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Report on the constitution and activities of the International Criminal Court Bar Association (“ICCBA”)

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Executive Summary

The quality of justice before the ICC depends on the ability of Counsel for Victims and the Defence to perform their respective roles effectively and independently. The overriding goal of the ICCBA is to strengthen the capacity of independent Counsel to perform this role, and ensure that the views and concerns of Victims' and Defence Counsel and Support Staff are represented to the Court. In the first 18 months of its existence, the ICCBA has developed into a fully functioning organization that has engaged with the Court, ASP and third parties to address issues of concern to the ICCBA membership and promote the ICCBA's broader goals in accordance with its mandate. The ICCBA has opened a dialogue with the Registrar and relevant Registry officials to discuss the views and concerns of Victims and Defence Counsel and Support Staff and seek improvements in their general conditions of work before the Court. It also contributed to the ongoing review of the Court's Legal Aid system through an in-depth commentary and by making cost-neutral proposals for significant improvements of the current situation pending the finalization of a complete review of the Legal Aid Scheme. The ICCBA is additionally conducting an assessment of potential policy gaps at the Court, which have a direct impact on the work of Counsel and Support Staff and the security of their clients – Victims, Defendants and Witnesses – to bring these matters to the Court's attention. The ICCBA has directly, and through partners, organized a variety of substantive and skills-based trainings for Counsel and Support Staff, and is in the process of launching online training facilities, through its website (www.iccba-abcpi.org), to provide easier access to expert training to its globally-based membership. Externally, the ICCBA is building a solid and worldwide network of Counsel interested in the ICC, reaching out beyond the limits of current membership to the Rome Statute, raising awareness of the ICC system in non-States Parties and supporting the Court's goal of reaching universality. Important components of this initiative include the appointment of Regional and National Focal Points who can explain the role and work of the ICC and the ICCBA, and reaching cooperation agreements with national and regional bar associations and other relevant entities. By doing so, the ICCBA strives to become an indispensable and reliable partner of the Court and the Assembly in achieving a model of modern and transparent criminal justice by enhancing the quality of representation of Victims, Defendants and other persons.

I. Background

1. Operative paragraph 62 of resolution ICC-ASP/15/Res.5 entitled “Strengthening the International Criminal Court and the Assembly of States Parties”, adopted by the Assembly of States Parties (“the Assembly”) on 24 November 2016, invited the International Criminal Court Bar Association (“ICCBA”) to report to the Assembly, through the Bureau, on its constitution and activities in advance of the sixteenth session. The present “Report on the Constitution and Activities of the ICCBA” aims at providing the Assembly with information in response to this invitation.

II. Governance and Structure of the ICCBA

A. Overview of ICCBA Constitution and Objectives

2. The ICCBA operates in accordance with its constitution.

3. The ICCBA Constitution was adopted on 30 June 2016 in The Hague by Counsel registered on the List established by the International Criminal Court (“ICC”, “the Court”) pursuant to rule 22 of the ICC Rules of Procedure and Evidence (“RPE”) (“List of Counsel”). The ICCBA Constitution establishes the ICCBA as an independent representative body of Counsel pursuant to rule 20(3) of the RPE. Its establishment in June 2016 and its recognition by the Assembly in November 2016 marked the fulfillment of a long-standing goal to establish a much-needed representative association of legal practitioners focused on matters relevant to the work of List Counsel and Support Staff before the ICC.

4. The objectives of the ICCBA are set out in Article 2 of its Constitution. These include supporting the functions, efficiency and independence of Counsel practicing before the ICC (para. 1); the promotion of the highest professional standards and ethics of Counsel (para. 2) as well as their proficiency and competence in the field of advocacy, procedural and substantive criminal law and information technology systems relevant to their functions before the ICC (para. 3); the independent representation of the interests of Counsel and Support Staff (para. 7); the promotion of the rights of victims, defendants and other clients and Counsel before the Court (para. 8); the promotion of equality of arms (para. 11); and representation of interests and concerns of its members before the Assembly (para. 12).

5. The ICCBA serves as a collective voice for independent Counsel and support staff who represent victims, defendants and other actors (e.g. witnesses, States) before the ICC, provides a range of support and services to its membership, and acts as a forum for discussion on all matters pertaining to the ICC. As an independent body deeply and directly involved in ICC activities, it also aims to contribute to raising awareness on issues which may affect the functioning of the Court, in order to enhance the quality of justice at the ICC required under the provisions of the Rome Statute and other recognized texts pursuant to Article 2(5) of its Constitution. Because its constituency extends to members of the legal profession in all countries, be they States Parties or not, the ICCBA seeks to develop and solidify its relationships with international, regional and national bars and other relevant organisations in order to promote and strengthen the Rome Statute system as well as discuss issues of mutual concern, including in countries and regions where the Court itself may have difficulties accessing.

6. The ICCBA is independent of the Court and is registered as a non-profit foundation (“*Vereniging*”) under the laws of The Netherlands.

7. The ICCBA is a non-profit organization funded primarily by membership fees. Its activities and outreach are the product of its members’ voluntary contribution of their time and energy.

