



***Priorities and Recommendations for the 15th Session
of the International Criminal Court Assembly of
States Parties***

November 2016

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Introduction

This paper sets out the priorities and recommendations of the International Bar Association (IBA) for the 15th session of the International Criminal Court (ICC) Assembly of States Parties (ASP), taking place from 16–24 November 2016 in The Hague.

The IBA ICC and 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 which 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. 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.

The 15th session of the ASP is taking place subsequent to notification from at least three States Parties – all from the African Group – that they will be withdrawing from the Rome Statute ('the Statute'). The IBA underscores that the universality of the principles outlined in the Statute have been strongly supported by African States, which have been instrumental in the creation of the Court, and which have also referred a number of situations to the Court for investigation.

The IBA joins with other civil society organisations and relevant stakeholders in calling for a robust and unified response from States in upholding the Statute as a leading and crucial component of both the fight against impunity and for the ability of victims to seek accountability. As Dr Mark Ellis, Executive Director of the IBA, has stated, '*The departure of these States would be an extraordinary and detrimental development for both international justice and for Africa.*'

While giving due regard to the context in which the 15th session of the ASP will take place, the IBA also strongly urges States Parties to ensure that the focus of this ASP remains on the Court's role in administering international criminal trials. In this regard, the IBA emphasises that the Court is an active institution with ongoing investigations and legal proceedings. The Court has indicated that in 2017 it will have ten situations under preliminary examination and ten situations at the investigation phase, of which six are active investigations.¹ During 2017, the Court further expects to have three cases at the trial phase, which will hear an estimated 92 witnesses and require 500 days of courtroom time.² The ICC anticipates that nine accused will appear before the Court, five of whom will remain in detention.³

¹ ASP, Proposed Programme Budget for 2017 of the International Criminal Court, ICC-ASP/15/10, 17 August 2016, paras 36–39. The six active investigations are CAR II.a (*Séléka*), CAR II.b (*anti-Balaka*), Libya (LBY 3), CIV II, Georgia and Darfur. In the Proposed Programme Budget the Court indicates nine situations under preliminary examination; in September 2016 the Government of Gabon referred the situation to the Court, bringing the number to ten.

² *Ibid*, paras 11, 33 and 43. The trials are in the *Gbagbo and Blé Goudé*, *Ongwen* and *Ntaganda* cases.

³ *Ibid*, para 42.

Priorities

Trials at the International Criminal Court

The ICC's legal regime contains many procedural guarantees to ensure fairness in its proceedings. Giving full meaning to these guarantees requires the participation and support of States Parties. As the IBA has noted in its recent report, 'Evidence Matters in ICC Trials', States Parties play an important role in developing the ICC's legal framework, as the body that amends the Rules of Procedure and Evidence. In turn, the Court's procedural regime regarding evidence has an impact on the efficiency of trial proceedings.⁴

The Court is developing its jurisprudence by: interpreting the amended Rule 68; expanding the use of prior recorded testimony as evidence; and assessing evidence within trial proceedings through ICC Regulation 55 and 'no case to answer' proceedings. While the IBA emphasises the fundamental independence of the Court and its judicial processes in relation to these evidentiary developments, it also encourages the Court and States Parties to incorporate lessons learned from other international criminal tribunals, including considering amendments as needed to codify established practices for 'no case to answer' proceedings.

The ICC also faces the challenge of incorporating an increasing amount of digital and technologically derived evidence in its investigations and trials. Based on a comparative analysis of the impact of such evidence at the ICC and other international criminal tribunals, the IBA underscores both the importance of an inclusive planning process that takes into account the rights of the accused, and the need for additional resources to ensure that trials remain fair. The ASP can support the Court in meeting this challenge through ensuring that such resources are made available in the budget and as part of the legal aid policy.

The ASP, through the Study Group on Governance and in the draft Omnibus Resolution, has noted that the judges of the ICC have adopted a Chambers Practice Manual, and has encouraged the judges to continue their work on practice issues in 2017.⁵ The Chambers Practice Manual, a non-binding document seeking to identify best practices, has the potential to support consistent rulings between Chambers. In the further development of this resource, the IBA recommends a consultation process, including external consultations with former ICC judges and judges from other international criminal tribunals. The IBA also recommends an annotation of the Chambers Practice Manual with relevant ICC jurisprudence to ensure that the document accurately reflects the best practices adopted by the majority of chambers. The IBA reiterates that any best practice should be in line with the rights of the accused.

⁴ IBA, Evidence Matters in ICC Trials (*IBA ICL Perspectives Report*), August 2016, available at www.ibanet.org/ICC_ICL_Programme/Reports.aspx#2016.

