



**Retreat on
Strengthening the Proceedings at the International Criminal Court**

Glion, Switzerland, 3-5 September 2014

Background Document

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Background Document

1. Introduction

1.1. THE ICC RETREAT: PURPOSE AND GOALS

Since its inception in 2002, the International Criminal Court (ICC) has established itself as an indispensable institution in the international peace, security and justice architecture. As such, it must constantly strive to satisfy the highest standards of justice. In particular, the effectiveness of its proceedings is essential to safeguarding the rights of victims and those of the accused, the credibility and authority of the institution and also the targeted use of financial resources. The significant financial costs of individual cases also limit the number of investigations and prosecutions which may be conducted at any one time. The more effective use of resources would enable the institution to try more cases than now and to do so more expeditiously. At the same time it is crucial that efforts to increase the effectiveness of proceedings should not be to the detriment of the overall fairness of proceedings.

Building on the work of the Study Group on Governance (SGG) of the Assembly of States Parties (ASP), the Working Group on Lessons Learnt of the Court (WGLL) and other actors and seeking to bring the various stakeholders together, the retreat presents a unique opportunity for an intense and constructive exchange of views on how to further enhance the effectiveness at the ICC.

The main goals of the retreat are:

- to reinforce the shared commitment and responsibility to fight impunity for the most serious crimes by means of the ICC;
- to create greater awareness and a better understanding of the main challenges in terms of effectiveness at the ICC as well as to identify possible solutions and priorities;
- to learn about existing formal and informal processes put in place to enhance the effectiveness at the ICC;
- to identify synergies between these different processes and the involved actors; and
- to stimulate future discussions in the context of the Assembly of States Parties to the Rome Statute (ASP) and at the ICC itself.

The retreat will bring together around 60 senior policy makers and practitioners, including representatives of the ICC, States Parties, and NGOs as well as independent experts. It will be held in an informal and interactive setting (no tie, group break-outs), and under Chatham House Rules. To ensure the greatest possible amount of interaction, we strongly encourage participants not to use pre-written statements but to actively engage in discussion. There will be no time allotted for general statements. We strongly encourage participants to engage in a frank, candid and respectful exchange among participants who have a shared commitment to fight impunity for the most serious crimes of concern to the international community as a whole. We invite participants to regard the meeting as a solution-driven exercise that is intended to find practical solutions to concrete problems faced by the ICC.

After the retreat, Switzerland will prepare an informal Chair's Summary. Switzerland hopes to stimulate reflections on the effectiveness of the proceedings before the ICC through this informal retreat and looks forward to a fruitful discussion in Glion.

1.2. THE BACKGROUND PAPER

The aim of this Background Document is to provide participants of the retreat with concise information about the issues to be addressed at the retreat and to identify possible issues for discussion. The structure of the document corresponds to the overall structure of the retreat with a view to enabling participants to make the most of the discussions and to facilitate the reaching of tangible conclusions on the way forward. Please note that the Background Document shall give an overview of the main issues but by no means provide a complete and comprehensive picture of all relevant issues.

The Background Document has been prepared under the sole responsibility of the Federal Department of Foreign Affairs of Switzerland (FDFA). It is suggested that the Background Document first be read in its entirety, given that the issues, and thus various sections of the text, are interlinked.

1.3. THE EXPERT REPORT ON PROMOTING EFFECTIVENESS AT THE ICC

In 2013, a group of independent practitioners and/or law professors under the leadership of Prof. Guénaël Mettraux decided to write a report on promoting effectiveness at the ICC. The report, a copy of which has been provided to you as a participant of the retreat, contains numerous recommendations on how to improve on the effectiveness at the ICC. The report is primarily intended for the Court itself, but also States Parties, NGOs and other interested stakeholders. It seeks to avoid, to the extent possible, recommending changes to the statutory or regulatory framework of the Court and focuses instead on changes of practice within and towards the Court. The report is the basis for the information provided for in Chapter 4 of the Background Document.

The members of the group of independent experts are:

- Prof. Dr. Guénaël Mettraux (counsel/consultant at the ICTY, ICTR, MICT, ECCC, STL and ICC);
- Justice Shireen Avis Fisher (former SCSL President);
- Dermot Groome (ICTY, Senior Prosecuting Trial Attorney; Distinguished Fellow at *Penn State Law*);
- Prof. Alex Whiting (Professor of Practice at Harvard Law School);
- Gabrielle McIntyre (Chef de Cabinet to the President of the ICTY and the MICT);
- Jérôme De Hemptinne (Senior Legal Officer at the STL);
- Prof. Göran Sluiter (Professor of International Criminal Law at University of Amsterdam).

All experts worked *pro-bono*. Upon their request, the FDFA agreed to cover costs for travel, accommodation and conference facilities as well as other expenses associated with the initiative. In addition, the University of Amsterdam provided in kind support. Most of the experts will be present at the retreat and look forward to exchanging with the participants.

2. Opening Session - Taking Stock

On 1 July 2002, more than 12 years ago, the ICC opened its door with the entry into force of the Rome Statute. **21 cases in 8 situations** (Uganda, Democratic Republic of Congo, Sudan, Central African Republic, Kenya, Libya, Côte d'Ivoire and Mali) have been brought before the Court. In addition, the ICC is currently conducting preliminary investigations in 10 situations (Afghanistan, Central African Republic, Colombia, Comoros, Nigeria, Georgia, Guinea, Honduras, Iraq and Ukraine). Two convictions in the context of the situation in the Democratic Republic of Congo against Thomas Lubanga (appeal pending) and Germain Katanga (conviction is final) have resulted from ICC proceedings. Also in the context of the DRC situation, Mathieu Ngudjolo has been acquitted by the Trial Chamber (appeal pending). **Arrest warrants** issued by the Court remain outstanding against more than 10 individuals.