8. The ICCBA Constitution provides for three categories of membership: Full, Associate, and Affiliate. Full membership is open to all persons who are admitted to the List of Counsel and who are practicing as independent counsel, as well as all persons who, while not admitted to the List of Counsel, are assigned as Counsel on a case at the ICC or who directly represent individuals at the ICC. Associate membership is open to all persons

who are either: (a) registered on the List established by the ICC pursuant to Regulation 68 of the Regulations of the Court and Regulation 125 of the Regulations of the Registry, or (b) assigned as support staff on a case at the ICC and have at least five years of relevant experience of international criminal law. Affiliate membership is open to all persons who support the objectives of the ICCBA and have demonstrable experience of international criminal law. Pursuant to the ICCBA Constitution, only Full Members may stand for election to the Executive Council, Victims Committee, Defence Committee and Professional Standards Advisory Committee. The Constitution further provides that the ICCBA Legal Advisory Committee, Membership Committee, Training Committee, and Amicus Committee must all be chaired by a Full Member and requires that these committees be composed of three Full Members and two Associate Members. Article 7(1) of the Constitution provides that the votes of Full Members shall be counted as one and a half the amount of Associate Members, and three times the amount of eligible Affiliate Members. Eligible Affiliate Members are persons who, as of the time of the vote, are assigned as Case Managers to an ICC Victims or Defence team, and who do not otherwise fulfil the experience requirement to be an Associate Member. Pursuant to Article 25 of the Constitution, the ICCBA Counsel Support Staff Committee is composed of seven Associate or Affiliate Members.

9. As of 30 October 2017, there were **426** members of the ICCBA, consisting of **243** Full Members, **80** Associate Members, and **103** Affiliate Members. In terms of gender, there are **159** female and **263** male members. With respect to geographic breakdown, there are **138** members from African States, **26** members from Asia-Pacific States, **14** members from Eastern European States, **13** members from Latin American and Caribbean States, and **254** members from Western European and other States. A full breakdown of the ICCBA's membership by nationality is provided in a chart at the end of this Report.

B. ICCBA Governance Structure

10. The ICCBA is governed by a General Assembly composed of its membership, who elects a President and fourteen additional members of an Executive Council mandated to manage the day-to-day operations of the association and carry out its strategic vision. The first President of the ICCBA (elected July 2016) was David Hooper QC. The second and current President of the ICCBA (elected July 2017) is Karim A.A. Khan QC.

11. An Executive Committee within the Executive Council, composed of the President, the Vice-President for Victims, the Vice-President for Defence, the Treasurer and the Secretary take a lead role in conducting the daily operations of the association. The current Executive Committee is composed of Karim A.A. Khan QC (President), Jens Dieckmann (Vice-President for Victims), Chief Charles Taku (Vice-President for Defence), Emile Aoun (Treasurer) and Xavier-Jean Keïta (Secretary). The Executive Committee is also assisted by a Secretariat composed of the Secretary and appointed voluntary ICCBA members. In September 2017, the ICCBA recruited Mr. Dominic Kennedy as part-time Executive Director in charge of the administration of the ICCBA and the implementation of strategies and activities undertaken by the Executive Council, pursuant to Article 15 of the ICCBA Constitution. The Executive Director is the only staff member remunerated by the ICCBA.

12. The General Assembly also elects members to eight ICCBA standing Committees, which have lead responsibility to consider issues and proposed activities and actions relevant to their particular area of focus. The eight standing Committees are distributed as follows:

(a) *The Defence Committee* is mandated to take into consideration the interests of suspects and accused and, through a commentary, provide proposals to the Legal Advisory Committee and advise the Executive Council and the General Assembly on all matters affecting the Defence. It is currently chaired by Caroline Buteau;

(b) *The Victims Committee* is mandated to take into consideration the interests of victims and, through a commentary, provide proposals to the Legal Advisory Committee and advise the Executive Council and the General Assembly on all matters affecting Counsel for Victims. It is currently chaired by Jens Dieckmann;

(c) *The Counsel Support Staff Committee* shall take into consideration the interests of support staff and, through a commentary, provide proposals to the Executive Council and report to the General Assembly on all matters affecting the support staff. It is currently chaired by Francesca Anzovino;

(d) *The Professional Standards Advisory Committee* provides advice and guidance to members on the Code of Conduct for Counsel and can offer advisory opinions when requested. It is currently chaired by Dr. Antonios Abou Kasm;

(e) *The Legal Advisory Committee* is responsible for considering proposed amendments to the ICC Rules of Procedure and Evidence and other recognised legal texts, as well as being the one to propose and draft amendments to the RPE and other recognized legal texts of the Court. In its work the Committee is required to represent the interests of all ICCBA members and/or their clients, as appropriate. It is currently chaired by Dr. Cyril Laucci;

(f) *The Membership Committee* reviews and decides upon applications for ICCBA membership. It is currently chaired by Elisabetta Galeazzi;

(g) *The Training Committee* is responsible for the design and implementation of advocacy training, and training in procedural and substantive international criminal law and information technology systems for all ICCBA Members. It is currently chaired by Jean-Claude Mubalama Zibona; and

(h) *The Amicus Committee* is responsible for considering and responding to requests for amicus curiae briefs issued by the ICC President or ICC Chambers, and also for considering and responding to requests for amicus curiae briefs submitted to the ICCBA Executive Council. It is currently chaired by Professor Dr. Philippe Greciano.