⁵ Draft Report of the Bureau on the Study Group on Governance, 20 October 2016, paras 13 and 15; and Draft Strengthening the International Criminal Court and the Assembly of State Parties, 6 November 2016, para 56*bis* ('Draft Omnibus Resolution').

Amendments

The Working Group on Amendments has been considering, as a priority, amendments to Rules 101, 144(2)(b), and 76(3) (known as the 'translation cluster') of the Rules of Procedure and Evidence, and has decided to recommend amending Rules 101 and 144(2)(b) at the 15th session of the ASP.⁶ The purpose of the translation cluster amendments is to give ICC judges additional latitude to take into account, on a case by case basis, language and translation issues in determining statutory timeframes, as well as in ordering partial translations of decisions.⁷

The IBA supports the two proposed amendments recommended for adoption in light of their potential to increase the efficiency of proceedings, and their explicit language directing the Chambers to ensure that orders given under these rules 'meet the requirements of fairness' and are in conformity with the rights of the accused set out in Article 67. However, in supporting the amendment to Rule 144(2)(b), the IBA emphasises that access to the proceedings and documents in a language that the accused fully understands and speaks is a fundamental component of the ability and right of accused persons to understand and participate in the criminal trial against them. Any application of the amended rule should therefore be interpreted in favour of the accused, and take into account the broad scope of the rights of the accused enshrined in Article 67. As one of the foremost organisations engaged in monitoring the application of international fair trial standards in the Court's proceedings and policies, the IBA will closely monitor the use of these amended provisions to ensure that they are interpreted in ways that do not erode fundamental fair trial guarantees.

The IBA shares the concerns raised by some States Parties and civil society organisations about the proposed amendment to Rule 76(3), as this relates to witness statements and factual narratives that the accused themselves should be able to review in full.⁸ The IBA is particularly concerned about the possible infringement of Articles 67(1)(e) and 67(2) of the Statute, and also notes that the proposed revision will give rise to increased litigation which will negatively impact the efficiency of the proceedings.⁹ For these reasons, any amendment to Rule 76(3) requires further discussion and should be approached with utmost caution.

⁶ Draft Report of the Working Group on Amendments, 1 November 2016, paras 21–28.

⁷ The first proposed amendment would insert the following text after Rule 101(2): '3. The Court may order in relation to certain decisions, such as those referred to in Rule 144, that they are considered notified on the day of their translation, or parts thereof, as are necessary to meet the requirements of fairness, and, accordingly, any time limits shall begin to run from this date.' The second proposed amendment would allow partial translation of a decision of the Trial Chamber, as opposed to requiring that all decisions be translated in full, by replacing Rule 144(2)(b) with the following text: '(b) The accused, in a language he or she fully understands or speaks, in whole or to the extent necessary to meet the requirements of fairness under article 67, paragraph 1(f).'

⁸ Among the concerns raised by States Parties were 'the possible negative impact on due process and on the rights of the accused, the shifting of the budgetary burden of translations to the defence and the fact that appeals on the grounds of the amendment in question could outweigh efficiency and effectiveness gains, rendering the amendment counterproductive'. See Draft Report of the Working Group on Amendments, 1 November 2016, para 23.

⁹ The proposed amendment reads as follows: '3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks. Where appropriate, the Chamber may authorize translations of relevant excerpts of the statements when, after seeking the views of the parties, it determines that full translations are not necessary to meet the requirements of

The creation of the International Criminal Court Bar Association

The IBA considers the creation and recognition of an association of counsel at the ICC to be a key step in promoting equality of arms and improving the efficient operation of the Court.¹⁰

In May 2016, the International Criminal Court Bar Association (ICCBA) was constituted, and in June 2016 the ICCBA held a Constitutional Congress and General Assembly during which it adopted a Constitution and elected leadership positions.¹¹ The IBA welcomes these developments and their potential to strengthen the voice of the legal profession acting before the ICC.

The success of any association of counsel before the ICC will depend in part on its integration into consultation and decision-making processes while maintaining full independence. Both the ASP and the Court should ensure that appropriate channels of communication are established and open – including during the annual sessions of the ASP – and that consultation takes place at key junctures of the Court’s development, in particular when decisions may impact the rights of counsel or the accused. This includes the management and review of legal assistance, rule amendments and the development of codes of conduct. As noted by the IBA, the independence of an association of counsel is, in part, dependent on its funding.¹² The ASP and individual States Parties are well placed to support and enhance the ICCBA’s legitimacy, in particular in the early years of its existence; through active engagement, including with their own national and regional legal associations; through recognition as an independent representative body of counsel under Rule 20(3); and through financial support for start-up costs.

fairness and would adversely affect the expeditiousness of the proceedings. For the purpose of such determination, the Chamber shall consider the specific circumstances of the case, including whether the person is being represented by counsel and the content of the statements.’ See ICC-ASP/13/31, Annex III, 7 December 2014.

