



KEY RECOMMENDATIONS

NINETEENTH SESSION OF THE ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE

14 – 23 DECEMBER 2020

CENTRE FOR INTERNATIONAL JUSTICE
hrij.amnesty.nl Twitter : @AmnestyCIJ

This paper sets out Amnesty International's **key recommendations** for the nineteenth session of the Assembly of States Parties to the Rome Statute ('ASP') which we urge all states parties to consider and the Assembly to address. The recommendations focus on the general debate and other topics on the Assembly's agenda, including the elections to fill six judicial vacancies, and we urge states to reflect the following points in their interventions and participation at the Assembly.

GENERAL DEBATE: The Assembly should make strong high-level statements in support of the ICC. In particular states parties should highlight the following key issues:

- Affirm their commitment to international justice, emphasizing the need to support the ICC in its work, fully respect and safeguard the independence of the Court¹, and protect the integrity of the Rome Statute;
- Recognize the high demands on the ICC to deliver justice to victims in situations around the world and call for the Court to be provided with the support, cooperation and funding required to meet these challenges;
- Emphasise the importance of independence to the work of the Office of the Prosecutor and the Judiciary, recognising that each organ must be able to undertake its work without political, budgetary or other interference – this includes safeguarding the Court's independence in states parties' discussions related to the 'Independent Expert Review' and complementarity;
- Emphasise that the rights of the accused, victims and witnesses must be fully respected and implemented, and the vital role that the Assembly must play in supporting the ICC's efforts to achieve human rights compliance;
- Call on all permanent members of the United Nations Security Council to refrain from using their veto power to block referrals to the ICC Prosecutor.

THREATS TO THE ICC

It is readily apparent that, as the Prosecutor moves to open investigations into situations involving powerful states, the ICC and its staff will be increasingly attacked and threatened. While attacks on the ICC and those who work with the Court are not new, threats emerging from powerful non-states parties present serious challenges to the Court. States parties must not be silent in the face of these threats - they must defend the ICC's ability to exercise its independent mandate.

On 2nd September 2020, the USA administration imposed sanctions on Prosecutor Fatou Bensouda and Mr. Phakiso Mochochoko, Head of the Jurisdiction, Complementarity and Cooperation Division in the OTP. As part of their **general debate statements**, and **during any relevant plenary session**, states parties should:

- **Call on the USA government to reverse the Executive Order and lift the sanctions imposed on members of the OTP;**

¹ See, for example, Amnesty International Statement on Israel/OTP: Call to Support ICC Investigation into 'Situation in Palestine' and Safeguard ICC Independence, 16 March 2020, available at <https://hrij.amnesty.nl/israel-opt-call-to-support-icc-investigation-into-situation-in-palestine-and-safeguard-icc-independence/>

- Strongly condemn all threats against the ICC, its staff, and those who are threatened for their work on the ICC and the Rome Statute, recognising that such threats are flagrant assaults on international justice;
- Recognise that states parties and the Assembly may need to take practical measures at the national and international level to negate the impact of sanctions on the Court and its staff;
- Agree to develop a formal strategy for responding to attacks on the Court by all states, including by non-states parties²;
- Recognise that the Court can best respond to threats if it is supported by the Assembly and a broad range of stakeholders, including states parties and civil society;
- Urge states parties to respond to threats against the Court through the timely issuance of high-level statements expressing support to the Court and its staff;
- Provide political and other support to states who may be pressured not to fulfil their obligations under the Rome Statute;
- Strongly condemn threats that have been made against civil society and human rights defenders for their engagement with the Court, both generally and in the context of the Assembly of States Parties, recalling that civil society and human rights defenders play a crucial role in the Rome Statute system, as noted by states parties in the omnibus resolution and regularly by the Court, and recalling the need to support the work of civil society;
- Recall that the APIC provides protection to Court staff and call upon states parties and non-states parties who have not done so, to ratify the Agreement;
- Recognise that budgetary cuts and non-cooperation by states parties present major threats to the Court's effective functioning;
- Consider strategic and coordinated responses (of the Assembly and ICC) to withdrawals and threats of withdrawals from the Rome Statute, recognising that universality of the Rome Statute may encourage stronger and broader geographic support to the Court;
- Recognise that well-funded and effective public information on the Court's activities serves to counter misinformation and powerful narratives which threaten the Court.