Five out of the eight situations mentioned above have been referred to the Court **by the respective countries** (Uganda, Democratic Republic of Congo, Central African Republic, Côte d'Ivoire and Mali). The **UN Security Council** has referred two situations (Darfur/Sudan and Libya) to the ICC and has been called upon to take the same step in relation to other situations, including Syria. Regarding the situation in Kenya, the **Prosecutor** acted *proprio motu*. The UN General Assembly and the Human Rights Council frequently include references to the Court in their resolutions. International commissions of inquiry, including those for Syria and North Korea have called for the involvement of the ICC. The United Nations and the ICC have concluded a relationship agreement although financial contributions and a vigorous and effective follow-up by the Security Council of its referrals have not yet become a reality. Conversely, the UN Secretary General, in 2013, instructed all parts of the Secretariat to limit contacts with persons who are the subject of arrest warrants or summonses issued by the ICC.

Since the entry into force of the Rome Statute in 2002, the number of **States Parties** has doubled to 122 (34 African States, 18 Asia-Pacific States, 18 Eastern Europe, 27 Latin American and Caribbean States and 25 Western European and other States). Accordingly, almost two-thirds of all UN Member States have ratified the Rome Statute, though a number of large states and states that have experienced armed conflicts or grave human rights violations have not joined the Statute. In general, ratifications by States have recently stagnated; the last country to join the Statute was Côte d'Ivoire in February 2013. As the figures above show, the number of States Parties also varies much between the different regions of the world and a need for more ratifications can be identified in the Asian-Pacific region. Recently, the ICC has been coming under increased criticism from African States, in particular in relation to the fact that all ongoing cases concern countries from the African continent and that there are several proceedings involving high African state officials.

As regards the **civil society**, more than 2'500 organisations from 150 countries have been expressing their support for the institution through the International Coalition for the International Criminal Court. The ICC and the Rome Statute are referenced on a regular basis in reports of leading human rights NGOs such as Human Rights Watch, the International Center for Transitional Justice or Amnesty International.

While the ICC has undisputedly provided a measure of justice to many victims of serious crimes, the limited number of concluded cases, the sometimes insufficient cooperation by States Parties and the limited stimulating effect on national trials for crimes pursuant to international law, are a concern. More than ever, States Parties, NGOs and other stakeholders have to ask themselves **what they expect from the ICC and what the Court can reasonably deliver**. While the ICC has become a leading institution in international criminal justice, it cannot realistically bring about peace, reconciliation or justice to every victim of an international crime. True, given its complementary nature, this has never been the role assigned to it. But as a centrepiece of a justice system where national and international jurisdictions are intertwined, the ICC may be expected to lead by example. To fulfil the essential mission of the Court, States Parties, the civil society, interested stakeholders and the Court itself have **a shared and on-going responsibility to make the ICC a better and stronger institution**.

Questions for Discussion:

- **What have been the greatest successes of the ICC?**
- **What have been the greatest challenges of the ICC?**
- **How do you evaluate the support to the ICC by...**
 - ... **States Parties?**
 - ... **the UN, in particular the Security Council?**
 - ... **civil society?**
- **In the future, what do you expect from...**
 - ... **the ICC?**
 - ... **States Parties?**
 - ... **the UN, in particular the Security Council?**
 - ... **civil society?**
- **What do you expect from this retreat?**

3. Existing Initiatives to Enhance the Effectiveness of Proceedings

3.1. INSTITUTIONAL DIALOGUE BETWEEN THE COURT AND STATES PARTIES

States Parties to the Rome Statute are currently addressing the issue of ICC efficiency and effectiveness through the **Study Group on Governance (SGG)**, an Assembly of States Parties (ASP) subsidiary body within the Bureau's The Hague Working Group. Its original mandate is to "conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence."¹

The Court produced its first Report on Lessons Learnt in 2012.² In that report it identified nine "clusters", which it viewed as needing consideration following 10 years of practice at the ICC and the completion of the first trial: Pre-trial; Pre-trial and trial relationship and common issues; Trial; Victims participation and reparations; Appeals; Interim release; Seat of the Court; Language Issues; and Organizational Matters. That same year, States established the Roadmap which set out a process under which the Judges' **Working Group on Lessons Learnt (WGLL)** submits proposals for amendments to the Rules of Procedure and Evidence (RPE) to States, drawing on those clusters identified in the Lessons Learnt

¹ Resolution ICC - ASP/9/Res.2 (10 December 2010).

² ICC-ASP/11/31/Add.1.

Report.³ It is composed of Judges from each division, representatives from the Registry, the Office of the Prosecutor and counsel from both defence and victims. These proposals are also discussed by the Advisory Committee on legal texts (ACLT) where representatives for the Prosecutor and Defence are also represented. The SGG, accessible to all States Parties representatives from The Hague and Brussels, tries to reach a consolidated assessment on the proposal, which is submitted to the **Working Group on Amendments (WGA)** in New York. The WGA is composed of States Parties representatives. It deliberates amendment proposals to the ICC regulatory framework and transmits its recommendations to the ASP.

