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***Priorities and Recommendations for the 16th Session  
of the International Criminal Court Assembly of  
States Parties***

**November 2017**

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## Introduction

This paper sets out the priorities and recommendations of the International Bar Association (IBA) for the 16th session of the International Criminal Court (ICC) Assembly of States Parties (ASP), taking place from 4–14 December 2017 in New York.

The IBA International Criminal Court and International Criminal Law (ICC & ICL) Programme monitors issues related to fairness and equality of arms at the ICC and other Hague-based war crimes tribunals. The Programme analyses proceedings and evaluates legal, administrative and institutional issues that could potentially affect the rights of defendants, the impartiality of proceedings and the development of international justice.

The annual ASP session highlights the central role of States Parties as architects of the ICC, and as decision-makers with respect to many of the Court's key institutional functions. At the same time, the annual ASP session, and discussions leading up to it, provide opportunities for the Court to inform all States Parties of its achievements and challenges, as well as strategic goals and needs. It is an opportunity for states to reiterate their strong commitment to the Court in both statements and actions, including by ensuring that the Court has the resources it needs to fulfil its mandate.

At the 16th session of the ASP, elections will take place to fill six judicial vacancies. States Parties will also approve the shortlist of candidates for ICC Registrar, and the ICC Judges will appoint a candidate to the position in 2018. Importantly, the ASP will determine the 2018 budget for the Court, and will also debate and discuss a number of operational matters related to the ICC's mandate.

In 2018, the ICC will have eight to ten situations under preliminary examination and 11 situations at the investigation phase, of which, seven will be active investigations.<sup>1</sup> During 2018, the Court further expects to have three cases at the trial phase, which will hear an estimated 132 witnesses and require 400 days of hearings.<sup>2</sup> The ICC anticipates that ten suspects/accused will appear before the Court, six of whom will remain in detention.<sup>3</sup> The IBA has taken into account the operational needs of the Court in identifying its priorities and recommendations, and is concerned that sufficient funding for key operational requirements may not be met.<sup>4</sup>

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<sup>1</sup> ASP, Proposed Programme Budget for 2018 of the International Criminal Court, ICC-ASP/16/10, 11 September 2017, paras 29–32. In the Proposed Programme Budget, the ICC identified six active investigations, namely CAR II.a (*Séléka*), CAR II.b (*anti-Balaka*), CIV II, Georgia, Libya (LBY 3) and Mali. On 25 October 2017, Pre-Trial Chamber III granted the OTP authorisation to commence an investigation in Burundi. On 3 November 2017, the Prosecutor announced that she would request the opening of an investigation in Afghanistan that, if granted, would then add an additional situation for 2018, bringing the number to 12. The request was filed before Pre-Trial Chamber III on 20 November 2017.

<sup>2</sup> *Ibid*, paras 34–36. The trials are in the *Gbagbo and Blé Goudé*, *Ongwen* and *Ntaganda* cases.

<sup>3</sup> *Ibid*, para 35.

<sup>4</sup> ICC, 'Impact of CBF Recommended Reductions to the Proposed Programme Budget 2018', 10 November 2017. This paper was prepared for the ASP at the request of the Budget Facilitator to explain the impact of proposed Committee on Budget and Finance (CBF) reductions. The Court has indicated that budgetary reductions being considered by the ASP will 'have a serious impact on the operational requirements of both [the] OTP and Registry', 'potentially delaying activities and reducing the Court's effectiveness'.

The year 2018 marks two decades since the signature of the Rome Statute. In celebrating this milestone, the ASP can demonstrate its commitment to the functionality of the ICC, and its unique role as the only permanent international criminal court with the mandate to address serious international crimes. In its 16th session, the ASP should thus ensure that the Court has the most qualified judges and leadership, and that the Court has sufficient resources to execute its mandate.

## Priorities

### Fair elections focused on merit and competence

At the 16th session of the ASP, States Parties will elect six judges to the bench, each of whom will serve for a nine-year term. The Rome Statute provides that ICC judges ‘shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in the respective States for appointment to the highest judicial office’. The Rome Statute further requires established competence in a number of relevant areas, including criminal law and procedure and selected disciplines of international law.<sup>5</sup> The requirements and procedures for judicial nominations and elections are also designed to achieve a gender and geographical balance in the nomination and election of ICC judges.