ELECTION OF JUDGES AND PROSECUTOR

States parties should elect the most-qualified candidates in merit-based and transparent election processes, free from vote-trading and political considerations. Amnesty International does not take a position on individual candidates who are nominated by States.

In relation to the elections of six new ICC judges, States parties are invited to take into account Amnesty International's 'Key Criteria for Election as a Judge to the International Criminal Court'³ in Annex I

- Judges should have proven competence in criminal law and procedure as a judge, prosecutor, advocate or in a similar capacity, including relevant practical experience of conducting complex criminal trial proceedings, fairly and expeditiously;
- Judges should have proven understanding and experience of the fundamental rights of accused persons to fair trials;
- Judges should have proven understanding and experience of the rights of victims to remedies and reparations, and to participate in criminal proceedings;
- Judges must serve independently and impartially;
- Judges should be of high moral standing.

² See Paragraphs 399 – 402, and Recommendation 169, in the 'Independent Expert Review of the International Criminal Court and the Rome Statute System - Final Report' 30 September 2020

³ Available at <https://hrij.amnesty.nl/key-criteria-for-election-as-a-judge-to-the-icc/>



INDEPENDENT EXPERT REVIEW

Amnesty International has consistently called for honest evaluation regarding the ICC's inadequate, sometimes flawed and inconsistent efforts to deliver international justice and the lack of support that it is receiving from states. In this regard, our organisation believes that the Independent Expert Review ('IER') has provided a number of important technical proposals to strengthen the ICC. It is important that the recommendations are followed up in a manner which is transparent, and with the involvement of the organs of the Court, states parties, and other relevant stakeholders.

Amnesty International is concerned that the IER's 'top-down' review process did not allow the review to benefit from the input of stakeholders and affected communities in states which have firsthand experience of the Court's operations, in particular situations which have been under ICC investigation or preliminary examination. A significant part of the Court's day-to-day work involves interactions with individuals and institutions away from The Hague – in field offices, through regular ICC missions to states, outreach programs, Trust Fund for Victims activities and so forth. Lessons learned from situations in which the Court has operated should form a central part of the ongoing review process and be considered in the implementation of the Review's recommendations.

Generally, the work of the Assembly in its intersessional working groups – including on cooperation or budget - has not led to honest appraisals as to how the non-fulfilment by states parties of their oversight or management obligations in the Rome Statute has led to the Court not being able to fulfil its mandate. Indeed, states parties have so far not been willing or able to review their own performance. With this in mind, the 'state-driven' review, with its restricted mandate to undertake a 'technical' review of the Court's internal functions, falls short in some of its recommendations due to its inability (or unwillingness) to address some of the fundamental reasons behind the Court's current performance which point to the role of states parties and the Assembly's governance shortcomings. These cannot continue to be overlooked as states parties consider the findings of the IER and its recommendations.

For example, while the Report rightly provides that '[c]onfidence would also grow with improved cooperation between States Parties and the Court, as well as stronger political support from the former when the Court is attacked by non-States Parties⁴ and recommends 'stronger political support for the Court by States Parties,'⁵ the Report stops short of highlighting that a lack of cooperation (see below) and political support by states parties goes beyond confidence in the institution, and to the heart of the Court being able to fulfil its mandate.

Similarly, in recommending that '[t]he Court should accept the legitimate authority of the ASP to decide its budget and should tailor its activities to match the resources available,'⁶ the Experts have endorsed a troubling conclusion that the Court's work should be driven solely by resources decided by states parties, rather than (increasing) demands for the Court's work. Similarly, while the ASP is recognised as the legitimate authority to decide the Court's budget, the Report stops short of highlighting the damage to the Court's operations that states' exercise of this authority has inflicted on the Court's effective functioning through the insistence of 'zero-growth' budgetting, which – even when justified budget requests are provided – has not enabled to the Court to reach its 'basic capacity' (see below) and meet demands placed upon it.

