



***Priorities and Recommendations for the 18th Session
of the International Criminal Court
Assembly of States Parties***

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Introduction

This paper sets out the priorities and recommendations of the International Bar Association (IBA) International Criminal Court and International Criminal Law (ICC & ICL) Programme for the 18th session of the International Criminal Court Assembly of States Parties (ASP), taking place from 2–7 December 2019 in The Hague.

The IBA 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.¹

The annual ASP session highlights the role of States Parties in creating and supporting 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. It is also a moment when other stakeholders, including civil society, victims and counsel, participate in stock-taking and present their views and priorities regarding the ICC's work.

In 2019, the ICC continues to operate in a challenging climate marked by limited resources and external threats. These threats include not only statements but obstruction, for example in the form of travel restrictions on the Prosecutor² and lack of cooperation on arrests, including inaction from the Security Council to ensure compliance with the Court's requests for cooperation.³ It is thus vital, in this challenging climate, for States Parties to have a unified voice of support for the institution, coupled with real practical support in the form of resources and actions. In assessing factors that influence the successful realisation of the ICC's mandate, the IBA has noted that '[a] major part of the problem is that instruments of justice do not receive universal support.'⁴ The IBA calls on States Parties to positively engage with the ICC's project and mandate during the 18th session of the ASP, and to reaffirm their commitment to the institution and to its underlying principles.

In the following paper, the IBA ICC & ICL Programme identifies its priorities for ASP action and engagement during the 18th session of the ASP, including opportunities for immediate cooperation and contribution, as well as issues for longer-term engagement to yield successful elections and address persistent cooperation gaps faced by the institution.

¹ For more information about the IBA Hague Office and ICC & ICL Programme, see https://www.ibanet.org/ICC_ICL_Programme/Home.aspx.

² Marlise Simons and Megan Specia, 'U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes' *The New York Times* (5 April 2019) <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html> accessed 25 November 2019; Reuters, 'U.S. revokes ICC prosecutor's entry visa over Afghanistan investigation' (4 April 2019) <https://www.reuters.com/article/us-usa-icc-prosecutor/u-s-revokes-icc-prosecutors-entry-visa-over-afghanistan-investigation-idUSKCN1RG2NP> accessed 25 November 2019.

³ ICC President Judge Chile Eboe-Osuji presented the report of the ICC to the UN General Assembly recalling that 'more than half of the outstanding arrest warrants relate to situations referred to the ICC Prosecutor by the UN Security Council' and urging 'the Security Council to take concrete measures to ensure compliance with the Court's requests for cooperation.' ICC, 'ICC President addresses United Nations General Assembly and calls for global support', *Press Release* (5 November 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=PR1492> accessed 22 November 2019.

⁴ Mark Ellis, 'The Growing Crisis With the International Criminal Court', *Jurist* (26 May 2019) <https://www.jurist.org/commentary/2019/05/mark-ellis-crisis-with-icc/> accessed 21 November 2019.

Priorities and Recommendations

Increasing state cooperation for interim and final release

The ICC relies on the cooperation of States Parties to accomplish a number of core functions, including the implementation of arrest warrants, witness protection and relocation, interim and final release of persons, and enforcement of sentences. ‘Framework’ agreements, concluded on a voluntary basis between states and the ICC, allow the Court to engage with states on these topics, with additional discussions and negotiations on a case-by-case basis when specific cooperation needs arise. In light of the importance of cooperation to the functioning of the ICC, States Parties will again hold a special plenary session on cooperation at the 18th session of the ASP.

As of 2019, there are **two** framework agreements concerning interim release and **one** agreement concerning final release, while there are **21** agreements concerning witness relocation, and **12** agreements concerning enforcement of sentences.⁵ This imbalance in voluntary cooperation agreements threatens the viability of some of the Court’s basic functions and risks violations of human rights of detained persons.

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.⁶ Voluntary agreements support a number of aims pursued by States Parties: complementarity, in that they take into account the needs and realities of each State Party and present opportunities for capacity building at the national level on issues such as witness protection and prison standards; effective and efficient trials and due process, 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; and budgetary considerations, in that the cost of legal proceedings would increase if there are delays in the delivery of State cooperation or cooperation cannot be secured.⁷ The Court is required to address, on an ad hoc basis, arrangements for situations as they arise in respect of witness relocation, interim release, and enforcement of sentences or relocation following an acquittal.

