


**Fourteenth session**

The Hague, 18-26 November 2015

**Report of the Bureau on the Study Group on Governance**
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## I. Introduction

1. The Study Group on Governance (the “Study Group” or “SGG”) was established via a resolution<sup>+</sup> of the Assembly of the States Parties (the “Assembly”) in December 2010 “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 [...]”; and “to facilitate this dialogue with a view to identifying issues where further action is required, in consultation with the Court, and formulating recommendations to the Assembly through the Bureau”. It was further decided that “the issues to be dealt with by the Study Group include, but are not limited to, matters pertaining to the strengthening of the institutional framework both within the Court and between the Court and the Assembly, as well as other relevant questions related to the operations of the Court”.
2. The Study Group, in 2011, dealt with the relationship between the Court and the Assembly, strengthening the institutional framework within the Court and increasing the efficiency of the criminal process. Following requests of the Assembly in its tenth, eleventh and twelfth sessions the dialogue between the organs of the Court and States Parties was continued throughout 2012, 2013, and 2014.
3. The thirteenth Assembly took note of the report of the Bureau on the Study Group and the recommendations contained therein and extended the mandate of the Study Group for a further year (ICC-ASP/13/Res.5, para 53).
4. On 2 March 2015, the Bureau reported that it had appointed Ambassador María Teresa Infante Caffi (Chile) and Ambassador Masaru Tsuji (Japan) as co-Chairs of the Study Group. In addition, focal points for two clusters were appointed: (a) Cluster I: Increasing the efficiency of the criminal process. Co-focal points: Mr. Alfredo Fortes (Peru) and Ms. Marisa Macpherson (New Zealand); and (b) Cluster II: Governance and budgetary process. Co-focal points: Mr. Klaus Keller (Germany) and Ms Lourdes Suinaga (Mexico). On 1 October 2015, following the departure of Mr. Keller, the Bureau appointed Dr. Reinhard Hassenpflug (Germany) as a new co-focal point for Cluster II.
5. The Study Group held a number of regular meetings between March and October 2015, as well as several informal meetings by the co-Chairs and co-focal points with the States Parties and the organs of the Court.
6. This report on the Study Group describes the activities of the Study Group in the past year and contains recommendations regarding the continuation of its work.

## II. Cluster I: Increasing the efficiency of the criminal process

7. The program of work for Cluster I in 2015 focused on three areas: a) participation of victims; b) the Roadmap on reviewing the criminal procedures of the International Criminal Court; and c) other matters related to increasing the efficiency of the criminal process.

### A. Participation of victims

8. In ICC-ASP/13/Res.5, annex I, para 10(a), the Assembly of States Parties invited the Bureau to explore, through its Study Group on Governance and based on a report the Court was requested to submit in 2015, the need for possible amendments to the legal framework for the participation of victims in the proceedings.
9. At a meeting of Cluster I on 26 June 2015 a representative of the Presidency of the Court delivered an oral presentation on the general legal framework for participation of victims in proceedings, focusing on victims’ applications, and a description of the alternative victims application systems used by Chambers.
10. Following that meeting, on 25 August 2015, the Judges’ Working Group on Lessons Learnt (WGLL) circulated its *Report on Cluster D(1): Applications for Victim Participation* (attached as annex I). That report set out the legal framework for victims’

<sup>+</sup> ICC-ASP/9/Res.2.

applications as well as a detailed comparative analysis of the evolution of application systems used by Chambers, but did not contain any recommendation on potential reforms as the topic was still under consideration by the judges. At a meeting of Cluster I on 29 September 2015 States Parties had the opportunity to discuss the report with a representative of the Presidency of the Court. During that meeting the representative of the Presidency advised that the WGLL would provide a further report on this work once a recommendation on potential reforms emerged. [Note: this paragraph will be updated should we receive a further report]

## **B. The Roadmap on reviewing the criminal procedures of the International Criminal Court**

11. The Roadmap on reviewing the criminal procedures of the International Criminal Court was set out in annex I to the 2013 report of the Bureau on the Study Group (ICC-ASP/12/37). The Roadmap sets out the process for amendments to the Rules of Procedure and Evidence (“Rules”). Paragraph 13 of the Roadmap provides that “States and the Court will keep under review the effectiveness of the Roadmap”.