As part of their **general debate statements**, and **during any relevant plenary session**, states parties should:

- Ensure that the IER's recommendations are followed up in a manner which is transparent, and with the involvement of the organs of the Court, states parties, and other relevant stakeholders;
- In their consideration of the Independent Expert Review, commit to considering findings and recommendations which point to performance shortcomings in states party support or management oversight and which require improvements by states parties to meet their obligations in the Rome Statute;

⁴ 'Independent Expert Review of the International Criminal Court and the Rome Statute System - Final Report' 30 September 2020, para. 951

⁵ *Ibid* Recommendation R361

⁶ *Ibid* Recommendation R362

- Commit to addressing where a lack of cooperation, or budgetary and political support have led to the Court and its organs being unable to fulfil their mandate;
- Urgently consider how to ensure that the input of affected communities and those who have interacted with the Court in situation countries can better be reflected in the ongoing review exercise and in the implementation of the IER's recommendations;
- Commit to ensuring that the implementation of any recommendations made as a result of the IER do not undermine the human rights law compliance of the Court and fully respect the rights of accused persons in the Rome Statute, as well as the rights of victims to access truth, justice, and reparation.

PROPOSED ICC BUDGET 2021

The Court has requested a programme budget of €144,917.2 thousand for 2021, which represents a decrease of 0.5 per cent (€703.3 thousand) against the total approved budget for 2020. The Committee on Budget and Finance (CBF) concluded that total reductions could be achieved in the amount of €243.3 thousand from a total proposed programme budget of €144,917.2 thousand excluding the host State loan. This represents a total decrease of €946.6 thousand (0.7 per cent) compared to the 2020 approved budget (excluding the host State loan). Therefore, the CBF has recommended that the Assembly approve a budget of €144,673.9 thousand excluding the instalments for the host State loan.

Amnesty International is concerned about the reduction of the Court's budget from 2020 - by the Court itself and the CBF. While reductions to the Court's budget for 2021 may have been made in recognition of the impact of the Covid-19 pandemic on states parties' economies, Amnesty International is concerned that the Court has willingly underfunded itself, and the reduction of its budget request may set a worrying precedent. Indeed, as states parties continue to push for 'zero-growth' annual budgets, it is by no means certain that states will increase the Court's budget in future years, to match an expected increase in activities and as the impact of the Covid-19 pandemic on the Court subsides.

In 2021 the Court will continue its recently opened and challenging investigation in Afghanistan, and with potential investigations in a number of outstanding preliminary examination situations which are close to being finalised in 2021⁷, as well as simultaneously absorbing an increase in UN Common System staff costs of €6.5 million in 2021, Amnesty International is concerned that next year the Court may find it is 'resource wise, impossible to respond'⁸ and unable to properly fulfil its mandate.

Noteably, in the Independent Experts' Report, the experts laid out - in detail - issues of under-resourcing in the OTP⁹, as well as in other organs, but did not make any recommendations that such resource constraints should require an increased resource allocation from states, instead recommending that manifest resource shortages could be addressed, for example, by prioritisation, finding synergies across organs, or even through re-interpreting the 'gravity' threshold in the Rome Statute. While the Court should undertake measures to find savings and synergies where possible, the Independent Experts – having highlighted regular resource and capacity constraints and challenges to the Court's functions – should have more clearly highlighted the impact of States Parties' failures over many years to properly fund the Court. The Report describes 'budgetary challenges facing the Court', without finding that such 'challenges' are largely created by states parties. Similarly, the report readily accepts a situation of 'limited resources'¹⁰ without providing that states parties have limited the resources made available to the Court,

⁷ See, *'Independent Expert Review of the International Criminal Court and the Rome Statute System - Final Report'* 30 September 2020 paras. 707: 'The Experts were informed of the Prosecutor's intention to reach finality in respect of all the outstanding PEs during the remainder of her term that ends in the middle of 2021' and para. 642: 'The greatest concern in terms of selection of situations for PEs, and later, for (requesting authorisation for) investigations relates to the increasing number of situations before the OTP and its insufficiency of resources. A number of PEs might be ready for investigation but with no available resources to proceed with them. The OTP acknowledges that if multiple situations reach the threshold of investigations at the same time, 'then it is, resource-wise, impossible to properly respond', and a case selection and prioritisation policy would have to be applied.'

⁸ OTP Strategic Plan 2019-2021, p.18, para.22.

