court: Recommendations on Policy and Practice – Financing, Victims, Judges, and Immunities* (2003) 47, 100.

Chapter III: States Parties' Cooperation

3.1 Introduction

Article 86 of the Rome Statute provides for the general obligation of States Parties to cooperate with the Court. This obligation applies to all provisions of the Statute, including those related to the defence. Without the cooperation of States Parties, judicial decisions will have little effect. In 1995, Antonio Cassese, then President of the ICTY, lamented that the Tribunal is 'like a giant who has no arms and no legs. To walk and work, he needs artificial limbs. These artificial limbs are the State authorities. Without their help the Tribunal cannot operate'.⁵² The same could be said of the ICC, albeit with the additional challenges of operating in a far larger jurisdictional sphere than the ad hoc tribunals or any domestic tribunal.

Despite having adopted a very detailed report in 2007 setting out 66 recommendations for States Parties on cooperating with the ICC, the Assembly of States Parties (ASP) has taken ineffective or insufficient measures to urge States to fully implement the recommendations.⁵³ As seen below, though the legal framework for cooperation contained in Part 9 of the Statute is fully elaborated its policy dimensions are less clear, particularly in relation to matters involving the defence.

3.2 The Bemba decision

The recent decision by the Single Judge in the case of Jean-Pierre Bemba Gombo (the *Bemba* case), granting the defendant interim release pending trial, highlights the difficulties facing the Court in securing the full cooperation of States Parties in executing its judicial rulings, and the way in which this lack of cooperation affects the right of an accused person to provisional release pending trial, which is a corollary of the presumption of innocence,⁵⁴ and is widely recognised in international human rights instruments.⁵⁵

Mr Jean Pierre Bemba, who is charged with war crimes and crimes against humanity arising from the prosecution's investigations in the Central African Republic, had applied for and been denied interim release on three prior occasions since his surrender to the Court in July 2008.⁵⁶ On 14 August 2009, Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre Trial Chamber II, issued a decision granting Mr Bemba's conditional release pending trial, (the Decision).⁵⁷ The decision, taken after considering all relevant factors, including the likelihood of interference with victims

⁵² Antonio Cassese, 'Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' (Speech delivered to the General Assembly of the United Nations, New York, 7 November 1995).

⁵³ 'Strengthening the International Criminal Court and the Assembly of States Parties', ICC-ASP/6/Res.2, para 40. See also, 'Report of the Bureau on Cooperation', ICC-ASP/6/21.

⁵⁴ The Decision, para 37.

⁵⁵ See for example: International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, Art 9 (entered into force 23 March 1976); (European) Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222, Art 5 (entered into force 3 September 1953); African Charter on Human and Peoples' Rights, opened for signature 27 June 1981, 21 ILM 58 (1982), Art 6 (entered into force 21 October 1986); and American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, Art 7 (entered into force 18 July 1978).

⁵⁶ *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on application for interim release, ICC-01/05-01/08-49, 20 August 2008; *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on Application for Interim Release, ICC-01/05-01/08-321, 16 December 2008; *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on Application for Interim Release, ICC-01/05-01/08-403, 14 April 2009.

⁵⁷ *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, ICC-01/05-01/08, 14 August 2009.

and witnesses, was based on the judge's determination that there had been a substantial 'change of circumstances' since the last ruling on interim release in April 2009, which justified Mr Bemba's release at this time.⁵⁸

In the Decision, the Single Judge found that the conditions to justify Mr Bemba's continued pre-trial detention had not been met.⁵⁹ The prosecution has since appealed the decision and at the time of writing, the Appeals Chamber's decision was still pending.

a) The cooperation of States Parties

While the Decision clearly affirms Mr Bemba's right to interim release pending trial, its implementation is less certain as it depends substantially upon the cooperation of States Parties. The defence has requested that Mr Bemba be released to Belgium, France, Germany, Italy, Portugal or South Africa. Each of these States Parties, as well as the Netherlands as host state, was invited to submit observations on the interim release, and all States expressed 'objections or concerns to host Mr Bemba on their territory'.⁶⁰ The Single Judge eventually scheduled a public hearing to obtain further views of the parties and relevant States before making final orders for Mr Bemba's interim release.⁶¹

In the Decision, the Single Judge stressed the vital importance of State Party cooperation to the fulfilment of the Court's mandate. The Single Judge adopted a strict approach to the issue of cooperation, noting that the decision on interim release was a matter to be determined by the Court, 'based on the law exclusively and specific circumstances of the case', and that the unwillingness of States Parties to provide guarantees for Mr Bemba's release could not weigh heavily against him.⁶²

b) The position of States Parties

For States Parties, the prospect of receiving accused from the Court on interim release undoubtedly raises complex domestic political, legal and logistical issues. Mr Bemba has committed to several undertakings, if released, including being fully responsible for all costs associated with his release and travel to and from the Court for his trial, and fully submitting himself to local authorities. The full legal ramifications of these undertakings will no doubt have to be explored. One clear issue would be the legally binding effect of such undertakings.

During consultations with the IBA, some States Parties' representatives indicated that the Court's decision convening a public hearing and requesting the submission of States was a matter of some concern. They contended that the practice thus far had been to request confidential submissions from States and it was unclear what had precipitated the change of approach. States felt that there

⁵⁸ The Decision, para 70.

⁵⁹ Article 60 of the Rome Statute provides that the Pre-Trial Chamber may review and modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require. In determining whether to grant interim release, the Chamber must consider whether the conditions set out in Article 58(1) have been met, namely whether detention is necessary:

- (i) to ensure the person's appearance at trial;
- (ii) to ensure the person does not obstruct or endanger the investigation or the court proceedings; or
- (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime.