¹⁰ Towards an Association of Counsel, IBA Discussion Paper, November 2015, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=c3269715-3135-4524-a891-3585f046d7b8.

¹¹ The ICCBA Constitution and other documents related to its formation are available at www.iccba-abcpi.org/documents.

¹² Towards an Association of Counsel, IBA Discussion Paper, November 2015, p 6.

Recommendations: States Parties and fairness of the International Criminal Court

As States Parties convene for the 15th session of the ASP, the IBA emphasises their 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 three areas in which States Parties can take direct action to support the fairness of the ICC.

Trust Fund for Family Visits

Consistent with international law and in accordance with ASP Resolution ICC-ASP/8/Res.4 (2009), an accused held in detention by the ICC has the right to family visits. This right is recognised in the legal texts of the Court as well as by international human rights jurisprudence and instruments.¹³ A March 2009 decision from the Presidency of the ICC 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.¹⁴

The ASP decided that family visits would be funded by voluntary donations, in lieu of funding the visits through the Court's regular budget. To this end, the ASP passed Resolution ICC-ASP/9/Res.4 (2010), which established the Trust Fund for Family Visits within the ICC Registry ('the Registry').¹⁵

However, since its creation in 2010, the Trust Fund for Family Visits ('the Fund') has received very little support and its current balance is minimal, putting the rights of indigent accused in jeopardy.¹⁶ On 30 August 2016, the Presidency of the ICC made public an important decision re-affirming the Court's positive obligation to 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 that the Fund 'has reached a critically low level'.¹⁷

Following on from the ASP's decision to create the Trust Fund for Family Visits, 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 2016 annual session of the ASP. Such

¹³ 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 Imprisonment 1988 and United Nations Revised Standard Minimum Rules for the Treatment of Prisoners 2015.

¹⁴ ICC, *Prosecutor v Germain Lubanga 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.

¹⁵ ASP, Resolution for 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.

¹⁶ As of 5 September 2016, the Registry has indicated that only EUR€9,630 remains in the Trust Fund for Family Visits, which is 'barely sufficient' to arrange for one visit. The Registry has also emphasised the importance of upholding the rights of all detained persons equally. See NV/2016/EOSS/253/JCA/cb.

¹⁷ 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.

contributions are necessary to ensure that the ICC can administer international criminal justice in a fair and sustainable manner.

The IBA also encourages the Registry and the ASP to develop tools to support the sustainability of the Trust Fund for Family Visits through greater transparency and visibility regarding its administration and the annual level of funding it requires. For example, public information and quarterly reporting to States Parties on the level of resources in the Fund – including anonymised information about its usage for indigent detainees – would provide a better picture of the supply and demand on the Fund.¹⁸

Cooperation – voluntary agreements

In light of the importance of cooperation to the functioning of the ICC, State 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.¹⁹ 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. In some instances, the Court's ability to implement judicial orders may rely on the existence of separate voluntary agreements concluded with States Parties.

The number of existing voluntary agreements remains low, which creates operational challenges and limitations for the Court. As of 2016, there are 17 agreements concerning witness relocation, eight agreements concerning enforcement of sentences, and one agreement concerning interim release.²⁰

As the IBA has previously emphasised,²¹ the conclusion of voluntary agreements supports a number of other 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.²² 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 Court's inability to implement judicial orders. Lack of sufficient voluntary agreements also has an impact on the budget of the Court, as

¹⁸ Currently the Court includes general information regarding the level of funds and usage of the Trust Fund for Family Visits in the annual 'Report on activities and programme performance of the ICC'. See, for example, ICC-ASP/15/3, p 24.

¹⁹ 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.

²⁰ ASP, Report of the Court on cooperation, ICC-ASP/15/9, 11 October 2016, paras 47-53; ASP, Report of the Court on cooperation, ICC-ASP/13/23, 23 October 2014, para 46.

²¹ IBA, ASP-ICC Address on cooperation, presented by Aurelie Roche-Mair at the 14th Session of the ASP, 20 November 2015.

²² 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.

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.

The IBA is encouraged that the number of existing voluntary agreements cited above include two agreements for witness relocation that were concluded in 2016, and that the Court has indicated that negotiations with a further 45 States are ongoing.²³ However, only one additional agreement for enforcement of sentences was signed in 2016 – the first since 2012 – and no agreements regarding interim release or relocation of persons released by the Court were concluded.²⁴ The IBA therefore urges States Parties which 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.