13. The ICCBA Executive Council also has appointed Regional and National Focal Points to conduct outreach activities on behalf of the ICCBA within each allocated area of geographic responsibility. The mandate of ICCBA Focal Points includes explaining the role of the ICCBA to List Counsel and Support Staff, explaining the work and jurisdiction of the ICC to legal professionals, assisting the ICCBA in liaising with national bar associations and providing recommendations on the training needs of local Counsel and on other relevant issues. To date, the ICCBA has appointed the following Regional and National Focal Points, all of whom are ICCBA members:

- (a) Regional Focal Points:
 - (i) Africa: Chief Charkes Taku, Vice-President for Defence;
 - (ii) Asia: Dato' Shyamala Alagendra, Executive Council member;
 - (iii) Latin America: Ana Cristina Rodriguez Pineda;
 - (iv) Eastern Europe: Professor Dr. Vladimir Tochilovsky and Jens Dieckmann, Vice President for Victims;
 - (v) Middle East: Mohamed Aouini, Executive Council member and Emile Aoun, Treasurer;
- (b) National Focal Points:
 - (i) Belgium: Luc Walley, Executive Council member;
 - (ii) Canada: Christopher Gosnell, Executive Council member;
 - (iii) China: Michael Yiqiang Liu;
 - (iv) France: Emmanuel Altit;
 - (v) Germany: Natalie von Wistinghausen;
 - (vi) Israel: Rosette Bar Haïm, Executive Council member;
 - (vii) Netherlands: Dr. Caroline Buisman, Executive Council member;
 - (viii) Palestine: Shawan Jabarin;
 - (ix) Philippines: Professor Diane Desierto;

- (x) Russia: Ambassador Alexander Khodakov;
- (xi) Sierra Leone: Ibrahim Yillah;
- (xii) United Kingdom: Rodney Dixon, QC, Executive Council member and David Young, Executive Council member;
- (xiii) United States of America: Colleen Rohan, Executive Council member.

III. Summary of ICCBA Activities and Achievements 2016-2017

A. The Establishment Phase (July-December 2016)

12. The ICCBA Constitution was adopted on 30 June 2016 at the first General Assembly Meeting in The Hague. Elections took place immediately to select a President – David Hooper QC – and the members of the eight standing Committees of the ICCBA. The ICCBA held its second General Assembly Meeting on 30 June 2017 in The Hague, during which time new elections were held for the position of President and all positions on the Executive Committee and all standing committees. Karim A.A. Khan QC was elected as the second President of the ICCBA.

13. Much of the first period of activities of the ICCBA (July-December 2016) was focused on establishment and building of the ICCBA's structure. The ICCBA enacted its first internal policy governing the work and functioning of its standing Committees in October 2016. It launched the first version of its website to provide its membership and third parties with information on the activities of the organisation and to facilitate communication. The ICCBA also entered into discussions with other Bar Associations and other organisations of Counsel to explore the modalities of their interaction with the ICCBA. A first meeting was held in Brussels on 24 October 2016 with several Bars and was attended by the ICCBA President. The Chair of the Victims Committee, Mr. Luc Walley, further met on 3 December 2016 with members of the Council of Bars and Law Societies of Europe (CCBE) to introduce the ICCBA to the members of the CCBE.

14. On 23 November 2016, the ICCBA organized a side event at the 15th session of the Assembly of States Parties in The Hague. During the event, the ICC President, Hon. Silvia Fernández de Gurmendi, the ICC Prosecutor, Hon. Fatou Bensouda, the ICC Registrar, Hon. Herman von Hebel, and the Vice-President of the Assembly, H.E. Sergio Ugalde, all welcomed the establishment of the ICCBA as an independent representative body of Counsel pursuant to rule 20(3) of the ICC RPE. This gathering was in fact the second side event relating to the ICCBA, as a previous side event had taken place in November 2015 in The Hague, which was attended, *inter alia*, by H.E. Sidiki Kaba, President of the Assembly, the ICC President, Hon. Silvia Fernández de Gurmendi, the ICC Prosecutor, Hon. Fatou Bensouda and the ICC Registrar, Hon. Herman von Hebel.

15. The Assembly took note of the establishment of the ICCBA at paragraph 62 of resolution ICC-ASP/15/Res.5 entitled “Strengthening the International Criminal Court and the Assembly of States Parties” of 24 November 2016 and invited the ICCBA to report on its structure and activities at the 16th session of the Assembly in New York in December 2017.

B. Improving of the General Conditions of Work of Counsel and Support Staff at the Court

16. The ICCBA aims at establishing a constructive dialogue with the management of the Court, in particular the Registry, in order to improve the general conditions of work of Counsel and Support Staff at the Court.

17. The ICCBA is raising issues with respect to access to IT facilities by Counsel and Support Staff. In April 2017, responding in part to a request of the ICCBA, the ICC extended the access of the public Wi-Fi network to include the areas of the Permanent Premises housing the workspace for Defence and Victims teams, which previously had no access to the network. Following a request of the ICCBA, the Registry Information Management Services Section (“IMSS”) launched in April 2017 a new system for raising

tickets for IT problems (“SolvIT”), which enables Defence and Victims teams to inform IMSS directly about a host of IT issues through creating incident tickets and to follow-up through the system on the actions taken by IMSS to address a problem.

18. On 14 July and 13 September 2017, the ICCBA President met with the ICC Registrar, Mr. Herman von Hebel. A variety of important matters were discussed. The Registrar agreed to create a single closed workspace available to individual Victims teams on a rotating / shared basis in accordance with their needs. The ICCBA President impressed upon the Registrar the need to provide work space for victims teams that best supports their ability to comply with their duty of confidentiality under the ICC Code of Conduct for counsel. Once the closed work space is created, the ICCBA will consult with victims teams regarding the utility and practicality of the work space, including with respect to the mentioned confidentiality and information protection concerns.