⁶⁰ Ibid, para 90.

⁶¹ There have been several important developments in the *Bemba* case since the decision granting interim release. On 18 September the Prosecutor's application for leave to appeal the decision confirming the charges was refused. The Presidency subsequently constituted Trial Chamber III, consisting of Judges Adrian Fulford, Elizabeth Odio Benito and Joyce Aluoch, and transmitted the record of the case to this Chamber (available at www.icc-cpi.int/iccdocs/doc/doc745448.pdf, last accessed 10 October 2009). Two of the three judges are presently involved in the trial of Thomas Lubanga. The Single Judge also postponed the public hearings with the relevant States due to the pending AC ruling. It is unclear whether this Chamber will decide to convene a public hearing pending the outcome of the appeal on interim release.

⁶² Ibid, para 88.

was need for clarity in the Court's application of and approach to Part 9 of the Rome Statute, particularly on such a sensitive issue. States Parties further pointed out that there were no procedural guidelines on how cooperation arrangements related to interim release should be approached. Part 9 of the Statute is silent and the issue is not clearly elaborated in the Rules of Procedure and Evidence.

c) Non-cooperation

Where States Parties persistently fail to cooperate with a judicial decision such that it is rendered ineffective, a Chamber can act pursuant to Article 87(7) to make a finding of non-cooperation and refer the matter to the ASP. According to ASP President Christian Wenaweser, 'if such a referral were to be made, the Assembly would be challenged to craft an appropriate response – and this response would have to be different in nature from the decisions it has so far adopted'.⁶³

The Court has to date refrained from invoking Article 87(7). However, if judicial decisions are undermined due to non-cooperation, it may be appropriate for the Court to pursue this option. The ASP must begin to discuss the procedural framework for addressing a finding of non-cooperation by the Court. If the Assembly first awaits a ruling of the Court in this regard, the circumstances may be too politically charged to allow for an appropriate, objective response.

Non-cooperation with the requests of the Court could also result in additional costs that are ultimately reflected in the Court's budget. During a diplomatic briefing in Brussels in May 2009, the ICC Registrar pointed out that 23 requests for cooperation on matters of asset tracing and freezing of assets remained unanswered.⁶⁴ The requests were made to offset the legal aid costs of ongoing proceedings and would greatly alleviate the pressure on the Court's budget. Yet States Parties have failed to respond to the Court's request for cooperation to trace or freeze relevant assets, which could assist the Registrar in making an accurate determination of indigence. The tracing and freezing of assets will also be critical to the Court's efforts to provide reparations for victims of crime.

3.3 The role of the Assembly of States Parties

The difficulties regarding this issue point to the clear gap in the policy framework for cooperation between the Court and States Parties. States have been decidedly unprepared to facilitate cooperation with the Court. In the Report of the Bureau on Cooperation, States Parties are urged to ensure that adequate implementing legislation and supplementary agreements are in place to facilitate cooperation; and to establish appropriate structures and procedures to make such cooperation run smoothly. In short, States Parties should reinforce an 'enabling environment by creating a global framework for cooperation'.⁶⁵ Regrettably, many States have failed to implement this recommendation and the ASP has failed to uphold the obligations of its members towards the Court.

Indeed, less than 40 of the 110 States Parties to the Rome Statute have enacted legislation to facilitate cooperation with the ICC, and much of the implementing legislation that has been enacted is flawed

⁶³ Christian Wenaweser, 'The Assembly of States Parties of the Rome Statute: Perspectives on the Years Ahead, 2009-2011 (Discussion paper, Consultative Conference on International Criminal Justice, September 9-11 2009, United Nations Headquarters, New York).

⁶⁴ 16th Diplomatic Briefing of the International Criminal Court, Remarks of Sylvania Arbia, Registrar of the International Criminal Court, 26 May 2009 at www.icc-cpi.int/NR/rdonlyres/302CA5E0-E2B5-4663-96DE-93E55B1FD26C/280385/Registrar_statement_ENG.pdf, last accessed 19 October 2009.

⁶⁵ Report of the Bureau on Cooperation, ICC-ASP/6/21 at para 74.

and does not include clear provisions to facilitate cooperation with the Court.⁶⁶

Though efforts have been made by the ASP-appointed focal point on cooperation, Belgian Ambassador Yves Haesendonck, to facilitate the implementation of some of the technical aspects of the Bureau's Report on Cooperation, more needs to be done. The IBA considers that in order for the recommendations contained in the Bureau's report to be fully implemented, the focal point on cooperation must be part of a broader working group tasked with the specific mandate of addressing cooperation. Indeed, non-governmental organisations (NGOs) have repeatedly called for the Assembly to establish a Working Group on Cooperation (WGC).

3.4 Recommendations

The IBA urges the Assembly to take decisive steps during its eighth session to establish the WGC with a mandate to examine obstacles to full implementation of the 66 recommendations contained in the Report of the Bureau on Cooperation. The WGC should also be mandated to formulate the procedural framework for the Assembly's response to a finding of non-cooperation by the Court pursuant to Article 87(7) of the Statute.

The IBA urges States during the Review Conference to fully reiterate their commitment to cooperating with the Court including on matters related to the defence. In this regard, the IBA encourages States who lack implementing legislation or whose implementing legislation lack specific provisions to facilitate cooperation with the Court, to make every effort to rectify the situation, including by seeking technical assistance where necessary.

The IBA also calls upon the Court and the Registry in particular, to continue to pursue bilateral arrangements to facilitate effective cooperation between the Court and States Parties.

