



# Recommendations of the International Bar Association ICC & ICL Programme to the Independent Expert Review of the International Criminal Court (April 2020)

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## **Recommendations of the International Bar Association ICC & ICL Programme to the Independent Expert Review of the International Criminal Court (April 2020)**

### **Introduction**

The International Bar Association (IBA) is the foremost organisation for international legal practitioners, bar associations and law societies. Established in 1947, shortly after the creation of the United Nations, the IBA was born out of the conviction that an organisation made up of the world's bar associations could contribute to global stability and peace through the administration of justice. The IBA's membership is comprised of more than 80,000 individual international lawyers from most of the world's leading law firms and some 190 bar associations and law societies spanning more than 170 countries.

The IBA ICC & ICL Programme, established in 2005, monitors issues related to fairness and equality of arms at the ICC and other Hague-based war crimes tribunals and encourages the legal community to engage with the work of these courts. The Programme's work includes thematic legal analysis of proceedings, and ad hoc evaluations of legal, administrative, and institutional issues that could potentially affect the rights of defendants, the impartiality of proceedings, and the development of international justice. The IBA's monitoring work and research is complemented by consultations with legal professionals, including court officials, academics and legal researchers, non-governmental organisations, individual counsel, and diplomatic representatives. The issues addressed in this submission derive from the programme's reports, expert roundtable discussions, workshops, and legal analysis over the last fifteen years.<sup>1</sup>

The IBA ICC & ICL Programme acknowledges the importance of the Independent Expert Review's mandate to 'identify ways to strengthen the International Criminal Court and the Rome Statute system'<sup>2</sup> and welcomes the opportunity to provide this submission to the Group of Experts (hereafter, 'Experts').<sup>3</sup>

In this paper, the IBA identifies and recommends measures to resolve a number of serious fair trial concerns, including defence and legal aid issues, which it urges the Experts to consider and address in the course of the Review.

Fair trial, defence, and legal aid issues are expressly recognised as falling under Cluster 1 of the Review on Governance. However, a number of fair trial and defence-related concerns raised in this

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<sup>1</sup> More information about the IBA ICC & ICL Programme, and all programme reports and commentaries, are available at: [https://www.ibanet.org/ICC\\_ICL\\_Programme/Home.aspx](https://www.ibanet.org/ICC_ICL_Programme/Home.aspx)

<sup>2</sup> ASP, 'Review of the International Criminal Court and the Rome Statute system' (6 December 2019) ICC-ASP/18/Res.7 <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-Res7-ENG-ICC-Review-resolution-17Dec19-1530.cln.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res7-ENG-ICC-Review-resolution-17Dec19-1530.cln.pdf)> Annex I.

<sup>3</sup> Statement at the end of the first meeting of the Independent Expert Review of the International Criminal Court, 23 January 2020 <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER%20Statement%2023.01.2020.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER%20Statement%2023.01.2020.pdf)>.

paper also relate to the judicial process covered in Cluster 2, as well as investigations and prosecutions covered in Cluster 3.

Indeed, as a fundamental requirement of justice, fair trial issues cut across all aspects of the ICC's work and should be considered in all aspects of the Review process. In particular, noting that previous efforts to improve the efficiency of the ICC have been criticised for scaling back on the rights of the accused,<sup>4</sup> the IBA calls on the Experts to develop evidence-based recommendations to strengthen the ICC and the Rome Statute system that respect fair trials, ensuring that any potential concerns are fully considered and resolved.

## **Cluster 1: Governance**

Fair trials are an essential indicator of good governance of the ICC. The Rome Statute requires that trials must be fair and that the rights of accused persons set out in the Statute and internationally recognised human rights must be respected. Good governance therefore requires that effective systems and structures must be in place to guarantee fair trials and the rights of the accused. The ICC and states parties must be accountable for fulfilling their responsibilities arising from the Statute to ensure fair trials.

Throughout this submission, the IBA highlights a number of serious fair trial concerns that have arisen at the ICC that remain to be adequately addressed. In many cases, they reflect weaknesses in the structure of the Court and flawed policy-setting. Disturbingly, in some instances, the fundamental rights of the accused do not appear to have been given due regard and priority.

Today, ICC defence teams are underfunded and have limited support and facilities that impair their ability to prepare and conduct an effective defence. They contend with a legal aid system that is not fit for purpose, ineffective administration by the registry, and inadequate cooperation by states. They receive important support from the Office of Public Counsel for the Defence (OPCD), but it is underfunded. As explained in the IBA's comments on Clusters 2 and 3, despite the rights enshrined in the Statute, the law has too often been interpreted and applied to the detriment of the accused.

Until the recent establishment of the ICC Bar Association (ICCBA), representatives of the defence have had little opportunity to raise these concerns within the ICC or at the Assembly of States Parties (ASP). As a result, many of these issues have been largely ignored or overlooked. Nowhere is this more clearly demonstrated than by the omission of any mention of fair trial, defence, and legal aid in the initial draft of the 'Matrix over possible areas of strengthening the Court and Rome Statute system', which guides the scope of this Review.<sup>5</sup>

The Independent Expert Review is therefore an important opportunity to acknowledge and address fair trial concerns at the ICC. Strengthening governance of fair trial, defence, and legal aid by the ICC and the ASP must form part of the solutions.

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<sup>4</sup> See for example: IBA, 'Priorities and Recommendations for the 15th Session of the International Criminal Court Assembly of States Parties' (2016) <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=21192EAD-59BC-4855-B20C-7B27EA06921A>> 3; Amnesty International, 'Amendments to Rule 165 of the International Criminal Court's Rules of Procedure and Evidence must ensure fair trials and the rights of the accused' (2016) <<https://www.amnesty.org/download/Documents/IOR5349102016ENGLISH.pdf>>.

<sup>5</sup> Draft Non-Paper, Meeting the challenges of today for a stronger Court tomorrow, Matrix over possible areas of strengthening the Court and Rome Statute System, 15 July 2019.

## **The Group of Independent Experts should recommend the establishment of a working group to conduct a detailed review of ICC systems and structures aimed at strengthening the voice of the defence in the Court, improving administration, and increasing support to defence teams**

The current structure and regulations of the ICC restrict the ability of the defence to engage in discussions and institutional processes that affect its work, including the development of policies and budgetary requests, and limits its standing to raise matters at the ASP.

Administration of the defence is conducted by the ICC registry. However, as an independent organ that supports the work of the Chambers and the Office of the Prosecutor, it is not well placed to represent the interests of the defence within the ICC. To its credit, the OPCD – which falls within the remit of the registry for administrative purposes but functions as a ‘wholly independent office’<sup>6</sup> – has consistently sought to advocate for the general interests of the defence inside and outside the Court. However, it has limited or no access to important institutional mechanisms and processes, including the Coordination Council<sup>7</sup> and the Advisory Committee on Legal Texts.<sup>8</sup> In light of efforts during the ReVision of the registry process to cast doubt on the independent status of the OPCD and the legitimacy of its advocacy for the general interests of the defence,<sup>9</sup> it is uncertain whether its input receives the attention and is given the weight it deserves.

This lack of a strong institutional voice can leave the representatives of the defence powerless to inform, let alone influence, processes that directly affect their work. In one extreme example, defence lawyers complained that they were not properly consulted during a review of the legal aid system in 2012, initiated by the ASP in reaction to rising legal aid costs.<sup>10</sup> That process led to a reduction salaries of defence counsel by more than 25%, which have been described as ‘unfair, arbitrary, humiliating and demotivating’.<sup>11</sup> Some defence representatives felt that the registry had provided insufficient information to states parties, which made legal aid an easy target for the cuts.<sup>12</sup>

The creation of the ICCBA in 2016 will hopefully address some of these issues. For example, the ICCBA has been consulted in a new process to revise the Legal Aid Policy that commenced in 2017. It has also been recognised in a 2019 resolution of the ASP, invited to report to the Assembly on its activities,<sup>13</sup> and has delivered statements to the Assembly’s annual general debate. The scope of its engagement with the ICC and ASP will hopefully continue to evolve.

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<sup>6</sup> Regulations of the Court (adopted 26 May 2004) ICC-BD/01-01-04, regulation 77.

<sup>7</sup> Regulation 3 of the Regulations of the Court restricts the membership of the Coordination Council, which meets regularly to discuss and coordinate on administrative activities, to the President, the Prosecutor and the Registrar.

<sup>8</sup> The Advisory Committee considers and reports on proposals for amendments to the Rules of Procedure and Evidence, Elements of Crimes and the Regulations. While Regulation 4 of the Regulations of the Court provides that one representative of counsel included on the list of counsel serves on the Committee, they are required to represent both counsel for defence and victims. Although, the Advisory Committee can invite other interested groups and persons to present their views, this is discretionary.

<sup>9</sup> See: OPCD Commentary on *Draft Basic Outline of Proposals to Establish Defence and Victims Offices: ICC Registry Revision Project*, December 2014.

<sup>10</sup> Richard J Rogers, ‘Assessment of the ICC’s Legal Aid System’ (2017) <<https://www.icc-cpi.int/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf>> para 130.

<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.*, para 185.

<sup>13</sup> ASP ‘Strengthening the International Criminal Court and the Assembly of States Parties’ (6 December 2019) ICC-ASP/18/Res. 6 <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-Res6-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res6-ENG.pdf)> paras 80-81.

Whilst the establishment of the ICCBA is a positive development, ICC structures and systems must also evolve to ensure that the defence has a strong internal voice at the Court in order to achieve equality of arms. Whereas the drafters of the Rome Statute recognised ‘the dangers of inequality of arms between the OTP and the Defence on account of the latter not being an organ of the Court’<sup>14</sup> and did nothing to address it, reforms should be considered now that those dangers have become reality.