⁹ See Annex II

¹⁰ The terms 'limited resources' and 'scare resources' appear in the Independent Experts' Report seventeen times.



often despite being informed that such limitations would impact the ability of the Court to fulfil its mandate.¹¹ Indeed, the Experts do not appear to have considered the ubiquitous pressure imposed by the Assembly and the CBF on the Court over many years to produce and work within the constraints of ‘zero-growth’ annual budgets and the impact that this has had on the Court’s performance. With this in mind, it is disappointing that the Experts did not provide stronger recommendations to states parties, including a recommendation that states should provide adequate resources to the Court when they receive well justified annual budget requests.

States parties should therefore:

- Commit to providing the Court, at a minimum, with a budget of €144,673.9 as recommended by the CBF;
- Commit to addressing where under-funding and pressure on the Court to present ‘zero-growth’ budgets has led to the Court’s underperformance and its organs being unable to fulfil their respective mandates;
- Commit to considering findings in the Independent Expert Review which detail the impact that a lack of resources has had on the OTP’s and other organs’ ability to perform at the levels expected of them by states parties and other stakeholders.

COOPERATION WITH THE ICC

Strengthening and promoting full and timely cooperation is vital to the effectiveness of the ICC. As the Independent Experts have stated in their report, ‘[m]ost of the OTP investigative steps require cooperation from States Parties, national governmental authorities, intergovernmental bodies, civil society organisations, commercial, and other entities. The need for this cooperation is only increasing with the growing number of situations, more suspects at large, the need to obtain evidence from witnesses located abroad, and increased use of digital evidence (e.g. online banking, messaging, social media, email platforms).’¹² Throughout the IER, brief references are made by the Experts to the impacts of a lack of states party cooperation on the Court’s operations, which result in the Court being unable to fulfil its mandate, or being severely delayed in doing so. For example, the Experts provide that delays in Preliminary Examinations ‘may be manifested by the provision of minimal cooperation, and inconsistent, insufficient, irrelevant, or delayed information.’¹³ However, the report stops short of highlighting how the performance of states in providing cooperation to the Court has hampered the performance of the Court.

In relation to the tracking and arrest of Court fugitives, the Experts state that ‘[i]n 2013, the ASP appointed a Rapporteur on arrest strategies, who delivered a comprehensive action plan for the ASP and the Court that was based on the lessons learnt from national and international jurisdictions. The ASP has taken note of the Rapporteur’s reports, and held a number of consultations, as well as information sharing and awareness raising activities. Unfortunately, these efforts do not appear to have had significant positive consequences.’¹⁴

Regarding ICC investigations, ‘the Experts heard serious concerns from some OTP staff to the effect that there remain troubling situations in which there is a serious lack of cooperation and inordinate delays in responding to requests for information.’¹⁵ The Experts state that ‘[w]ell before the pandemic, investigative staff frequently encountered difficulties in collecting evidence due to lack of cooperation.’¹⁶ This is replicated in relation to cooperation required for interviewing witnesses and realising investigative opportunities, where the Experts ‘were informed of the increasingly burdensome requirements placed by some states on the OTP to enable it to carry out

¹¹ The Experts appear to accept – without further interrogation – a situation where resources are ‘unavailable’ to the Court without finding that it is states parties who have not made adequate resources ‘available’ to the Court. For example, the Report describes how certain activities within the OTP are ‘unsustainable having regard to the *limited resources available* [emphasis added]’ and that the OTP aims to refine its investigations ‘*within the available resources*’. Paras. 642, 646, and 744.

¹² ‘*Independent Expert Review of the International Criminal Court and the Rome Statute System - Final Report*’ 30 September 2020 para. 751.

¹³ *Ibid* para. 727

¹⁴ *Ibid* para. 768

¹⁵ *Ibid* para. 755

¹⁶ *Ibid* para. 776

witness interviews [which regrettably] also applies to some States Parties. Delayed interviews not infrequently result in the loss or dilution of investigative opportunities.¹⁷

Defence representatives also told the Experts that Court Defence teams have to contend with ‘inadequate cooperation by States Parties’.¹⁸

States parties must therefore urgently examine the findings in the Expert’s Report and the instances which detail significant cooperation challenges faced by the Court. With these in mind, the Experts’ (limited) recommendations that ‘[t]he OTP and the ASP should consider improvements in cooperation’¹⁹ and that ‘cooperation between the Court and the ASP needs to be encouraged’²⁰ must be urgently acted upon. As discussed above, and as necessary, states parties must more seriously consider their own performance shortcomings and obligations in the Rome Statute as they relate to cooperation, including in the intersessional cooperation working group and in the consideration of the Independent Expert Review’s findings and recommendations.