The IBA notes that negotiations with a further 21 States are ongoing.⁸ However, the rate of concluding voluntary cooperation agreements for interim and final release has been too slow, and the consequences are no longer in the abstract. The ICC is currently facing challenges implementing Chambers’ decisions on (interim) release due to the insufficient number of framework or ad hoc cooperation agreements.⁹ The Court has emphasised that the consequences of the absence of States Parties willing to accept released persons are serious.¹⁰

In 2019, the IBA ICC & ICL Programme examined the practices of the ICC along with other international criminal tribunals in a Discussion Paper: *Provisional release, release at advanced stages*

⁵ ASP, Report of the Court on cooperation, ICC-ASP/18/16, 21 October 2019, para 57; ASP, Report of the Court on cooperation, ICC-ASP/17/16, 29 October 2018, paras 59 - 60.

⁶ ICC, ‘Cooperation Agreements’, August 2017, p 5.

⁷ ICC, ‘Cooperation Agreements’, August 2017, p 5.

⁸ ASP, Report of the Court on cooperation, ICC-ASP/18/16, 21 October 2019, para 59.

⁹ *Ibid*, para 62.

¹⁰ *Ibid*.

of proceedings, and final release at international criminal courts and tribunals,¹¹ and held an Experts' Roundtable on *Seeing Justice Through: long-term issues in international justice*.¹² These activities were aimed at raising awareness of the challenges faced by international courts in securing sufficient state cooperation for release at all stages of proceedings, and at emphasising the impact of this lack of cooperation on individual human rights.

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 interim release and relocation of persons released by the Court. The IBA further urges actions that can build a more sustainable base of support for these ongoing cooperation needs, including:

- **Increasing efforts to raise awareness and share technical information, as well as identifying tools to improve cooperation on a domestic level, such as the establishment of a central authority for cooperation with the court.**
- **Reviewing and if necessary amending domestic legislation for facilitating cooperation, giving additional attention to specific provisions that will allow cooperation with the Court. This will allow for easier handling of cooperation requests in relation to areas such as facilitating a summons to appear and implementing conditions on release.**¹³

The IBA remains committed to working with the Court and States Parties to strengthen the legal frameworks for and address gaps in cooperation.

Ensuring a genuine and meaningful review of the ICC that strengthens the fairness, efficiency, and effectiveness of the Court

The IBA welcomes the steps taken by States Parties¹⁴ and the Court¹⁵ to initiate an 'independent expert review' process of the ICC, which will review the Court's structure and practices in key areas, with the aim of strengthening the court. The current process includes a group of independent experts appointed according to Terms of Reference set by the ASP, who will make recommendations to the ASP and the Court on specific issues within three clusters: governance; judiciary; and,

¹¹ IBA, 'Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals', October 2019, p 80 https://www.ibanet.org/ICC_ICL_Programme/Reports.aspx accessed 22 November 2019.

¹² IBA, 'Seeing Justice Through: long-term issues in international justice, 21 October 2019, Peace Palace, The Hague, an IBA ICC & ICL Programme Experts' Roundtable Discussion addressing theory, practice, and future perspectives' <https://www.ibanet.org/Conferences/Seeing-Justice-Through-long-term-issues-in-international-justice.aspx> accessed 26 November 2019.

¹³ IBA, 'Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals', October 2019, p 81 https://www.ibanet.org/ICC_ICL_Programme/Reports.aspx accessed 22 November 2019.

¹⁴ [Draft] Terms of Reference for the Independent Expert Review of the International Criminal Court.

¹⁵ 2019/PRES/95/CE-O, Letter to H.E. O-Gon Kwon, the President of the Assembly of States Parties to the Rome Statute, 10 May 2019.

investigations and prosecutions.¹⁶ Some of the issues falling within these clusters have been set out in a [draft] matrix.¹⁷

The review process must be independent, inclusive and transparent

The IBA calls for the appointment of qualified, independent experts who will identify ways to strengthen the ICC and the Rome Statute System. The principles of independence, inclusivity and transparency are essential to the legitimacy and effectiveness of the review process. The importance of independence has been highlighted by former ASP Presidents,¹⁸ and by the Principals of the Court.¹⁹ In particular, the independence of the experts must be safeguarded in relation to their work, and they must be empowered to freely gather and process information, including through interaction with Court staff. They must be allowed to do so without being accountable to the court or individual states. Further, the experts must have the latitude to examine and make recommendations regarding the working methods and oversight functions of the ASP, if they find it necessary to do so.