12. In light of that paragraph, on 29 April 2015 the co-focal points convened a meeting to discuss the operation of the Roadmap and whether there was a need for streamlining the process. The co-focal points set out the process outlined in the Roadmap and sought views on its operation and outcomes in previous years.

13. A representative of the Presidency of the Court spoke on the Court-led elements of the Roadmap and noted that the WGLL was undergoing a transition. The new President had recently taken over the chairmanship of the WGLL and, in addition, one third of the judges were newly elected and therefore new to the amendment exercise. The judges who sat on the Advisory Committee on Legal Texts (ACLT) would now also sit on the WGLL, as this would make consultation between the two bodies more efficient. In addition, if a proposal went to the ACLT then each member of the ACLT would be mandated to consult with the group he or she represented.

14. On substance, the representative advised that the judges would focus this year on changes to practice in areas of importance as identified by the Court in 2012,<sup>2</sup> with a specific focus on the pre-trial and trial relationship, victims participation (particularly the application system), as well as the harmonizing of judgment and decision drafting across the chambers of the Court. Normative changes (i.e. changes to the Regulations of the Court, or changes to the Rules) would only be proposed if an issue could not be resolved via changes of practice. For 2015, therefore, the Roadmap and its timelines would not apply in its classical sense as no amendment proposals were being prepared by the Court.

15. Some delegations intervened to welcome the efforts of the Court in pursuing a more holistic approach, including changes to practice, in order to increase the efficiency of the criminal process. Regarding the operation of the Roadmap, some delegations were of the view that the duplication of efforts between the Study Group and the Working Group on Amendments (WGA) should be reconsidered.

16. In order to streamline the future process of amending the Rules, it was proposed by some delegations that the Study Group could be considered as the only forum to discuss proposed amendments before they are submitted to the Assembly. In that regard the point was made that a new division of labour between the Study Group and the WGA could be considered, whereby the former would consider amendment proposals to the Rules, while the latter would focus on amendment proposals to the Rome Statute. This would mean that the duplication of efforts could be avoided.

17. At the same time it was recalled that caution should be applied when reviewing the Roadmap, as the document had been the result of lengthy and difficult discussions and changes to it would most likely entail a complex consensus-finding process.

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<sup>2</sup> ICC-ASP/11/31/Add.1.

18. This topic was also discussed during the visit of Hague Working Group facilitators to New York in June 2015. Different views were expressed on this topic and some delegations noted that there is a role for both the Study Group and the WGA in the process.

19. The co-focal points noted that there was no clear consensus on the way forward and therefore did not make any proposals for streamlining the Roadmap in 2015.

20. During informal discussions with the Court, concerns were expressed with the recent experience of the Roadmap process. In this context, it must be remembered that originally States Parties requested the Court to streamline its criminal procedures and strengthen the efficiency and effectiveness of the procedures, which is what led to the establishment of the SGG in 2010. Therefore when the Court submits its proposals for amendments to the Rules States Parties should fully consider the Court's proposals and should strive to expeditiously reach a final view on the proposals.

21. As a way forward, the Study Group should continue to keep under review the effectiveness of the Roadmap in 2016,<sup>3</sup> bearing in mind the ongoing work regarding the reform of working methods of the Assembly, including the relationship between The Hague and New York Working Groups.

### **C. Other matters related to increasing the efficiency of the criminal process**

22. A number of other developments relating to the efficiency of the criminal process also took place in 2015.

23. On 30 September 2015 the WGLL presented its *Progress Report on Clusters A, B, C and E* (attached as annex II to this report), including the *Pre-Trial Practice Manual* (contained at appendix II of the Progress Report).

24. On 14 October 2015 a special meeting of the Study Group on Governance was held. During the special meeting the Study Group was joined by the President of the International Criminal Court, Judge Silvia Fernández. President Fernández presented the Progress Report as well as the Pre-Trial Practice Manual. The meeting provided an opportunity for interaction and exchange of ideas between the President, States Parties, and other stakeholders.

25. The co-focal points also worked with interested delegations to develop a proposal for the Bureau regarding the specific item on “the efficiency and effectiveness of Court proceedings” on the agenda of the fourteenth session of the Assembly, as mandated in ICC-ASP/13/Res.5, annex I, para 7(c).