Looking to other international criminal courts for best practice, the establishment of an independent Defence Office as a separate organ of the Special Tribunal for Lebanon (STL) stands out as a model that should be considered for the ICC. François Roux, former Head of the STL Defence Office, emphasises that it has played an important role in ensuring equality of arms between the defence and the prosecution by providing a strong independent institutional voice for the defence:

‘[a]s long as the Prosecutor will be an Organ of the institution, with offices within its premises, it seems essential to me to also have, inside the institution, an independent Organ for the Defence with equal footing with the Office of the Prosecutor. This is the guarantee that the voice of the defence is heard inside the institution for all questions related to its functions, and notably in all-organs coordination and management meetings of the institution, where today the defence is cruelly absent.’<sup>15</sup>

Establishing an independent defence office at the ICC and tasking it to administer and support defence teams could also address long standing complaints regarding the registry’s administration. An expert review of the legal aid system reported in 2017 that the vast majority of defence counsel and legal assistants consulted were dissatisfied with the Counsel Support Section’s (CSS) administration of legal aid.<sup>16</sup> Lawyers felt deeply frustrated by what they considered to be a fundamental lack of understanding of defence work on the part of CSS management.<sup>17</sup> Almost all stated that they wasted many hours justifying requests for resources that were obviously necessary, and most felt that the CSS acted arbitrarily, favoured some counsel over others, and lacked transparency.<sup>18</sup> The expert review found:

Whilst CSS has staff who are clearly skilled, dedicated and hardworking (including the acting head of the legal aid unit), the section as a whole lacks vision, direction, and strategic management. The LAS procedures are bureaucratic, lacking in transparency, and—at times—irrational.<sup>19</sup>

In contrast, the experience of the STL has demonstrated that some degree of centralisation in the form of working practices, case management, case strategy, investigations, and knowledge of the law and facts relevant to the case can conserve resources, reinforce equality of arms, and increase efficiency in assisting defence teams.<sup>20</sup> For example, the STL Defence Office has negotiated

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<sup>14</sup> Karim Khan, ‘Article 34: Organs of the Court’ in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck-Hart-Nomos 2016) 1201, fn 28.

<sup>15</sup> IBA, ‘Towards an ICC Association of Counsel’ (2015)

<<https://www.ibanet.org/Document/Default.aspx?DocumentUid=875B959C-FDF6-4D43-B6AD-43AC01FA1731>>.

<sup>16</sup> Richard J Rogers (n 10) para 183.

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*, para 186.

<sup>20</sup> IBA, ‘Evidence Matters in ICC Trials’ (2016)

<<https://www.ibanet.org/Document/Default.aspx?DocumentUid=864B7FC6-0E93-4B2B-A63C-D22FBAB6F3D6>> 31;

IBA, ‘Legal Representation, Fairness and Access to Justice in Hybrid Tribunals and Specialised Chambers’ (2018)

<<https://www.ibanet.org/Document/Default.aspx?DocumentUid=98649142-A852-4D39-BEE6-2C8DC4B63F72>> 49.

memoranda of understanding with Lebanon and promoted cooperation by other states with the defence, which is a considerable challenge for ICC defence teams.

For these reasons, the IBA, which has called for the establishment of a defence office as a fifth organ of the ICC since 2011 to 'redress inequality in structural and policy matters for the defence'<sup>21</sup>, and has promoted independent defence offices for hybrid tribunals and specialised chambers,<sup>22</sup> continues to see significant value in the proposal.

In light of the serious fair trial concerns raised in this submission, the IBA believes that the current Review of the ICC and Rome Statute system is an essential moment to strengthen the role of the defence in the structure of the ICC, establish a new system of independent administration, and strengthen support provided to defence teams.

Other stakeholders support addressing these governance issues. In particular:

- A 2014 'Expert Initiative on Promoting Effectiveness at the International Criminal Court' recommended that '[a]n independent Defence Office should be set up, centralising and including both the Legal Aid Unit (CSS) and the Legal Advisory Unit (OPCD) within its ambit'.<sup>23</sup>
- A 2015 'Report on the Assessment of the Functioning of the International Criminal Court's Legal Aid System' by the International Criminal Justice Consortium recommended that consideration should be given to creating a 'fifth organ of the ICC: a Defence Services Office, similar to the one that exists at the Special Tribunal for Lebanon'.<sup>24</sup>
- The OPCD has called for the Independent Expert Review to address the structural inequality of arms, increasing efficiency in decision making relating to defence issues, and reducing procedural and administrative litigation.<sup>25</sup>
- The ASP's facilitator on legal aid, in her 2019 report, has identified the need for independence in defence administration and recommended that this issue be addressed within the context of ICC Review discussions.<sup>26</sup>

Addressing these issues and developing significant structural changes raise complex questions regarding the need for amendments to the legal framework, reorganising the current structure, and managing any transition. The IBA therefore urges the Experts to recommend that a Working Group made up of representatives of the registry, OPCD, ICCBA, the ASP's focal point on fair trials (if established, see below) and civil society be established to review these issues. The Working Group should consult with all organs of the Court, defence practitioners, the STL Defence Office, and other fair trial focused non-governmental organisations. It should develop a detailed proposal of reforms for consideration by the ICC in 2021 and the ASP at its 20th session.

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<sup>21</sup> IBA, 'Fairness at the International Criminal Court' (2011) <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=7D9DA777-9A32-4E09-A24C-1835F1832FCC>> 10-11.

<sup>22</sup> IBA, 'Legal Representation' (n 20) 75: '[t]he creation of a defence office supports fairness, in particular when it combines high-level representation for the defence, administrative responsibilities including managing the list of counsel and legal aid for the defence, and substantive legal support for counsel'.

<sup>23</sup> 'Expert Initiative on Promoting Effectiveness at the International Criminal Court' (2014) <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/Ind\\_Exp\\_Initiative.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/Ind_Exp_Initiative.pdf)> para 145.

<sup>24</sup> International Criminal Justice Consortium, 'Report on the Assessment of the Functioning of the International Criminal Court's Legal Aid System' (2015) para 129, see Attachment E in Richard J Rogers (n 10) 125.

<sup>25</sup> OPCD, 'Office of Public Counsel for the Defence Suggestions for Draft Non-Paper: Meeting the Challenges of today for a stronger Court tomorrow: "Matrix over possible areas of strengthening the Court and Rome Statute System" dated 15 July 2019', 9 August 2019.

<sup>26</sup> ASP, 'Report of the Bureau on legal aid' (12 November 2019) ICC-ASP/18/11 <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-11-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-11-ENG.pdf)> para 19.

**The Group of Independent Experts should recommend that urgent steps be taken to adopt a new Legal Aid Policy which establishes a comprehensive system of legal aid that is accessible, effective, sustainable, and credible**

The IBA is seriously concerned that a long overdue revision of the ICC's legal aid system has been repeatedly delayed and that several important issues remain unresolved.

Following controversial revisions to the legal aid scheme in 2012, including cuts in salaries (see above), the current legal aid system provides significantly less legal aid to defence teams compared to other international criminal courts.<sup>27</sup>

Legal aid for the defence accounted for only 2.2% of the total budget request of the Court for 2020, compared to 32% of resources allocated to the OTP.<sup>28</sup> Remuneration of defence counsel and staff of defence teams is less than the salaries and benefits provided to their counterparts in the OTP.<sup>29</sup> Defence teams are understaffed from the initial stages of an investigation and throughout the case.<sup>30</sup> The defence has very limited resources to conduct defence investigations that are essential to preparing and conducting an effective defence, compared to the vast resources provided to the prosecution.

This situation is inconsistent with the statutory requirement of equality of arms between the defence and the prosecution<sup>31</sup> and the right of an accused person to adequate facilities for the preparation of the defence. It undermines the ICC's efforts to attract and retain highly skilled counsel and contributes to the unacceptable practice of some teams hiring a larger number of junior staff, in many cases female lawyers in the early stages of their careers, on inadequate salaries and working conditions.<sup>32</sup>

Despite a 2017 expert assessment of the ICC's legal aid system commissioned by the registry that called for significant revisions to the Legal Aid Policy to increase resources for the defence,<sup>33</sup> a new Policy has yet to be adopted. A new process aimed at revising the Policy was initiated in 2017 that included consultations with the IBA, ICCBA, defence counsel, and civil society. However, it has

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<sup>27</sup> Richard J Rogers (n 10) 15-21.

<sup>28</sup> ASP, 'Proposed Programme Budget for 2020 of the International Criminal Court' (25 July 2019) ICC-ASP/18/10 <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-10-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-10-ENG.pdf)> paras 8 and 512-513.

<sup>29</sup> IBA, 'IBA Comments on ICC Draft Legal Aid Policy' (2018) <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=9FBC6DFF-A7F2-46DF-887A-27E24E21D02A>> 4.

<sup>30</sup> *ibid* 5-6.

<sup>31</sup> As Trial Chamber I held in the Lubanga case, the requirement of 'in full equality' in Article 67 encompasses the principle of equality of arms and that appropriate facilities must be provided to the defence in accordance with Article 67(1)(b). Although the Chamber recognised that it will be impossible to create a situation of absolute equality of arms, '[a]n assessment of the adequacy of the facilities for the defence will clearly be influenced by the extent of those at the disposal of the prosecution, since it will in general be necessary and desirable to rectify significant disparities'. See: ICC, Prosecutor v. *Thomas Lubanga Dyilo*, ICC-01/04-01/06-1091, Decision on Defence's Request to Obtain Simultaneous French Transcripts, 14 December 2007, paras 18-19.

<sup>32</sup> IBA, 'IBA Comments on ICC Draft Legal Aid Policy' (n 29) 6.