The IBA supports selection of judges based on merit,<sup>6</sup> and joins the Coalition for the ICC in strongly opposing reciprocal political agreements in all ICC and ASP elections.<sup>7</sup> The IBA therefore urges States Parties to consider carefully the competencies and qualifications of the candidates for the particular role of serving on the ICC bench. In particular, the IBA highlights the relevance of expertise in international criminal law and procedure, as well as a demonstrated commitment to principles of fairness and equality of arms. The IBA encourages States Parties to take note of the findings of the Advisory Committee on Nominations of Judges, which has identified candidates who are ‘particularly well qualified’ for appointment to the ICC.<sup>8</sup> The IBA also highlights the need to elect qualified female judges in the 2017 judicial election, in keeping with the requirements of the Statute and to ensure a fair representation of women on the ICC bench.<sup>9</sup>

In 2018, the ICC judges will elect the ICC Registrar – the principal administrative officer of the Court – from a shortlist of candidates put forward by the ASP. The Rome Statute provides that, among other qualifications, the Registrar shall be a person of ‘high moral character’ and ‘highly competent’.<sup>10</sup> The Registrar is responsible for key functions of the Court, including overseeing witness protection, cooperation agreements, administration of legal aid and supervision of the detention centre.

**In this regard, the IBA encourages both States Parties and ICC judges to ensure that the selected candidates possess the relevant skills and show a demonstrated commitment to a fair administration of justice and equality of arms.**

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<sup>5</sup> Rome Statute, Art 36(3).

<sup>6</sup> IBA Resolutions, ‘IBA Minimum Standards of Judicial Independence’ (Adopted 1982), para 26.

<sup>7</sup> Coalition for the ICC, Memorandum for the December 2017 judicial elections.

<sup>8</sup> ASP, Report of the Advisory Committee on Nominations of Judges on the work of its sixth meeting, ICC-ASP/16/7, 10 October 2017, Annex I.

<sup>9</sup> Rome Statute, Art 36(8)(a)(iii).

<sup>10</sup> Rome Statute, Art 43(3).

## Witnesses and evidence for ICC investigations and trials

### *Preparing for electronic evidence and ensuring equality of arms*

The 16th ASP comes at a time when the ICC is incorporating an increasing amount of digital and technologically-derived evidence in its investigations and trials. The amount of digital evidence collected by the Court has risen to 80 per cent, and is expected to rise to 100 per cent by 2020.<sup>11</sup> The urgency and relevance of these issues was highlighted in August 2017, when the Court issued an arrest warrant relying heavily on video and social media evidence in the Libya Situation.<sup>12</sup> Based on the IBA's comparative analysis of the impact of such evidence at the ICC and other international criminal tribunals, integration of digital evidence requires an inclusive planning process that takes into account the rights of the accused, and additional resources will be required to support all actors involved in the litigation of those cases. Relevant resources may include funding for experts, opportunities for training, opportunities to investigate and access to information about available sources of digital evidence.<sup>13</sup>

The Court has also identified an urgent need to upgrade its IT systems.<sup>14</sup> In February 2017, the ICC adopted a 'Court-wide Five Year IT/IM Strategy' 'to ensure a holistic approach to information technology, information security and information management aimed at meeting the Court's essential needs while maintaining better control of invested resources and maximizing their impact'.<sup>15</sup> The IBA commends the Court on taking steps to address these issues, and **recommends that the ASP support the Court in its efforts to address shortcomings identified in the strategy.**

The extent to which the specific needs of the defence and victims' counsel were taken into account in drafting the strategy is unclear. As the IBA has noted, digital evidence, as well as outdated and insufficient IT systems, can have an impact on the fairness of proceedings, including on the right to be tried without undue delay, and the right to adequate time and facilities to prepare the defence.<sup>16</sup> **The IBA encourages that counsels' perspectives be included in further efforts to upgrade the IT systems of the Court, to ensure that their specific concerns can be addressed.**

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<sup>11</sup> ASP, Proposed Programme Budget for 2018 of the International Criminal Court, ICC-ASP/16/10, 11 September 2017, para 423(a).