As part of their **general debate statements**, and **during any relevant plenary session**, states parties should:

- Commit to considering improvements in cooperation²¹ and their own performance shortcomings and obligations in the Rome Statute as they relate to cooperation, including in the intersessional cooperation working group and in the consideration of the Independent Expert Review’s findings and recommendations;
- Commit to and urge other states to cooperate promptly and fully with the ICC, including in the execution of all arrest warrants – recognising that outstanding arrest warrants undermine efforts to advance states parties’ shared goal to ‘put an end to impunity for the perpetrators of these [Rome Statute] crimes’;
- Commit to further strengthening and regularly reviewing the Assembly’s Procedures related to non-cooperation - recognising the crucial role of the Assembly to respond to instances of non-cooperation provided in Article 87(7) of the Rome Statute to ensure that states parties fulfil their cooperation obligations;
- Urge the United Nations Security Council to support the efforts of the ICC in Darfur and Libya, especially by responding to findings of non-cooperation, and through providing resources in instances where the Council refers situations to the Court;
- Commit to and urge other states to promptly ratify or adhere to - without making any reservations - the Agreement on Privileges and Immunities (APIC), recognising that the APIC allows the Court and its staff to fulfil their mandate in any territory subject to the jurisdiction of states parties;
- Commit to and urge other states to enter into agreements with the ICC on witness relocation, interim release, enforcement of sentences and relocation of acquitted persons; recognising that such agreements are necessary for the Court to comply with its fair trial and human rights obligations;
- Commit to strengthening the Court’s capacity to effectively investigate and pursue the identification, freezing and seizure of assets including for reparations as provided in Article 75(4) of the Rome Statute and Rule 99(1) of the Rules of Procedure and Evidence;
- Cooperate fully with, and take all measures and steps required to assist the Trust Fund for Victims (TFV) in the implementation of its assistance and reparations mandate.

¹⁷ *Ibid para. 754*

¹⁸ *Ibid para. 823*

¹⁹ *Ibid* Recommendation R274

²⁰ *Ibid* Recommendation 361

²¹ *Ibid* Recommendation R274



AMNESTY INTERNATIONAL

KEY CRITERIA FOR ELECTION AS A JUDGE TO THE INTERNATIONAL CRIMINAL COURT

In December 2020, elections to fill six judicial vacancies at the International Criminal Court ('ICC') will take place at the nineteenth session of the Assembly of States Parties. States parties should elect the **most-qualified candidates** in a **merit-based** and **transparent** election process, **free from vote-trading and political considerations**. Amnesty International urges states parties to give due consideration to equitable geographical distribution, the representation of principal legal systems, and balanced gender representation.

Amnesty International does not take a position on individual candidates who are nominated by States. However, states parties are invited to take into account the below criteria in electing candidates.

- **HAVE PROVEN COMPETENCE IN CRIMINAL LAW AND PROCEDURE AS A JUDGE, PROSECUTOR, ADVOCATE OR IN A SIMILAR CAPACITY, INCLUDING RELEVANT PRACTICAL EXPERIENCE OF CONDUCTING COMPLEX CRIMINAL TRIAL PROCEEDINGS, FAIRLY AND EXPEDITIOUSLY**

ICC proceedings involve complex issues of criminal procedure, including for example, highly dynamic issues of witness management or handling of evidence. As such, judicial candidates should have: knowledge of and practical experience in criminal law and practice, including trial procedure; experience managing complex criminal trials²² and; experience in international criminal law and procedure, as relevant to the judicial work of the Court.