The IBA welcomes the opportunities that have been extended to civil society and other stakeholders to provide input on the format of the review process and drafting of the terms of reference for the experts, and looks forward to continuing to engage with the process. The current expert review process envisages wide consultations with all relevant stakeholders including States Parties, the Court and civil society.²⁰ The IBA underlines the importance of including external counsel as well as stakeholders outside of The Hague in consultations.

The review process, including the working methods of the experts, should be transparent. This is a key element of ensuring that the process is seen as legitimate and credible. The experts should aim to provide clear timelines to ensure that all stakeholders remain informed about and engaged with the process. The final reports of the experts should be made public.

The review process should recognise cross-cutting issues including fair trials

During consultations on the draft Terms of Reference, the IBA called for fair trials to be treated as a cross-cutting issue that must be considered at every stage of the review process and in every cluster of issues identified.²¹

¹⁶ [Draft] Terms of Reference for the Independent Expert Review of the International Criminal Court, paras 2 and 5.

¹⁷ [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'.

¹⁸ Prince Zeid Raad Al Hussein, Bruno Stagno Ugarte, Christian Wenaweser, and Tiina Intelman, 'The International Criminal Court needs fixing', *Atlantic Council* (24 April 2019)

<https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/> accessed 26 November 2019. "As strong supporters of the International Criminal Court (ICC), we believe that an independent assessment of the Court's functioning by a small group of international experts is badly needed."

¹⁹ 2019/PRES/95/CE-O, Letter to H.E. O-Gon Kwon, the President of the Assembly of States Parties to the Rome Statute, 10 May 2019.

²⁰ [Draft] Terms of Reference for the Independent Expert Review of the International Criminal Court, para 15.

²¹ IBA, IBA Comments on the Draft Terms of Reference for the Independent Expert Review of the International Criminal Court, October 2019.

The credibility of international justice depends on rigorous respect and commitment to fair trials. The importance of fair trials as a human rights standard is evident from the negotiations at the Rome Conference.²² The Rome Statute includes comprehensive provisions that address the rights of the accused, consistent with internationally recognised human rights. The Rome Statute System contains further provisions that underscore this commitment to fairness. These include Article 54(1)(a), which requires the Prosecutor, in order to establish the truth, to investigate incriminating and exonerating circumstances equally, and Article 64(2) which imposes a duty on the trial chamber to ensure that a trial is fair and expeditious and conducted with full respect for the rights of the accused. The common value of fair trials is evident in the provisions addressing investigations, prosecutions and judicial proceedings and consistent with the Rome Statute's safeguards.

Experts should therefore analyse issues relating to all areas of review taking into account their potential impact on the rights of the accused and the fairness of proceedings.

Likewise, other cross-cutting issues, such as gender, must be taken into account as an integral part of every stage of the review process and in every cluster of issues identified. Analysing the Court's challenges from a gender perspective will support recommendations that can strengthen the ICC's ability to provide gender justice, both in its substantive work as well as its institutional composition and practices.

The review process must give due consideration to the position of external counsel, and actively seek to strengthen equality of arms at the ICC

Stakeholders including the IBA, have noted that the proposed expert review is an essential moment to review the Court's structures and practices relating to legal representation and equality of arms. Issues for potential resolution include addressing the structural inequality of arms, increasing efficiency in decision making relating to defence issues, and reducing procedural and administrative litigation.²³ The ASP's facilitator on legal aid has also identified the need for independence in defence administration and has recommended within the context of ICC review discussions, for States Parties '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.'²⁴ The IBA has previously recommended that the defence be established as a fifth organ of the Court, to redress inequality in structural and policy matters for the defence.²⁵

The IBA notes that States Parties initiated the independent expert review as 'a process for identifying and implementing measures to strengthen the Court and improve its performance'²⁶, and

²² Margaret M deGuzman, 'Article 21: Applicable law' in Otto Triffterer and Kai Ambos (eds) *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck-Hart-Nomos 2016) 947.

²³ OPCD, 'Office of Public Counsel for the Defence ["OPCD"] 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.

²⁴ ASP, Report of Bureau on Legal Aid, Annex Facilitator's report: Consultations on the Court's revised legal aid policy, ICC-ASP/18/11, 12 November 2019, p 4, para 19.