<sup>12</sup> *The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli*, ICC-01/11-01/17-2, Warrant of Arrest, 15 August 2017.

<sup>13</sup> See further, IBA ICL Perspectives, *Evidence Matters in ICC Trials* (IBA 2016), pp 31–33.

<sup>14</sup> ASP, Proposed Programme Budget for 2018 of the International Criminal Court, ICC-ASP/16/10, 11 September 2017, para 421, Budget Annex IX.

<sup>15</sup> *Ibid*, para 422.

<sup>16</sup> IBA ICL Perspectives, *Evidence Matters in ICC Trials* (IBA 2016), pp 19–33. See also, ICC, 'Impact of CBF Recommended Reductions to the Proposed Programme Budget 2018', 10 November 2017, para 5(f). Proposed budget cuts will result in 'unavoidable delays in the implementation of the 5-year Court wide IT strategy, as the Registry will not be provided with the required resources to develop new investigative and prosecutorial tools, in particular focused on the processing of digital evidence. This will lead to the prolonged use of time-consuming and outdated IT tools in the eCourt system in the courtroom'.

### *Strengthening witness practices*

With 132 witnesses scheduled to testify in 2018 – the highest number to date in the Court’s history – the IBA urges continued examination and strengthening of practices surrounding witnesses.<sup>17</sup> As the IBA has emphasised, witness issues are complex and multifaceted, often taking place out of the public eye. They entail the cooperation and support of multiple organs and actors within the Court, as well as states. Witness issues also bring a fair trial dimension, notably as the prosecution and defence have equal rights to call and examine witnesses, and due to the need to balance considerations of witness protection while upholding the fundamental rights of the accused.

In light of the number of witnesses expected to testify, the IBA encourages continued attention to ensuring that witnesses can testify safely and receive adequate support and protection. Chambers and the OTP, as well as the IBA, have emphasised the need to address the root causes underlying witness vulnerability and unreliability, including, *inter alia*, by strengthening practices for investigations, limiting and more carefully managing the use of intermediaries, and reinforcing witness support.<sup>18</sup> Noting also that witness testimony has provided the bulk of the Court’s evidence in its first cases, the IBA has emphasised the importance of developing other sources of evidence in support of a goal already identified by the OTP.<sup>19</sup>

States play an important role in supporting the Court’s ability to safely interact with witnesses and benefit from their testimony. States can ensure that the Court has sufficient resources for witness protection and transfers, thus ensuring efficient and cost-effective trials.<sup>20</sup> In addition, States Parties have obligations under the Rome Statute to effectively protect and support witnesses, particularly during investigations and in facilitating the transfer, protection and support of witnesses. As further discussed below, **the IBA encourages States Parties to enter into framework agreements on witness relocation, and encourages all states to facilitate the temporary movement of witnesses who the Court may urgently require.**<sup>21</sup>

### *Improving procedures for Article 70 of the Rome Statute*

As the Court continues to work to strengthen its practices regarding witnesses, the IBA urges improvement of procedures around Article 70, in particular as used to address witness

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<sup>17</sup> ASP, Proposed Programme Budget for 2018 of the International Criminal Court, ICC-ASP/16/10, 11 September 2017, paras 7 and 687.

<sup>18</sup> IBA ICC & ICL Programme Discussion Paper Series, *Offenses against the administration of justice and fair trial considerations at the International Criminal Court* (IBA 2017), pp 58–59.

<sup>19</sup> ICC OTP, *Strategic Plan 2016-2018*, 6 July 2015, para 78; IBA ICL Perspectives, *Evidence Matters in ICC Trials* (IBA 2016), p 17.

<sup>20</sup> ICC, ‘Impact of CBF Recommended Reductions to the Proposed Programme Budget 2018’, 10 November 2017, para 5(d) and (g). The Court has indicated that the proposed cuts will hinder the Registry’s ability to support witnesses and trials, causing delays and increasing the overall costs of trials. The Court has also indicated that it may require recourse to the Contingency Fund to ensure protection of victims and witnesses.