When assessing the competencies of all candidates in accordance with article 36(3)(b) of the Rome Statute, Amnesty International urges states parties to have particular regard to the minimum requirements for admission to the ICC list of counsel which are provided in Rule 22 of the ICC Rules of Procedure and Evidence, read in conjunction with regulation 67 of the Regulations of the Court. The *Guide for applicants to the ICC List of Counsel and Assistants to Counsel*,²³ provides that in order to be admitted to the ICC List of Counsel, prospective defence or victims' counsel are only qualified if they meet the following three criteria: i. A minimum of ten years of relevant experience (five years for assistant counsel); ii. In criminal proceedings; iii. As a judge, prosecutor, advocate or in other similar capacity.

In our view, 'Extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court' in article 36(3)(b)(ii) should be interpreted to require proven competence in criminal law and procedure and relevant experience in conducting complex criminal law proceedings. Accordingly, 'competence in relevant areas of international law' is a highly preferred quality for all ICC judges and supplementary to practical experience in complex criminal law and procedure.

- **HAVE PROVEN UNDERSTANDING AND EXPERIENCE OF THE FUNDAMENTAL RIGHTS OF ACCUSED PERSONS TO FAIR TRIALS**

Article 67 of the Rome Statute provides for the fundamental rights of the accused to a fair trial at the ICC, including the right to be tried without undue delay through public, impartial, and fair hearings.

Judicial candidates should have excellent knowledge of the international and regional legal frameworks and case law relevant to the fundamental rights of the accused and proven experience in ensuring that the rights of the accused are fully realised, including through an effective defence. While not conclusive, Amnesty International notes that candidates with relevant experience in criminal proceedings as a judge, prosecutor, advocate or other similar capacity, may have

²² Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report (30th September 2020), see, for example para. 966 '[ICC judges must be of the] highest calibre with the experience, ability and skills necessary to conduct a mass atrocities trial of a complex nature over a number of years, both fairly and expeditiously'. See also paras. 971,972, and 977.

²³ See, *Guide for applicants to the ICC List of Counsel and Assistants to Counsel* provides [emphasis added]:

'To be admitted to the List of Counsel, candidates must meet the following requirements: Competence: Candidates shall have proven competence and expertise in international or criminal law and procedure.

Experience: Candidates must have a **minimum of ten years of relevant experience in criminal proceedings** as a **judge, prosecutor, advocate or in other similar capacity**. Professors of law meet this requirement only where they have **intervened in criminal proceedings for a minimum of ten years in one of the capacities listed above**; otherwise, they can be admitted to the List of Assistants. [...] To be admitted to the List of Assistants, candidates must meet one of the following two requirements: **Five years of relevant experience in criminal proceedings** [or] specific competence in international or criminal law and procedure'.



first-hand understanding of the rights of the accused to effective legal representation and competence to manage complex criminal proceedings in a fair and expeditious manner.

- **HAVE PROVEN UNDERSTANDING AND EXPERIENCE OF THE RIGHTS OF VICTIMS TO REMEDIES AND REPARATIONS, AND TO PARTICIPATE IN CRIMINAL PROCEEDINGS**

The Rome Statute provides that victims have a right to participate in proceedings: Article 68(3) states that 'where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court'. Article 75 of the Rome Statute provides that victims have a right to reparations.

Judicial candidates should have excellent knowledge of the international and regional legal frameworks and case law relevant to the right to remedies and reparations, including compensation and rehabilitation of victims. Judicial candidates should also have excellent knowledge of the rights and needs of victims, including victims of sexual and gender-based crimes; and crimes against children. Candidates should have proven experience in ensuring that victims' perspectives and their rights have been realised through, *inter alia*, investigations; prosecutions and; effective and meaningful participation in trial proceedings.

- **SERVE INDEPENDENTLY AND IMPARTIALLY**

ICC judges must be fully independent from States. Accordingly, Article 40 of the Rome Statute and articles 3 and 4 of the ICC's Code of Judicial Ethics ('CJE') provide that ICC judges shall be independent and 'ensure the appearance of impartiality in the discharge of their judicial functions' and 'shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest.' Article 10 CJE provides that judges shall not exercise any political function.

- **BE PERSONS OF HIGH MORAL STANDING**

States parties must elect people of high integrity in their personal and public life. ICC judges must not have been involved, by act or omission, in any violation of international human rights law or international humanitarian law.

