

## ICC-NGO Roundtable: Defence Session – Speaking Notes

### Opening remarks (~ five minutes)

- It is a pleasure to be with all of you today. I want to first extend our thanks to the Registry, and in particular the External Relations Section, for including the ICCBA on this panel. The Bar Association is only in its second year of existence, and not everyone may be familiar with our organisation, so I did want to briefly mention our mandate.
- This session is focused on the defence. I want to stress, however, that the ICCBA serves as a collective voice for independent Counsel and Support Staff who represent victims as well as defendants before the ICC. In addition to advocating on behalf of our membership within the Court and externally, the Bar provides a range of support and services which include, among others, specialised training programs on international criminal law and trial practice, liaising with the Court to resolve practical issues facing legal teams, and providing analysis and commentary on a variety of issues relevant to counsel's practice before the ICC as well as the wider functioning of the Court. For additional information on the Bar please do visit our website, which is available in both French and English.
- The Bar will not be present at tomorrow's session on **Legal Aid**, permit me therefore to directly address you on this crucial topic. A properly funded and functioning legal aid system is central to the Court's ability to uphold the highest standards of international criminal justice, including the fundamental principles of equality of arms between the parties and the provision of adequate resources to the defence – as well to legal teams representing victims.
- In January 2017, an outside expert engaged by the Former ICC Registrar issued an assessment report on the ICC's legal aid system. This **Assessment Report**, as well as commentaries on the ICC legal aid system by the **Bar**, the **OPCD**, and other entities are available on the Bar's website.
- The Assessment Report was clear in its findings: **(i)** Fees for counsel and support staff at the ICC are significantly lower than at other international tribunals; **(ii)** the ICC spends measurably less on legal aid for the defence, as a percentage of its total budget, than other international courts; and **(iii)** the ICC's legal aid system involves significant bureaucracy.
- The ICC's legal aid system is in dire need of reform to ensure that it is truly 'fit for purpose' and capable of fulfilling the Rome Statute's goal of a Court that is an example to the world in the quality, efficiency and fairness of the justice it delivers.
- The ASP has mandated that the Court present proposals on reform of the legal aid system. The Registry, under the former Registrar, unfortunately failed to meet the deadlines set by the ASP for such proposals. The President of the Bar Association, Karim Khan QC, has met with the new Registrar, Mr. Peter Lewis, and the Bar has every expectation for genuine engagement with the Registry and involvement in the discussions surrounding the drafting of the mandated proposals on legal aid. We indeed very much look forward to working with our partners in the Counsel Support Section, the Judicial Services Division, the OPCD, and the Registrar's immediate office on formulating these vitally important proposals.
- In order to achieve a successful reform of the legal aid system for both the defence and victims, it is vitally important that you, the NGO community, are engaged on this topic with the Court, the Committee on Budget and Finance, the ASP, and individual States. We invite you to review the reports on legal aid available on the ICCBA website.

- Lastly, the Bar believes it is crucial that debate over reform of the ICC legal aid framework is not constrained and cut short by principles couched in the language of reforming the system “within existing resources” and that views legal aid primarily through the lens of being a “cost driver”. The Court’s proposal to the ASP should objectively and transparently establish the parameters of a fair and adequate legal aid system before an international tribunal, so that the States can determine on full information how best to achieve a legal aid framework that is ‘*fit for purpose*’.

## **Notes on Individual Topics:**

### **Gender balance and actions to ensure diversity in the List of Counsel:**

- The ICC is the world's court, and it is imperative the List of Counsel reflects gender equality and expands national diversity. Women are certainly under-represented on the List, as are certain regions of the world, such as Latin America.
- The ICC Bar Association Constitution requires gender and geographic representation to be taken into consideration for elections to the Executive Council of the Bar, and the Bar Association President has signed the G-QUAL Action Plan for Gender Parity in international representation.
- The Executive Council of the Bar has also appointed Regional as well as certain national focal points, whose mandate includes encouraging qualified candidates from around the world, including women candidates and candidates from unrepresented regions, to apply to the ICC List of Counsel.

### **Detention Issues / Family visits**

- International trials regularly last for several years and, as is the case at the ICC, take place far from the place of the alleged crimes. Defendants on trial are, of course, presumed to be innocent until proven otherwise beyond a reasonable doubt.
- In these circumstances, if a defendant is remanded into custody during the pre-trial and trial phases, it is fundamental that the defendant's human rights are respected. This means humane treatment in line with international standards, including the United Nations Mandela Rules. The defendant must receive adequate and proper physical and mental healthcare, must be permitted adequate time to exercise in the open air. When a defendant is so far from his or her familiar surroundings, care must also be given to the defendant's food, religious counselling, and connection to his or her home country.
- Family visits are crucial for a defendant's well-being, as is for the well-being of his family. It is highly unfortunate that family visits for ICC defendants are not funded from the main budget, but only through voluntary contributions. Technologies for video conferencing should also be explored to enhance a defendant's connection to and communication with his or her family, but this does not substitute for in-person visits.

### **Voluntary Agreements on Interim Release and Release of Persons**

- International trials regularly last for several years and, as is the case at the ICC, take place far from the place of the alleged crimes. Defendants on trial are, of course, presumed to be innocent until proven otherwise beyond a reasonable doubt, and detention prior to trial should be the exception, not the norm.
- It is accordingly crucial that the Court, the Bar, and the NGO community encourage and lobby States to follow the example of Belgium and Argentina to reach agreements on interim release.
- It is similarly vital, if the ICC system is to be a 'complete' system that fully respects international human rights standards, that persons who are released from the Court's custody, such as acquitted persons, are not placed in a state of limbo. Argentina again should be applauded for reaching an agreement on this important issue, and other States must follow its lead.

## State Cooperation

- The Office of the Prosecutor may and indeed has reached cooperation agreements with various Situation States. The Defence, of course, does not have this option, and must primarily rely upon a State's general cooperation obligations under Part 9 of the Rome Statute. When it comes to Memorandums of Understanding with United Nations entities, including peacekeeping missions, the contents of the agreements are kept confidential, and accordingly the defence is usually unable to ascertain how and to what extent cooperation related to the defence is addressed under an MoU.
- In many instances, States are reluctant to provide the same level and efficiency of cooperation to defence teams as they are to the Office of the Prosecutor. Defence teams must often times rely upon the Registry's good offices to facilitate requests for cooperation to States.
- One way of improving the state of affairs is for the Court to reach separate cooperation agreements for the defence, as well as victims teams.
- Also important would be inclusion of the Defence in ICC outreach in the field – whether that be counsel on defence teams in the Situation, or Bar Association representatives or counsel who are not involved in the Situation. This would demonstrate to State officials at all levels, as well as the civilian population, that the defence is a recognized and vital part of the judicial and truth-seeking process that deserves equal respect and assistance from the Situation state.