²⁵ IBA, Fairness at the International Criminal Court, August 2011, p 10 – 11

https://www.ibanet.org/ICC_ICL_Programme/Reports.aspx accessed 22 November 2011.

²⁶ [Draft] Resolution on Review of the International Criminal Court and the Rome Statute system, 25 November 2019, para 4.

calls for consideration of issues relating to the position of external counsel and equality of arms, including structural changes to better support counsel and fair trials, in the independent expert review.

Supporting a meaningful revision of the ICC Legal Aid Policy

The IBA supports the ongoing review of the legal aid system, and has provided input at various stages of the development of the system. In 2016, the Registry of the Court engaged an independent expert to assess the Court's legal aid system, and has worked continuously to draft a revised Legal Aid Policy (LAP). The IBA has participated in several rounds of consultations and has provided detailed comments on the principles of the LAP as well as on the substantive issues in the draft.²⁷

The ASP's facilitator on legal aid has concluded that the draft LAP in its current form is not ready for consideration by the ASP at the 18th session.²⁸ The facilitator recommended that the working group (on legal aid) continue its work and the States Parties consider and address specific issues requiring substantive discussion.²⁹ The IBA welcomes the facilitator's report and endorses the recommendation that the draft LAP requires further consideration. The IBA concurs that major issues including taxation, team composition during various stages of proceedings and minimum employment standards, all require further consideration, and reiterates its previous recommendations on these topics.³⁰

As stated above, the legal aid policy revision raises issues that could be addressed in the context of the ICC review, in particular issues that arise from the non-staff status of external counsel team members such as taxation and employment conditions. The IBA particularly notes the facilitator's observation that '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.'³¹

The IBA recalls that the ASP's requirement of revising the LAP within existing resources will make it extremely challenging to find solutions for many of the issues noted by the facilitator and other stakeholders. The IBA recommends that the ASP renew the facilitation on legal aid, to ensure that due consideration continues to be given to the operational and technical aspects of legal aid.

²⁷ See, IBA, IBA Comments on ICC Draft Legal Aid Policy, December 2018 <https://www.ibanet.org/Document/Default.aspx?DocumentUid=9FBC6DFF-A7F2-46DF-887A-27E24E21D02A> accessed 21 November 2019; IBA, IBA Comments on 'Concept Paper: Review of the International Criminal Court Legal Aid System', 9 June 2017 <https://www.ibanet.org/Document/Default.aspx?DocumentUid=5DBF1968-CE69-4053-A672-CDCC7B1F7E3E> accessed 21 November 2019.

²⁸ ASP, Report of Bureau on Legal Aid, Annex Facilitator's report: Consultations on the Court's revised legal aid policy, ICC-ASP/18/11, 12 November 2019, p 2, para 3.

²⁹ *Ibid*, p 2, para 4.

³⁰ IBA, IBA Comments on ICC Draft Legal Aid Policy, December 2018 <https://www.ibanet.org/Document/Default.aspx?DocumentUid=9FBC6DFF-A7F2-46DF-887A-27E24E21D02A> accessed 21 November 2019.

³¹ ASP, Report of Bureau on Legal Aid, Annex Facilitator's report: Consultations on the Court's revised legal aid policy, ICC-ASP/18/11, 12 November 2019, p 4, para 15.

With respect to current legal aid requirements, the Court has estimated that up to 11 defence teams and up to 7 teams of legal representatives of victims will need to be financed by legal aid in 2020.³² The IBA calls on the ASP to ensure it provides these full resources.

Finding a sustainable source of funding for family visits

International human rights law standards as well as the Court's jurisprudence and legal instruments recognise that a person detained by the ICC has a right to family visits.³³ The legal basis of family visits for detained persons lies in their presumption of innocence, the right to family life and right to have access to the outside world. Family visits are vital for the well-being, health and dignity of the detainee as well of their family.³⁴

The Trust Fund for Family Visits was established by the ASP in 2010 to solicit voluntary contributions from States Parties to facilitate family visits to indigent detainees.³⁵ To date, the Trust Fund has received approximately 250,000 Euros from five states.³⁶ In 2016, the Presidency reaffirmed the right of indigent detainees to family visits.³⁷ According to the most recent information available, the Trust Fund has exhausted all resources.³⁸ When family visits are not possible, the Court has to spend more resources towards the support of detained persons, and has noted that the inability to see family has a tremendous impact on the psychological well-being of detainees, which in turn can lead to their inability to participate in the judicial process and costly delays in legal proceedings.³⁹

The IBA observes that funding family visits through voluntary contributions has not provided a consistent or sustainable source of resources for family visits. While the Registry has made ongoing

³² ASP, Proposed Programme Budget for 2020 of the International Criminal Court, ICC-ASP/18/10, 25 July 2019, para 16.