19. The Executive Council has entrusted a Working Group consisting of Ms. Chloé Grandon (Chair) (member of Counsel Support Staff Committee), Dr. Cyril Laucci (Executive Council Member and Chair of Legal Advisory Committee), and Ms. Caroline Buteau (Chair of Defence Committee) to focus on the issue of tax liabilities and exemptions for Counsel and Support Staff. This Working Group will report back to the Executive Council in due course with its recommendations and proposals for action.

20. The Executive Council has also entrusted Ms. Colleen Rohan (Executive Council Member) to draft proposals for the establishment of a “hotline” for reporting cases of harassment – sexual or otherwise – experienced by Counsel and Support Staff. The aim of this hotline is to provide a safe and confidential space where a caller can discuss the incident(s) of harassment and to provide advice to victims of such behaviour. An internal ICCBA policy on the functioning and terms of reference of this hotline is under preparation.

21. In September 2017, the ICCBA launched a new website (www.iccba-abcpi.org). The Executive Council’s goal in commissioning the new website was to simplify and enhance user experience and ease of navigation. In addition, the Executive Council soon realized that the previous platform was not able to support the training programs that it intended to post. The new website includes a “Members’ Area”, for privileged access to information and resources by ICCBA members. Further to a request of the ICCBA President, the Registrar has provided links on the ICC website to the ICCBA website: <https://www.icc-cpi.int/get-involved/Pages/legal-professionals.aspx>; <https://www.icc-cpi.int/about/defence>; <https://www.icc-cpi.int/about/victims>; <https://www.icc-cpi.int/about/witnesses>.

22. By the end of 2017, the ICCBA will post on its website new resources documents prepared by the Legal Advisory Committee in the fulfilment of its work programme. These include a thematic index of existing ICC internal policies (Presidential Directives, Administrative Instructions, Information circulars) applicable to Counsel and support staff or having an impact on their working environment; a legal analysis of existing internal accountability mechanisms and policies within the ICC (including an introduction to the mandate of the Independent Oversight Mechanism (“IOM”) and the anti-fraud and whistleblower protection policies); and a legal analysis of the ICC Information Protection Policy. The aim of these contributions is to foster awareness and understanding of the ICC’s general policy framework among Counsel and Support Staff. Similar contributions are in preparation on items such as the protection of victims and witnesses, privileges and immunities, field activities and the like.

C. Voicing the Views and Concerns of Counsel and Support Staff in ICC Internal Debates on Legal Aid

23. At its 15th session, the Assembly instructed the ICC to submit proposals for adjustments to the legal aid remuneration policy for consideration of the Assembly at its 16th session in December 2017 (ICC-ASP/15/20). In January 2017, the ICC Registry issued a Report on Legal Aid prepared by an external consultant, Mr. Richard Rogers, which provides a comparative analysis of the legal aid schemes applicable before the ICC and other international courts. Its main conclusion was that Counsel and Support Staff before the ICC were – by far – the most poorly remunerated in comparison to other international criminal tribunals.

24. The ICCBA undertook intensive consultations with the ICC Registrar and his external consultant, Mr. Richard Rogers, on this issue. In particular, it requested the ICC Registrar to implement immediately – and without waiting for a full completion of the review of the Legal Aid Scheme – the automatic payment of the professional uplift of 30% for Counsel and 15% for Support Staff provided for under the professional charges compensation scheme on a monthly basis. In a 2014 report titled “Registry report on ways to improve the legal aid procedures”, the Registrar proposed a similar measure of incorporating the professional uplift and reimbursement for travel and subsistence costs into one monthly lump sum payment. This measure, he had said, would “simplify and streamline the payment of reimbursements”, “generate savings” as well as save time for the various Registry sections involved (ICC-ASP/13/6, paras. 6–10). Nevertheless, in a letter dated 31st March 2017 to the ICCBA President, the ICC Registrar declined to implement the ICCBA’s requested measure on the ground of alleged legal difficulties under the existing Legal Aid Scheme.

25. In April 2017, the ICC Registrar circulated a “Concept Paper” on legal aid in view of the organization of a seminar with NGOs and other relevant stakeholders on 19 June 2017.

26. On 24 April 2017, the ICCBA issued a Commentary on the Registry’s Concept Paper on Legal Aid in which it noted its concerns with respect to the postponement of the review of the Legal Aid Scheme and highlighted the need for the prompt implementation of a set of interim measures, including the automatic payment of the uplift for compensation for professional charges on a monthly basis.

27. The ICCBA attended the 19 June 2017 seminar and reiterated the need to implement the identified interim measures, without impact on the Registrar’s position.

28. On 18 August 2017, the ICCBA addressed a written “Submission on Legal Aid” to the Committee on Budget and Finance (“CBF”) (the full Submission is available on the ICCBA website at the following address: https://docs.wixstatic.com/ugd/ff5a5e_34693d7558a74cfbb0b8fa6c1d5fc2d5.pdf). In this Submission, the ICCBA respectfully requested the CBF to recommend to the 16th session of the Assembly the following measures:

(a) That the ASP should decide that, pending completion of a full review of the Legal Aid Scheme, the professional uplift for compensation of charges provided under the current Legal Aid Scheme:

(i) shall be paid automatically on a monthly basis together with the fees of Counsel and support staff, without the need to submit supporting documentation; or

(ii) in the alternative, shall be paid in advance on a monthly basis together with the fees of Counsel and support staff, and that the verification of supporting documentation submitted at the end of the year be made a *pro forma* process; and

(b) That the ASP should amend the ICC Budget structure or financial rules so that legal aid funds cannot be reallocated by the ICC Registrar for other non-legal aid purposes pursuant to rule 104.3 of the Financial Rules and Regulations: this could be achieved by an amendment to the budget structure, insulating the legal aid budget as a separate budget or special account, or by inserting a specific caveat to the ICC Registrar’s authority to reallocate funds in the Financial Regulations and Rules – whichever way is deemed most appropriate by the CBF and the ASP.