### **D. Future work**

26. The Study Group welcomed the reports received from the WGLL during 2015, which demonstrated that significant steps had been taken towards increasing the efficiency of the criminal process.

27. The Study Group aims to continue its ongoing dialogue with the Court, with a view to enhancing the efficiency and effectiveness of the Court, and ensuring the best use of the Court's resources; while, at the same time, fully preserving the ICC's judicial independence and the quality of its work, as well as safeguarding the rights of the accused and victims.

## **III. Cluster II: Governance and budgetary process**

### **A. Executive summary**

28. Cluster II mandate derives from Section I of operative paragraph 5 of resolution ICC-ASP/13/Res.1 which took note of paragraph 44 of the report of the Committee on Budget and Finance on the work of its twenty-third session recommending that States Parties consider “whether a financial envelope or target should be set at each Assembly

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<sup>3</sup> As set out in paragraph 13 of the Roadmap.

meeting that would define the anticipated outer limits of the budget for the year following the one immediately thereafter”.

29. Cluster II was mandated to discuss elements that could help decide whether a financial envelope could be set. At the outset, it was clarified that discussions on specific increases to the Court’s budget correspond to the facilitation on the budget.

30. Over ten encounters, including consultations, formal and informal meetings, took place from March to September 2015 in which Cluster II was actively involved. All meetings aimed at facilitating and fostering objective discussions.

31. Cluster II’s activities were at all times guided in the spirit of understanding and approaching positions between the Court and States Parties.

32. Early discussions made it clear that States Parties coincided that the Court should have adequate resources to efficiently carry out its mandate. Consequently, transparency and a clear understanding of the elements which explain the Court’s needs were of the essence.

33. Cluster II conveyed said interests to the Court and aimed at having objective answers to the States inquiries which resulted in the document provided by the Office of the Prosecutor on the Basic Size as a tool (element) that provides stability and contributes to its financial predictability.<sup>4</sup>

34. Discussions showed that States Parties considered that in addition to the Basic Size, other elements needed to be considered when analyzing if a financial envelope should be set. Among these elements delegations pointed to the following:

- (a) The Court should have adequate resources to efficiently carry out its mandate.
- (b) The Economy of States Parties, i.e. their gross domestic product (GDP).
- (c) Domestic costs of States’ judiciary systems, the budgetary allocation level and approved growth (increases).
- (d) The average cost of a judicial proceeding within the Court /”*Skeleton Case*”. This element was underscored by some delegations.
- (e) The natural limitations/constrains of the Court’s capacity (premises, number of judges, staff, etc.)
- (f) Natural peaks on work load.
- (g) The experience of other international criminal Tribunals.<sup>5</sup>

35. Results/Challenges/Conclusions:

- (a) Although discussions showed the commitment of States Parties to the Court and the Court’s commitment to improve its efficiency, no consensus has yet been reached on how the budgetary level should be decided, though some States Parties pointed out that the budgetary level of the Court has been adopted somewhere between the resource driven approach and the demand driven approach.
- (b) There is no consensus among States Parties on the introduction of a financial envelope. This situation however, did not prevent a fruitful discussion on the matter from being carried on:
  - (i) For some delegations, establishing a financial envelope is desirable, others consider it is still early to decide on it.
  - (ii) Some delegations were clear on its support on introducing a financial envelope and acknowledged the fact that consensus had not yet been reached, thus, it was proposed to continue discussions with a view to developing the Court as a sustainable institution.
- (c) Some States Parties were of the view that the Basic Size of the Office of the Prosecutor still faces some challenges:

<sup>4</sup> ICC-ASP/14/21.

<sup>5</sup> See para. [57].

- (i) The Concept falls short on predictability as it is one of the elements to consider when discussing a financial envelope.
  - (ii) The definition of the concept “Basic size” is ambiguous. A point was made on the lexical/idiomatic nature of the term.
  - (iii) Nevertheless, reaching an agreement on these elements might help in defining the criteria that should guide the budgetary level.
  - (iv) The Presidency and the Registry are working on the financial implications on their respective organs of the Office of the Prosecutor Basic Size, which could be ready in April 2016.
- (d) In response to the notion that the definition (term) of the Basic size required clarification, the Office of the Prosecutor indicated that the Basic size provides the Office with the necessary resources to meet the demand it faces with the required quality and efficiency and with a reasonable level of prioritization amongst its cases.
- (e) States Parties and the Court agreed that there are objective challenges beyond their control (reach), which make it difficult at this time, to determine in the short term whether a financial envelope or target should be set and, more importantly, when it could be attained.
- (f) There were opinions of States Parties which welcomed that the Basic Size of the Office of the Prosecutor was a good basis to start discussions that would seek to enhance predictability.