Article 8 CJE provides that in conducting judicial proceedings, 'judges shall avoid conduct or comments which are racist, sexist, or otherwise degrading.'

ICC judicial candidates must not have, by words or conduct, manifested or appear to have condoned bias or prejudice, including, but not limited to, bias or prejudice based upon age, race, creed, colour, gender, sexual orientation, religion, national origin, disability, marital status, socioeconomic status, alienage or citizenship status. Similarly, judicial candidates must not have discriminated against or harassed an individual on any of these grounds.

Annex II

Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report (30th September 2020), paras 176 – 184

176. In order to meet the high standards of international criminal investigations and prosecutions, the OTP must have access to adequate resources. The OTP has repeatedly referred to the lack of resources, especially in terms of staff,²⁴ as one of the reasons for its inability to perform at the levels expected of it by the States Parties and other stakeholders.²⁵ The reported ‘mismatch between resources and actual work’²⁶ has wide-reaching consequences for the operations of the OTP, delaying or prolonging PEs, investigations and prosecutions, and limiting the number of situations that the OTP can effectively investigate.²⁷

177. In response to a request from the States Parties and the Committee on Budget and Finance (CBF) to provide more clarity relating to the OTP’s growth, in 2015 the OTP conducted an internal Basic Size assessment. It assessed the needs of the teams and support services at each stage of a PE, investigation, and court proceedings. It defined what is meant by the ‘basic size’ of an integrated team. This assessment can effectively be used to compare the current workload against resources.²⁸

178. Based on the 2020 budget proposal, two of the three OTP Divisions are under-staffed as measured by the Basic Size estimates.²⁹ The ID is the most severely under-resourced Division, having 87 less full time staff than estimated to provide the basic needs of the Division.³⁰ The Experts were informed that understaffing has already resulted in ‘more time required for the completion of planned activities, inability to react appropriately to important unforeseen events (...); diminished capacity to conduct lessons learned exercises; (...) limited tracking capacity; and highly diminished capacity to deal with cases in ‘hibernation’.³¹ Under-staffing is also an issue in the PD, requiring 30 additional full time staff to achieve basic size.

179. Investigations by the OTP are the core function for the Court’s success. The under-staffing and the imbalance of resources between PD and ID is acknowledged at many levels of the OTP.³² Currently, the ratio of investigative staff (comprised of the Investigations Section (IS) and Investigative Analysis Section (IAS)) to the PD’s Prosecutions Section is about 1:1. A more appropriate ratio, taking into account the wide range of activities during active investigations, should be closer to 3:2. In terms of the size of integrated teams, currently they range from 4.5 to 11 investigative staff, compared to the Basic Size estimate of twenty.³³ The sizes of the teams within the OTP also fluctuate significantly, depending on the stage of the investigation/prosecution, and competing demands for resources.

180. Lack of sufficient staff also appears to be an issue for the JCCD. The International Cooperation Section (ICS) currently has 15 staff members, which has remained largely unchanged over the past five-six years, while the volume of

²⁴ See, e.g. ICC-ASP/18/1, p.81, p.37

²⁵ See, OTP Report on the Implementation of Strategic Plan 2016-2018 p.4, para.iii(b), OTP Strategic Plan 2019-2021, p.12, para.9.

²⁶ OTP Report on the Implementation of Strategic Plan 2016-2018, p.8, para.21.

²⁷ In 2019, faced with limited resources, the Office prioritised eight investigations out of eleven that were opened, In ICC-ASP/18/10, p.11, paras.21-22, the OTP reported ‘On account of the limited resources approved for 2019 <...> the pace of some investigative activities has been negatively affected.’

²⁸ See Report of the Court on the Basic Size of the Office of the Prosecutor, ICC-ASP/14/21 (2015).

²⁹ *Ibid.*, p.4, para.7. It is important to note that the OTP Basic Size estimation was conducted on the basis of 6 active investigations, 9 preliminary examinations, 9 hibernated examinations, 5 cases in pre-trial, 5 cases in trial, 2 cases in appeal, and 1 new situation. Currently, there are 9 PEs, 11 open investigations (not all active – DRC, Kenya, Uganda largely hibernated. The OTP states that it will prioritise nine active investigations, and conducts 8 simultaneously; ICC-ASP/18/10, paras.20-23.

