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IBA/ICC Monitoring and Outreach Programme

Including the Defence Perspective in the Review Conference

IBA Position Paper for the resumed session of the eighth Assembly of States Parties and the
2010 International Criminal Court Review Conference

March 2010

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About the Programme

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. The IBA has a membership of 30,000 individual lawyers and over 195 bar associations and law societies spanning all continents. It has considerable expertise in providing assistance to the global legal community.

The IBA is currently implementing a MacArthur Foundation-funded programme to monitor the work and proceedings of the International Criminal Court (hereinafter the Court or ICC) and to conduct outreach activities. The monitoring component follows and reports on the work and proceedings of the ICC. The outreach component of the programme works in partnership with bar associations, lawyers and civil society organisations disseminating information and promoting debate on the ICC in different jurisdictions across the globe.

Additional information about the programme can be obtained via the IBA website: http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_monitoring_and_outreach_project.aspx

Introduction

1. The Review Conference of the International Criminal Court (ICC) and the Rome Statute system will take place in Kampala, Uganda from 31 May - 11 June 2010. The Review Conference is mandated to consider a limited number of amendments to the Rome Statute as well as the crime of aggression. Importantly, the Conference is expected to conduct a 'stocktaking' of the Rome Statute system, with particular emphasis on four key areas: peace and justice; the impact of the ICC on victims and affected communities; complementarity; and state cooperation.
2. The International Bar Association (IBA) fully supports the four topics that have been identified for 'stocktaking' during the Review Conference. The IBA considers that the Review Conference is an important opportunity for States Parties and the entire international community to both assess and evaluate the progress made by the ICC and the Rome Statute system in these areas, but to also recommit to fully supporting the Court in fulfilling its mandate.
3. The international community established the ICC to ensure that a credible, capable institution exists for bringing to justice those persons alleged to have committed egregious crimes. This is aimed at stemming the tide of impunity for such crimes, which contributes to restoring the rule of law in many traumatised communities. The legitimacy of the ICC and the Rome Statute system will and should be judged by its ability to conduct fair and impartial

proceedings at the international and national level. An assessment of the progress of the Rome Statute system would therefore be incomplete if the defence perspective were to be excluded.

4. The IBA takes note of the significant preparatory work carried out by the focal points on the stocktaking issues, and is grateful for the opportunity to have participated in consultations facilitated by the NGO Coalition for the International Criminal Court (CICC) on drafts of the background papers.
5. This IBA position paper aims to contribute to the debate during the resumed session of the Assembly of States Parties (ASP) in New York from 22-25 March 2010 and also to the stocktaking discussion during the 2010 Review Conference, in particular on the themes of complementarity and cooperation. The paper aims to highlight some issues of particular concern to the defence and to indicate how these issues might be included in both the debate and the outcomes proposed by the ASP focal points.

Cooperation

6. The IBA welcomes the attention of States Parties to the important issue of cooperation during the Review Conference. The Rome Statute obliges States Parties to cooperate with the Court in a number of ways, including on matters concerning the defence. Other forms of cooperation are non-mandatory, but are nevertheless essential for the effective function of the Court. Under Article 88 of the Statute, States are obliged to ensure that procedures are available under national law for such forms of cooperation to take place.
7. In particular, the IBA welcomes in principle the proposals contained in the draft background paper prepared by the ASP focal points, Costa Rica and Ireland. While generally supportive of the proposed format for discussions and the suggested outcomes, the IBA wishes to encourage States Parties to ensure that the dialogue on this issue is sufficiently balanced and inclusive.
8. The IBA recalls that the issue of cooperation on defence matters has been specifically considered by the Bureau of the Assembly of States Parties (ASP) in previous reports. In the *Report of the Bureau on Cooperation* (ICC-ASP/6/21), the Bureau highlighted specific challenges often faced by the Court in seeking to obtain cooperation in relation to defence requests for judicial assistance. States Parties, particularly in civil law systems, were urged to be mindful of ways in which the process could be made more efficient having regard to the principle of equality of arms.