## B. Background/Introduction

36. Cluster II finds its origins in the decision<sup>6</sup> adopted by States Parties that established the Study Group on Governance (SGG).

37. Resolution ICC-ASP/9/Res.2 established the Study Group on Governance to conduct a structured dialogue between States Parties and the Court with a view to enhancing the efficiency and effectiveness of the Court, while fully preserving its judicial independence.

38. Resolution ICC-ASP/9/Res.2 set forth the issues<sup>7</sup> entrusted to the Study Group on Governance, and indicated that to carry out its mandate, the SGG should adopt its own working methods. Consequently, Cluster I and Cluster II were established in February 2013.

39. The Study Group on Governance, created in 2010, and thereafter the existence of Cluster I and Cluster II, have been renewed annually by subsequent resolutions. The last one was adopted by consensus on 17 December 2014.<sup>8</sup>

## C. Issue at hand and Cluster II’s mandate

40. The specific mandate for 2015 of Cluster II - “*Governance and Budgetary Process*”, derives from Section I operative paragraph 5 of resolution ICC-ASP/13/Res. 1 – (“*The Budget Resolution*”) which took note of the Recommendation in paragraph 44 of the Report of the Committee on Budget and Finance on the work of its twenty-third session, recommending States Parties to consider “*whether a financial envelope or target should be set*”.

41. Based on the above, a consultation process was carried out among States Parties and on 2 March 2015 the Bureau appointed Mr. Klaus Keller (Germany) and Ms. Lourdes Suinaga (Mexico) as co-focal points for Cluster II.

<sup>6</sup> Resolution ICC-ASP/9/Res.2, adopted by consensus on 10 December, 2010.

<sup>7</sup> “...the issues to be dealt with by the study group include, but are not limited to, matters pertaining to the strengthening of the institutional framework both within the Court and between the Court and the Assembly, as well as other relevant questions related to the operation of the Court (.....) ....”the study group shall (.....) shall adopt its own working methods;”

<sup>8</sup> ICC-ASP/13/Res.5.

42. In line with the recommendation of the Committee on Budget and Finance, Cluster II proposed in its *Work Program for 2015* that it will facilitate discussions to “*study and analyze the matter*<sup>9</sup> in an open-ended way and to report its findings”.

43. Cluster II’s working methods, as reflected in its Work Program for 2015, included discussions with States Parties, consultations with the organs of the Court and the Committee on Budget and Finance (CBF).

44. Cluster II’s was mandated to identify elements that would guide discussions as to the feasibility of establishing a financial envelope, but not to determine specific increases to the Court’s budget as this latter point had been entrusted to the facilitation on the budget.

45. The issue of qualitative and quantitative indicators, was entrusted to the Court<sup>10</sup>, the work of Cluster II was to serve as an interlocutor and facilitate a forum of discussion around the topic, being respectful of the Court’s mandate and independence of its working methods in this regard.

## D. Analysis

### 1. Work Program and Concept Paper/Consultations

46. As agreed upon with the Study Group on Governance Coordinators, consultations (27 March 2015) were held by Cluster II with the representatives of the three organs of the Court (Presidency, Registry and Office of the Prosecutor) inquiring on comments to the Proposal of Work Program.

47. The Court’s position coincided in general terms with the contents of the Work Program. Minor comments made by the representatives of the three organs of the Court were included.

48. The Work Program of Cluster II (annex III) was presented to States Parties, representatives of the organs of the Court and other stake holders at the first formal meeting of the Study Group on Governance/Cluster II (7 April 2015).

49. The Work Program was well received by all attendees who inquired about the dynamics/relation between Cluster II and the facilitation on the budget. The co-focal points clarified that Cluster II will study and analyze elements on the feasibility of establishing a financial envelope, while discussions on specific numbers impacting the Court’s budget would be handled by the specific facilitation established for said purposes.