⁶⁶ See Jonathan O'Donahue, 'States object to cooperating with the conditional release of Jean-Pierre Bemba Gombo – another sign of a cooperation crisis?', 10 September at <http://www.coalitionfortheICC.org>.

Chapter IV: Effective and Efficient Proceedings

4.1 Introduction

The core mandate of the ICC is to put an end to impunity for perpetrators of very serious crimes and thus contribute to the prevention of those crimes. Fair, efficient and expeditious public proceedings are consistent with goal one of the strategic goals and objectives of the ICC as enounced in the Strategic Plan of the Court, and are key to the ICC's legitimacy.⁶⁷

The effective and efficient management of proceedings depends on a number of interrelated factors. The onus to manage judicial proceedings rests on the judges. The prosecution bears the responsibility of ensuring that investigations and prosecutions are focused, appropriate charges reflecting the range of criminality are laid and there is sufficient evidence to support these charges. The Registrar is responsible for providing technical and logistical support through the Court Management Division and other support services. States Parties also play an important role by ensuring that adequate resources are allocated to the Court for its efficient functioning.

4.2 Multiple trials at the ICC

The activity level at the ICC has significantly increased since January 2009. In 2010, there are likely to be four ongoing trials of cases before the Court.

The case of *The Prosecutor v Thomas Lubanga Dyilo*, the ICC's first – for enlisting, conscripting and using children under the age of 15 years to participate actively in hostilities – will continue in 2010 (pending the ruling on an issue by the Appeals Chamber). The ICC's second trial against Germain Katanga and Mathieu Ngudjolo Chui, both charged with war crimes and crimes against humanity arising from investigations in the Democratic Republic of Congo (DRC), is scheduled to commence on 24 November 2009 and continue into the following year. The case against Jean-Pierre Bemba has now been set to start on 27 April 2010. The confirmation of charges hearing in the case of Mr Abu Garda who is charged with war crimes arising from the Darfur, Sudan situation was concluded at the end of October 2009. If the charges are confirmed, a trial date is also likely to be set in 2010.

Though a welcome development, the prospect of multiple trials at the ICC will test the adequacy of the Court's technical, logistical and human resources capacity to facilitate several proceedings simultaneously and the willingness of States Parties to provide the resources to enable the trials to proceed as efficiently as possible.

The ICC currently has two available courtrooms for conducting trials. A third is at present being used by the Special Court for Sierra Leone for the trial of former Liberian President, Charles Taylor, but will not be available until November 2010 as the memorandum of understanding between the Special Court for Sierra Leone and the ICC has been extended to facilitate the completion of the trial and relevant appeals in that case.

⁶⁷ Strategic Plan of the International Criminal Court ICC-ASP/5/6.

It is imperative that the Court facilitates parallel rather than consecutive trials in order to ensure trial without delay, particularly for defendants in detention. With some effort and flexibility, the ICC will be able to accomplish this. At the ICTY, the Trial Chambers at their peak ran eight trials simultaneously in its three courtrooms, taking advantage of interstices in trial schedules.⁶⁸

4.3 Budgetary implications

The Registrar has prepared the ICC programme budget for 2010 based on assumptions of consecutive rather than parallel trials during that year. The Registry noted that projecting for parallel trials would have significantly increased the overall proposed budget estimates for 2010. This approach was driven by the high costs associated with maintaining human resources capacity for parallel trials, given the number of technical and logistical arrangements that would need to be made. The Registry has, however, pointed out that the final decision concerning the commencement of trials is made by the judges. In the event that there are multiple trials that are not provided for in the Court's annual programme budget, the Court has the option to resort to the Contingency Fund.

Given that multiple trials for 2010 are clearly foreseeable, the IBA considers that costs should be reflected in the proposed budget rather than resorting to the Contingency Fund. While it is important to ensure that costs are minimised, every effort should be made within the ICC's programme budget to fund parallel trials.

4.4 Safeguarding the rights of defendants before the Court

Article 67(1) of the Rome Statute sets out the fundamental rights afforded to every defendant at the ICC. These include the right to trial without undue delay. During the trial it is the responsibility of the judges to ensure that the trial is both fair and expeditious.⁶⁹ In relation to the confirmation of charges proceedings, the Pre-Trial Chamber (PTC) is required to hold a hearing confirming the charges 'within a reasonable time after the person's surrender or voluntary appearance before the Court'.⁷⁰

a) Trial without delay: developments in the Lubanga case

The commencement of the *Lubanga* trial was a welcome development given that the case has been beset by delay since the defendant was first surrendered to the Court in March 2006. Regrettably, though significant progress had been made following the commencement of the trial in January 2009, the case has again been postponed pending a ruling from the Appeals Chamber on an appeal against the Trial Chamber's majority decision giving notice of the legal recharacterisation of the facts in the case.

A joint application to legally recharacterise the charges against Mr Lubanga pursuant to Regulation 55 of the Regulations of the Court was filed by the legal representatives for victims in the case. Under this provision, the Chamber has the authority to change the legal characterisation of facts to accord with the crimes under Articles 6, 7 or 8 of the Rome Statute or the form of participation of the

⁶⁸ Sixteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY Annual Report for period 1 August 2008 to 31 July 2009), A/64/205 S/2009/394.

⁶⁹ Article 64(5) of the Rome Statute.

⁷⁰ Article 61(1) of the Rome Statute.

accused in the said crimes under Articles 25 and 28 of the Statute. The victims submitted that the charges against Mr Lubanga, namely the recruitment and use of child soldiers, was limited in scope and did not accurately reflect the facts and evidence in the case.