<sup>33</sup> Richard J Rogers (n 10).

been undermined by short-sighted and unrealistic demands by states parties that the revision be accomplished 'within existing resources',<sup>34</sup> which the registry has been unwilling to challenge.<sup>35</sup>

Regrettably, the ASP's Committee on Budget and Finance – which is made up of experts of recognised standing in financial matters at the international level –<sup>36</sup> has fuelled opposition to increases in legal aid by mislabelling it as a 'very significant cost driver'<sup>37</sup> and calling for the review to be 'more respectful of the budgetary limits approved by the Assembly'.<sup>38</sup>

Legal aid is of course not a cost driver that can be arbitrarily restricted. It is an 'essential element of a functioning criminal justice system that is based on the rule of law.'<sup>39</sup> UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems require that effective legal aid is provided promptly at all stages of the criminal justice process<sup>40</sup> and that every person charged with a criminal offence has adequate time, facilities, and technical and financial support, in case he or she does not have sufficient means, to prepare his or her defence.<sup>41</sup> Having ratified the Rome Statute which established the ICC, states parties have an obligation under the Statute and internationally recognised human rights to ensure that legal aid is sufficient.

In her report to the Assembly in December 2018, the ASP's facilitator on legal aid observed that a number of issues remained unresolved in the current draft Legal Aid Policy, and that it was not ready for consideration by the ASP at its 18th session.<sup>42</sup> These issues include taxation, team composition during various stages of proceedings, and minimum employment standards for team members. Some of these issues arise from the non-staff status of external counsel team members, such as taxation and employment conditions, and require that the employment status of team members be further evaluated.

As observed by the facilitator on legal aid, 'junior counsel and support staff roles are disproportionately filled by women' and a lack of adequate frameworks to address employment conditions may result in women occupying these roles to simply leave or fail to advance beyond a junior level, 'worsening the gender inequality in higher levels of ICC practice.'<sup>43</sup> While including specific suggestions in her report,<sup>44</sup> the facilitator generally recommended that the policy issues

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<sup>34</sup> See, eg, ASP, 'Strengthening the International Criminal Court and the Assembly of States Parties' (14 December 2017) ICC-ASP/16/Res.6 <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP16/ICC-ASP-16-Res6-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res6-ENG.pdf)> Annex 1, para 8; ASP, 'Strengthening the International Criminal Court and the Assembly of States Parties' (12 December 2018) ICCASP/17/Res.5 <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP17/RES-5-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/RES-5-ENG.pdf)> Annex 1, para 8(a).

<sup>35</sup> IBA, 'IBA Comments on ICC Draft Legal Aid Policy' (n 29) 1-2.

<sup>36</sup> ASP, 'Procedure for the nomination and election of members of the Committee on Budget and Finance' (adopted 3 September 2002) ICC-ASP/1/Res.5 <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-ASP1-Res-05-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-05-ENG.pdf)> para 1.

<sup>37</sup> ASP, 'Report of the Committee on Budget and Finance on the work of its twenty-sixth session' (12 July 2016) ICC-ASP/15/5 <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP-15-5-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-5-ENG.pdf)> para 12.

<sup>38</sup> ASP, 'Report of the Committee on Budget and Finance on the work of its thirtieth session' (31 May 2018) ICC-ASP/17/5 <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP17/ICC-ASP-17-5-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-5-ENG.pdf)> para 12.

<sup>39</sup> UNGA, 'Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' (adopted 20 December 2012) UN Doc A/Res/67/187 <<https://undocs.org/A/Res/67/187>> para 1.

<sup>40</sup> *ibid*, principle 7.

<sup>41</sup> *ibid*, guideline 4.

<sup>42</sup> ICC-ASP/18/11 (n 26) 2, para 3.

<sup>43</sup> *ibid*, para 15.

<sup>44</sup> *ibid* 4-5: 'For example, States Parties might wish to explore the effectiveness of creating an independent unit within the Registry that would include a limited pool of junior counsel, paralegals, investigators and support staff with the status of employees of the Court, who would be available to support independently-retained senior counsel for a number of cases. Such a unit could be funded from savings coming from the legal aid envelope currently applied to such staff when engaged by senior counsel.'

present in the legal aid discussion which ‘reach beyond the realm of budgetary or administrative considerations’ be considered as part of the Independent Expert Review.<sup>45</sup>

In light of the delays so far in advancing the development of the new Legal Aid Policy, and the risk that resolution of these issues and adoption of a new policy may be further deprioritised this year unless they are addressed by the Independent Expert Review, the IBA urges the Experts to recommend that the revised policy be finalised as soon as possible. Where possible, the Experts are encouraged to provide concrete recommendations aimed at resolving outstanding issues taking into account the IBA’s detailed comments and recommendations contained in its December 2018 submission: *IBA Comments on ICC Draft Legal Aid Policy*.<sup>46</sup>

In particular, the IBA encourages the Experts to emphasise that the development of the Legal Aid Policy should not be restricted by arbitrary budgetary limits. Instead, taking into account the obligations of the ICC under the Rome Statute and internationally recognised human rights, the Legal Aid Policy must establish a comprehensive system of legal aid that is accessible, effective, sustainable, and credible,<sup>47</sup> including ensuring equality of arms with the prosecution and adequate facilities to defence teams to prepare and conduct an effective defence.

### **The Group of Independent Experts should recommend urgent action by the ASP to address the lack of cooperation agreements providing for interim and final release**

Although states parties have stated their intention to address state cooperation,<sup>48</sup> the IBA urges the Experts to consider and make recommendations that will inform the ASP’s efforts to strengthen cooperation in order to ensure fair trials.

In particular, the IBA is concerned that the vast majority of states parties have yet to enter into cooperation agreements with the ICC to accept persons on interim or final release. Only two states have entered into an agreement concerning interim release and one state has entered into an agreement concerning final release. This threatens the viability of some of the Court’s basic functions and risks violations of human rights of detained persons.

As explained further in recommendations on Cluster 2, the lack of a clear and strong system of state cooperation to support interim release of accused persons has contributed to the situation where no one has been granted interim release, except on humanitarian grounds. The emerging general practice of detention is inconsistent with the rights of the accused, including the presumption of innocence.

The challenges faced by the ICC in implementing the conditional release of Charles Blé Goudé following his acquittal in 2019 further demonstrate the inadequacy of state cooperation in upholding the rights of persons tried at the ICC. Without a state willing to accept him, Mr Blé Goudé has remained under the supervision of the ICC in the Netherlands.<sup>49</sup> As Judge Tarfusser noted:

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<sup>45</sup> *ibid.*

<sup>46</sup> IBA, ‘IBA Comments on ICC Draft Legal Aid Policy’ (n 29).

<sup>47</sup> UNGA (n 39) guideline 2.

<sup>48</sup> ICC-ASP/18/Res.7 (n 2) 7.

<sup>49</sup> Vincent Duhem, ‘Côte d’Ivoire: Charles Blé Goudé n’a pas encore trouvé de pays d’accueil’ (*JeuneAfrique*, 21 January 2019) <<https://www.jeuneafrique.com/mag/710170/politique/cote-divoire-charles-ble-goude-na-pas-encore-trouve-de-pays-daccueil/>>.

For Mr Blé Goudé, this regime, compounded by the Court's inability to secure meaningful cooperation by the Dutch authorities, resulted in him being confined to a closed location, at exorbitant costs for the Court, in a situation of 'house arrest' comparable, if not virtually equivalent, to remaining in detention, which is still ongoing.<sup>50</sup>

The IBA urges the Experts to recommend that the ICC and States Parties intensify their efforts to address the lack of state cooperation with interim and final release as a matter of urgency.

**The Group of Independent Experts should recommend that the ASP establish mechanisms and procedures to provide effective oversight of fair trial issues and ensure effective cooperation by states to give effect to the rights of the accused**

In light of the fair trial concerns contained in this submission, the IBA urges the Experts to recommend the establishment of a new ASP Focal Point for Enhancing Fair Trials and an independent Ombudsman to monitor, defend, and protect the rights of suspects, accused persons, victims, and other persons who interact with the ICC.

On 27 February 2018, the OPCD and Office of Public Counsel for Victims (OPCV), with the support of the ICCBA, published a concept note proposing the creation of a Hague Working Group Focal Point for Enhancing Fair Trials, emphasising that it would strengthen the Court's effectiveness and efficiency, as well as ensure the highest respect for fair trial principles.<sup>51</sup> The proposal noted that a focal point for fair trial issues is 'especially necessary at the ICC where the Defence and Victims are not Organs of the Court'.<sup>52</sup>

The IBA supports this proposal recognising that an ASP Focal Point for Enhancing Fair Trials could play a vital role in ensuring that states parties are informed and take appropriate action to address fair trial concerns at the ICC. In particular, the Focal Point could:

- Promote the development of a new Legal Aid Policy and increase the knowledge and understanding of states about the legal aid system;
- Keep states regularly informed of the ICC's needs in relation to interim and final release and encourage more states parties to enter into cooperation agreements;
- Support defence teams in establishing contacts with national authorities and encourage those states to provide cooperation to the defence;
- Monitor ICC detention facilities and keep states parties informed of any issues;
- Monitor the level of resources of the ASP's Voluntary Fund for Family Visits, promote voluntary contributions by states and, given the ongoing lack of contributions,<sup>53</sup> propose additional mechanisms to ensure that the ICC fulfils its obligations to ensure that the right to family visits are respected;<sup>54</sup> and

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<sup>50</sup> ICC, *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1263-AnxA, Opinion of Judge Cuno Tarfusser, 16 July 2019, para 117.

<sup>51</sup> OPCD Concept Note, 'Creation of a Hague Working Group Focal Point for Enhancing Fair Trials', 27 February 2018, 1.

<sup>52</sup> *ibid.*

<sup>53</sup> IBA, 'Priorities and Recommendations for the 18th Session of the International Criminal Court Assembly of States Parties' (n 4) 8.

<sup>54</sup> ASP, 'Report of the Court on cooperation' (21 October 2019) ICC-ASP/18/16 <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-16-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-16-ENG.pdf)> para 32: 'facilitating the maintenance of family contacts can save the Court valuable time, as well as human and financial resources, for example, by preventing the delay of proceedings due to issues related to a detained person's mental or physical health'. Due to lack of voluntary contributions, the IBA has called on states to 'reconsider the source of funding for family visits, and to consider

- Monitor proposals for amendments to the legal framework and draw any fair trial issues to the attention of states parties.