³³ ICC, Regulations of the Court, Regulation 100(1); ICC, Regulations of the Registry, Regulation 179(1); ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Case ICC-RoR-217-02/08, 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. See also, UN, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, A/RES/43/173, 9 December 1988 and UN, United Nations Revised Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), A/RES/70/175, 8 January 2016.

³⁴ ICRC, ICRC Statement, Fifteenth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, 16-24 November 2016 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/GenDeba/ICC-ASP15-GenDeba-IO-ICRC-ENG.pdf accessed 26 November 2019.

³⁵ ASP, Programme budget for 2011, the Working Capital Fund for 2011, scale of assessments for the apportionment of expenses of the International Criminal Court, financing appropriations for 2011 and the Contingency Fund, ICC-ASP/9/Res.4, 10 December 2010 https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.4-ENG.pdf#page=4 accessed 21 November 2019.

³⁶ ASP, Report of the Court on cooperation, ICC-ASP/18/16, 21 October 2019, para 33.

³⁷ ICC, ICC-RoR221-02/16, 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.

³⁸ ICC, ICC-RoR220-04/19-1, Yekatom Defence Request for Review of Registrar's Family Visit Decision, Defence for Mr. Alfred Rombhot Yekatom, 19 November 2019, para 7.

³⁹ ASP, Report of the Court on cooperation, ICC-ASP/18/16, 21 October 2019, 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"*.

efforts to raise awareness of the need for voluntary contributions, nearly ten years after the ASP's decision to fund family visits through voluntary contributions, it is clear that such funding is not forthcoming in any reliable manner. At the time of writing, there is pending litigation in which the lack of funding has been referred yet again, to the President.⁴⁰ The IBA further notes that both Registry efforts to secure funding as well as litigation regarding the lack of funds divert resources, including time, from the Court's work in other areas as well as from Defence counsel.

The IBA therefore calls on States Parties to make voluntary contributions to the Trust Fund for Family Visits, to meet the immediate needs of the Court. The IBA further urges the ASP to reconsider the source of funding for family visits, and to consider allocating funds as part of the regular budget of the court.

Nominating qualified candidates for upcoming ICC elections

The election of the next Prosecutor of the ICC will take place in December 2020 at the 19th session of the ASP. The position has been advertised and the ASP, acting pursuant to its mandate under article 112 of the Rome Statute, has initiated the process for the selection of the next Prosecutor.⁴¹ It is essential at this early stage to ensure that the process leading up to the elections is transparent, independent and merit-based.

The vacancy for the position of Prosecutor states that the Prosecutor 'shall be a person of high moral character, be highly competent and have extensive practical experience in the investigation, prosecution or trial of criminal cases,' and 'shall not seek or act on instructions from any external source, such as a government, international organisation or others.'⁴² This is in line with the Rome Statute and in particular article 43(3), which calls for a 'high moral character' and high competency.⁴³

In preparation for the elections, stakeholders have identified a number of concrete ways to improve the process. These include the 'need for an agreed upon, comprehensive, and meaningful definition of "high moral character"' and that a 'rigorous assessment of ethical character should start from the beginning of a vetting process, through setting up procedures... that test a person's ethical outlook

⁴⁰ ICC, ICC-RoR220-04/19-1, Yekatom Defence Request for Review of Registrar's Family Visit Decision, Defence for Mr. Alfred Rombhot Yekatom, 19 November 2019. See previous litigation in ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Case ICC-RoR-217-02/08, 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; ICC, ICC-RoR221-02/16, 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.

⁴¹ ICC, 'President of the Assembly of States Parties welcomes the publication of the vacancy announcement for the position of Prosecutor of the ICC', *Press Release* (6 August 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=PR1476> accessed 26 November 2019.

⁴² https://career5.successfactors.eu/career?career_ns=job_listing&company=1657261P&navBarLevel=JOB_SEA_RCH&rcm_site_locale=en_GB&career_job_req_id=18977&selected_lang=en_GB&jobAlertController.jobAlertId=&jobAlertController.jobAlertName=&s.crb=r4rGOIJahFVn8wMzrFYb92rwDuQ%3d.