In the meantime, the SGG managed to establish an on-going, constructive dialogue with the Court in order to increase the Court's efficiency and expedite its proceedings. To date, States have adopted amendments to the Rules of Procedure and Evidence (RPE), by adding Rule 4*bis* (the presidency), Rule 132*bis* (Designation of a judge for the preparation of the trial), Rule 134*bis* (Presence through the use of video technology), Rule 134*ter* (Excusal from presence at trial), Rule 134*quater* (Excusal from presence at trial due to extraordinary public duties); as well as amending Rule 100 (place of the proceedings) and Rule 68 (prior recorded testimony). This year, the Court has submitted proposals relating to language and interpretation, and organizational clusters. These proposals are currently being discussed.

On 9 July 2014, a one day **SGG - seminar** has been organized in order to broaden the work of the SGG without creating a parallel track to it, focusing on the "pre-trial and trial relationship" cluster. A Court paper identifying *bottlenecks* has been presented by the Court. After the summer break, the group will be discussing concrete measures in this area on the basis of further proposals made by the Court.

3.2. GERMAN NON-PAPER

A non-paper circulated in July 2014 by Germany focuses on a reform discussion around the confirmation of charges proceeding.⁴ It indicated that, amongst others, one of the reasons for the choice of that topic was that the rules governing the procedure were often ambiguous and failed to determine to what extent the confirmation proceedings should prepare and streamline the trial stage.

It identified the duplication of procedural steps taken during the confirmation proceedings at the trial stage and the divergent approaches by the Pre-trial Chambers to the scope of pre-confirmation disclosure to be among the main challenges relating to emerging practice before the Court in that field. In order to address these challenges, it was decided to open a discussion on how to reduce the length of the confirmation proceedings and to better determine to what extent these proceedings substantially contribute to the preparation and thus the expeditiousness of the trial.

As to the way forward, it has been indicated that the process and outcome of the initiative were open and that anyone was welcome to join the discussion.

³ ICC-ASP/11/Res.8. The Roadmap was annexed to the Report of the Bureau on the Study Group on Governance, ICC/ASP/11/31. The "Revised Roadmap" was endorsed by the ASP on 27 November 2013. ICC-ASP/12/Res.8

⁴ As laid down in Art. 61 of the Rome Statute.

3.3. FCO SEMINAR 2012

The United Kingdom Foreign and Commonwealth Office held a seminar, under the Chatham House rule, on ICC procedures on 26 October 2012. The seminar, chaired by former ICC Judge, Sir Adrian Fulford, and attended by representatives from academia, the ICC, the bar and *ad hoc* international criminal tribunals, discussed in detail issues related to pre-trial, trial and appellate procedures, as well as victims' participation. The result was a comprehensive summary of discussion which has been published recently.⁵

3.4. INITIATIVE OF THE COALITION FOR THE INTERNATIONAL CRIMINAL COURT

Since 2011, the Coalition for the ICC (CICC) has been developing and encouraging initiatives parallel to the Lessons Learnt and Study Group on Governance processes advocating a constructive and inclusive approach to discussing those issues. These efforts resulted in a project that seeks to promote processes similar to the 1999 UN Expert Group study on the Yugoslavia and Rwanda tribunals (see below 3.6.), the 2012 FCO seminar on ICC procedures (see above 3.3.), the work of the Open Society Justice Initiative (see below 3.5.), the efforts by Switzerland, etc. The CICC project envisions the continued need for a series of efforts in coordination with States Parties, the ICC, experts of the *ad hoc* as well as other specialised tribunals, and CICC members. The project concretely focuses on the Rome Statute system and the ICC, and specifically attempts to reduce the 8-12 years that international criminal cases have often taken to complete without impairing the fairness of the proceedings, including the rights of victims. The CICC's immediate effort will be on what is perceived to be an unsustainable status of the appeal practices and processes at the ICC. The initiatives would include both informal and formal expert studies on strengthening the efficiency and effectiveness of ICC proceedings, but also look at ASP structures and processes. The results could then lead to an ASP special session or a second review conference of States Parties. The CICC project addresses several levels:

- reforms of practices of the ICC that do not require ASP decisions;
- reforms that require changes of the legislative framework by the ASP, including strengthening ASP structures;
- reforms that require Rome Statute amendments;
- reforms that emerge from a systematic review of UN procedures and rules imported *in toto* by the ASP in 2002 and 2003 that have never since been reviewed by the ASP.

3.5. ACTIVITIES OF THE OPEN SOCIETY JUSTICE INITIATIVE

The Open Society Justice Initiative (OSJI) has been actively supporting the ICC in various fields in order to improve its efficiency and effectiveness and is currently working on the development of further projects in that regard. As an example, the OSJI has been working with NGOs on how they can better support Prosecution investigations by the Office of the Prosecutor (OTP) in a way that enhances the credibility and effectiveness of ICC proceedings. This includes using new forms of gathering of evidence that the OTP is developing. The OSJI has also assisted the Registry in reviewing the policies and practices of the Victims and Witness Unit (VWU) in order to ensure the Unit's effectiveness so as to meet current challenges.

⁵ Foreign & Commonwealth Office, FCO Seminar on ICC Procedures - Executive Summary, (14 July 2014), available at: <https://www.gov.uk/government/publications/fco-seminar-on-icc-procedures-executive-summary>.

3.6. PREVIOUS REVIEW PROCESSES AND EXPERT REPORTS

In 1998, the UN General Assembly requested the Secretary-General to conduct a review of the *ad hoc* criminal tribunals. The “Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda” undertook an extensive review of the processes and proceedings of the two tribunals, including through extensive interviews.⁶ Many experts believe that this single undertaking had a profound impact on the tribunals’ functioning and operations. Mention should also be made of two important reports, one by Judge and Professor Antonio Cassese on the SCSL⁷ and David Tolbert’s report regarding the State Court of Bosnia and Herzegovina.⁸

With respect to the ICC, the International Bar Association (IBA)⁹ and the Washington College of Law War Crimes Research Office (WCRO)¹⁰ have both issued expert reports on efficiency, both appearing to be free-standing exercises. Both reports are extensive compilations of analysis and recommendations on how to expedite the criminal process at the ICC.