In addition, the IBA notes that the Experts working on the Governance Cluster have been asked to consider the ‘establishment of Ombudsman/internal grievance procedures’. While the objective listed is to ensure adequate and efficient grievance procedures ‘with a view to meeting staff needs and handling efficient conflict- resolution’,<sup>55</sup> the IBA urges the Experts to consider establishing an ombudsman along the lines of the Ombudsperson for the Kosovo Specialist Chambers (KSC) who is responsible for acting ‘independently to monitor, defend and protect the fundamental rights and freedoms enshrined in Chapter II of the Constitution of persons interacting with the Specialist Chambers and Specialist Prosecutor’s Office in accordance with the Law and the Rules’.<sup>56</sup>

Rule 29 of the KSC Rules of Procedure and Evidence provides the functions of the Ombudsperson as:

- (a) conduct inquiries into complaints received from any person asserting a violation of his or her rights by the Specialist Chambers or the Specialist Prosecutor’s Office. If the complaint is made on behalf of someone whose rights have alleged to have been violated, their consent is needed before any inquiry is commenced;
- (b) enter and inspect at any time and without notice the Specialist Chambers’ detention facilities to assess the conditions of detention;
- (c) propose or facilitate mediation and reconciliation in order to resolve a complaint; and
- (d) make recommendations to the President or Specialist Prosecutor on matters falling within their functions.

The establishment of an independent ICC ombudsman with a similar mandate would provide an important accountability mechanism to ensure that complaints relating to fair trials are properly examined and, where possible, solutions are identified through mediation.

## **Cluster 2: Judiciary and the judicial process**

In the course of the ICC’s first cases, a number of serious fair trial issues have arisen in relation to the judicial process and the judiciary’s application of the legal framework.

Many of these issues arise from gaps in the legal framework and opaque provisions. Regrettably, despite the substantial fair trial protections in the Rome Statute and the requirement in Article 21(3) that the law must be interpreted and applied consistent with internationally recognised human rights, too often the law has been interpreted and applied to the detriment of the accused.

In this section, the IBA highlights what it sees as the most serious fair trial concerns that have arisen and urges the experts working on Cluster 2 to consider amendments and clarifications in the legal framework.

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allocating funds as part of the regular budget of the court. IBA, ‘Priorities and Recommendations for the 18th Session of the International Criminal Court Assembly of States Parties’ (n 4) 9.

<sup>55</sup> ASP, Draft Working Paper ‘Meeting the challenges of today for a stronger Court tomorrow: Matrix over possible areas of strengthening the Court and Rome Statute System Introductory notes’ (11 October 2019) 10.

<sup>56</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (adopted 17 March 2017, revised 29 May 2017, entered into force 5 July 2017) KSC-BD-03/Rev1/2017 <<https://www.scp-ks.org/en/file/402/download?token=qPTfSzyd>> rule 28.

**The Group of Independent Experts should recommend amendments to Regulation 55 to include additional safeguards to uphold the rights of the accused and propose measures to ensure that alternative and cumulative charging practices do not overwhelm the defence**

The application of Regulation 55 by the ICC to change the legal characterisation of fact to accord with crimes or forms of participation, in particular in the very late stages of the *Katanga* case, has resulted in widespread criticism of the provision and allegations of unfairness.<sup>57</sup>

Whether Regulation 55 is consistent with a fair trial depends in part on the stage of proceedings at which it is applied, and on the procedures adopted by the relevant Trial Chamber to give effect to paragraph 3 of Regulation 55.<sup>58</sup> This provision obliges the Trial Chamber to ensure that the accused shall have ‘adequate time and facilities for the effective preparation of his or her defence in accordance with Article 67, paragraph 1(b)’ and ‘be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Rome Statute in accordance with article 67, paragraph 1(e)’.

In the *Lubanga* case, the Appeals Chamber noted that Regulation 55 itself contained ‘stringent safeguards for the protection of the rights of the accused’, but that

‘[h]ow these safeguards will have to be applied to protect the rights of the accused fully and whether additional safeguards must be implemented has not been fully considered in the context of the present appeals and will depend on the circumstances of the case.’<sup>59</sup>

The Appeals Chamber ruled that Regulation 55 may not be used to include additional facts and circumstances that are not described in the charges and any amendments to the charges.<sup>60</sup>

However, the application of Regulation 55 in the *Katanga* case demonstrates that the safeguards are not sufficient. As pointed out in Judge Van den Wyngaert’s dissenting opinion, the Majority’s recharacterisation of facts at the end of the trial both exceeded the facts and circumstances of the case and violated Mr Katanga’s right to a fair trial, including (as he had already given evidence during the trial) the right to remain silent,<sup>61</sup> the right to be informed of the charges, to have adequate time and facilities to prepare the defence, and to be tried without undue delay.<sup>62</sup>

In the *Gbagbo and Blé Goudé* case, the Appeals Chamber also made a concerning finding that the ability of a chamber to give notice under Regulation 55 ‘at any time during the trial’ included ‘the

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<sup>57</sup> See for example: Sophie Rigney, ‘Case Note: “The words don’t fit you”: Recharacterization of the Charges, Trial Fairness and Katanga’ (2014) 15 *Melbourne Journal of International Law* 515-533; Kevin Jon Heller, ‘“A Stick to Hit the Accused with”: The Legal Recharacterization of Facts under Regulation 55’ in Carsten Stahn (ed), *The Law and Practice of International Criminal Court* (Oxford University Press 2015) 981-1006; Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford University Press, 2016) 65-66.

<sup>58</sup> IBA, ‘Evidence Matters in ICC Trials’ (n 20) 62.

<sup>59</sup> ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2205, Judgment on the appeals of Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’, 8 December 2009, para 85.

<sup>60</sup> *ibid*, para 112.

<sup>61</sup> ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3436-Anxl, Minority Opinion of Judge Christine Van den Wyngaert, 10 March 2014 <[https://www.icc-cpi.int/RelatedRecords/CR2014\\_02619.PDF](https://www.icc-cpi.int/RelatedRecords/CR2014_02619.PDF)> paras 54 and 59.

<sup>62</sup> *ibid*, paras 129–132 and 309–320.

stage after a Trial Chamber is seized of a case and before opening statements'.<sup>63</sup> This practice is at odds with the accused's right to know with certainty the charges against which they must defend themselves, which, according to the ICC's framework, should be set by the confirmation decision.<sup>64</sup> Departing from the established pre-trial framework may encourage an overly broad charging practice on the part of the prosecution, in which they leave indeterminate or frequently revisit the theory of the case and mode of liability. Indistinct theories of cases in turn may lead to lengthier trials. Following this practice, the role of the Pre-Trial Chamber becomes less distinct and the expectations for the pre-trial phase of proceedings lack clarity.<sup>65</sup>

The Chambers Practice Manual has sought to limit the use of Regulation 55, describing it as 'an exceptional instrument which, as such, should be used only sparingly if absolutely warranted'.<sup>66</sup> It also notes that use of Regulation 55 immediately after the issuance of the confirmation decision even before the opening of the evidentiary debate at trial is improper.<sup>67</sup> However, the Manual is not binding on chambers and in order to limit recourse to Regulation 55, it concerningly endorses alternative charging where '[i]t would then be the Trial Chamber, on the basis of a full trial, to determine which one, if any, of the confirmed alternative is applicable to each case.'<sup>68</sup> Further, '[t]he Prosecutor may also present cumulative charges, i.e. crimes charged which, although based on the same set of facts, are not alternative to each other, but may all, concurrently, lead to a conviction. [...] In doing so, the Pre-Trial Chamber will give deference to the Trial Chamber which, following a full trial, will be better placed to resolve questions of concurrence of offences.'<sup>69</sup>

While alternative and cumulative charging is clearly permitted by the Statute, the IBA is concerned that the extent to which it has been pursued by the OTP in recent cases inflates the prosecution's case and places undue burden on the defence, raising questions of fairness and expeditiousness, especially at a time when the legal aid is insufficient. For example, Dominic Ongwen was charged with more than 70 offences involving four different modes of liability.

The IBA urges the Experts to review the ICC's application of Regulation 55 and to propose amendments to ensure that fair trial concerns regarding its application do not arise in the future. In particular, consideration should be given to limiting the stages of the proceedings during which it can be applied and strengthening the fair trial criteria in Regulation 55(3) that guide its application, including expressly requiring the chamber to ensure that the accused's right not to incriminate oneself is protected.

Recognising that the approach proposed in the Chamber's Practice Manual for the OTP to expand alternative and cumulative charging risks overwhelming the defence, the Experts should consider the fair trial implications of such charging practices and recommend safeguards, including ensuring that during the confirmation of charges process the pre-trial chamber considers alternative modes of criminal responsibility for each crime charged, and that the legal aid policy provides sufficient resources to the defence to address such complex cases.

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<sup>63</sup> ICC, *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-369, Judgment on the appeal of Laurent Gbagbo against the decision of Trial Chamber I entitled 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court', 18 December 2015, para 1.

<sup>64</sup> IBA, 'Evidence Matters in ICC Trials' (n 20) 65.

<sup>65</sup> *ibid.*

<sup>66</sup> Chambers Practice Manual (2019) <<https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf>> para 67.

<sup>67</sup> *ibid.*

<sup>68</sup> *ibid.*

<sup>69</sup> *ibid.*, para 68.

## **The Group of Independent Experts should recommend that the ICC Rules of Procedure and Evidence be amended to codify rules and procedures for ‘no case to answer’ proceedings**

‘No case to answer’ proceedings, sometimes referred to as ‘motions for judgment of acquittal’ proceedings, are an established practice at other international criminal tribunals and in many domestic justice systems. Although the ICC’s legal framework does not contain explicit provisions for such proceedings, the ICC has so far made two ‘no case to answer’ determinations in the *Ruto and Sang* and *Gbagbo and Blé Goudé* cases.