### 2. Meetings and discussions

50. On 24 April 2015, the Study Group on Governance/Cluster II met with the Court’s President, Prosecutor and Registrar. The Work Program was commented upon. Results were positive as it proved to be an encounter where a respectful, open and candid dialogue took place. The challenge of balancing budgetary predictability vis-à-vis providing the Court with enough resources to carry out its mandate, was the backbone of the discussions. The importance of transparency in this regard was underscored and shared among attendees.

(a) Feasibility of a financial envelope:

- (i) The concept of “Basic Size” was mentioned for the first time by the Court’s Prosecutor who anticipated it as part of the Office of the Prosecutor Strategic Plan 2016-2018.
- (ii) The Prosecutor explained that while it was a work in progress, the goal was to present the “*Basic Size*” to States Parties during July 2015.
- (iii) This element was taken into consideration by Cluster II and included as one of the elements to guide discussions.

<sup>9</sup> Whether a financial envelope or target should be set.

<sup>10</sup> ICC-ASP/13/Res.5, 17 December 2014, annex I, para. 7(b).

- (b) Indicators:
- (i) As the Court is in the “*driving seat*” the Study Group on Governance/Cluster II will serve as an interlocutor with States Parties. The Court pointed to the sufficient time needed to develop indicators at various levels as there are Court-wide indicators and indicators per organ. The Office of the Prosecutor had already finalized its organ-specific indicators as part of its revised Strategic Plan 2016-2018.
  - (ii) The Court will continue to work on their development.
  - (iii) The Court considered that the establishment of indicators would be performance related. However, the organ-specific performance indicators would also be complemented with more detailed budgetary indicators.

51. The focal points conducted informal consultations with the Chair of the Committee on Budget and Finance regarding the scope of interpretation of paragraph 44. From a technical perspective, it was explained that the intention was to convey to States Parties whether the Court’s budget was resource or demand driven. It seemed complicated to analyze and authorize a budget aimed at attending to all situations and cases before the Court, while keeping a zero nominal growth.

52. Based on the work program for Cluster II, the co-focal points proposed to States Parties a Concept Paper (CP) based on the result on consultations conducted with the Study Group on Governance Coordinators, the Chair of the Committee on Budget and Finance, and the organs of the Court.

53. In the informal meeting on 4 June 2015, States Parties discussed whether the budgetary level of the Court is resource-driven or demand-driven and the feasibility to introduce a financial envelope for the budget of the Court. No consensus has yet been reached on how the budgetary level should be decided, though some States Parties pointed out that the budgetary level of the Court has been adopted somewhere between the resource-driven approach and the demand-driven approach. There was no consensus on the feasibility to introduce a financial envelope because some States Parties insisted that there must be a limit to the budgetary level of the Court, but others claimed that setting such an envelope might adversely affect the prosecutorial and judicial activities of the Court.

54. The CP was submitted for consideration of States Parties at an informal meeting on 8 June 2015.

55. States Parties identified additional elements (issues) to be included in the CP. The said elements were incorporated in the CP (annex IV) and guided discussions of Cluster II’s meetings (9 July, 16 July and 17 September 2015).

56. Taking into consideration comments by delegations, a set of questions were prepared by Cluster II and distributed to States Parties to further facilitate discussions for the July 16, meeting (annex VI).

57. Meeting on 9 July 2015:

- (a) The Office of the Prosecutor introduced and presented its “*Basic Size*” document<sup>11</sup>(annex V).
- (b) The experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) was shared by the Chief of Administration, Mr. David Falces, who spoke about the Tribunal’s budgetary experience indicated that at first the budget was set on an annual basis but from the year 2000 a biennial budget was established. This contributed to a reasonable predictability. The International Criminal Tribunal for the former Yugoslavia budget<sup>12</sup> reached its peak at \$161 million in 2008 and progressively diminished. The temporary nature of the International Criminal Tribunal for the former Yugoslavia vis-à-vis the Court as a permanent tribunal is among the elements that will impact considerations on the possibility of the establishment of a “*financial envelope*”.

<sup>11</sup> ICC-ASP/14/21 and annex III.