The merits of the application are outside the scope of the present discussion given that the matter is before the Appeals Chamber. However, the application itself raises several questions that go beyond the substantive issues likely to be determined on appeal.

First, it is of concern that at this stage in the proceedings the defendant should be placed in a position of uncertainty concerning the charges that he is expected to answer. One of the minimum guarantees of a defendant under Article 67(1) (a) of the Statute is to be informed promptly and in detail of the nature, content and cause of the charges in a language which he speaks and understands. As a corollary to this right, the RPE establishes that the Trial Chamber shall make orders for disclosure of material prior to the start of the trial, 'in order to enable the parties to prepare for the trial and to facilitate the fair and expeditious conduct of proceedings'⁷¹.

Second, the application raises questions of fairness. It is regrettable that the request to trigger this provision was made at such an advanced stage of the proceedings. During consultations the IBA was advised that the timing of the filing was attributable to the delay in the determination of the status of victims eligible to participate in the proceedings by the Chamber. In addition, legal representatives point to the fact that the issue was raised during opening speeches. Finally, the victims suggest that they did not have prior access to the evidence on which the prosecution sought to rely, thus they were not properly in a position to make meaningful submissions at an earlier stage.

The timing and nature of the application to legally recharacterise the facts in the *Lubanga* case has placed the defence in a difficult position and further delayed the proceedings. The expeditious resolution of the appeal is therefore of paramount importance. The IBA has previously expressed concern at the pace at which Appeals Chamber decisions are rendered.⁷² However, the IBA has noted a commendable improvement in this regard evidenced by the recent delivery of a ruling by the Appeals Chamber on the admissibility challenge in the case of Germain Katanga within four months of the appeal being filed.⁷³ Given that the continuation of the *Lubanga* trial depends on the outcome of the appeal, the IBA urges the Appeals Chamber to expedite its consideration of this matter.

b) Balancing the rights of victims and defendants

The legal texts of the ICC have codified the right of victims to participate in proceedings before the Court, a significant departure from the practice of the ad hoc tribunals where victims were generally restricted to the role of witnesses. The scope and modalities of the right to participate at the pre-trial and trial stages have been interpreted by respective Chambers at the ICC. In determining the manner in which victims are allowed to participate in the proceedings the Chambers have been constrained by Article 68(3) of the Rome Statute to ensure that the right of victims to present their views and concerns does not conflict or prejudice the rights of the accused and a fair and impartial trial.

⁷¹ Rule 84 of the Rules of Procedure and Evidence of the ICC.

⁷² IBA/ICC Monitoring and Outreach Programme report, *Balancing Rights: The International Criminal Court at a Procedural Crossroads*, May 2008, page 9.

⁷³ Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA8, 25 September 2009.

In the *Lubanga* case, the framework for participation at the trial stage of proceedings was set by the Trial Chamber in its decision of 18 January 2008,⁷⁴ and substantially affirmed by the Appeals Chamber in July 2008.⁷⁵ Among others, victims have the right to lead evidence as to the guilt or innocence of the defendant and challenge the admissibility of evidence. The Appeals Chamber found that the framework established by the Trial Chamber ‘did not create an unfettered right for victims to lead and challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation’.⁷⁶

On 26 June 2009, Trial Chamber I granted the application of three victims to appear in person and give evidence in the *Lubanga* trial, the first application of its kind during the trial.⁷⁷ The victims applied to the Chambers through their legal representatives to make representations on what they had suffered and to present their views and concerns.

Both the prosecution and defence objected to the application. The prosecution argued that it was not clear whether the victims were being called to testify or present their views and concerns in accordance with Article 68(2) of the Statute. The prosecution further contended that the application failed to demonstrate that there were exceptional circumstances which justified the victims appearing in person to lead evidence as stipulated by the Appeals Chamber. The defence agreed that the application failed to meet the criteria set by the Appeals Chamber and further submitted that as the victims were anonymous, their appearance to give evidence would contravene the rights of the accused to a fair trial. The victims have agreed to lift their anonymity as regards the defence but not to the public.

This recent decision does raise a number of concerns. The first is that the case-by-case approach to the determination of whether potential victims may testify in person leaves the defence in the untenable position of not being fully prepared to challenge the evidence presented.

To satisfy disclosure requirements, the Trial Chamber has ordered each victim who has applied to present views and concerns to provide a witness statement or comprehensive summary of the evidence. The defence is entitled under Article 67(1)(b) of the Statute to have adequate time and facilities for the preparation of his defence; thus timely advanced disclosure of relevant material is important for effective advanced preparation.

The Appeals Chamber’s decision of July 2008 left unresolved the issue of how the right of victims to give evidence on a case by case basis at trial could be reconciled with the defence’s right to full disclosure of both incriminatory and potentially exculpatory evidence prior to the commencement of trial. As Judge Philippe Kirsch noted in his partly dissenting opinion to the Appeal Chamber’s decision:

‘The specific provisions set out [in the Statute and Rules of Procedure and Evidence] are designed to ensure the fairness of the proceedings. There are specific obligations upon the Prosecutor to disclose evidence of assistance to the defence; and there are provisions that enable both parties appropriately to prepare for the trial. The fact that no requirements in relation to

⁷⁴ *The Prosecutor v Thomas Lubanga Dyilo*, Decision on Victims’ Participation, ICC-01/04-01/06-1119, 18 January 2008.

⁷⁵ *The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008.

⁷⁶ *Ibid.*, para 99.