The ICC Appeals Chamber has upheld the practice of some trial chambers to consider ‘no case to answer’ motions, finding that they are permitted pursuant to the power in Articles 64(6)(f) and Rule 134 to rule on matters concerning the conduct of the proceedings.<sup>70</sup> In doing so, the Appeals Chamber emphasised that the procedures must be conducted in a manner that ensures that the trial proceedings are fair and expeditious pursuant to Articles 64(2) and 64(3)(a) of the Rome Statute.<sup>71</sup>

Indeed, Trial Chamber V(A) in the *Ruto and Sang* case held that the ‘primary rationale’ for a ‘no case to answer’ proceeding lies in ‘the principle that an accused should not be called upon to answer a charge when the evidence presented by the prosecution is substantively insufficient to engage the need for the defence to mount a defence case’, and that this principle flows from the general rights of the accused, including the presumption of innocence and right to a fair and speedy trial, reflected in Articles 66(1) and 67(1) of the Rome Statute.<sup>72</sup>

The IBA agrees that ‘no case to answer’ procedures can be essential to ensure a fair and expeditious trial. However, the organisation is concerned that, in the absence of clear rules and procedures governing the process, several issues have emerged from the ad hoc practice to date that undermine legal certainty and may lead to inconsistency.

First, the Appeals Chamber’s ruling that a trial chamber has a broad discretion in deciding whether or not to consider a ‘no case to answer’ motion,<sup>73</sup> even though it is directly connected to the rights of the accused,<sup>74</sup> risks different trial chambers taking inconsistent approaches and may result in a situation where not all remedies are available to all defendants.

Second, although the Trial Chamber in the *Ruto and Sang* case appeared to follow the ICTY’s test for determining a ‘no case to answer’ motion of ‘whether there is evidence on which a reasonable

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<sup>70</sup> ICC, Prosecutor v *Bosco Ntaganda*, ICC-01/04-02/06 OA6, Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on Defence request for leave to file a ‘no case to answer’ motion”, 5 September 2017, para 44.

<sup>71</sup> *ibid.*

<sup>72</sup> ICC, Prosecutor v *William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1334, Decision No 5 on the Conduct of Trial Proceedings (Principles and Procedures on ‘No Case to Answer’ Motions), 3 June 2014, para 12.

<sup>73</sup> ICC, Prosecutor v *Bosco Ntaganda* (n 70) para 46.

<sup>74</sup> *ibid.*

Trial Chamber could convict',<sup>75</sup> there has been some disagreement and confusion as to whether and how this relates to the beyond reasonable doubt standard of proof.<sup>76</sup>

Third, although the Trial Chamber in the *Ruto and Sang* case found that it would not consider questions of reliability and credibility relating to evidence,<sup>77</sup> some judges have challenged this approach.<sup>78</sup>

Fourth, instead of acquitting the accused, the Trial Chamber in the *Ruto and Sang* case took the unusual step of vacating the charges, even though the prosecution had completed the presentation of its case, terminating proceedings without prejudice to charges being brought anew at a later stage.<sup>79</sup> However, this approach, which Judge Eboe-Osuji would have preferred to be applied by ordering the remedy of a mistrial in this case,<sup>80</sup> is inconsistent with the principle of *ne bis in idem* set out in Article 20(1) which states that 'except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court'.<sup>81</sup>

Recalling that the Independent Expert Review presents an opportunity to strengthen the '[e]fficiency of the judicial process'<sup>82</sup> and the '[d]evelopment of process and procedures to promote coherent and accessible jurisprudence and decision-making, including through learning from best practices from other jurisdictions',<sup>83</sup> the IBA urges the Experts to recommend that detailed rules and procedures governing the conduct of 'no case to answer' proceedings be codified in the ICC Rules of Procedure and Evidence.

In particular, to ensure that accused persons are able to access the remedy of 'no case to answer' in appropriate cases, consideration should be given to:

- requiring automatic consideration of 'no case to answer' at the end of the prosecution case or moving to a procedure that is also available to the Trial Chamber *proprio motu* without requiring the defence to file a motion;<sup>84</sup>
- requiring trial chambers to rule on all motions for 'no case to answer';

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<sup>75</sup> ICC, Prosecutor v *William Samoei Ruto and Joshua Arap Sang* (n 72) para 32.

<sup>76</sup> ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1234, Dissenting Opinion of Judge Herrera Carbuca to the Chamber's oral decision of 15 January 2019, 15 January 2019, paras 40-41. See also: Paul Bradfield, 'No Case to Answer? Show Me the (Standard of) Proof!' (*Opinio Juris*, 20 January 2019) <<http://opiniojuris.org/2019/01/20/no-case-to-answer-show-me-the-standard-of-proof/>>; Kevin Jon Heller, 'Did the Gbagbo Majority Get the No Case to Answer Standard Wrong?' (*Opinio Juris*, 21 January 2019) <<http://opiniojuris.org/2019/01/21/did-the-gbagbo-majority-get-the-no-case-to-answer-standard-wrong/>>.

<sup>77</sup> ICC, Prosecutor v *William Samoei Ruto and Joshua Arap Sang* (n 72) para 32.

<sup>78</sup> ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1263-AnxB-Red, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, Public Redacted Version of Reasons of Judge Geoffrey Henderson, 16 July 2019 <[https://www.icc-cpi.int/RelatedRecords/CR2019\\_07450.PDF](https://www.icc-cpi.int/RelatedRecords/CR2019_07450.PDF)> 15-18.

<sup>79</sup> ICC, Prosecutor v *William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2027-Red-Corr, Decision on Defence Applications for Judgments of Acquittal, 16 June 2016.

<sup>80</sup> Judge Eboe-Osuji, concurring with Judge Fremr's evidential assessment, also vacated the charges and discharged the accused without prejudice to re-prosecution in the future. However, Judge Eboe-Osuji declared a mistrial in the case. See ICC, Prosecutor v *William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, 5 April 2016, para 187.

<sup>81</sup> See also William A Schabas, 'The Mistrial, An Innovation in International Criminal Law' (*PhD Studies in Human Rights*, 8 April 2016) <<http://humanrightsdoctorate.blogspot.com/2016/04/the-mistrial-innovation-in.html>>.

<sup>82</sup> ASP Matrix Introductory Notes (n 55) Cluster 2.7, 16.

<sup>83</sup> *ibid*, Cluster 2.8.

<sup>84</sup> IBA, 'Evidence Matters in ICC Trials' (n 20) 67.

- clarifying the test for determining no case to answer motions and the standard of proof to be applied;
- clarifying whether and the extent to which the credibility and reliability of evidence should be considered; and
- requiring that, if the test is met, the accused must be acquitted.

### **The Group of Independent Experts should recommend amendments to Rule 64 requiring chambers to determine challenges to the admissibility and relevance of evidence promptly and transparently during trials**

In a number of recent ICC cases (including the *Bemba* case,<sup>85</sup> the *Bemba et al.* case,<sup>86</sup> the *Gbagbo and Blé Goudé* case,<sup>87</sup> and the *Ongwen* case<sup>88</sup>) trial chambers have decided to defer consideration of admission of evidence, including challenges made pursuant to Rule 64 of the ICC Rules and Procedure of Evidence, until deliberating the judgment. This, it has been argued, saves time<sup>89</sup> and allows the trial chamber to consider the ‘relevance and probative value [of evidence] as part of a holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused’.<sup>90</sup> However, as a number of judges and other commentators<sup>91</sup> have recognised, this practice undermines the ability of the accused to conduct an effective defence and makes it very difficult to evaluate a trial chamber’s findings for the purpose of appeals.

In the absence of prompt determinations on admissibility of evidence in these cases, the defence has had the onerous burden of responding to all evidence submitted, regardless of its relevance or probative value, and without a clear understanding of how it relates to the charges in the prosecution’s case.<sup>92</sup>

While the approach was endorsed by the majority of the Appeals Chamber in the *Bemba et al.* case, which found that it did not cause prejudice to the rights of the accused,<sup>93</sup> Judge Henderson

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<sup>85</sup> ICC, Prosecutor v *Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1022, Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 19 November 2010.

<sup>86</sup> ICC, Prosecutor v *Jean-Pierre Bemba et al.*, ICC-01/05- 01/13-1285, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05- 01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015.

<sup>87</sup> ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-405, Decision on the submission and admission of evidence, 29 January 2016.

<sup>88</sup> ICC, Prosecutor v *Dominic Ongwen*, ICC-02/04-01/15-497, Initial Directions on the Conduct of Proceedings, 13 July 2016.

<sup>89</sup> See for example: ICC, Prosecutor v *Dominic Ongwen*, ICC-02/04-01/15-497, Initial Directions on the Conduct of Proceedings, 13 July 2016, para 25.

<sup>90</sup> ICC, Prosecutor v *Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-2275-Red, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, para 598.

<sup>91</sup> See for example Chiara Loiero, ‘Admitting mistakes on admitting evidence – It’s not too late for the ICC to get it right’ (*Amnesty International*, 4 May 2018) <<https://hrij.amnesty.nl/icc-bemba-et-al-judgment-admitting-mistakes-on-admitting-evidence/>>; ‘Time to Clarify the ICC Rules on Admission of Evidence’ (*Amnesty International*, 5 October 2018) <<https://hrij.amnesty.nl/time-to-clarify-icc-rules-admission-evidence/>>.

<sup>92</sup> Chiara Loiero (n 91).