<sup>21</sup> IBA ICC Perspectives, *Witnesses before the International Criminal Court* (IBA 2013), p 7.

interference.<sup>22</sup> Article 70 of the Rome Statute ‘seeks to protect the integrity of the proceedings before the Court by penalising the behaviour of persons that impedes the discovery of the truth, the victims’ right to justice and, generally, the Court’s ability to fulfil its mandate’.<sup>23</sup> Among other crimes, Article 70 aims to protect witnesses from interference in the form of intimidation, corruption and threats. In light of the centrality of witnesses to ICC proceedings, Article 70 is a crucial provision that criminalises, and thus has the potential to deter, behaviour that can seriously undermine ICC proceedings.

The IBA’s analysis of Article 70 proceedings to date has highlighted areas for further discussion and attention, and has identified considerations for Chambers, the OTP and States Parties. Chambers play an important role in ensuring the integrity and fairness of Article 70 proceedings through, *inter alia*, full realisation of the rights of the accused, with additional safeguards applied if necessary. The IBA urges Chambers to exercise strict supervision and limitation of exceptional measures such as *ex parte* proceedings and monitoring and restrictions on the communications of an accused person.<sup>24</sup>

In light of the OTP’s mandate to investigate and prosecute Article 70 allegations from all sources, the IBA encourages the OTP to increase transparency regarding the procedures and actions taken under this mandate. The OTP should articulate policies that clarify guidelines and procedures for key issues, including: appointing staff and independent counsel to investigate allegations; providing sufficient and timely responses to allegations from all parties; and ensuring that any potential conflicts of interest within the OTP are addressed in a transparent manner according to the legal framework.<sup>25</sup> The IBA recommends a public summary or accounting of measures taken in respect of the OTP’s Article 70 mandate, to support the transparency and objectivity of the Court, to more clearly account for the resources required to address Article 70 allegations, and to better inform States Parties and other stakeholders.<sup>26</sup>

Article 70(4) of the Statute gives States Parties an important role to play in addressing Article 70 allegations. To the extent that a state would have jurisdiction over an Article 70 matter or can otherwise assist the OTP with Article 70 investigations and prosecutions, states should provide this support, including, where appropriate, prosecuting crimes domestically.<sup>27</sup> As highlighted by the President of the ICC, there is both a relationship between effective prosecution of Article 70 offences for the effective prosecution of core crimes, and a ‘specific obligation under article 70.4

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<sup>22</sup> See IBA ICC & ICL Programme Discussion Paper Series, *Offenses against the administration of justice and fair trial considerations before the International Criminal Court* (IBA 2017).

<sup>23</sup> ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-2123, Decision on Sentence Pursuant to Art 76 of the Statute, 22 March 2017, para 19.

<sup>24</sup> IBA ICC & ICL Programme Discussion Paper Series, *Offenses against the administration of justice and fair trial considerations before the International Criminal Court* (IBA 2017), p 56.

<sup>25</sup> *Ibid*, p 57. For example, Art 31 of the OTP Code of Conduct prohibits members of the Office from participating in any matter in which their impartiality might reasonably be doubted on any ground.

<sup>26</sup> *Ibid*, p 57.

<sup>27</sup> *Ibid*, p 57. The IBA notes, however, that prosecution by states may not be feasible in all circumstances. Some of the possible challenges include crimes committed across multiple jurisdictions, issues with witness protection *vis-à-vis* local authorities, as well as the reluctance of witnesses to trust and cooperate with local authorities, and absence of appropriate domestic legislation.

of the Statute on States Parties to extend their criminal laws to encompass offences against the administration of justice before the ICC'.<sup>28</sup>

However, a recent review of implementing legislation highlights the relatively small number of States Parties that have addressed Article 70 offences in their implementing legislation.<sup>29</sup> **In this regard, the IBA encourages States Parties to review domestic legislation with a view towards ensuring the inclusion of Article 70 offences, if such crimes are not included.** The IBA underscores that States Parties investigating and prosecuting Article 70 matters should do so consistent with the international standards of fair trials.