⁷⁷ *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, ICC-01/04-01/06-2032-Anx, 26 June 2009.

disclosure are placed upon victims indicates that it was not envisaged that victims would disclose and thereafter lead, evidence related to guilt or innocence.⁷⁸

The second is that the modalities for presenting the views and concerns are unclear. The Appeals Chamber indicated that after the victims have completed their evidence, they would be best placed to determine if they wished to express their views and concerns personally or through their legal representatives. The views and concerns would not be presented on oath from the witness box and will not form part of the trial evidence.

The precise modalities for the presentation of the views and concerns have been left to the discretion of the legal representative for the victims. Where those views and concerns may include complex matters of law, the Chamber urges the legal representative to decide whether it would be more appropriate for the legal representative rather than the victim to address those issues.

This in our view does not provide sufficient certainty for the defence. It is unclear what rights if any the defendant has to question victims who choose to present their views and concerns following their testimony. It is also unclear whether the defence will be allowed to ask additional questions in the event that some aspects of the victims' views and concerns are potentially exculpatory. In sum, an unfair burden is placed on the defence to adjust its case strategy during the trial.

Finally, the decision has an impact on the time and resources required by the defence to conduct adequate investigations, which could potentially further delay the proceedings.

c) Equality of arms

The notion of equality of arms requires that the defence should never be placed at a 'substantial disadvantage' vis-a-vis the prosecution in terms of its ability to present its case. In essence, the defence must have adequate resources to properly conduct its case without disadvantage. Providing sufficient resources for the defence to enable adequate advanced preparation and proper conduct of its case is an important element in assuring that proceedings are conducted efficiently.

Regulation 83 of the Regulations of the Court provides that the Court will cover 'all costs reasonably necessary' as determined by the Registrar for an 'effective and efficient' defence. Those costs include payments to counsel and staff, expenses involved in gathering evidence, overheads, translation and interpretation costs, and travel costs.

Significant efforts have been made by the Court to streamline the legal aid system and reduce costs. Nevertheless, despite the likely increase in trial activity during 2010, the CBF has proposed a seven per cent reduction in the budget for legal aid for defence for the 2010 budgetary period. The Court has indicated that this recommendation is a matter of some concern given the current implementation rate of 97 per cent for the 2009 budget.

The trial phase of proceedings demands the most resources. Given the likely continuation in 2010 of at least two trials involving indigent detainees, the CBF recommendation does not appear to correspond with the realities of the Court's expenditure needs. The IBA urges the ASP to reject the CBF recommendation in this regard and to ensure that the Court has adequate

⁷⁸ *The Prosecutor v Thomas Lubanga*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Partly Dissenting Opinion of Judge Philippe Kirsch, ICC-01/04-01/06-1432-Anx, 23 July 2008.

resources in order that it would not need to resort to the Contingency Fund to supplement the approved budget for legal aid.

4.5 Legal representation of victims

As discussed above, the participation of victims at the ICC has introduced a new dimension to international criminal proceedings. If not effectively managed, this has the potential to lead to significant delay in the proceedings. The role of the legal representatives of victims is crucial to ensuring that victims can effectively and meaningfully participate in proceedings without compromising their expeditious conduct.

Given the potentially large numbers of victims who may be eligible to participate in proceedings before the Court, the legal texts of the Court envisage a system of common legal representation.

a) Funding legal representation

The ASP invited the Court to undertake an extensive analysis of the financial aspects for funding victims' legal representation and to consider a number of issues that have an impact on cost, such as the Court's approach to common representation and the relative use of internal and external counsel to represent victims.⁷⁹ The Court considered three principal funding arrangements: wholly internalised representation by the Office of Public Counsel for Victims (OPCV), wholly external representation, and a combination of internal and external representation.

The Court's report presents useful information on the relative advantages and disadvantages of internal and external representation. The report concluded that while the appointment of external legal teams representing victims may be more costly than a purely in-house option, the continued engagement of external lawyers in ICC proceedings alongside the OPCV would generate an appropriate balance between the different considerations at stake and create the best possible basis for effective representation of victims before the Court.

Regrettably, disparate figures submitted by the OPCV and the Registrar prevented the CBF from making an accurate assessment of the relative costs of either option. The CBF was prompted to comment that 'the figures provided in the annex to the report were highly unreliable and could lead an unwary reader to conclude that choosing the OPCV was automatically the most economical option without justification'.⁸⁰ The CBF has wisely deferred the issue for consideration during its next meeting pending the submission of accurate figures from the Court.

One victim's advocate consulted by the IBA noted that while it was important to assess the relative costs of external versus internal counsel for victims, costs should not be the sole determinant of the appropriate mode of legal representation for victims under the legal aid scheme of the Court.⁸¹

The IBA considers that the determination of the most appropriate mode of representation for victims must be given careful consideration, as the ramifications of such a decision go beyond the cost implications involved. An observation of external counsel in proceedings before the Court to date demonstrates that there are significant benefits to be gained from the continued involvement

⁷⁹ Report of the Court on legal aid: legal and financial aspects for funding victims' legal representation before the Court.

⁸⁰ Report of the Committee on Budget and Finance on the work of its thirteenth session, ICC-ASP/8/15 at para 126.

⁸¹ IBA consultations with the International Federation of Human Rights (FIDH) representative in The Hague.

of external counsel in the proceedings, particularly those from situation countries with localised knowledge and experience. External counsel representing victims play an important part in the Court's efforts at maximising impact, promoting its work in affected communities, and dispelling notions that it is a distant Western institution. The in-house expertise of the OPCV is important for developing an institutional memory and ensuring that counsel are provided with substantive legal support and advice. An appropriate combination of both at this time appears to be the most feasible option.