<sup>93</sup> *Bemba et al* Appeal Judgment (n 90) paras 602-628.

dissented, opining that the approach was erroneous as a matter of law and resulted in the defendants suffering great prejudice.<sup>94</sup>

A few months later, the majority of a differently constituted Appeals Chamber challenged the practice in delivering the Appeals Judgment in the main *Bemba* case, albeit in their separate opinions. Judges Van den Wyngaert and Morrison emphasised:

‘Not only is it necessary to rule on the admissibility of all evidence submitted by the parties, the Trial Chamber must also apply the admissibility criteria of article 69 (4) of the Statute sufficiently rigorously to avoid crowding the case record with evidence of inferior quality.’<sup>95</sup>

Judge Eboe-Osuji opined that although Rule 64 does not expressly require a trial chamber to rule on the admissibility of evidence during trial:

There is no question (...) that in expressly *requiring* parties to register their objections at the point of submission of evidence, rule 64 does—as a matter of *necessary* implication—require trial judges to play their own incidental part, by ruling upon the evidential concerns raised by the parties.<sup>96</sup>

Implementation of the approach in some cases has resulted in some trial chambers failing to rule on admissibility and to adequately explain which evidence they ultimately relied on in the judgment. Indeed, the Appeals Chamber in the *Bemba et al.* case went as far as indicating that a lack of express considerations of relevance, probative value and potential prejudice of evidence in the judgment does not necessarily represent a failure of the Chamber to provide ‘a full and reasoned statement of [its] findings on the evidence and conclusion’, as required by Article 74(5) of the Statute.<sup>97</sup>

The majority of judges in the Bemba Appeals Judgment challenged this approach. Judges Van den Wyngaert and Morrison emphasised in their separate opinion concerns ‘about the opacity of the Conviction Decision in terms of outlining the evidentiary basis for many of the findings’<sup>98</sup> and highlighted what they considered ‘obvious evidentiary problems’.<sup>99</sup> Acknowledging concerns that the appellant was ‘left without clarity as to the relevance and probative value of the evidence upon which the Trial Chamber relied to convict him, and why exculpatory evidence was not clearly or sufficiently addressed in the Trial Judgment’,<sup>100</sup> Judge Eboe-Osuji noted:

‘a regime of appellate review which appears to place upon an appellant the burden of demonstrating materiality of the errors on the part of the Trial Chamber very critically puts

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<sup>94</sup> ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-2275-Anx, Separate Opinion of Judge Geoffrey Henderson, 8 March 2018, para 38.

<sup>95</sup> ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3636-Anx2, Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, 8 June 2018, para 18.

<sup>96</sup> ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3636-Anx3, Concurring Separate Opinion of Judge Eboe-Osuji, 14 June 2018, para 302.

<sup>97</sup> *Bemba et al* Appeal Judgment (n 90) paras 597-598.

<sup>98</sup> Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison (n 95) para 6.

<sup>99</sup> *ibid*, para 14.

<sup>100</sup> Concurring Separate Opinion of Judge Eboe-Osuji (n 96) para 91.

in issue the need for an appellant to see with clarity whether or not, and to what extent, the Trial Chamber had relied upon contested evidence submitted at trial.<sup>101</sup>

Although the IBA interprets the existing legal framework as requiring a trial chamber to rule promptly on all challenges to admissibility made pursuant to Rule 64, this recent practice and the clear divisions amongst the ICC judges demand clarifications in the legal framework to prevent these issues from arising in future cases. The IBA urges the Experts to recommend amendments to Rule 64 requiring trial chambers to determine all challenges to admissibility of evidence promptly during the trial and to provide full reasons for its decisions.

### **The Group of Independent Experts should recommend amendments to Rule 119 and Regulation 51 of the Court, as well as additional amendments to the Rules and Regulations to provide clarity, consistency, and additional safeguards for interim and conditional release**

While the legal framework of the ICC provides for interim release during legal proceedings, to date, no accused person has been granted interim release, other than for humanitarian reasons.<sup>102</sup> The IBA's analysis of ICC jurisprudence on interim release shows a lack of clarity and consistency in the application and interpretation of the legal framework, with implications for the rights of the accused and the integrity of the proceedings.<sup>103</sup>

In the *Bemba* case, the Appeals Chamber held that identification of a state willing to accept the person concerned, as well as to enforce related conditions, is necessary.<sup>104</sup> It invoked Rule 119(3), 'which obliges the Court to seek, inter alia the views of the relevant states before imposing or amending any conditions restricting liberty', and concluded that 'a state willing and able to accept the person concerned ought to be identified prior to a decision on conditional release'.<sup>105</sup>

When a state was willing to accept Mr Bemba on its territory, the Trial Chamber held that the conditions specified by the state were not explicit enough, and there continued to be a meaningful risk that, if provisionally released into the territory of that state, the accused would not return to complete his trial.<sup>106</sup> The Appeals Chamber held that, if a chamber is considering conditional release and a state has indicated its general willingness and ability to accept a detained person and enforce conditions, the chamber 'must seek observations from that state as to its ability to

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<sup>101</sup> *ibid*, para 93.

<sup>102</sup> ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1099-Red, Decision on the Defence Request for Jean-Pierre Bemba to Attend his Stepmother's Funeral, 12 January 2011, paras 13–15. See also ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-437-Red, Decision on the Defence's Urgent Request Concerning Jean Pierre Bemba's Attendance of his Father's Funeral, 3 July 2009, para 9.

<sup>103</sup> For an analysis of individual cases, see IBA, 'Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals' (2019) <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=7acf3b18-454e-4a9b-b253-b1ba5da46d03>>.

<sup>104</sup> ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-631-Red, 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, 2 December 2009, para 106.

<sup>105</sup> *ibid*.

<sup>106</sup> ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1565-Red, Public Redacted Version of the 'Decision on Applications for Provisional Release' of 27 June 2011, 16 August 2011, paras 59–61.

enforce specific conditions identified by the chamber'.<sup>107</sup> Depending on the circumstances, the chamber may have to seek further information from the state if it finds that the state's observations are insufficient to enable the chamber to make an informed decision.<sup>108</sup>

Subsequently, when making a new determination, the Trial Chamber confirmed that the state willing to receive Mr Bemba in its territory had sent an 'extensive and comprehensive list of the measures' that the state was willing to implement if the accused was released into its territory.<sup>109</sup> However, the Trial Chamber held that the proposed measures did not eliminate the risk of absconding,<sup>110</sup> despite the state in question having extensively and specifically covered nearly all the conditions enumerated in Rule 119(1).<sup>111</sup>

Given the vital role that states must play in providing interim release, there should be clear, fair, transparent, and consistent rules and regulations that govern their involvement in the process. The IBA therefore urges the Experts to recommend amendments to Rule 119 requiring trial chambers to enumerate the specific conditions they are willing to accept from states, prior to deciding on applications for conditional interim release.<sup>112</sup>

Likewise, Regulation 51 of the ICC Regulations of the Court states that '[f]or the purposes of a decision on interim release, the Pre-Trial Chamber shall seek observations from the host State and from the State to which the person seeks to be released'. These observations allow a chamber to ascertain a state's willingness to implement conditions on release, and to ensure that any risk identified by the ICC may be mitigated by measures short of detention. However, in the *Ongwen* case, the Single Judge did not seek the observations of Belgium, the country to which Mr Ongwen requested to be released.<sup>113</sup> The Single Judge held that 'while interim or conditional release cannot be granted before observations are requested from the State to which the person seeks to be released and the Host State', Regulation 51 'cannot be understood to require that observations must be requested even in the absence of any reasonable prospect that an application for interim release (with or without conditions) may be granted'.<sup>114</sup>

The obligation to engage with states on interim release thus remains ambiguous and poses a significant barrier for granting interim release. In order to protect the rights of the accused and to ensure adherence to international human rights standards, it is essential to clarify the process for determining interim release. The IBA urges the Experts to recommend amendments to Regulation 51 of the Court, clarifying that chambers shall seek observations from the State to which the person seeks to be released, 'in relation to all applications'.

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<sup>107</sup> ICC, Prosecutor v *Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1626-Red, Judgment on the appeal of Jean Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled 'Decision on Applications for Provisional Release', 19 August 2011, para 55.

<sup>108</sup> *ibid.*

<sup>109</sup> ICC, Prosecutor v *Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1789-Red, Public Redacted Version of the 26 September 2011 Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011, 27 September 2011, para 17.

<sup>110</sup> *ibid.*, paras 37-38.

<sup>111</sup> ICC, Prosecutor v *Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1937-Red2, Judgment on the appeal of Jean Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled 'Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011', 15 December 2011, para 37.

<sup>112</sup> IBA, 'Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals' (n 103) 81.

<sup>113</sup> ICC, Prosecutor v *Dominic Ongwen*, ICC-02/04-01/15-349, Decision on the 'Defence Request for the Interim Release of Dominic Ongwen', 24 March 2016, para 25.

<sup>114</sup> *ibid.*

The legal framework is also unclear regarding conditional release following an acquittal. Article 81(3)(c) does not expressly contemplate the possibility of conditional release of an acquitted person. Conditional release is provided for in relation to a convicted person, whereas an acquitted person must be released immediately, unless there are exceptional circumstances for continued detention 'having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal'.

Despite this language, in the *Gbagbo and Blé Goudé* case, the Appeals Chamber found that not only could a trial chamber order conditional release, but that the 'exceptional circumstances' test did not apply. 'Compelling reasons' would suffice.<sup>115</sup> It is logical that a chamber with powers to order continued detention of an acquitted person can order conditional release as an alternative, given that immediate release of acquitted persons is clearly the rule in Article 83(1)(c). However, there is no statutory basis to impose a test other than 'exceptional circumstances' for conditional release. As the Appeals Chamber has previously acknowledged following the acquittal of Mathieu Ngudjolo Chui:

'in the ordinary course of events, the acquitted person is to be released immediately, thereby respecting the fundamental right to liberty of the person.'<sup>116</sup>

In the *Gbagbo and Blé Goudé* case, the Appeals Chamber went on to apply broad criteria to conclude that compelling reasons existed, including relying heavily on the seriousness of the charges as an incentive to abscond.<sup>117</sup> Far from demonstrating exceptional circumstances, the 'compelling reasons' cited would likely apply to most acquitted persons in ICC cases.