4. Exchange of Views on How to Enhance the Effectiveness of Proceedings

→ *This part of the Background Document is based on the report of the independent experts on promoting effectiveness at the ICC, a copy of which you have received. For detailed information, we invite you to refer to the relevant sections of the report.*

4.1. INVESTIGATION AND PROSECUTION

4.1.1. Investigations

According to the independent experts, the investigative phase will define in many respects the quality of the whole criminal process that follows. In the absence of a sound and solid investigation, there is a high risk that defendants will be charged without sufficient evidence, more meritorious cases remain unnoticed and/or time and money will be wasted on *poor-quality* cases. The experts conclude that, so far, investigations at the ICC fall short of best practices in this field which has negatively

⁶ To carry out this review, the Secretary-General appointed an expert body of five eminent persons with experience in international organizations, international tribunals and national courts. The expert body issued a comprehensive report identifying obstacles to the tribunals’ effective functioning and proposing concrete measures for their improvement. See Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Document A/54/634 (11 November 1999), available at http://www.un.org/ga/search/view_doc.asp?symbol=a%2F54%2F634&Submit=Search&Lang=E.

⁷ <http://www.rscsl.org/Documents/Cassese%20Report.pdf>.

⁸ <http://www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf>.

⁹ International Bar Association Human Rights Institute, Enhancing efficiency and effectiveness of ICC proceedings: a work in progress (January 2011), available at http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx; see the fifth report, dated 11 January 2011, entitled Enhancing efficiency and effectiveness of ICC proceedings: a work in progress January 2011.

¹⁰ American University Washington College of Law War Crimes Research Office, Expediting Proceedings at the International Criminal Court (June 2011), available at <http://www.wcl.american.edu/warcrimes/icc/documents/1106report.pdf>.

affected the effectiveness of proceedings. In particular, they agree with ICC jurisprudence that the practice of continuing investigative tasks after the confirmation of charges stage has been a concern and that efforts should be made to dissuade such practices to the greatest reasonable extent. They also identify problems with the degree of bureaucracy and the lack of continuity in the treatment of cases, the quality of the evidence collected, the delegation of investigative functions (to intermediaries), the duty to investigate incriminating and exonerating circumstances equally and the handling of disclosure obligations. Finally, the experts express the view that the Prosecution seems to lack some of the resources - in terms of funding, adequate staff and offices - it needs to adequately investigate situations to the high standard required. The experts welcome the fact that the Prosecution has already announced several key changes to its practices (in particular in the OTP's Strategic Plan 2012-2015¹¹) and stress that they should be fully implemented and supported.

Key Recommendations of the Experts:

- *Make institutional changes in relation to the Prosecution (inter alia by adopting a "vertical prosecution" model¹² and by establishing field offices where possible).*
- *Improve investigative practices (inter alia by streamlining the management of investigation and developing a classification system for investigative paperwork to facilitate review and disclosure).*
- *Build cases with sufficient depth, to accommodate the possible loss of witnesses or other evidence.*
- *Conclude all core investigations prior to the confirmation hearing.*
- *Provide adequate funds and personnel for quality investigations, foster secondment from States Parties and make use of innovative mechanisms such as Justice Rapid Response to accommodate for short-term needs.*
- *Supplement internal processes with independent confidential reviews of investigations and cases.*

Questions for Discussion:

- **What is the impact of the quality of the investigation and prosecution on the effectiveness of the whole criminal process?**
- **What are the advantages and disadvantages of the prosecution model currently applied by the OTP?**
- **Should institutional changes to the Prosecution be considered?**
- **How to ensure that investigations are carried out with sufficient depth and are essentially completed prior the confirmation process?**
- **What steps not mentioned by the experts should be taken?**
- **What measures should be implemented as a matter of priority?**

4.1.2. *Presentation and Admission of Evidence*

Evidence lies at the heart of any criminal case. Before an international criminal tribunal, the presentation and admission of evidence is typically cumbersome and lengthy (for instance, in the *Lubanga* case, 1373 exhibits were admitted). This is

¹¹ OTP, Strategic plan, June 2012-2015, 11 October 2013 available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf.

¹² A core team of qualified investigators, prosecutors and analysts remains in charge of a case all through the proceedings and is supplemented with additional personnel as needed.

partly unavoidable due to factors such as the complexity of the cases and the magnitude of the crimes. Yet, considering in particular the relatively modest size of most ICC cases by comparison to other international criminal tribunals, the independent experts conclude that there is room for improvement at the ICC: evidence presented by the parties and admitted by Chambers is often of poor quality, it is often repetitious or irrelevant to core issues in dispute, and a lot of time is spent on litigating the admission of evidence due to the lack of certainty and consistency between Chambers as regards the conditions of admissibility of evidence. This is a concern not only because it unnecessarily and unfairly prolongs proceedings, but also because it undermines the credibility of the case record and increases the risk of a miscarriage of justice.