4.6 The judges of the Court

Judges play an important role in ensuring the overall efficiency of the Court. At the pre-trial and trial level judicial management of procedural issues – such as disclosure between the parties and participants, ruling on filings and submissions of the parties, and determining the overall conduct of proceedings – is critical to ensuring an expeditious process. At the appellate level, it is imperative that the Appeals Chamber and Presidency in their respective capacities deliver timely and informed decisions which correctly interpret the law while providing guidance for the lower courts and the parties and participants.

a) Appointment of judges to the Appeals Chamber

The appointment of judges to the respective Chambers of the Court facilitates the overall efficiency of the Court. The permanent assignment of two judges who had previously adjudicated during the pre-trial phase of proceedings to the Appeals Chamber, contrary to the stipulations of the legal texts of the Court, was a matter of grave concern and indeed a highly questionable decision.⁸²

On 11 March 2009, five judges who had been elected to the ICC for a term of nine years by the ASP were sworn in at the seat of the Court. At the 14th plenary meeting held on 13 March 2009, the judges decided on their assignment to the Pre-Trial, Trial and Appeals Divisions of the Court, in accordance with Rule 4 of the RPE. The plenary made the decision to permanently assign Judges Akua Kuenyehia and Anita Ušacka – both of whom previously adjudicated during the pre-trial phase of proceedings in the cases arising from the situations in the DRC and Darfur, Sudan – to the Appeals Chamber.

Judges are elected to serve for a nine-year term at the Court. Articles 39(3)(b) and 39(4) of the Statute require that judges assigned to the Appeals Division serve in that division for their *entire* term of office and *only* in that division. By contrast, the Statute provides for assignments for a three-year period in the Pre-Trial and Trial Divisions, and implicitly allows for periodic rotation between these divisions.

As the Court's workload has increased the judges in question have had to be excused from hearing appeals arising from the cases or situations on which they had previously adjudicated. Specifically, three interlocutory appeals have been filed before the Appeals Chamber, in the cases of *The Prosecutor v Joseph Kony*, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* and *The Prosecutor v President Omar Al Bashir*. Shortly after the filing of each of the latter two appeals, Judges Kuenyehia and Ušacka requested the Presidency, pursuant to Article 41, paragraph 1, of the Statute and Rule 33 of the

⁸² Richard Goldstone, 'An error of judgment', *Equality of Arms Review*, July 2009 http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/EQ_Magazine.aspx, page 5.

RPE, to be excused from the entirety of the two appeals on the basis of their previous involvement in the pre-trial phases of those cases.⁸³ The Presidency granted their requests and proceeded with the temporary attachment, for the purpose of those two appeals, of Judge Trendafilova (from the Pre-Trial Division), who is in the process of terminating the *Bemba* pre-trial proceedings, and Judge Aluoch (from the Trial Division), who has not yet been assigned to a trial.

In response to a request from the Assembly for a report detailing the impact of the judicial assignments on the efficiency of the Court, the Presidency indicated that the assignments will not in practice impair the efficiency of the Appeals Division⁸⁴ as a result of collegial sharing of work and effective assignment of legal officers in the division. The two judges concerned may reportedly also be deployed to engage in other activities at the Court including outreach, speaking to high-level visitors, sitting on recruitment panels, induction for new staff, leading Chambers working groups, and representing the judiciary on various inter-organ working groups such as the Africa Strategy Group and the Judicial Capacity Strengthening Programme.⁸⁵

While efforts to minimise the impact of the assignments are welcome, the IBA is concerned that such a decision was made in the first place. Given that judicial elections are scheduled to be held during the eighth meeting of the ASP in November 2010, the Court is urged to ensure that careful consideration is given to the judicial assignments to the respective Divisions to ensure the effective functioning of the Court.

83 Order annexing to the 'Decision replacing a judge in the Appeals Chamber' of 23 September 2009 the decision of the Presidency on the request of 16 September 2009, pursuant to Article 41 of the Rome Statute, to be excused from judicial functions, ICC-01/04-01/06, 2 October 2009.

84 Report of the Court on the new composition of the Appeals Division and the excusal of judges, ICC-ASP/8/31, para 13.

85 Ibid Para 14.

Chapter V: Conclusions and Recommendations

The Assembly of States Parties (ASP) is in the process of preparing for the first International Criminal Court (ICC) Review Conference scheduled for May 2010 in Kampala, Uganda. The Assembly will determine during its eighth session what issues should be included on the agenda of the event. Apart from the mandatory issues for review such as Article 124 and the crime of aggression, the Review Conference is largely expected to be an exercise in stocktaking for the Court, and thus presents a unique opportunity for States Parties to recommit to fully supporting the Court.

In Rome there was significant momentum behind the need for a permanent international criminal court which culminated in the signing of the Rome Statute. The 2010 Review Conference scheduled for Kampala, Uganda presents a unique opportunity for all stakeholders – States Parties, civil society, victims from affected communities and the Court itself – to closely examine the ICC’s progress to date in fulfilling its core mandate of putting an end to impunity for egregious crimes through the prosecution of alleged perpetrators.

The ICC is an important part of the global fight against impunity. The ICC is however a complex institution. The Court is governed by a Statute that incorporates aspects of civil and common law, with its own unique features. It has an intricate management structure, with administrative responsibility vested in the Presidency and the ASP; and an independent Prosecutor. It lacks enforcement powers; thus it relies exclusively on the cooperation of States Parties to carry out judicial decisions and fulfil its mandate.