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<sup>28</sup> Judge Silvia Fernández de Gurmendi, President of the International Criminal Court, Keynote speech at Seminar 'From Ratification to Action: The Importance of Full Implementation of the Rome Statute', The Hague, 16 September 2015, p 2.

<sup>29</sup> Case Matrix Network International Criminal Law Guidelines, *Implementing the Rome Statute of the International Criminal Court*, September 2017, pp 69–70, citing 21 States Parties with relevant provisions.



## Recommendations: States Parties and fairness of the International Criminal Court

As States Parties convene for the 16th session of the ASP, the IBA emphasises states' role in ensuring that the ICC's legal regime and administration of justice continue to meet the standards of fairness set out in the Court's legal framework, as well as in other applicable international legal instruments. In this regard, the IBA wishes to highlight four areas in which States Parties can take direct action to support the fairness of the ICC.

### Legal aid

The IBA supports the ongoing review of the legal aid system, and has provided input at various stages of the development of the system, as well as on the indigence determination.<sup>30</sup> In 2017, the IBA participated in consultations and provided detailed comments on the Legal Aid Concept paper put forward by the ICC Registry.<sup>31</sup> Following these consultations, the Registry has indicated that it will submit proposals for adjusting the legal aid system to the Assembly, and that the proposals will form the basis for a facilitated consultation process throughout 2018, with the goal of adopting a revised system at the ASP's 17th session, for implementation in 2019.<sup>32</sup>

The IBA has welcomed the opportunity to provide input on the revisions of the legal aid system as well as the Registrar's broad consultation with stakeholders in fulfilment of his obligation under Rules 20(3) and 21(1).<sup>33</sup> Noting that the ASP's Committee on Budget and Finance (CBF) calls for 'an irreproachable and unquestionable legal aid system',<sup>34</sup> the IBA emphasises the importance of consultations for arriving at this result. As the IBA has noted, the aim of improving the operation of the ICC is shared by all organisations interested in the work of the Court, and interested in the promotion of international justice, equality of arms and the rule of law in general.<sup>35</sup>

Legal aid is an operational and technical matter, and an integral part of the Court's ability to administer its judicial process fairly and with full respect for equality of arms. Stakeholders and, in particular, counsel and associations of counsel, provide perspectives informed by practical experience and create essential linkages to victims and suspects who appear before the Court. In this regard, the IBA, together with other stakeholders, have highlighted operational and technical issues such as fair remuneration levels for counsel, the proper consideration of case complexity, team composition, and resources for experts and investigations.<sup>36</sup> **The IBA therefore encourages**

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<sup>30</sup> Legal aid is currently provided according to the structure set out in Resolution ICC-ASP/11/2/Add.1 (2012).

<sup>31</sup> IBA Comments on 'Concept Paper: Review of the International Criminal Court Legal Aid System' (9 June 2017).

<sup>32</sup> ICC Registry, Report on the progress of the development of proposals for adjustments to the legal aid remuneration system as of 2019, 31 October 2017, para 5.

<sup>33</sup> *Ibid*, paras 19, 23 and 25.

<sup>34</sup> ASP, Report of the Committee on Budget and Finance on the work of its twenty-ninth session, ICC-ASP/16/15 Advance version, 17 October 2017, para 179.

<sup>35</sup> IBA Comments on 'Concept Paper: Review of the International Criminal Court Legal Aid System' (9 June 2017), p 1.

<sup>36</sup> *Ibid*, pp 5–9.

**the ASP to ensure that this constructive dialogue, inclusive of external stakeholders, remains part of efforts to arrive at a revised legal aid system.**

The IBA is concerned that the CBF is departing from the ASP's principles adopted in 2004 concerning legal aid – equality of arms, objectivity, transparency, continuity and economy<sup>37</sup> – by seeking solely to define the legal aid system according to budgetary limits.<sup>38</sup> The IBA again emphasises the 2012 Report of the ASP's Focal Point on Legal Aid, rejecting this approach as neither 'appropriate nor supportive to the goal of managing the legal aid costs'. The ASP's Focal Point stated then that:

'It is important to reiterate the fundamental importance of the legal aid system to ensure the fairness of judicial proceedings, and the rights of the defendants and victims to quality legal representation and high degree of professionalism. It should also be noted that any revision of the legal aid system has to uphold and strengthen the founding principles of the legal aid, namely equality of arms, objectivity, transparency, continuity and economy.'<sup>39</sup>

The IBA calls on States Parties to maintain these principles, which are essential to ensure the fairness of judicial proceedings. As such, the IBA strongly objects to the proposed language in the draft Omnibus Resolution (Annex I) on the Court's ongoing mandate for the legal aid review, requesting the Court provide 'proposals for adjustments *within existing resources* to the legal aid remuneration policy' [emphasis added].<sup>40</sup> This approach precisely pre-empts the ongoing discussions on legal aid, and undermines the Court's process to provide the ASP with a proposal that genuinely reflects both expert advice as well as technical and operational considerations. Such budgetary limitations are unacceptable and will only undermine the long-term viability of the revised legal aid system.

**The IBA supports the following language for inclusion in Annex I of the Omnibus Resolution: 'With regard to Legal Aid, requests the Court to reassess the functioning of the legal aid system and to present, as appropriate, proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly at its sixteenth session.'**

With respect to current legal aid requirements, the Court has estimated that legal aid will continue to finance 12 defence teams and up to five teams of legal representatives of victims

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<sup>37</sup> ASP, Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons, ICC-ASP/3/16, para 16.

<sup>38</sup> See, ASP, Report of the Committee on Budget and Finance on the work of its twenty-ninth session, ICC-ASP/16/15 Advance version, 17 October 2017, paras 179 and 181.

<sup>39</sup> 'Legal Aid - The way forward, Report by the Focal Point, 26 September 2012', the Hague Working Group (HWG) recommended to the Bureau the appointment of Ambassador Leon Marc (Slovenia) as the Focal Point on Legal Aid within the Budget facilitation, para 15.

<sup>40</sup> ASP, 'Strengthening the International Criminal Court and the Assembly of States Parties' (Omnibus Resolution), Draft 10 November 2017, Annex I, para 8. The proposed language states 'With regard to **Legal Aid**, requests the Court to continue its review of the functioning of the legal aid system and to present, in early 2018, as appropriate, and without pre-empting the discussion, proposals for adjustments within existing resources to the legal aid remuneration policy for the consideration of the Assembly, through the Committee on Budget and Finance, at its seventeenth session.'

during 2018.<sup>41</sup> In the 2018 budget, the Court has indicated the estimated amounts required for covering the costs of legal aid, in keeping with the Court's obligation to provide legal assistance for indigent accused under Article 67 of the Statute, as well as to provide legal representation for indigent victims.<sup>42</sup> **The IBA strongly urges the ASP to ensure it provides these full resources.**

## Financial investigations

Financial investigations continue to be an important area for development and attention from both the Court and States Parties. The ability to perform financial investigations helps the Court to ensure that the legal aid system remains reserved for those who cannot afford to pay for their own representation. Financial investigations may also result in locating funds that could be reserved for reparations following a conviction. The IBA notes the progress made during 2017 on financial investigations, and that the CBF has marked this issue for future study.<sup>43</sup> At the same time, the Court has highlighted that CBF reductions to the Registry's 2018 proposed budget would affect financial investigation capacity, and that this would have 'considerable operational impact'.<sup>44</sup> Sufficient resources for financial investigations, taking into account the purposes of the investigation and the need for avoiding conflicts of interest, have the potential to reduce costs for the Court in the long term. **Therefore, in addition to undertaking further study on financial investigations, the IBA recommends that the ASP provide the resources to address current needs for financial investigation capacity.**

## Trust Fund for Family Visits

The IBA continues to highlight the importance of voluntary donations to the ICC Trust Fund for Family Visits. The ASP created the Trust Fund for Family Visits in lieu of funding the visits through the Court's regular budget.<sup>45</sup> However, ASP participation remains unacceptably low, with only four States Parties having contributed since the inception of the Trust Fund for Family Visits.<sup>46</sup>

The right to family visits of an accused held in ICC detention is consistent with international law, ASP Resolution ICC-ASP/8/Res.4 (2009), and the legal texts of the Court.<sup>47</sup> A March 2009 decision

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<sup>41</sup> ASP, Proposed Programme Budget for 2018 of the International Criminal Court, ICC-ASP/16/10, 11 September 2017, para 37.