Key Recommendations of the Experts:

- *Before trial, ensure a maximum of clarity of the charges.*
- *Make investigating "à décharge" a priority in line with Article 54(1)(a).*
- *Focus the evidential process onto central issues in dispute through stricter standards of admission of evidence.*
- *Consider systematically introducing a "no-case-to-answer" stage after the Prosecution case (to either terminate the case or to limit the Defence case to charges or counts that have passed the applicable prima facie standard of proof).*
- *Consider limiting the application of Regulation 55 of the Court ("Authority of the Chamber to modify the legal characterisation of facts").*

Questions for Discussion:

- **How to implement the obligation to investigate "à décharge" pursuant to Article 54(1)(a) of the Statute?**
- **Should the application of Regulation 55 of Regulations of the Court be restricted and if so in what manner?**
- **How could Judges and the parties expedite the evidential process whilst at the same time maintaining the fairness of proceedings?**
- **What steps not mentioned by the experts should be taken?**
- **What measures should be implemented as a matter of priority?**

4.1.3. *Disclosure*

An efficient and reliable disclosure process is a precondition to effective and fair proceedings before the ICC. Under the terms of the legal framework of the ICC, Prosecution and Defence have *inter partes* disclosure obligations to be enforced if necessary by Chambers. According to the independent experts, disclosure issues have led to considerable delays and time-consuming litigation. A concern has been that different Chambers have adopted varying approaches with respect to the disclosure process. Confidentiality agreements, the absence of a presumptive approach to disclosure, the ineffective management of material subject to disclosure, uncertainty over the required assistance to be given by the Prosecution to the Defence have also added to the problem. Finally, an effective sanctions regime in the event of failure to disclose is missing. A novel approach could also be considered, whereby the rule would be disclosure with the exception (non-disclosure) to necessitate further argument.

Key Recommendations of the Experts:

- *Chambers should provide greater clarity to the parties with respect to the discharge of disclosure obligations.*
- *Apply stricter conditions for non-disclosure.*
- *Make disclosure a priority essential to guaranteeing the fairness and expeditiousness of proceedings.*
- *Streamline and simplify the disclosure process, in particular by providing electronic and searchable material in one of the working languages of the Court.*
- *Develop a regime of sanctions for failure to meet disclosure obligations.*

Questions for Discussion:

- **How could the clarity with respect to the discharge of disclosure obligations of parties be improved?**
- **How could the parties be made to work together on a more effective disclosure system?**
- **What sort of regime of sanctions should be put in place to dissuade failure to meet disclosure obligations?**
- **What steps not mentioned by the experts should be taken?**
- **What measures should be implemented as a matter of priority?**

4.2. CHAMBERS**4.2.1. *The Confirmation Process***

The confirmation process was a novel feature in international criminal justice when it was introduced in the Rome Statute. Its purpose is to weed out weak cases before they go to trial, with a view to promote efficiency, the targeted use of Court resources and fairness for the person(s) charged. The experts conclude that the confirmation stage at the ICC has had positive effects as several “bad” cases failed to pass confirmation and cases were re-focused or reduced as a result. However, they recommend that the process should be streamlined further in order to prevent that the pre-trial phase should become a “mini-trial” resulting in unnecessary and inefficient duplications with the trial stage. An issue has been that the material facts that make up the case and for which notice must be given were often not clearly defined by the confirmation decision and the charges remained ambiguous and subject to uncertainties all through the proceedings. Subsequent re-shaping of charges has created uncertainty in the scope of the case, heavy litigation, claims of unfairness and delays in the proceedings.

Key Recommendations of the Experts:

- *Ensure that the Prosecution’s Document Containing the Charges is clear and focused and clearly links the evidence to alleged material facts.*
- *Ensure that the confirmation decision results in a clear set of charges which outlines clearly all relevant material facts making up the case.*
- *The process of confirmation should be less party- and more court-driven.*
- *Cases should only be brought to confirmation if the case has been comprehensively investigated (including “à décharge”) and is effectively ready to proceed to trial.*

Questions for Discussion:

- **How can overlaps between the pre-trial and trial phase be avoided?**
- **How can it be ensured that cases are trial-ready when they reach the confirmation stage?**
- **What steps could be taken by Chambers to ensure the timely completion of investigations?**
- **What steps not mentioned by the experts should be taken?**
- **What measures should be implemented as a matter of priority?**

4.2.2. *Interlocutory Appeals*

Interlocutory appeals, i.e. appeals against decisions of Pre-Trial or Trial Chambers other than against a judgment of acquittal or conviction, have created important jurisprudence that has contributed to the effectiveness and the fairness of proceedings before the ICC. However, the experts note that interlocutory appeals have taken as much as seven months to be decided, not including the procedure to grant leave to file an appeal. Delays occur due to the time it takes Pre-Trial and Trial Chambers to grant leave and the time spent by Appeals Chamber to issue its decision. With respect to the effectiveness and/or fairness of proceedings, a difficulty identified by the experts is that Pre-Trial and Trial Chambers have to decide whether to grant leave to appeal against decisions they previously rendered *themselves*.