29. The CBF invited the ICCBA to make a presentation on the basis of its Submission. Further to this invitation, on 22 September 2017, the ICCBA President appeared before the CBF and reiterated the abovementioned requests and arguments in support.

30. In its “Report on the Work of its 29th session” to the Assembly (ICC-ASP/16/15), the CBF takes note of the Submission and presentation made by the ICCBA (paras. 7, 177), and “underlined that any document submitted to the Assembly that could have financial or budgetary implications has to be submitted to the Committee for consideration” – as done by the ICCBA through its Submission of 18 August 2017 to the CBF – and referred to the authority of the Assembly to take a “decision on any amendment to the legal aid system” (para. 183).

31. With that recommendation, the ICCBA is addressing the same Submission and requests to the Assembly for its determination at its 16th session.

D. Building of a Strong Network of Counsel Interested in the Court Worldwide

32. The discussions initiated in October to December 2016 with other organisations of Counsel were carried on and intensified in 2017. On 29 March 2017, the ICCBA arranged a meeting for national and international bars at the seat of the ICC. All those who attended demonstrated a clear and positive intention to support the ICCBA in its work. The meeting was a great success, bringing a wide range of bars and associations together to decide on a structure for future cooperation. There was a wide selection of Bars and Associations and others to discuss the issue: ‘What is the best way for the ICCBA to engage with, and have the effective participation of, other Bars?’ Among those who attended were representatives of The Hague Bar, German Federal Bar (BRAK), Netherlands Bar, Union Internationale des Avocats (UIA), Ordre des Barreaux francophones et germanophones de Belgique (OBFG), OHADA Conference, International Criminal Bar Association (ICB), Conférence Internationale des Barreaux de tradition juridique commune (CIB), The Council of Bars and Law Societies of Europe (CCBE), Bar of England and Wales, Criminal Bar Association, American Bar Association, International Bar Association, African Bar Association, the Rwandan Bar Association, the Defence Office of the STL and the ADC-ICT.

33. Based on the outcome of this successful event, the ICCBA promulgated, in April 2017, its “Procedure regarding Affiliations”, which sets the policy framework for the affiliation of other Bars and organisations to the ICCBA, pursuant to Article 40 of the ICCBA Constitution.

34. On 29 April 2017, the ICCBA organized a training session open to its members at the Marriott Hotel in The Hague. After a keynote speech delivered by Honourable Judge Geoffrey Henderson, ICCBA members made presentations on Defence investigations, Article 70 proceedings, and understanding charges in ICC cases.

35. In May 2017, the ICCBA entered a memorandum of understanding with the Siracusa Institute in Sicily, Italy. Based on this agreement, the ICCBA and the Siracusa Institute together aim at developing joint programmes, particularly relating to the ICC. The ICCBA has partnered with the Siracusa Institute to launch a Programme that represents a new, multi-annual and globally oriented training framework for the promotion and protection of defence rights and fundamental human rights in international criminal proceedings and national cases on transnational crimes. The Programme is part of a global effort to enhance defence rights in the international criminal justice chain through different entry-level and specialisation courses. The Programme officially started with the inaugural Course on “Fundamentals on Defence Rights before International Courts”, which was held between May 15-19 at the Siracusa Institute’s Headquarters. Together with the ICCBA, other partners of the Programme are the Union Internationale des Avocats (UIA), the Association Internationale de Droit Pénal (AIDP), the International Criminal Justice Consortium (ICJC), the Centre d’Etudes sur la Sécurité Internationale et le Coopération Européennes (CESICE) of the University of Grenoble, and the Italian Scuola Superiore dell’Avvocatura (SSA).

36. The ICCBA was selected by the ICC Registry, following an open procurement process, to organise the ICC’s annual training for List Counsel, which took place at the ICC Permanent Premises from 27 to 29 June 2017, and which was scheduled to coincide with the ICCBA’s second General Assembly Meeting on 30 June 2017. The focus of the first day of training was on vulnerable witnesses, protective measures, the role of duty counsel in representing vulnerable witnesses and persons at risk of self-incrimination, and questioning vulnerable witnesses in court. The focus of the second day of training was on reparations proceedings before the ICC. Practical advocacy exercises played an important part of this training module. The third day of training included observing trial hearings at the Court, lectures by experts on achieving best evidence and best practice in terms of protecting vulnerable witnesses in the adversarial system, and a panel discussion of

experienced practitioners, including a member of the Trial Chamber, on issues and concerns arising out of the training.