Legal aid

At the 15th session of the ASP, States Parties will consider and approve the annual budget for the ICC for 2017. Within this 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.²⁵ The Court has estimated that 12 defence teams and up to five teams of legal representatives of victims will continue to be financed through legal aid during 2017.²⁶

Legal aid is provided according to the structure set out in Resolution ICC-ASP/11/2/Add.1 (2012). The system remains under review by the Court at the request of the ASP, and is also being addressed in the context of The Hague Working Group.²⁷ As a preliminary matter, the legal aid system only applies to those who are found to be indigent. In this regard, the IBA commends ongoing efforts by the Court to strengthen financial investigations and calls for continued support and cooperation from States for such investigations, to ensure that the legal aid system remains reserved for those who cannot afford to pay for their own representation.²⁸

Indigent victims are also entitled to legal aid, as reflected in the Regulations of the Court and the current legal aid policy. The IBA notes that the legal aid provisions for victims and accused persons reflect their different positions in the legal process. However, victims' rights to choose counsel, and counsels' ability to represent their clients independently, remain fundamental principles of the Court.

²³ ASP, Report on activities and programme performance of the International Criminal Court for the year 2015, ICC-ASP/15/3, 14 September 2016, para 189.

²⁴ ASP, Report of the Court on cooperation, ICC-ASP/15/9, 11 October 2016, paras 47–53.

²⁵ ASP, Proposed Programme Budget for 2017 of the International Criminal Court, ICC-ASP/15/10, 17 August 2016, para 571.

²⁶ *Ibid*, para 43.

²⁷ Notably in the Study Group on Governance (September 2016).

²⁸ Following an October 2015 workshop on cooperation and financial investigations, the Court released an outcome document detailing actions that States and the Court could take to strengthen this area of the Court's work. See ICC-ASP/15/9, para 9, and 'Report on cooperation challenges faced by the Court with respect to financial investigations: Forward-looking conclusions', pp 3–7, available at www.regierung.li/files/medienarchiv/icc/Report_on_cooperation_challenges_with_respect_to_financial_investigation____.pdf?t=636023396302049108.

The IBA supports the ongoing review of the legal aid system and has provided input to the Court at various stages of the development of the legal aid system, as well as on the indigence determination. The IBA recognises that such a fundamental component of the Court's budget is due both consideration and analysis. Given the importance and urgency for clarification of the legal aid system, the IBA encourages the Registry and the ASP to expedite the establishment of the revised system, taking into account data from cases which have progressed through the full trial phase, including the *Bemba et al* case, as well as input from counsel, representatives for counsel issues at the ICC and external stakeholders.

The IBA notes the 2014 request of the ASP that the Court consider, 'in the context of its assessment of the legal aid system', 'policy options' regarding the level of legal aid to be provided by the Court to the accused in cases of offences against the administration of justice ('Article 70' cases) – 'including the establishment of specific criteria and a quantitative ceiling, as appropriate'.²⁹ The Court has indicated that, on the basis of the Registry's request, in 2016 savings of EUR€1.6m were made in the legal aid for the *Bemba et al* Article 70 case 'pending a final comprehensive review of the legal aid system'.³⁰ The Registry has also stated that it 'intends to distinguish such proceedings from the more traditional proceedings for crimes under article 5 of the Statute' for the purposes of legal aid, particularly in light of the anticipated increase of Article 70 proceedings before the Court.³¹ In relation to Article 70 cases, the IBA supports a cautious approach and one that incorporates an evaluation of the complexity of each case alleging offenses against the administration of justice. While some such cases may be appropriately handled in a more streamlined way, others – in particular those with multiple accused or that rely on complex evidence – may require more resources.

The IBA further notes the *Bemba et al* Trial Chamber's finding that the Statute does not make a distinction between Article 5 (referring to the 'core crimes' of genocide, war crimes and crimes against humanity) and Article 70 cases as it relates to entitlement to legal aid.³² The Chamber ruled that while the Registrar has the power to allocate legal aid, he is also obliged to fully take into account the 'actual needs' of the legal aid applicant as well as 'the interest of justice in the given case' when making this decision, regardless of whether it is an Article 5 or Article 70 proceeding; and that the allotted resources must allow for 'an efficient and effective defence'.³³ As the Court proceeds to evaluate the legal aid policy in relation to Article 70 cases, the IBA emphasises the importance of upholding these principles.

²⁹ ASP, Resolution on the Programme budget for 2016, the Working Capital Fund and the Contingency Fund for 2016, scale of assessments for the apportionment of expenses of the International Criminal Court and financing appropriations for 2016, ICC-ASP/14/Res.1, 26 November 2015, Section J, para 14.

³⁰ ICC-ASP/15/10, para 403.

³¹ *Ibid*, para 521.

³² *The Prosecutor v Bemba et al*, Decision on the Defence Applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, ICC-01/05-01/13-955, 21 May 2015, para 35. This paragraph refers to articles 55(2)(c) and 67(1)(d) of the Rome Statute.

³³ *Ibid*, paras 37–38.

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