Key Recommendations of the Experts:

- *Create a separate (Pre-)Trial Chamber responsible for granting leave to appeal.*
- *Use oral hearings and render oral decisions (if necessary followed by a written decision in order not to delay proceedings).*
- *Shorten and enforce deadlines for parties, (Pre-)Trial and Appeals Chambers.*
- *Render simplified and focused appeals decisions.*
- *Resolve all contentious matters that are in issue on appeal, especially when they negatively impact on the duration of proceedings or are likely to arise in other cases.*
- *Restrict victims' participation in interlocutory appeals proceedings.*
- *Ensure adequate staffing of the Appeals Chamber.*
- *Ensure transparency of the working methods of Appeals Chamber.*

Questions for Discussion:

- **Should institutional changes, such as the creation of a separate (Pre-)Trial Chamber, be considered to deal with requests for granting leave to appeal?**
- **What improvements should be considered at the level of the Appeals Chamber?**
- **What steps not mentioned by the experts should be taken?**
- **What measures should be implemented as a matter of priority?**

4.2.3. *Orality*

According to the experts, there is an unprecedented practice of extensive written litigation before the ICC, which has been negatively affecting the resources, not only of the parties but also of Chambers, and expanding the overall duration of proceedings. For instance, in *Lubanga*, there have been more than 3'090 individual

filings and 275 written decisions and orders. The excessive amount of time consumed in that process is evidenced by the fact that, out of a sample of 50 decisions in the *Lubanga* case, the average decision took 95 days to issue and was 18 pages long. In contrast, at the ICTY, comparable cases involved much fewer filings (e.g. 1'967 filings in *Boškoski & Tarčulovski* involving two defendants). Even one of the largest ICTY cases, *Milutinović et al.*, involving six co-accused, produced a mere 4'402 filings. The independent experts conclude that, at the ICC, the promotion of a culture of orality might help increase effectiveness, in particular as regards to routine issues that may readily be resolved orally. However, they also point out that due to scheduling issues (availability of court rooms, interpreters, counsel etc.) and the complexity of certain legal issues, written submissions and decisions are sometimes unavoidable.

Key Recommendations of the Experts:

- *Press the parties to try to resolve issues inter partes before addressing the Court, in particular by promoting greater collegiality and scheduling informal working meetings for the parties.*
- *Expressly invite the parties, if necessary, to address the court orally rather than in writing.*
- *Render decisions orally.*
- *Ensure that parties are ready and able to address issues in the case orally and in a succinct manner.*
- *Develop tools to prioritise routine issues and issues that delay proceedings.*
- *Ensure that representatives of all parties selected to play a part in the proceedings are professionally and institutionally in a position to litigate matters orally and effectively in court.*
- *Make sure that candidates selected to be ICC judges, especially in Pre-Trial and Trial Chambers, have significant experience in managing complex criminal cases.*

Questions for Discussion:

- **Why is there such a strong culture of making written submissions and issuing written decisions at the ICC?**
- **How could a culture of greater orality be promoted?**
- **What steps not mentioned by the experts should be taken?**
- **What measures should be implemented as a matter of priority?**

4.3. INSTITUTIONAL ISSUES

4.3.1. *Victims' Participation*

The independent experts underscore that victims' participation before the ICC is a major advance in the building of a functioning, credible and participatory sort of international criminal justice. Yet, they note that under the current system, the impact of victims on proceedings has not been as effective as might be desirable and that it contributed to longer and more resource-intensive trials. According to the experts, the problems relate, in particular, to the lack of clarity regarding the roles of victims due to contradictory views of the participation of victims at the ICC. As a result, victims have sought and were allowed to perform tasks which overlap in part with the Prosecution's mandate. For instance, the eliciting of evidence by victims has taken a lot of court time but with little demonstrable effect on the forensic search for truth. In the *Lubanga* case, for example, none of the evidence elicited by victims

was accepted by the Court. The experts emphasize that, under the Statute, the victims are permitted to present their views only where their personal interests are affected and at stages of the proceedings determined to be appropriate by the Court. Victims are not actual "parties" to the proceedings and they do have no role in the actual prosecution of the accused (eliciting of evidence, questioning of witnesses etc.). Finally, the experts draw attention to the overlapping mandates of the Victims Participation and Reparations Section and the Office of the Public Counsel for Victims as well as the cumbersome process of individual registration of victims.

Key Recommendations of the Experts:

- *Clearly separate the role and competence of victims and the Prosecutor.*
- *Make victims' participation begin where the Prosecution's own responsibility ends, in particular where they can legitimately claim to have a "personal interest", namely establishing the harm or injury done to them and establishing the appropriate relief for the harm.*
- *Enforce strict requirements of knowledge of international (criminal) law and procedure to be eligible to represent victims.*
- *Provide adequate resources to victims' representatives in order to ensure that their participation is more effective.*
- *Merge the Victims Participation and Reparations Section and the Office of the Public Counsel for Victims into a unified "Office for Victims", with a clear mandate; avoid the representation of victims by the Office for Victims.*
- *Abolish the individualised victims' applications prior to the reparations stage and replace it by a system where the new "Office of Victims" would proceed to a collective registration. In individual cases, this collective registration could be challenged by the parties and subjected to a strict and narrow review by Chambers.*

Questions for Discussion:

- **How could the role of victims be more clearly distinguished from the role of the Prosecutor?**
- **Should the application system for victims be reformed and if so how?**
- **What steps not mentioned by the experts should be taken?**
- **What measures should be implemented as a matter of priority?**

4.3.2. *Defence*

According to the experts, the quality of the Defence at the ICC is key, not only to the fairness and the legitimacy of proceedings, but also their effectiveness. For instance, competent and experienced counsel are likely to litigate only issues that are core to their case which in turn shortens the duration of the trial or appeal and reduces overall costs. A competent and effective defence is also essential to the perception of the ICC as an institution of justice. The independent experts further point out that, in particular due to a lack of involvement during the process of creating the ICC, the place of the Defence has been relatively secondary. This has been contributing to a sense of alienation from the Court and affecting the appearance of fairness of proceedings. Lack of clarity of mandate of both the Counsel Support Section (CSS) and the Office of Public Counsel for the Defence (OPCD) - and lack of independence of either of both offices - have further lead to the ineffective use of resources deemed to guarantee the effective representation of defendants before the ICC. Reduction in resources allocated to the Defence is also likely to have a negative impact on the overall effectiveness of the Defence, might

dissuade experienced counsel from participating and might negatively affect the overall quality of proceedings.