- (c) Discussions were fruitful, attendees agreed to continue them in a new meeting.
58. Meeting on 16 July 2015:
- (a) Discussions continued on the Basic Size.
- (b) Some delegations underscored (the idiomatic/lexical ambiguities in the use of the term “Basic Size”) that the definition of the concept “Basic size” shows ambiguities and commented, (as it) fell short as an efficient tool for predictability and the possible establishment of a financial envelope. Additional elements were to be considered.
- (c) The Office of the Prosecutor stressed that other factors might have to be considered for it currently lacks adequate level and depth of resources to be able to absorb any unforeseen developments. The Basic Size is a useful tool for stability because it indicates the appropriate level of resources to carry out its mandate based on clear and transparent justifications while contributing to financial predictability as it allows the Office to absorb the estimated demand with a reasonable level of prioritization and while maintaining its standards of quality and efficiency.
- (d) No agreement was reached on how to determine the budgetary level of the Court. While a view was expressed to provide the Court with all the resources it requires to carry out its mandate, some delegations underscored their position in favor of a financial envelope, and others pointed to the importance of clarity in allocation of resources, transparency and accountability.
- (e) Some delegations indicated elements that should be considered when analyzing the possibility of a financial envelope such as: economy of State Parties, i.e. their GDP; domestic costs of States’ Judiciary systems/the budgetary level and approved growth (increases); average cost of a judicial proceeding /”*Skeleton Case*”, natural limitations/constraints of the Court’s capacity (premises, number of judges, staff.
- (f) With regard to comparing costs of States’ judiciary systems to the budget of the Court, the Office of the Prosecutor explained in response that it was difficult to compare the two: domestic systems are typically mature systems with an important number of similar cases and activities allowing to make more general planning of resources, while the Court is still a young institution under development; and where the average cost of a case cannot be defined in a meaningful way because the number of cases is too low and the nature and scope of each case is different. In addition, national judiciary systems benefit from the coordinated help of law enforcement forces, secret services and even the military, which are not included in the judiciary budget but concur to the finalization of investigations.
- (g) A request was made to have the Office of the Prosecutor answer in writing the set of questions proposed by Cluster II in annex VI.
59. Meeting on 17 September 2015 and additional comments sent on 22 September 2015:
- (a) The Office of the Prosecutor provided written answers to the set of questions proposed by Cluster II (annex VII).
- (b) Discussions and inquiries continued on the Basic Size.
60. Although some delegations acknowledged the effort of the Office of the Prosecutor in developing the concept, other delegations continue to insist on its deficiencies and challenges.
61. A point was made that indicated that the Basic Size must be discussed not only by scrutinizing its financial impact on the budget of other organs of the Court, but also by examining the formulation of an exit strategy of each situation and its feasibility.
62. Some delegations underscored the serious limitations faced by their countries in getting authorization for an increase of the budgetary level. They insisted that the OTP would need to prioritize and select situations and cases and the current concept of Basic Size envisaged by the Office of the Prosecutor does not necessarily coincide with their understanding of the concept of Basic Size of the Office of the Prosecutor.

63. The Office of the Prosecutor explained in response that the Basic Size concept would still foresee a need for prioritization but at a more reasonable level than is the case today. The concept was based on estimated demand, not full demand, and the resources it would require to address the most urgent requests for its intervention.

64. A point was made that underscored the importance of the Court with a realistic perspective on its “size” and activities. Some delegations expressly supported the Recommendation given by the Committee on Budget and Finance to States Parties to consider a “financial envelope”.

65. Some delegations called again upon the importance of transparency, clear allocation of resources and proper accountability.

66. Some delegations stated that establishing a financial envelope might adversely affect the prosecutorial and judicial activities of the Court.

67. A point was made that by establishing such envelope, States Parties would be the ones doing the prioritization of cases instead of the Court, and that would affect its independence.

(a) Although the Office of the Prosecutor was receptive to the comments expressed by States Parties, it highlighted the importance of considering the budget of the Court against the reality where it operates, not only against an artificial envelope.

(b) The Office of the Prosecutor pointed out that while the results from the past years following the implementation of the revised Strategy were showing promising results, other planned results have not been achieved for several reasons, such as lack of cooperation, the precarious security situations in which investigators operate, the interferences encountered in gathering and preserving evidence; that referrals of the United Nations Security Council are not accompanied by additional resources and thus the Office of the Prosecutor was forced to put some cases into “hibernation”, as well as the fact that the Court’s actual budget is equivalent to that of the International Criminal Tribunal for the former Yugoslavia in the year 2000 (or even less if the inflation rate is applied), however, the Court’s jurisdiction is geographically wider and more complex.