The IBA urges the Experts to recommend new Rules of Procedure and Evidence to clarify that conditional release of acquitted persons should only be ordered in exceptional circumstances, and to set out new criteria that requires a chamber to consider justifications for conditional release, as well as criteria (including the potential length of appeal proceedings) for granting unconditional release.

### **The Group of Independent Experts should recommend amendments to the Rules of Procedure and Evidence to ensure that the human rights of a sentenced person are taken into account in determining whether to approve a request by a state to prosecute, punish, or extradite them for other offences**

The IBA is concerned that in applying Article 108 in the Katanga case, the ICC Presidency and the Appeals Chamber failed to give adequate consideration of the fair trial concerns raised by Mr Katanga regarding the request by the Democratic Republic of Congo to prosecute him nationally.

Article 108 allows a state of enforcement, after an approval by the ICC, to prosecute, punish, or extradite a sentenced person for any conduct engaged in prior to that person's delivery to the State of enforcement. The legal framework requires the state of enforcement to transmit certain documents to the presidency when making a request under Article 108.<sup>118</sup>

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<sup>115</sup> ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1251-Red, Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, 1 February 2019, para 2.

<sup>116</sup> ICC, Prosecutor v *Ngudjolo Chui*, ICC-01/04-02/12-12, Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect, 20 December 2012, para 22.

<sup>117</sup> ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé* (n 115) paras 59-60.

<sup>118</sup> Rules of Procedure and Evidence, ICC-PIDS-LT-02-002/13\_Eng, rule 214:

In *Katanga*, the Article 108 request was granted in the absence of the required documents.<sup>119</sup>

The Presidency noted arguments raised by Mr Katanga that he would not have access to legal aid to fund defence counsel in the national proceedings and that there was no right of appeal against a judgment before the *Haute Cour Militaire*, but emphasised that ‘the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights’.<sup>120</sup> Instead of examining the concerns in detail, it relied largely on the fact that Democratic Republic of Congo is a party to the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights, which set out fair trial rights,<sup>121</sup> in approving the request. However, this does not address the concerns raised by Mr Katanga.

As the Presidency noted, ‘[t]he legal texts of the Court do not expressly set out any relevant criteria to be applied by the Court when considering the approval of the prosecution, punishment or extradition of a sentenced person by a State of enforcement.’<sup>122</sup> Regrettably, it did not consider developing criteria, drawing from internationally recognised human rights in accordance with Article 21(3) of the Rome Statute.

According to Professor William Schabas, in applying Article 108, the court should:

- refuse authorisation under Article 108 where there is a real danger of abuse of its own process, for example, where the prosecution is politically motivated or is in some way vexatious, or where there appears to be a likely breach of the *ne bis in idem* rule set out in Article 20 paragraph 2;
- take into account evolving norms of international human rights law that may be applicable, for example, the conditions of detention;
- avoid a situation where it would be complicit in a punishment that is cruel, inhuman, or degrading, by requiring that conditions be imposed upon its consent, such as an assurance that capital punishment not be inflicted; and
- consider allowing the intervention as *amici curiae* of nongovernmental organisations with recognised expertise when questions concerning the legitimacy of certain forms of punishment or other treatment arise.<sup>123</sup>

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‘1. For the application of article 108, when the State of enforcement wishes to prosecute or enforce a sentence against the sentenced person for any conduct engaged in prior to that person’s transfer, it shall notify its intention to the Presidency and transmit to it the following documents:

- (a) A statement of the facts of the case and their legal characterization;
- (b) A copy of any applicable legal provisions, including those concerning the statute of limitation and the applicable penalties;
- (c) A copy of any sentence, warrant of arrest or other document having the same force, or of any other legal writ which the State intends to enforce;
- (d) A protocol containing views of the sentenced person obtained after the person has been informed sufficiently about the proceedings.’

<sup>119</sup> ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3679, Decision pursuant to article 108(1) of the Rome Statute, 7 April 2016.

<sup>120</sup> *ibid*, para 31.

<sup>121</sup> *ibid*.

<sup>122</sup> *ibid*, paras 8-11.

<sup>123</sup> William A Schabas, ‘Article 108: Limitation on the prosecution or punishment of other offences’ in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck-Hart-Nomos 2016) 2203.

The IBA echoes these recommendations and urges the Experts to recommend that criteria that clearly reflects internationally recognised human rights should be expressly set out in the Rules of Procedure and Evidence or Regulations of the Court.

Moreover, Rule 216 should be amended to require the ICC to monitor the domestic proceedings, following a positive Article 108 decision, to ensure that they uphold fundamental principles and do not affect the integrity of the ICC. In this regard, the ICC should monitor the quality and fairness of the proceedings, and consider requesting regular reports to reinforce standards of fairness and to ensure adherence of domestic courts to international standards.<sup>124</sup>

Finally, recognising that the Appeals Chamber rejected an application to appeal the decision by Mr Katanga by noting the lack of a provision for appeal in the Statute or the Rules of Procedure and Evidence, the IBA recommends an amendment to the Rules of Procedure to include rules providing for an appeal of an Article 108 decision as an essential safeguard to ensure that the rights of sentenced persons are respected.<sup>125</sup>

### **Cluster 3: Preliminary examinations, investigations and prosecutions**

Although Cluster 3 focusses primarily on the structure and work of the Office of the Prosecutor, leading the IBA to raise only one important issue, the IBA urges the Experts to consider the requirement of fair trials and the potential impact of changes to the OTP on the defence throughout its review.

#### **The Group of Independent Experts should recommend measures to address potential conflicts of interest and ensure the rights of the accused in view of the Prosecutor's mandate to investigate offences against the administration of justice under Article 70**

Article 70 of the Rome Statute provides the ICC with jurisdiction over a number of offences against its administration of justice, including giving false testimony, presenting evidence that is known to be forged, influencing witnesses, intimidating officials of the court, retaliating against court officials, or soliciting or accepting bribes as an official of the court.

The IBA has monitored Article 70 cases and issued several reports that identify concerns regarding the statutory framework and its implementation.<sup>126</sup> In particular, it is concerned that Rule 165 gives the Office of the Prosecutor unilateral authority to investigate offences against the administration of justice without oversight or accountability, even when there are apparent conflicts of interests.<sup>127</sup>

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<sup>124</sup> IBA, 'Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals' (n 103) 83.

<sup>125</sup> In *Katanga*, the Appeals Chamber noted the lack of a provision for appeal in the Statute or the Rules of Procedure and Evidence in rejecting Katanga's application to appeal. See: ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3697, Decision on the admissibility of Mr Katanga's appeal against the 'Decision pursuant to article 108(1) of the Rome Statute', 9 June 2016, para 16.

<sup>126</sup> IBA, 'Witnesses before the International Criminal Court' (2013)

<<https://www.ibanet.org/Document/Default.aspx?DocumentUid=9C4F533D-1927-421B-8C12-D41768FFC11F>>; IBA, 'Evidence matters in ICC Trials' (n 20); IBA, 'Offences against the Administration of Justice and Fair Trial Considerations before the International Criminal Court' (2017)

<<https://www.ibanet.org/Document/Default.aspx?DocumentUid=d1566944-3cd2-4221-b6bf-7700b7b9120b>>.

<sup>127</sup> IBA, 'Witnesses before the International Criminal Court' (n 126) 49.

Concerns of impartiality have arisen in at least one Article 70 case. While the Appeals Chamber in *Bemba et al.* rejected a request for disqualification of the Prosecutor, Deputy Prosecutor, and OTP staff, finding that it did not give rise to reasonable doubts as to the Prosecutors' impartiality, Judge Kourula, in a separate concurring opinion, stated that the OTP staff involved in the Article 5 case should have voluntarily excused themselves from the Article 70 case. Judge Kourula further noted that the Prosecutor should have not appointed the same staff to the two cases.<sup>128</sup>

To address these concerns, the IBA has recommended that ICC judges consider appointing *amici curiae*<sup>129</sup> to make recommendations on whether investigations should be launched (and whether they should be conducted internally or externally) when there are strong allegations of false testimony or witness interference but no apparent investigations, regardless of who the alleged offender is.<sup>130</sup>

Further, the IBA has called for the OTP to develop a clear and consistent policy for implementing its Article 70 mandate.<sup>131</sup> Until such a policy is developed, the IBA has urged the OTP to create Article 70 specific guidelines defining conflict of interest and setting out procedures for managing conflicts of interest and complying with the Rome Statute's requirements for impartiality.<sup>132</sup>

Furthermore, the IBA has called for more attention to be paid to the implications of Article 70 investigations on the rights of persons being prosecuted for Article 5 crimes.<sup>133</sup>

In the *Bemba* case, Trial Chamber III presided over early but crucial stages of the prosecution's Article 70 investigation, including an important *ex parte* status conference on 9 April 2013.<sup>134</sup> While the status conference was *ex parte*, the information discussed and the measures requested raised concerns about the absence of any representation for the rights of the defence. While the Trial Chamber redirected the investigation to the Pre-Trial Chamber, the information that the Trial Chamber was exposed to was raised as an issue in the appeal in the *Bemba* Article 5 case on the grounds that the Trial Chamber could be prejudiced by the material shared by the prosecution.<sup>135</sup>

In the *Katanga and Ngudjolo* case, the Appeals Chamber clarified that the Trial Chamber had the discretion to order disclosure of parts of an accused's confidential detention record, including

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<sup>128</sup> ICC, Prosecutor v *Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-648-Anx1, Separate concurring opinion of Judge Erkki Kourula, 21 October 2014, para 6.

<sup>129</sup> A Trial Chamber may appoint *amici curiae* at any stage of the proceedings under the Rule 103(1), if it considers it desirable for the proper determination of the case. This can be done by inviting or granting leave to 'a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate'.

<sup>130</sup> IBA, 'Witnesses before the International Criminal Court' (n 126) 49.