Key Recommendations of the Experts:

- *Join the Counsel Support Section and the Office of Public Counsel for the Defence into a single "Defence Office". Give the Office an institutional place that allows it to have an impact on policies affecting the Defence.*
- *Ensure that staff assigned to work in the new "Defence Office" or to represent defendants before the ICC has demonstrated experience as Defence counsel or as members of Defence teams.*
- *In consultation with relevant stakeholders, adopt a strategic plan for the Defence which would set out objective and transparent benchmarks for what would qualify as "effective representation".*
- *Take further steps to ensure that representation is effective, in particular through the contribution of the new "Defence Office" in the appointment of counsel and close supervision of Chambers of the performance of Defence counsels.*
- *Put adequate resources at the disposal of the Defence to ensure that representation is truly effective and that equality of arms is guaranteed.*

Questions for Discussion:

- **How can it be ensured that the Defence has the role and resources necessary to guarantee equality of arms?**
- **Should institutional changes, such as the creation of a single "Defence Office", be considered?**
- **What steps not mentioned by the experts should be taken?**
- **What measures should be implemented as a matter of priority?**

4.3.3. *Institution Building and Administration*

Regarding matters of institution building and administration the experts note that guaranteeing judicial and prosecutorial independence of the ICC is essential to protect its legitimacy. For instance, ICC personnel should strictly respect high ethical standards in respect to external attempts to influence staffing and outside actors should refrain from such lobbying. The experts also emphasise that in a legally multi-cultural environment, with very different approaches to many legal and jurisprudential issues, collegiality does not occur automatically but must be actively encouraged, resourced and recognised as a priority. This might also positively contribute to the jurisprudential stability and consistency. Regarding the selection of judicial candidates, the independent experts welcome the recent creation of the Advisory Committee on Nominations. They underline the necessity to further improve on the selection of judges, by selecting judges according to the ICC's needs and by recruiting persons with judicial and practitioners' experience in dealing with the management of complex criminal cases. Finally, the experts also see need for a sexual harassment audit, an internal judicial performance audit and a staffing policy which contributes to maintaining expertise and institutional memory but also bringing in new personnel with fresh ideas and relevant practice-based experience in the management of complex criminal litigations.

The experts note that there is a lack of readily available benchmarks to evaluate the performance of the Court. While they acknowledge that assessing the performance of a court of law is challenging, they underscore that clear benchmarks would assist the Court and States Parties in identifying the sources of its difficulties and

addressing them with a view to improve performance. Furthermore, benchmarks would enable it to identify what resources it needs to succeed and justify that need *vis-à-vis* States Parties. The experts invite the Court to come up with its own benchmarks and suggest that the following factors could be taken into account:

- Quality and efficiency of judicial management of cases and work of Chambers and ability to reduce overall duration of proceedings and to eliminate delays;
- Effective use of resources (financial and personnel) and willingness to subject its management thereof to professional auditing;
- Transparency of proceedings and transparency of the Court's activities;
- Increased awareness in affected countries of the nature of the Court's work and mandate, improved reputation and greater jurisprudential relevance;
- Transparency and fairness of hiring process of staff and ability of the Court to attract leading practitioners and professionals;
- Active engagement of the Court, its organs and staff with relevant experts in the field;
- Use by the Court, its organs and the parties of evidential, procedural, administrative and professional practices best suited to ensure fair and expeditious proceedings;
- Elimination of gender bias and sexual harassment.

Key Recommendations of the Experts:

- *Adopt guidelines with respect to the relationship of ICC staff with officials from outside the Court or NGOs, in particular as regards external attempts to influence staffing.*
- *Promote a collegial environment through regular informal meetings of Judges and their staff, stimulation by outside experts, increased information sharing and cooperation between and among Judges etc.*
- *Foster jurisprudential stability and consistency by harmonizing conflicting practice through regulation and fast tracking of the resolution of diverging practice. Consider the creation of specialized chambers.*
- *Select Judges based on needs of the Court and give priority to candidates with extensive trial-management experience.*
- *Make an institution-wide independent sexual harassment audit.*
- *Consider introducing an internal judicial performance audit.*
- *Adopt a staffing policy which contributes to maintaining expertise and institutional memory but also bringing in new personnel with fresh ideas and practice-based and judicial experience.*
- *Adopt benchmarks to evaluate and improve upon the performance of the Court.*

Questions for Discussion:

- **How can a collegial environment be fostered at the ICC, given the different roles and functions at the Court?**
- **How to ensure that ICC attracts the best junior and senior professionals?**
- **How should the Court go about adopting adequate benchmarks to provide the possibility to better evaluate its performance and needs?**
- **How is staffing related to the effectiveness of ICC proceedings?**
- **What steps not mentioned by the experts should be taken?**
- **What measures should be implemented as a matter of priority?**

4.3.4. *Witness Protection*

Witness protection has emerged as a key issue at the ICC and is critical to the efficiency of the process and the ability of the Prosecution to perform its functions effectively. According to the independent experts, problems include difficulties that have been affecting the execution of the mandate of the Victims and Witnesses Unit, the limited amount of financial resources for the adequate protection of witnesses and the low number (12 as of July 2013) of witness relocation agreements between States and the ICC.