37. On 2 October 2017, the ICCBA and the African Bar Association (“AFBA”), represented by its President Mr. Hannibal Uwaifo, signed an Affiliation Agreement at a ceremony held at the ICC Permanent Premises in The Hague. This Affiliation Agreement is the first affiliation agreement signed by the ICCBA and another Bar. The agreement was reached in accordance with the ICCBA Procedure Regarding Affiliations of April 2017, and will form the basis for continued and deepening collaboration and cooperation between the two bar associations on issues of mutual concern and interest. *Inter alia*, the Affiliation Agreement provides in its Article 3 that the ICCBA will rely on the AFBA to assist, facilitate or otherwise support its outreach activities in all African countries, be they States Parties to the Rome Statute or not, before the African Union and before all relevant regional organisations represented in African countries. The ICCBA and AFBA were honoured by the presence at the signing ceremony of several Judges of the Court, in particular Honourable Judge Joyce Aluoch, First Vice-President of the Court, Honourable Judge Sanji Monageng, and Honourable Judge Howard Morrison, the Registrar of the United Nations Mechanism for International Criminal Tribunals, Mr. Olufemi Elias, the Registrar of the Residual Special Court for Sierra Leone, Ms. Binta Mansaray, and officials from the ICC Office of the Prosecutor and Registry.

38. During Summer-Fall 2017, ICCBA President Karim Khan QC and members of the newly elected Executive Council represented the ICCBA before various international conferences and bar associations. Chief Charles Taku addressed the annual conference of the African Bar Association in Nigeria, and Karim Khan QC addressed the annual conference of the Sierra Leone Bar in Freetown. In Asia, Karim Khan QC met with Presidents of the ASEAN Law Association (Mr. Avelino Cruz), the Integrated Bar of the Philippines (Mr. Abdiel Dan Elijah Fajardo), and the Singapore Law Society (Mr. Gregory Vijayendran), and addressed a conference of local prosecutors and lawyers in Timor-Leste hosted by the Prosecutor General H.E. Jose Ximenes and presided over by the Minister of Justice, H.E. Ivo Valente. ICCBA Secretary Xavier-Jean Keïta represented the ICCBA at the International Criminal Justice Day Conference held in Dakar, Senegal, and Karim Khan QC and Dato’ Shyamala Alagendra participated in a workshop for judicial officers of the Supreme Court of Indonesia at the ICC Permanent Premises in The Hague. These activities form part of the Outreach efforts undertaken by the ICCBA to promote the ICC and raise awareness and interest about the Court among members of the legal profession worldwide.

39. On 5 October 2017, the ICCBA President signed the GQUAL Action Plan on behalf of the ICCBA in The Hague. The GQUAL campaign seeks to raise awareness about and achieve concrete actions to address the underrepresentation of women in leadership positions in international bodies. The signature of the GQUAL Action Plan was preceded by a mock debate, in which the ICCBA President participated, on the issues of gender quotas and targets hosted by the ICC, Women in International Law Network and GQUAL. The ICC President, First Vice-President, and Judge Christine Van den Wyngaert served as adjudicators for the mock debate.

40. Also on 5 October 2017, the ICCBA Secretary Xavier-Jean Keïta represented the ICCBA at The Hague Municipality’s annual NGO network reception, which was hosted by UNICEF at its offices in The Hague and attended by local and international NGOs with a presence in The Hague. The ICCBA co-hosted, with the Coalition for the International Criminal Court, one of three break-out sessions, focused on legal matters.

41. In October 2017, the ICCBA reached an agreement on a multifaceted project focused on victim participation, with Oxford University and the OPCV, which will include the organisation of workshops and expert seminars, publishing of briefing papers for judges, prosecutors, defence lawyers and victims’ legal representatives at the ICC, and development of a training program for victims’ legal representatives.

E. Supporting the ICC and the Assembly’s Efforts in Achieving a Model of Modern and Transparent Criminal Justice

42. Enhancing the quality of justice at the ICC pursuant to the principles and requirements established under the provisions of the Rome Statute and other relevant texts forms part of the main objectives of the ICCBA pursuant to Article 2(5) of its Constitution. In particular, the quality of justice before the ICC depends on the ability of the Defence and Victims, as parties and participants to ICC proceedings, to perform their roles effectively and independently. The overriding goal of the ICCBA is to strengthen the capacity of counsel to perform this role, and ensure that the views and concerns of Defence and Victims’ counsel are represented to the Court. All ICCBA activities summarized in the present Report primarily aim at fulfilling this objective by establishing and further developing the ICCBA as a reliable and independent partner of the Court and of the Assembly in achieving the goals of the Rome Statute. The promotion of the interests and concerns of Counsel and Support Staff contributes to achieving this goal by enhancing the quality of representation of victims, defendants and other persons before the Court.

43. At the 16th Session of the ASP, the ICCBA will organize a side event on the topic of how it can best contribute to supporting the ICC and the Assembly in strengthening the Rome Statute model of international criminal justice, and achieving the highest standard of due process and fair trial for victims and defendants before the Court. The ICCBA will further explore with the representatives of the Court and of States Parties the advantages of the ICCBA’s global network of Counsel, Support Staff and Focal Points and of its participation as the voice of independent Counsel in the institutional and policy debates with the Organs of the Court.

44. The ICCBA welcomes the description included in Vacancy Announcement Number 13121 concerning the functions of the next ICC Registrar, which includes “liaising and cooperating with the ICC Bar Association” and emphasizing the crucial importance of the Registrar with respect to the work of Counsel and Support Staff. The ICCBA Executive Council will invite the candidates shortlisted for the Registrar position to answer a written questionnaire on topics relevant to the ICCBA and its membership, and additionally welcome the candidates to address follow-up questions and other issues in-person with a specially constituted ICCBA panel.