<sup>42</sup> *Ibid*, paras 596–598.

<sup>43</sup> ASP, Draft report of the Bureau on cooperation, 14 November 2017, paras 10–12 and Annex I; ASP, Report of the Committee on Budget and Finance on the work of its twenty-ninth session, ICC-ASP/16/15 Advance version, 17 October 2017, paras 27 and 28.

<sup>44</sup> ICC, 'Impact of CBF Recommended Reductions to the Proposed Programme Budget 2018', 10 November 2017, para 6.

<sup>45</sup> ASP, Resolution on Family visits for indigent detainees, ICC-ASP/8/Res.4, 26 November 2009; ASP, Resolution ICC-ASP/9/Res.4, 10 December 2010, Section X.

<sup>46</sup> Germany, Switzerland, the Netherlands and the Philippines. See [www.icc-cpi.int/trust-fund-for-family-visits](http://www.icc-cpi.int/trust-fund-for-family-visits) accessed 17 November 2017.

<sup>47</sup> See, for example, Regulations of the Court, Regulation 100(1) and Regulations of the Registry, Regulation 179(1); United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or

from the ICC Presidency held that, in order to render the right to receive family visits effective, the Court had the obligation to fund such visits for indigent detainees.<sup>48</sup> The ICC Presidency reaffirmed this positive obligation in August 2016, finding that the Court must provide an effective right to family visits for ICC detainees, including by providing funding for such visits. In the same decision, the Presidency expressed concern about the critically low level of the Trust Fund for Family Visits.<sup>49</sup>

The IBA commends the ICC Registry for creating a dedicated webpage and email address to provide information and solicit donations in 2017, and encourages the Registry to continue taking active measures to increase the visibility and support the viability of the Trust Fund for Family Visits.<sup>50</sup> As of 2017, the information provided by the Registry shows that the Trust Fund for Family Visits is providing an essential function, allowing the Court to arrange ‘a total of 26 visits for 80 persons, benefiting seven detained persons’. However, the Registry also notes that the Trust Fund for Family Visits remains in urgent need of donations ‘in order not to run the risk of being unable to meet its family visit responsibility to indigent detainees and their families’.<sup>51</sup>

**The IBA calls on States Parties to ensure that the Fund contains sufficient resources to allow family visits to take place by making voluntary contributions during the 2017 annual session of the ASP.** Such contributions are necessary to ensure that the ICC can administer international criminal justice in a fair and sustainable manner.

## **Cooperation – voluntary agreements**

The ICC’s legal regime provides that States Parties cooperate with the Court to accomplish a number of core functions, including the implementation of arrest warrants, witness protection, interim release of accused persons and enforcement of sentences. The ICC has highlighted that ‘appropriate and timely’ cooperation is in the legal and financial interest of States Parties, and that framework agreements increase legal certainty for both parties.<sup>52</sup> The terms of such agreements provide that States Parties retain the power to make a final decision whether or not to accept a specific witness or sentenced person.<sup>53</sup> The Court has made available model

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Imprisonment 1988 and United Nations Revised Standard Minimum Rules for the Treatment of Prisoners 2015.

<sup>48</sup> ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-RoR217-02/08-8, Decision on ‘Mr Mathieu Ngudjolo’s Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008’, 10 March 2009.

<sup>49</sup> ICC, Presidency, ICC-RoR221-02/16-3-Red, Public redacted version of Decision on the ‘Application to review the “Decision on Complaint to the Registrar by [REDACTED] concerning Supported Family Visit” dated [REDACTED] 2016’, 30 August 2016, para 42.

<sup>50</sup> See webpage [www.icc-cpi.int/trust-fund-for-family-visits](http://www.icc-cpi.int/trust-fund-for-family-visits) accessed 17 November 2017 and email address [ICC.FamilyVisits@icc-cpi.int](mailto:ICC.FamilyVisits@icc-cpi.int).