Key Recommendations of the Experts:

- *Comprehensively review the witness protection process in order to assess the needs of the Court with respect to personnel, resources and cooperation.*
- *Conclude more witness relocation agreements and adopt the necessary legislation on the domestic level.*

Questions for Discussion:

- **How could the protection of witnesses be improved?**
- **What steps not mentioned by the experts should be taken?**
- **What measures should be implemented as a matter of priority?**

5. Governance – The Role of States Parties and their Relationship with the ICC

The **role of States Parties** *vis-à-vis* the ICC is defined in the Rome Statute. Pursuant to Article 112, the ASP shall, in particular, "provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court", decide over the budget and consider questions in relation to non-cooperation. Furthermore, the ASP elects the highest officials of the Court. To assist the ASP in the execution of its mandate, a Secretariat, a Bureau (chaired by the ASP President), two working groups in The Hague and in New York (chaired by the two ASP Vice Presidents) as well as several other subsidiary bodies, including the Committee on Budget and Finance, the Working Group on Amendments, the Study Group on Governance and the Independent Oversight Mechanism, have been created. A problem identified by the independent experts is the complicated **process of amending the Rules of Procedure and Evidence** that includes the (sometimes repeated) involvement of the Working Group on Lessons Learnt, the Advisory Committee on Legal Texts, the Study Group on Governance, the Working Group on Amendments and the Assembly of States Parties, the latter of which only meets once a year for regular meetings.

The **work of the ASP** is resource-intensive for States Parties, the ASP Secretariat and the Court. Every year, countless meetings take place in The Hague and New York, and the ASP Secretariat circulates several hundred e-mail messages to States Parties. Due to a growing number of facilitations, the ICC itself is faced with an increasing number of requests for reports. For example, the documentation for the 12th session of the ASP in November 2013 included more than 60 reports and other documents, ranging from as little as few to more than 200 pages. The preparation of these documents as well their consideration in the framework of the ASP and its subsidiary bodies is time-consuming and places a significant burden on the Court and on States Parties, especially smaller ones. The Bureau has addressed some of these and other issues in its **2013 report on "Evaluation and rationalization of**

the working methods of the subsidiary bodies of the Bureau".¹³ The goal of the report was to establish the right balance between the obligation of States Parties to exercise effective oversight over the ICC's activities and their parallel duty not to micromanage it and provide it with a certain margin of appreciation. Through this exercise, greater clarity as to the mandates of facilitations has been provided and thereby possibilities for targeted reduction of amount of meetings and paperwork were identified.

As the ICC does not have its own law enforcement personnel, the **cooperation of States Parties** is indispensable to the effective performance of its mandate. Under the Rome Statute, States Parties are therefore under a legal obligation to cooperate with the ICC (Part IX of the Rome Statute) and are responsible for the enforcement of sentences of imprisonment (Part X). Their support is key to, inter alia, the arrest and surrender persons, to the tracking and freezing of assets and the protection of victims and witnesses. The fact that cooperation by States Parties is not always forthcoming and that there has been limited success in concluding witness relocation and enforcement of sentences agreements continues to present a major challenge to the ICC. The independent experts point out that the ICTY was successful in securing cooperation due in large part to the sustained and active diplomatic pressure by the European Union, the Security Council and the international community in general. Accordingly, similar concrete diplomatic and political show of support by States and relevant international actors are necessary in relation to ICC proceedings. It is also important to note that not only the support by States Parties, but also the public and diplomatic backing by international organisations, especially the United Nations, and the civil society is critical for the ICC.

In conclusion, States Parties are stakeholders of the ICC as they oversee the Court, have an obligation to cooperate with it and finance it. At the same time, in discharging its prosecutorial and judicial functions, the ICC is independent from States Parties. The relationship between States Parties and the ICC is therefore critical, including for the effectiveness of proceedings.

Questions for Discussion:

- **Overall, how to you evaluate the relationship between States Parties and the ICC?**
- **Where does the role of the ASP to oversee the Court end and where does the responsibility of the Court begin?**
- **Should the role of the ASP Secretariat be strengthened?**
- **Is making changes to the legislative and regulatory framework of the Court too cumbersome?**
- **What are the expectations of States Parties with respect to the cooperation with the ICC in the framework of the ASP, and *vice versa*?**
- **Which issues should be dealt with as a matter of priority?**

¹³ ICC-ASP/12/59.

6. **Synergies Between Existing Initiatives to Enhance the Effectiveness and Next Steps**

As seen in Chapter 3, there are a number of converging efforts to address the effectiveness of proceedings at the ICC. The final session of the retreat provides the opportunity to identify synergies between those initiatives. How can those initiatives be taken forward in a comprehensive manner? The Roadmap adopted by States Parties provides a framework. However, efforts so far seem to result in one regulatory change at the time, despite the fact that many of the challenges in relation to effectiveness are interlinked and predominately concern practices rather than the legal framework.

Based on the previous discussions on substance and process, the final session shall be the opportunity to present clear and concrete ideas and propositions as to the way forward. Recommendations should as much as possible be grounded in relevant judicial experience. The goal is to come up with concrete proposals for future action in informal or formal settings with a view to enhance the effectiveness of ICC proceedings.

Questions for Discussion:

- **What are the possible synergies between existing initiatives to enhance the effectiveness of proceedings? How can they best complement each other?**
- **Is there a need for a *comprehensive* reform of practice at the ICC?**
- **Is there a need for a *comprehensive* legislative and regulatory reform?**
- **Looking forward, what is the expected contribution of the ICC / States Parties / the civil society to improving effectiveness of proceedings?**
- **What improvements should be visible and concrete in 5, 10 and 20 years time?**
- **Which issues should be dealt with as a matter of priority?**

F DFA, 15 August 2014