⁴³ It is of note that Article 42(3) of the Rome Statute calls for 'experience in the prosecution or trial of criminal cases.' Thus, experienced judges or defence counsels may meet the statutory qualifications. See Morten Bergsmo, Frederik Harhoff and Dan Zhu, 'Article 42: The Office of the Prosecutor' in Otto Triffterer and Kai Ambos (eds) *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H.Beck, Hart, Nomos, 2016) 1272.

and decisions throughout their career.⁴⁴ In line with the IBA's work to address bullying and sexual harassment in the legal profession, the IBA fully supports efforts to ensure that moral character evaluations address ethical considerations. The qualifications of the Prosecutor 'must not allow doubts as to their professional competence, integrity and independence.'⁴⁵ In fact, the 'credibility of the very idea of an independent ICC Prosecutor depends on the personal qualifications and qualities of the Prosecutor.'⁴⁶

In December 2020, States Parties will also 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.⁴⁷

States Parties have an obligation to find and nominate qualified candidates, however, a recent OSJI report has highlighted that 'too few ICC States Parties nominate candidates to the bench' and that 'most States Parties do not have a framework in place that governs nominations of judicial candidates to the ICC.'⁴⁸ This is concerning, in light of the Court's need for the most qualified persons. In addition, the IBA agrees that 'knowledge and experience in criminal law and procedure, as well as substantial experience in managing complex trials, are key to the effective exercise of judicial functions at the ICC and should be required of all judges elected to the ICC bench—not just some of them.'⁴⁹

The IBA calls on States Parties to actively seek out and nominate candidates, in particular female candidates, for the position of Prosecutor who possess the relevant competencies and qualifications.

The IBA calls on States Parties to actively seek out and to nominate the most qualified judicial candidates, in particular female candidates, and those with expertise in complex criminal trials as well as a demonstrated commitment to principles of fairness and equality of arms.

All candidates should be of the highest moral character, and all efforts should be made to ensure that persons are vetted for ethical behaviour.

⁴⁴ Coline Schupfer and Taegin Reisman, 'Electing the Next ICC Prosecutor: Assessing Sexual Misconduct as Part of the "High Moral Character" Requirement', *International Justice Monitor* (13 November 2019) <https://www.ijmonitor.org/2019/11/electing-the-next-icc-prosecutor-assessing-sexual-misconduct-as-part-of-the-high-moral-character-requirement/> accessed 21 November 2019.

⁴⁵ Morten Bergsmo, Frederik Harhoff and Dan Zhu, 'Article 42: The Office of the Prosecutor' in Otto Triffterer and Kai Ambos (eds) *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H.Beck, Hart, Nomos, 2016) 1272.

⁴⁶ *Ibid.*

⁴⁷ Rome Statute, Article 36(3).

⁴⁸ OSJI, Raising the Bar: Improving the Nomination and Selection of Judges at the International Criminal Court, p 4 <https://www.justiceinitiative.org/uploads/7627a69c-dc69-43da-a58c-c66162f1c2b0/raising-the-bar-20191028.pdf>, accessed 26 November 2019.

⁴⁹ *Ibid.*

Improving Geographical Representation and Gender Balance

The Rome Statute provides that the ICC shall ensure the highest standards of efficiency, competency and integrity, and shall take into account fair representation of women and men, representation of the principal legal systems of the world, and equitable geographical representation.⁵⁰ According to the Bureau, the data on geographical representation of staff ‘reveals the chronic nature of the imbalanced representation in the Court in disfavour of some countries and regions, in particular from Asia-Pacific and Latin American and the Caribbean.’⁵¹ Furthermore, while the overall gender balance continues within range, there is severe under-representation of female staff at higher levels.⁵²

The Registry has identified several initiatives within the existing legal framework for addressing the imbalances in geographical representation and gender balance,⁵³ and the Court maintains that this is a key priority.⁵⁴ IBA welcomes that gender balance/gender equality has been recognised as a cross-cutting topic at the Court, and continues to be prioritised through the commitment to several initiatives such as a mentoring programme, plans to appoint a gender focal point and trainings on unconscious bias and gender awareness.⁵⁵

The IBA further welcomes the steps taken by the Court to increase outreach activities specifically for under- and unrepresented states parties, and in recognising the significance of its Internship and Visiting Professionals Programme to identify and generate pools of qualified applicants for its professional positions.⁵⁶ The IBA has continued to support these initiatives, including through sharing calls for applications for visiting professional and internship positions with IBA membership in underrepresented regions.