9. The Bureau further urged States to facilitate defence requests for operational support, where possible, and encouraged the Court to explore ways in which defence teams can benefit from existing arrangements between the Court and States Parties.
10. In its 2009 *Report on Cooperation* (ICC-ASP/8/44), the Court noted that cooperation and coordination with national authorities and relevant international organisations is key to ensuring that counsel and their teams can provide effective and efficient legal representation to suspects and accused persons.
11. The Court's report suggests that, in general, cooperation with States Parties to facilitate the technical and logistical aspects of defence work in the field was satisfactory. However, the IBA is concerned that the defence continues to meet obstacles to substantive field investigations including requests for documents or other forms of evidence. The IBA understands that some States are less willing to cooperate with the defence in this regard.
12. The main difficulty is that a number of States lack relevant procedures under their national law to provide the requested cooperation. Lack of cooperation, particularly in relation to time-sensitive requests from the defence, has a negative impact on the overall efficiency of the Court's proceedings and the rights of defendants to expeditious trials. The appointment of national focal

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points will significantly assist in streamlining the Court's relationship with national legal systems.

Complementarity

13. The IBA welcomes the draft report of the focal points on complementarity - South Africa and Denmark - and, in particular, the emphasis on increased efforts at the national level to facilitate the investigation and prosecution of serious international crimes by national authorities.
14. An important component of this emphasis on national prosecutions is ensuring that adequate legislation is in place to facilitate such prosecutions. Implementing such legislation facilitates cooperation with and assistance to the ICC and enables Rome Statute crimes (particularly for lower level perpetrators) to be prosecuted at the national level.
15. The IBA urges States to ensure that national implementing legislation reflect the fair trial standards embodied in the Rome Statute. While a number of important fair trial norms- including those contained in the International Covenant on Civil and Political Rights - are reflected in other pieces of national legislation or in the constitutions of most states, certain important defence rights contained in the Rome Statute (such as the right to disclosure of potentially exculpatory material) are not widely accepted in all legal systems.
16. An important component of complementarity is the sharing of information between the ICC and national courts. This has significant implications for the defence. For example, how should the ICC Prosecutor transfer or share

potentially exculpatory material obtained during his investigations with defence counsel at the national level?

17. The IBA supports the proposal for capacity building for stakeholders in national legal and judicial systems. We agree that States Parties rather than the Court should take the lead on initiatives in this area. It is important to ensure that all relevant judicial and legal personnel, including defence counsel, participate in training and capacity building exercises. Defence counsel at the national level are usually unaccustomed to dealing with massive cases involving voluminous and complex evidentiary documents, and thus require specific training in this regard.

Recommendations

- ❖ The IBA encourages all States to sign and ratify the Agreement on Privileges and Immunities of the International Criminal Court (APIC) before the ICC Review Conference and to follow up with adequate support mechanisms.
- ❖ Experts or practitioners with particular experience in defence matters at the international level should be among the panellists participating in the panel discussions during the Review Conference.
- ❖ The panel discussions should include reference to the challenges and impediments (whether legal, technical, logistical or financial) faced by States in concluding supplementary agreements and arrangements concerning the defence. Consideration should be given to how the issue has been addressed by the ad hoc tribunals or other international courts. It may be useful to highlight specific challenges that are peculiar to civil or common law systems and best practices in each context.
- ❖ States should discuss practical ways in which to facilitate cooperation on sensitive issues such as interim release. States may need to discuss openly the principled objections they have to cooperating with the Court on this issue. Creative solutions may need to be found; one State with principled

- or practical objections to hosting provisionally released or acquitted defendants may willingly provide technical, financial and logistical support to other States who are willing to receive them.
- ❖ On the issue of implementing legislation, the IBA urges States to ensure that fair trial standards embodied in the Rome Statute are included in the relevant national legislation. States with the death penalty are encouraged to abolish this provision. Where this is not immediately an option, States must ensure that the sentences provided for in the ICC implementing legislation are consistent with the penalties prescribed in Article 77 of the Rome Statute.
 - ❖ The IBA urges States, during the general debates, to use language that emphasises the important role of the ICC as a fair and impartial institution which respects the rights of victims and defendants. Outcome documents such as pledges, resolutions or declarations should clearly iterate States' commitment to cooperating with the Court, including on defence-related matters.