Table 1: ICCBA members based on nationality

<i>State</i>	<i>Number of ICCBA Members</i>
African States	138
Benin	3
Cameroon	18
Central African Republic	5
Congo	1
Democratic Republic of the Congo	34
Egypt	3
Gabon	2
Gambia	2
Ghana	1
Guinea-Bissau	1
Ivory Coast	3
Kenya	10
Liberia	1
Libya	1
Madagascar	1
Mali	6
Niger	1
Nigeria	7
Rwanda	2
Senegal	10
Sierra Leone	3

South Africa	6
Sudan	1
Tanzania	2
Togo	1
Tunisia	5
Uganda	6
Ukraine	2
Asia-Pacific States	26
Cambodia	1
China	1
India	3
Jordan	2
Lebanon	8
Malaysia	4
Palestine	1
Philippines	1
Singapore	1
South Korea	1
Timor-Leste	2
Turkey	1
Eastern European States	14
Armenia	1
Croatia	3
Macedonia	2
Moldova	1
Poland	1
Romania	3
Russia	2
Serbia	1
Latin American and Caribbean States	13
Argentina	1
Bolivia	1
Brazil	3
Chile	1
Columbia	1
Guatemala	1
Mexico	1
Western European and other States	254
Australia	10
Belgium	12
Canada	21
Denmark	1
France	60
Germany	21
Greece	4
Ireland	5
Israel	2
Italy	17
Netherlands	13
New Zealand	1
Slovakia	1
Spain	3
Sweden	2
Switzerland	4
United Kingdom	41
United States	36

Annex

Submission on legal aid, made to the 16th session of the Assembly of States Parties, by the International Criminal Court Bar Association (“ICCBA”)

1. The ICCBA President has the honour of addressing to the 16th session of the Assembly of States Parties (“ASP”) the submissions below in relation to the Legal Aid Scheme before the Court. This is done in accordance with paragraph 62 of Resolution ICC-ASP/15/Res. 5 of 24 November 2016 inviting the International Criminal Court Bar Association (“ICCBA”) to report to the ASP on its activities. The present Submission follows an equivalent Submission addressed to the Committee on Budget and Finance (“CBF”) on 18 August 2017. In the Report on the Work of its 29th session (ICC-ASP/16/15), the CBF noted the ICCBA’s Submission (par. 177) and referred it to the ASP for decision (par. 183). Accordingly, the ICCBA now respectfully requests the ASP to decide as follows:

(a) That, pending completion of a full review of the Legal Aid Scheme, the professional uplift for compensation of charges provided under the current Legal Aid Scheme:

(i) shall be paid automatically on a monthly basis together with the fees of Counsel and support staff, without the need to submit supporting documentation; or

(ii) in the alternative, shall be paid in advance on a monthly basis together with the fees of Counsel and support staff, and that the verification of supporting documentation submitted at the end of the year be made a *pro forma* process; and

(b) That the ICC Budget structure or financial rules be amended so that legal aid funds cannot be reallocated by the ICC Registrar for other non-legal aid purposes pursuant to rule 104.3 of the Financial Rules and Regulations: this could be achieved by an amendment to the budget structure, insulating the legal aid budget as a separate budget or special account, or by inserting a specific caveat to the ICC Registrar’s authority to reallocate funds in the Financial Regulations and Rules – whichever way is deemed most appropriate by the ASP.

I. Background

2. Based on the outcome of two subsequent reviews of the Legal Aid Scheme in 2015-2016, the ASP requested the ICC to submit “proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly” at its Sixteenth session in December 2017 (ICC-ASP/15/20). The Registrar issued a draft Concept Paper on the Review of the International Criminal Court Legal Aid System and held a Seminar on 19 June 2017. The draft Concept Paper reads that, instead of the requested proposals for adjustments to the legal aid remuneration policy, the ICC Registrar intends to present an “update on the consultation process” at the Sixteenth Session of the ASP.

3. The ICCBA invited the ICC Registrar to review his intended timeline and speed up the review and proposal process in compliance with the ASP instruction. The ICCBA also proposed the implementation of certain interim measures pending a full review of the Legal Aid Scheme in order to improve the current situation at no cost for States Parties. Both requests were denied.

4. At the same time, a report submitted by a consultant hired by the ICC Registrar (“the Rogers Report”) acknowledged that the level of remuneration for Counsel and support staff before the ICC is the lowest of all international tribunals. The ICCBA submits that the current situation cannot remain unaddressed for an indefinite period of time. Mindful of the need to ensure efficient and transparent use of the legal aid funds budgeted and authorized by the States Parties, the present Submission requests the Sixteenth Session of the ASP to take the immediate and cost-neutral interim measures mentioned in paragraph 1 in order to

improve the level of remuneration of Counsel and support staff without increasing the level of legal aid. Such interim measures can be implemented immediately, pending the completion of a full review of the existing Legal Aid Scheme by the Court.

II. Automatic or advance payment of professional uplift

5. A measure identified in the Rogers Report that can be implemented pending a full review of the Legal Aid Scheme without generating extra legal aid costs is the automatic payment of the professional uplift of 30% for Counsel and 15% for support staff for compensation of charges factored into the hourly and monthly fee rates. On 31 March 2017, the ICC Registrar refused this interim measure primarily on the basis that the payment of the additional uplift cannot be automatic and had to be conditional on the production of supporting documentation of actual payment of charges. The ICCBA respectfully disagrees with this analysis and notes that this measure was proposed as an efficiency measure by the Registrar himself in the “Registry Report on Ways to Improve the Legal Aid Procedures” submitted to the 13th session of the ASP on 22 May 2014 (ICC-ASP/13/6, par. 7). The ICCBA is thus of the view that the Registrar has the authority to issue a policy decision implementing the proposed measure without derogating from the existing Legal Aid Scheme, as he proposed in 2014. In the absence of such a policy decision, the ICCBA now raises this issue before the ASP for its consideration and appropriate action, as recommended by the CBF in its Report.