Within the current framework, interns and visiting professionals from developing regions, with a focus on candidates from unrepresented and under-represented States parties, may receive funding from the Trust Fund for Interns and Visiting Professionals (TFIVP), which relies on voluntary contributions from States parties.⁵⁷ Prior to the introduction of the TFIVP in 2018, the majority of the interns and visiting professionals were from WEOG countries.⁵⁸ In 2018, the TFIVP provided 22 funded placements, representing 15 nationalities, out of a total of 339 interns and visiting

⁵⁰ Rome Statute, Articles 44(2) ad 36(8).

⁵¹ ASP, Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court, ICC-ASP/17/36, 7 December 2018, para. 19.

⁵² *Ibid*, paras 10-11 and 19.

⁵³ ICC, Registry Strategic Plan 2019-2021, 17 July 2019, paras 6 and 19. <https://www.icc-cpi.int/itemsDocuments/190717-reg-strategic-plan-eng.pdf> accessed 21 November 2019.

⁵⁴ ICC, Strategic Plan 2019-2021, 17 July 2019, paras 30 and 34, section VI(C), Goal 8 – ‘Goal 8: Achieve more equitable GRGB, particularly at higher level posts’ <https://www.icc-cpi.int/itemsDocuments/20190717-icc-strategic-plan-eng.pdf> accessed 26 November 2019; ICC, OTP Strategic Plan 2019-2021, 17 July 2019, paras 39(h) and 45(a) <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf> accessed 26 November 2019; Registry Strategic Plan 2019-2021, 17 July 2019, section II(C) and para 6 <https://www.icc-cpi.int/itemsDocuments/190717-reg-strategic-plan-eng.pdf> accessed 26 November 2019.

⁵⁵ ASP, Report of the Court on Human Resources Management, ICC-ASP/18/4, 25 July 2019, paras 18 and 96.

⁵⁶ *Ibid*, para 91(d).

⁵⁷ *Ibid*. para 113.

⁵⁸ *Ibid*. para 91(d).

professionals.⁵⁹ At present the funded placements are severely restricted by limited funding and the majority of the interns and visiting professionals are still from WEOG countries⁶⁰

The IBA recommends that the ASP support the Court's efforts to address imbalances in geographical representation and gender balance, including the appointment of a gender focal point as soon as possible.

The IBA recommends that States Parties make contributions to the Trust Fund for Interns and Visiting Professionals, as a means of supporting the geographical balance of the Court.

Ensuring the ICC is a safe working environment for all

The Court has acknowledged the link between engagement/wellbeing and performance, and committed itself to being a safe and secure working environment.⁶¹ The Committee on Budget and Finance has raised concerns about the high cost of sick leave at the Court and has endorsed the Secondary Trauma Prevention project and a Staff Counsellor, with expectations of 'offsetting reductions in sick leave as a result.'⁶²

On 6 November 2019, the IBA, together with the ICC, the International Labour Organisation and the Municipality of The Hague co-convoked a roundtable to discuss the legal framework to address bullying and harassment in international organisations. The event was supported by all organs of the Court, which reaffirmed their commitments to a safe working environment made in the Strategic Plans for 2019-2021.⁶³ The IBA has welcomed this opportunity to support the work of the Court.

The IBA further welcomes the initiatives the Court has taken towards making the working environment more diverse and inclusive, including staff surveys, trainings and workshops, and suggests that such activities be regularly repeated and made a mandatory requirement for all personnel. The IBA also welcomes the steps taken by the Registry to revise the Administrative Instruction on Sexual and Other Forms of Harassment (2005).

States Parties should support the engagement and wellbeing of all ICC personnel including those without staff status, such as external counsel and teams, and interns, by ensuring that the Court has sufficient resources to conduct these activities.

⁵⁹ *Ibid*, paras 114 and 117. The funding supports the travel costs and provides a monthly stipend.

⁶⁰ *Ibid*, paras 115, 117, 120 and 122.

⁶¹ *Ibid*, para. 9.

⁶² ASP, Report of the Committee on Budget and Finance on the work of its thirty-third session, ICC-ASP/18/15, 27 September 2019, paras 82(i) and 224.

⁶³ ICC, 'ICC hosts event on legal framework to address bullying and harassment in international organisations', Press Release (6 November 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=PR1493> accessed 26 November 2019.