<sup>51</sup> See [www.icc-cpi.int/trust-fund-for-family-visits](http://www.icc-cpi.int/trust-fund-for-family-visits) accessed 17 November 2017.

<sup>52</sup> ICC, ‘Cooperation Agreements’, August 2017, p 5.

<sup>53</sup> ASP, Draft Report of the Bureau on Cooperation, 14 November 2017, para 7.

agreements that clearly set out the terms for the four main areas of framework agreements, and has additionally provided detailed questions and answers on the agreements.<sup>54</sup>

As of 2017, there are 18 agreements concerning witness relocation, ten agreements concerning enforcement of sentences, and one agreement concerning interim release.<sup>55</sup> While the Court and States Parties may also conclude ad hoc agreements as need arises, the low number of existing voluntary agreements risks operational challenges and limitations for the Court. This is particularly the case for interim release, enforcement of sentences and relocation of persons released by the Court, all areas where state cooperation is required to implement judgments and judicial orders. In designing the Rome Statute system, States Parties committed to providing this essential form of cooperation, which is fundamental to the Court's ability to function. As emphasised by the Court, within the terms of a framework agreement, States Parties always retain the ability to accept or reject a particular request for specific cooperation.

As the IBA has previously emphasised,<sup>56</sup> the conclusion of voluntary agreements supports a number of aims pursued by States Parties. They support **complementarity**, as the agreements are individually-negotiated instruments that take into account the needs and realities of each State Party, while also presenting opportunities to build capacity at the national level on issues such as witness protection and prison standards.<sup>57</sup> Voluntary agreements further support the **efficiency** of the Court, in that the lack of agreements can result in delays to trial proceedings, protracted pre-trial detention for defendants and the inability of the Court to implement judicial orders. Lack of sufficient voluntary agreements also has an impact on the budget of the Court, as the Court is required to address, on an ad hoc basis, arrangements for situations as they arise in respect of witness relocation, provisional release, and enforcement of sentences or relocation following an acquittal.

In light of the importance of cooperation to the functioning of the ICC, States Parties will again hold a special plenary session on cooperation, building on the work done by the Working Groups of the ASP, as well as on previous recommendations and commitments made by States Parties.<sup>58</sup> Among the initiatives before States Parties is the establishment of a coordinating mechanism of national authorities dealing with cooperation, to deal with 'the technical aspects of cooperation

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<sup>54</sup> See, Model Arrangement on Witness Relocation, and Model Agreements on Interim Release, the Release of Persons, and Enforcement of Sentences, in ICC, 'Cooperation Agreements', August 2017, pp 22–49.

<sup>55</sup> ASP, Draft Report of the Bureau on Cooperation, 14 November 2017, para 8.

<sup>56</sup> IBA, ASP-ICC Address on cooperation, presented by Aurélie Roche-Mair at the 14th Session of the ASP, 20 November 2015.

<sup>57</sup> The IBA notes in this regard the memorandum of understanding with the United Nations Office on Drugs and Crime, which will facilitate agreements on enforcement of sentences and ensure that international standards are upheld. See, ASP, Draft Report of the Bureau on Cooperation, 4 November 2016, paras 8–9.

<sup>58</sup> See, for example, ASP, 'Strengthening the International Criminal Court and the Assembly of States Parties', ICC-ASP/6/Res.2, Annex II, 14 December 2007. See also ASP, Declaration on cooperation, RC/Decl.2, adopted at the 9th plenary meeting, 8 June 2010, by consensus; and ASP, Resolution on cooperation, ICC-ASP/14/Res.3, adopted at the 12th plenary meeting, 26 November 2015, by consensus, para 24.

or mutual legal assistance and sharing of knowledge and know-how on this subject'.<sup>59</sup> The IBA supports further discussion on this initiative and its proposed test meeting in 2019.

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

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<sup>59</sup> ASP, Draft Report of the Bureau on Cooperation, 14 November 2017, para 14 and Annex III ('Proposal submitted by Belgium to establish a coordinating mechanism of national authorities dealing with cooperation').