The IBA is concerned that the lack of clarity in the Court’s legal texts regarding the overlap in the respective management roles of the Presidency and ASP on administrative matters threatens to undermine the institution. The issue has been brought into sharp relief by the response of some States to a decision from the Presidency on family visits for an indigent detainee, which States contend addresses budgetary matters for which they have management oversight responsibility. The developments in response to this issue point to a clear weakness in the management structure of the Court.

The IBA considers that States can and should do more to support the Court. The IBA notes that although States Parties are concerned that the Presidency has acted outside the scope of its judicial mandate on the family visits issue, the ASP has failed to consistently demonstrate leadership in other areas where they are clearly mandated under the Statute to do so. The ASP has notably done very little to impel States to increase the level of cooperation with the ICC, which is effectively impotent without States’ cooperation.

Finally, the IBA considers that the ICC’s biggest challenge will continue to be to fulfil its core mandate to put an end to impunity for perpetrators of very serious crimes and thus contribute to the prevention of those crimes. To accomplish this task, it will require effective judicial management, stakeholder engagement, adequate resource allocation by States Parties and the commitment of the entire international community.

Findings and recommendations

The Review Conference

1. The Review Conference presents a unique opportunity for States Parties to reinforce and strengthen the ICC and the Rome Statute system. In order for the Review Conference to be successful, States will have to lead the process and begin to actively build consensus on the expected outcomes for the event, similar to what was achieved in Rome in 1998. The success of the event will largely depend on effective advanced preparation as well as strong political support from States Parties.
2. Except for the mandatory review of Article 124 of the Statute and the crime of aggression, proposed amendments to the Statute must command very broad consensual support. As such, amendments to the Court's legal texts that are not broadly supported should be deferred for consideration at subsequent ASP sessions. The ICC is still in the stage of institutional and juridical infancy, and sweeping changes to the Rome Statute at this stage could open a 'Pandora's box' of issues which could ultimately weaken the institution.
3. The IBA considers that it will be important from the outset to set a realistic agenda of issues to be discussed at the Review Conference. Too broad an agenda is likely to be detrimental to the potential impact of this important event.
4. The stocktaking should be a separate and equal portion of the Conference which is allotted its own schedule to avoid conflict with the discussions on proposed amendments. The IBA urges the Assembly to ensure that the scheduling of sessions to consider proposed amendments to the Statute does not conflict with stocktaking sessions.
5. Preparations are important to ensure the success of the Review Conference. As such the IBA urges the Assembly to determine at its eight session the appropriate procedures and mechanisms for advancing further discussions and preparations and to decide the scope of the stocktaking exercise in order to allow delegations to contribute meaningfully to the debate.
6. Going forward it will be important for the Assembly and the Court to follow-up on the key achievements and shortcomings of the Court as highlighted during the Review Conference. The IBA encourages the Assembly to prepare an outcomes document detailing the specific areas of concern for follow up after the Review Conference. The Assembly should also propose a mechanism for following up on the issues raised during the Conference. The mandate of the Working Group on the Review Conference may need to be extended to facilitate this process with a view to reporting to the Assembly during its next session.

Organisational challenges – management and internal coordination

7. The Court is a unique organisation and faces a range of novel internal and external challenges which underscore the importance of a cohesive vision for the Court as a permanent institution. With the rapid growth of the organisation, it is understandable that there will be some challenges in achieving coordination between the various organs.

8. Internally, the IBA observes that despite the existence of several committees and the ‘One Court’ principle designed to ensure cohesion among the different organs, lack of internal coordination continues to be one of the Court’s greatest challenges. In this regard, the IBA has taken note of the concern of the Committee on Budget and Finance (CBF) – a subsidiary body of the ASP – that the lack of internal coordination presents a real risk of inefficiency for the Court. Where matters of non-judicial administrative coordination are concerned, the Court requires clear leadership from its top officials to transform the ‘One Court’ principle into reality. The IBA encourages genuine dialogue between ICC organs to ensure efficiency of the Court.
9. One of the main challenges the ICC currently faces is the lack of clarity regarding the appropriate scope of authority and management oversight to be exercised by the Presidency of the Court and the ASP on administrative matters. The issue has been brought into sharp relief by the response of some States Parties to a decision of the Presidency on family visits for an indigent detainee, which States Parties contend addresses budgetary matters for which they have management oversight responsibility.
10. On the one hand, the family visits decision raises the question of the extent to which the Presidency, when exercising its judicial function, is required to take into account policy directives by the ASP. On the other, the ASP’s response to the Presidency’s perceived trespass on its management role threatens to undermine a core tenet of the institution – judicial independence.
11. The IBA believes that an impasse between the management of the Court on this issue is not only highly undesirable, but unnecessary. A disproportionate response from States Parties to the Presidency’s decision risks undermining the judicial aspects of the Court’s work and may suggest that the judiciary is being censured by the Court’s political body. The ASP must carefully navigate between the need to re-affirm its role as the principal decision-making body for budgetary issues and demonstrating respect for judicial independence. Through continued dialogue between the ASP and the Court a practical solution which takes into account the ASP’s budgetary policies but which fully respects the independence of the judiciary can be crafted. While due regard must be given to the practical and political implications of the decision on family visits, every effort must be made to arrive at a feasible solution that takes into account the rights of the indigent detainee.
13. The IBA welcomes the Presidency’s initiative to ensure that judicial decisions are informed by the fiscal constraints within which the Court operates. The IBA, however, urges caution. While it is important for judges to be generally aware of the administrative and budgetary framework in which the Court operates, care must be taken not to compromise the independence and impartiality of the judiciary by making judicial decisions subject to budgetary considerations.
14. The IBA considers that there is an obvious need for creating and/or strengthening the mechanism for addressing disputed administrative or governance issues between the ASP and the Presidency of the Court. The ASP is therefore urged to adopt, in consultation with the Presidency, a policy document establishing a clear protocol for addressing disputed issues regarding the management of the Court. The IBA recommends that one of the inter-sessional working groups be mandated to closely examine the matter with a view to submitting a draft proposal for adoption at the tenth session of the Assembly.