<sup>131</sup> IBA, 'Offences against the Administration of Justice and Fair Trial Considerations before the International Criminal Court' (n 126) 29.

<sup>132</sup> *ibid* 30. On impartiality, Article 42(7) the Rome Statute provides that neither the Prosecutor nor the Deputy Prosecutor shall participate in a matter in which their impartiality might reasonably be doubted on any ground. All staff of the OTP make an undertaking to act impartially. The OTP's Code of Conduct emphasises that it is 'one of the core principles governing the work of the office' (see paras 8, 11, 20 and 29–31.) It requires OTP staff to refrain from participating in and request to be excused from any matter 'in which their impartiality might reasonably be doubted on any ground', with emphasis on any matters they were involved in prior to taking office. The ICC Prosecutor is mandated in Article 54(1)(a) to 'establish the truth' and cover 'all facts and evidence relevant to an assessment of whether there is criminal responsibility... and in doing so, investigate incriminating and exonerating circumstances equally'. The Code of Conduct emphasises 'objective truth seeking', and calls for 'impartial judgments based on the evidence' as part of effective investigation and prosecution (paras 49 and 51).

<sup>133</sup> *ibid* 36.

<sup>134</sup> *ibid* 21.

<sup>135</sup> *ibid*.

recordings, under the exception contained in Regulation 92(3) of the Court.<sup>136</sup> In coming to this decision, the Appeals Chamber noted that the Trial Chamber's original rejection of the Prosecutor's request for access 'hinders him from fulfilling his duty under article 54(1) of the Statute "to establish the truth"', and that the Trial Chamber must strike a balance between the Prosecutor's Article 54(1) responsibilities and the rights of the accused, including the rights to privacy and the right to conduct his defence.<sup>137</sup>

Following the guidance from the Appeals Chamber, the Trial Chamber issued a decision that nonetheless denied the prosecution's request for full access, finding that the prosecution had failed to make the case that 'a lack of access to such information would, in this instance, deprive him of any possibility of achieving the objective prescribed by article 54(1) of the Statute'.<sup>138</sup> In its decision, the Trial Chamber emphasised both the discretion of the Chamber, as well as the role of the registry in reporting on communications in such a way that prevents irrelevant or sensitive information from passing to the prosecution. The Trial Chamber emphasised that it was 'essential to inquire as to the necessity and proportionality of the proposed prosecutorial interference' in imposing any measures that interfered with the right to respect for private and family life or the right to mount a defence.<sup>139</sup>

In contrast, in the *Bemba* and *Ntaganda* cases, the prosecution was granted greater access to non-privileged communications in relation to suspected offences against the administration of justice.

During *ex parte* proceedings in the *Bemba* case, the Single Judge ordered that the prosecution be given direct access (rather than through an independent counsel, as the prosecution had requested) to the non-privileged recordings.<sup>140</sup> The Single Judge also granted the prosecution's request for suspending the accused's right to be heard, as provided in the Regulations of the Court and the Registry.<sup>141</sup> In this decision, the Single Judge distinguished the 'specific purpose' served by recordings made in the detention unit from that served by the detention record and determined that they should be treated differently with respect to confidentiality and disclosure.<sup>142</sup> According to the Single Judge, the detention record, which contains personal information of a confidential nature, is intended to preserve all information pertaining to the period of the accused's time in the Court's custody.<sup>143</sup> On the other hand, the Single Judge found that telephone conversations are recorded and saved in case they are needed for an eventual investigation, stating that recordings 'can be of the essence in allowing the relevant authorities to properly investigate' any 'suspicion as to the behaviour of an accused'.<sup>144</sup> For this reason, the Single Judge found that all unprivileged

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<sup>136</sup> Regulations of the Court (n 4) regulation 92. See also *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1718, Judgment on the Appeal of the Prosecutor Against the 'Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre', 9 December 2009, paras 40–41.

<sup>137</sup> *ibid*, paras 50 and 52.

<sup>138</sup> ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-2187-tENG-Red, Decision Further to the Appeals Chamber Judgment of 9 December 2009 and Responding to Request 1959-Conf-Exp of the Office of the Prosecutor, 10 June 2010, para 61.

<sup>139</sup> *ibid*, para 59.

<sup>140</sup> ICC, Situation in the Central African Republic, ICC-01/05-46, Decision on the Prosecutor's 'Request for Judicial Assistance to Obtain Evidence for Investigation Under Article 70', 8 May 2013, para 4.

<sup>141</sup> *ibid*, para 8.

<sup>142</sup> *ibid*, para 9.

<sup>143</sup> *ibid*.

<sup>144</sup> *ibid*.

calls ‘can be legitimately directly accessed by the Prosecutor for the purposes of her investigation and there is accordingly no need for an “independent counsel” to be appointed’.<sup>145</sup>

The IBA is concerned that this finding contains insufficient safeguards for the rights and privacy of the accused, especially in a situation where, in reality, the communications may be provided to the same prosecutors who are trying the Article 5 case.

In the *Ntaganda* case, the defence filed a request for a stay of the proceedings, arguing that the prosecution’s access to Mr Ntaganda’s telephone conversations could expose defence strategy, and amounted to ‘an abuse of the Court’s process, as a result of which Mr Ntaganda cannot receive a fair trial’.<sup>146</sup> In its decision, Trial Chamber VI recognised that the prosecution’s access to certain information placed it in an ‘unduly advantageous position vis-à-vis the Defence’ and that was indeed prejudicial to the accused, but denied the defence’s request for a permanent stay, finding that the prejudice incurred did not meet the high threshold required for that remedy.<sup>147</sup>

The IBA thus recommends the implementation of safeguards, such as review by an independent counsel or further involvement of the chamber or registry. This would prevent non-relevant information from being unnecessarily exposed, protect the privacy of the accused, and ensure that defence strategy is not made available to the prosecution. In addition, the IBA emphasises the role of the chamber in finding a balance between any investigations into the communications of the accused and their right to privacy, family life, or the right to mount a defence. As articulated by the Trial Chamber in the *Katanga* and *Ngudjolo* case, any measures that interfere with the accused’s fundamental rights must be carefully assessed and found to be both necessary and proportional.

In addition, the IBA emphasises the importance of transparency and consistency in Article 70 proceedings. The legal framework is clear that Article 70 should be equally available to all parties. This means that the OTP should be able to promptly and transparently respond to allegations brought by not only the prosecution, but also the defence, the chamber, another participant, or an external source.<sup>148</sup> Current practice does not publicly address how the OTP responds to allegations in a consistent and fair manner, and in such a way that upholds its obligation to investigate objectively.<sup>149</sup> In this regard, a public summary or accounting of measures taken in respect of the OTP’s Article 70 mandate would support the transparency and objectivity of the court.<sup>150</sup> It would also more clearly account for the resources that are required to address Article 70 allegations, informing states parties and other stakeholders about the resources needed for the Article 70 mandate. The IBA thus recommends that the OTP adopt measures to increase transparency in its procedures, and to ensure that the framework for Article 70 investigations is available to all parties.<sup>151</sup>

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<sup>145</sup> ICC, Situation in the Central African Republic, ICC-01/05-50, Decision on the ‘Registry’s Observations Pursuant to Regulation 24bis of the Regulations of the Court on the Implementation of the “Decision on the Prosecutor’s ‘Request for Judicial Assistance to Obtain Evidence for Investigation Under Article 70’”’, 27 May 2013, para 10.

<sup>146</sup> ICC, Prosecutor v *Bosco Ntaganda*, ICC-01/04-02/06-1883, Decision on Defence request for stay of proceedings with prejudice to the Prosecution, 28 April 2017, para 2.

<sup>147</sup> *ibid*, paras 42–43 and 60–62.

<sup>148</sup> IBA, ‘Offences against the Administration of Justice and Fair Trial Considerations before the International Criminal Court’ (n 126) 57.

<sup>149</sup> IBA, ‘Offences against the Administration of Justice and Fair Trial Considerations before the International Criminal Court’ (n 126) 57.

<sup>150</sup> IBA, ‘Offences against the Administration of Justice and Fair Trial Considerations before the International Criminal Court’ (n 126) 57. See also, IBA, *Witnesses before the International Criminal Court*, July 2013, p 49.

<sup>151</sup> IBA, ‘Offences against the Administration of Justice and Fair Trial Considerations before the International Criminal Court’ (n 126) 57.

Last but not least, the IBA recommends that if independent counsel is appointed to screen material from an Article 70 investigation, there should be a clear legal framework for this role, including ‘guidelines for selecting counsel and ensuring their impartiality’.<sup>152</sup> Furthermore, ‘in instances of chamber-appointed counsel, material should be reviewed according to a “strict relevance” standard rather than a “might be of relevance” standard to ensure that only directly relevant material is shared with the Prosecution’.<sup>153</sup> This practice would further safeguard the privacy of the accused and secure material relevant for the defence’s strategy.<sup>154</sup>

## Conclusion

The recommendations proposed by the IBA in this submission are aimed at strengthening the fairness of the ICC and therefore its efforts to deliver effective justice and end impunity. It is axiomatic that the ICC’s trials must be fair and that the rights of the accused are respected.

The Independent Expert Review presents a unique opportunity to strengthen the performance, efficiency, and effectiveness of the Court and the Rome Statute system as a whole. A thorough review of the ‘processes, procedures, practices, and the organisation of and framework for the Court’s operations’,<sup>155</sup> consistently applying a fair trial perspective, will result in recommendations that not only strengthen governance, the judiciary, the registry, and the prosecution, but the defence as well.

To ensure that the Independent Expert Review is successful in achieving its mandate, the IBA urges the Experts to make their interim report available for comments by civil society and external counsel, so that any fair trial concerns can be raised for the Experts’ consideration before finalising their report.

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<sup>152</sup> *ibid* 60.

<sup>153</sup> *ibid*.

<sup>154</sup> *ibid*.

<sup>155</sup> ICC-ASP/18/Res.7 (n 2) 4.