³⁰ Basic Size estimate: 255 FTE, 2020 budget assumption: 177 FTE; ICC-ASP/14/21, p.5

³¹ In the 2020 budget proposal, the OTP states: ‘with the current resources, ID has not been able to maintain regular contact with witnesses from past cases, as provided for in its quality standards. The number of investigations pending an arrest warrant has increased, but efforts are restricted to reacting to incidents and opportunities owing to limited resources. (...) there is a clear indication of overstretch across the Division as a result of the team being considerably smaller than the optimal team size: high levels of untaken leave; increased sick leave; increased requests for more analytical support from the Prosecution division and a growing backlog in workload in FSS.’ ICC-ASP/18/10, p.70, para.281. ‘In the Investigation Section, current capacity in terms of investigators still falls short of identified needs. The persistent consequences of understaffing are as follows: more time required for the completion of planned activities; inability to react appropriately to important unforeseen events without removing or significantly reducing resources allocated to other priority activities; diminished capacity to conduct lessons learnt exercises, develop standards and ensure adequate training, limited tracking capacity; and highly diminished capacity to deal with cases in “hibernation”’, ICC-ASP/18/10, para.283.

³² *Ibid.*, p.70, para.281: as reported in 2019 ‘While a flexible approach to resource allocation has been taken, there is a clear indication of overstretch across the Division as a result of the team being considerably smaller than the optimal team size: high levels of untaken leave; increased sick leave; increased requests for more analytical support from the Prosecution Division and a growing backlog in workload in FSS.’

³³ ICC-ASP/14/21, p.16.

work has increased significantly.³⁴ The number of relevant members of staff was not commensurately increased. This hampers the speed of cooperation activities, and reduces the ability of the ICS to respond promptly to the needs of teams or changing circumstances on the ground. The Preliminary Examinations Section (PES), carrying out all the analytical and legal tasks related to preliminary examinations is carried out by 12 staff members in total.³⁵ The small number of staff available to PES is reported as one of the reasons for the length of PEs.

181.The Experts were informed of widespread dissatisfaction with the speed of transcription and translation services. The Language Services Unit (LSU), located in the OTP Services Section, reportedly falls short of the needs of the OTP in two areas: (i) recruitment of interpreters/translators for relevant languages in situation countries, and (ii) providing timely transcription and translation in working languages of the Court (English/French), and Arabic (to English/French).

182.Concerning recruitment, the Experts were informed that in some instances it takes over a year to recruit a translator/interpreter in a specific language, especially with respect to languages that are not widely used. These delays impact all activities of the OTP. The delays appear to be a consequence of the restrictive recruitment rules of the OTP, combined with an insufficient pool of suitable candidates.

183.The shortcomings in the OTP's ability to keep up with the teams' requests for translations and interpretations are serious. The teams frequently wait months for the LSU to provide a response to their requests. Those working on non-prioritised situations report even longer delays. Since a large number of translations and transcriptions are outsourced, outsourced, the ability of the LSU to respond to the teams' demands is also linked to the budget allocated to the Unit. At the end of 2019, this led to an effective halt on outsourcing translations and transcriptions. Based on the proposed programme budget, in 2020 the LSU anticipates that it will be short of resources amounting to the equivalent of 3,415 pages of materials to be translated.³⁶

184.The Experts also note the lack of administrative support staff for the teams, resulting in highly professional staff spending appreciable amounts of time performing clerical tasks.

³⁴ The number of RFAs increased by 68.68% between 2013 and 2018, and by 21.29% between 2017 and 2018 (based on internal JCCD – International Cooperation Section overview, February 2020).

³⁵ Three Situation Analysts (P-3), six Associate Situation Analysts (P-2), two Assistant Situation Analysts (P-1), and one Head of Section (P-5). No additional resources have been allocated to it since an increase in 2014. ICC-ASP/18/10, pp.64-65, paras.262-265

³⁶ *Ibid.*, p.52: OTP LSU Translation capacity: 11,935 pages; anticipated translation volume: 16,950 pages.; para.214: As an example, the *Al-Hassan* case evidence requiring translation from Arabic exceeded 5,000 source pages, and the Document Containing Charges reached 500 pages (as compared to standard 30 pages).