15. The IBA proposes that Regulation 23 of the Regulations of the Court be amended to include a provision mandating parties to judicial review proceedings to file a public notification of the application for review with confidential annexes. The IBA also recommends that the Legal Text Review Committee considers an amendment to the Regulations of the Court to set out the full powers and scope of the judicial review functions of the Presidency.
16. The IBA reiterates the need for transparency and accountability at the ICC. As such the IBA welcomes the proposal for the establishment of an independent oversight mechanism (IOM). The IBA considers that external, systematic and objective inspection and evaluation of the Court's activities could be an important aid in promoting its efficient operation. It is however essential to ensure the IOM does not become an instrument for interference in the independent functioning of the Court. As such, while it is appropriate that the oversight mechanism report to the Bureau and ASP, it must be operationally independent of both the ASP and the Court to avoid accusations of political interference. The Court is encouraged to fully engage with the ASP concerning the establishment of appropriate regulations for the effective functioning of the IOM.

States Parties' cooperation

17. The IBA is concerned by the continued reluctance of States Parties to fully cooperate with the Court, in particular on matters relating to the defence. The IBA urges the Assembly to take decisive steps during its eighth session towards establishing a Working Group on Cooperation with a clear mandate to examine the obstacles to full implementation of the 66 recommendations contained in the Report of the Bureau on Cooperation; as well as to address the procedural framework for the Assembly's response in the event of a finding of non-cooperation by the Court and a referral to the Assembly under Article 87(7) of the Statute.
18. The IBA urges States during the Review Conference to fully reiterate their commitment to cooperating with the Court including on matters related to the defence. In this regard, the IBA encourages States who lack implementing legislation or whose implementing legislation lack specific provisions to facilitate cooperation with the Court, to make every effort to rectify the situation, including by seeking technical assistance where necessary.

Effective and efficient judicial proceedings

19. The efficient conduct of proceedings at the ICC will be a significant determinant of the Court's success. The Court struggles to complete its first trial against Thomas Lubanga which has been hampered by delays in the past and again recently postponed pending an Appeals Chamber ruling on an application to legally recharacterise the facts of the case.
20. The timing and nature of the application to legally recharacterise the facts in the *Lubanga* case has placed the defence in a difficult position and further delayed the proceedings. The expeditious resolution of the appeal is therefore of paramount importance. The IBA has previously expressed concern at the pace at which Appeals Chamber decisions are rendered.⁸⁶ However, the IBA has noted a commendable improvement in this regard evidenced by the recent delivery of a ruling by the Appeals Chamber on the admissibility challenge in the case of

⁸⁶ IBA/ICC Monitoring and Outreach report, *Balancing Rights: The International Criminal Court at a Procedural Crossroads*, May 2008, page 9.

Germain Katanga within four months of the appeal being filed.⁸⁷ Given that the continuation of the *Lubanga* trial depends on the outcome of the appeal, the IBA urges the Appeals Chamber to expedite its consideration of this matter.

21. The activity level of the ICC is however set to increase significantly in 2010 with the continuation of two trials and the possible commencement of two others. Though a welcome development, the prospect of multiple trials at the ICC will test the adequacy of the Court's technical, logistical and human resources capacity to facilitate several proceedings simultaneously together with the willingness of States Parties to provide the resources to enable the trials to proceed as efficiently as possible.
22. Given that multiple trials for 2010 are clearly foreseeable, the IBA considers that these costs should be reflected in the proposed budget rather than resorting to the Contingency Fund. While it is important to ensure that costs are minimised, every effort should be made within the ICC's programme budget to fund parallel trials.
23. The IBA considers that the determination of the most appropriate mode of representation for victims must be given careful consideration, as the ramifications of such a decision go beyond the cost implications involved. An observation of external counsel in proceedings before the Court to date demonstrates that there are significant benefits to be gained by the continued involvement of external counsel in the proceedings, particularly those from situation countries with localised knowledge and experience. External counsel representing victims play an important part in the Court's efforts at maximising impact, promoting its work in affected communities, and dispelling notions that it is a distant Western institution. The in-house expertise of the Office of Public Counsel for Victims (OPCV) is important for developing an institutional memory and ensuring that counsel are provided with substantive legal support and advice. An appropriate combination of both at this time appears to be the most feasible option.
24. The IBA is particularly concerned by the potentially adverse impact of the CBF's proposed reduction of the defence legal aid budget by seven per cent. The CBF recommendation does not appear to correspond with the realities of the Court's current trend in expenditure. Given the likely continuation in 2010 of at least two trials involving indigent detainees, the ASP is urged to ensure the Court has adequate resources such that it would not need to resort to the Contingency Fund to supplement the approved budget for legal aid.
25. The permanent assignment of two judges who had previously adjudicated during the pre-trial phase of proceedings to the Appeals Chamber, contrary to the stipulations of the legal texts of the Court was a matter of grave concern and indeed a highly questionable decision. While efforts to minimise the impact of the assignments are welcome, the IBA is concerned that such a decision was made in the first place. Given that judicial elections are scheduled to be held during the eighth meeting of the ASP in November 2010, the Court is urged to ensure that careful consideration is given to the judicial assignments to the respective divisions to ensure the effective functioning of the Court.

⁸⁷ Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA8, 25 September 2009.