6. The Registry’s Single Policy Document on the Court’s Legal Aid System (ICC-ASP/12/3), which defines the current Legal Aid Scheme, provides that the compensation of charges is not paid automatically: costs compensated must have a direct link with intervention and involvement in Court proceedings, and it is conditional on the production at the end of the year of supporting documentation of actual payment of charges. This provision does not preclude the advance payment of the uplift for compensation on a monthly basis in addition to legal fees and the yearly verification of actual payment of charges. In any case, as long as Counsel and support staff remain potentially liable for income tax (up to 52% in the Netherlands), the totality or a significant portion of the uplift is thereby absorbed irrespective of other side activities, thus creating a presumption that the full compensation of charges is, in any case, justified, without prejudice to other charges.

7. This presumption is sufficiently strong to justify the automatic payment of the uplift without the need for supporting documentation of actual payment of charges. The ICCBA therefore respectfully requests that the ASP direct the Registrar to pay the professional uplift of 30% for Counsel and 15% for support staff automatically and waive the requirement for this supporting documentation until the completion of a full review of the Legal Aid Scheme. In the alternative, the ICCBA respectfully requests that the ASP decide that the professional uplift be paid in advance and factored into the hourly and monthly fee rates, without the need for an onerous process for verifying supporting documentation. The ASP should therefore decide that, until the completion of a full review of the Legal Aid Scheme, the verification of documentation at the end of the year be made a *pro forma* process. These simple solutions would reduce the bureaucratic expenses linked to the current way charges are verified. Either measure should be implemented with immediate effect and would come at no cost for States Parties, who already allot these amounts for compensation of charges in the annual legal aid budget.

III. Preventing reallocation of legal aid funds

8. The ICCBA has noted that, for various reasons (which would appear to include a lack of transparency or guiding documents in relation to entitlements), only a small portion of Counsel and support staff entitled to receive the uplift for compensation of charges have been claiming it and/or receiving it in full or at all. A substantial amount of Counsel and support staff’s compensation under the Legal Aid Scheme, which is budgeted for each year by States Parties as part of the legal aid budget, never reaches Counsel and support staff. This unpaid portion is neither returned to States Parties nor is it added to the budget of the following year. In the absence of publicly available actual numbers, it is presumed that the

unpaid portion of the legal aid budget is reallocated to the financing of Registry operations each year.

9. Under the current legal framework and budget structure of the Court, the Registrar, as first administrative officer of the Court, has the authority to reallocate the unutilized portion of the legal aid budget within the Registry budget pursuant to rule 104.3 of the Financial Rules and Regulations. All that this would require is a simple reallocation of resources among organizational units within the Registry, namely from CSS to other sections, such that the budget meant for payment of legal aid is used for other expenditures. It does not even need to be reported to the CBF or ASP. This way of reallocating resources means that the legal aid budget appears inflated when in fact it is not being allocated for the benefit of Counsel and support staff, and ultimately to ICC legal aid-assisted defendants, victims and witnesses. If this situation is not rectified, any augmentation to the legal aid budget – such as the one proposed in the Rogers Report – would primarily increase the portion and amount of the legal aid budget which the Registrar would have authority to reallocate to other ICC Registry operations and not pay to Counsel and support staff, who are the intended recipient of these funds.

10. Should the ASP grant the first request regarding the professional uplift above, the issue of the potential reallocation of the unpaid portion of the legal aid budget should automatically be mitigated, as more of the budget allocated for legal aid would indeed be spent for that purpose. To safeguard any unpaid portion of the legal aid budget remaining, the ICCBA respectfully requests, as a second urgent interim measure, that the ASP decides that the rules governing the legal aid budget and/or the structure of the 2018 ICC budget be amended to prevent reallocations of legal aid funds for other purposes. Such measures would increase the transparency surrounding the Court's legal aid funding. It is suggested that any solution should ensure that the system remains flexible enough to provide for the contingency extension of the legal aid budget in order to face unforeseen expenses and continue to honour the ICC's financial obligations under the Legal Aid Scheme. The ASP could, for example, request that the Court create a separate "Major Programme" within the budget structure to outline legal aid costs.

11. The ASP may also impose the making of a clear distinction in the legal aid budget between funds allocated to the payment of Defence fees, legal representatives' fees and fees paid to Counsel assisting witnesses for the sake of better transparency. The ICCBA defers to the ASP authorities to determine the most appropriate and cost-efficient solution. It simply draws the attention of the ASP to the fact that creating a special account funded by assessed contributions, pursuant to regulation 6.5 of the Financial Rules and Regulations, for the purpose of legal aid, may also present some advantages in terms of efficiency, such as the potential to report or record unexpended funds from one financial period to the next.

12. Finally, the ICCBA looks forward to presenting the Report on its Constitution and Activities to the ASP. The present Submission is also annexed to the ICCBA's Report.

Respectfully submitted,

[Signed]

Karim A. A. Khan
QC President, ICCBA-ABCPI