## **E. Conclusions**

### **1. Financial Envelope**

68. Discussions showed the commitment of States Parties to the Court and the Court’s commitment to improve its efficiency. Though some States Parties pointed out that the budgetary level of the Court has been adopted somewhere between the resource driven approach and the demand driven approach, no consensus has yet been reached on how the budgetary level of the Court should be decided.

69. However there are objective elements beyond the control of all parties which make it undisputable to acknowledge that provision of resources and the Court’s capacity will face a limit.

70. There is no consensus on the introduction of a financial envelope neither is there on the elements that must be analyzed if said financial envelope were to be set.

71. Some delegations recommended continuing discussions on the matter.

### **2. Indicators**

72. After some initial work at the end of 2014, the Court held two consultation sessions in 2015 with a pro bono external consultant, the Open Society Justice Initiative (OSJI), in March and July.

73. The aim was to identify the aspects of the Court’s performance that should be measured and to identify possible performance indicators, including the short and long term processes for implementation.

74. Further inter-organ sessions were held and relevant information was gathered.
75. As a result, a number of Court-wide performance indicators have been identified as relevant and measurable.
76. The Court is presently in the process of verifying that relevant data can be retrieved in a systematic manner as of the beginning of 2016, and to what extent relevant data already collected in the past can be used for this exercise.
77. In addition, some organs are still in the process of identifying potential organ-specific performance indicators to be developed once the Court-wide indicators have been finalised and agreed upon by the Heads of organs.
78. The Court envisages providing a written report to the fourteenth session of the Assembly of States Parties on the development of its Court-wide performance indicators.
79. Once the implementation of Court-wide indicators is underway in 2016, the Court will finalize its organ-specific indicators and report on these in 2016.
80. Therefore, the Study Group on Governance (Cluster II) is supposed to receive any update on the progress of the Court-wide performance indicators from the Court.

## IV. Recommendations

81. The Study Group through the Bureau submits the following recommendations for the consideration of the Assembly:

### A. For inclusion in the omnibus resolution:

*The Assembly of States Parties,*

1. *Welcomes* the continued 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 and *invites* the Court to further engage in such a dialogue with States Parties;
2. *Takes note* of the Bureau's report on the Study Group on Governance;<sup>13</sup>
3. *Extends* for another year the mandate of the Study Group, provided in resolution ICC-ASP/9/Res.2 and extended in resolutions ICC-ASP/10/Res.5, ICC-ASP/11/Res.8, and ICC-ASP/13/Res.5, and requests the Study Group to report back to its fifteenth session;
4. *Welcomes* the Judges' Working Group on Lessons Learnt Report on Cluster D(1): Applications for Victim Participation; and *encourages* the judges to continue their work on this issue in 2016;
5. *Welcomes* the Judges' Working Group on Lessons Learnt Progress Report on Clusters A, B, C and E, including the Pre-Trial Practice Manual; and *encourages* the judges to continue their work on these issues in 2016;
6. *Welcomes* the efforts of the Court to develop qualitative and quantitative indicators that would allow the Court to demonstrate better its achievements and needs, as well as allowing States Parties to assess the Court's performance in a more strategic manner<sup>14</sup> and *invites* the Court to share with the Study Group on Governance any update on the development of such indicators.
7. *Welcomes* the discussions held regarding the recommendation in paragraph 44 of the report of the Committee on Budget and Finance on the work of its twenty-third session, *notes* that no consensus has been reached as to the introduction of a financial envelope and further *invites* the Bureau in consultation with the Court to continue its consideration of the recommendation, in the context of the review of the budgetary process, taking into account the OTP Strategic Plan 2016-2018, the Report on the Basic Size of the Office of the Prosecutor and other relevant documents of the Court.

<sup>13</sup> ICC-ASP/14/30.

<sup>14</sup> Origin: ICC-ASP/13/Res.5, annex I, para. 7(b).

**B. For inclusion in the mandates annexed to the omnibus resolution:**

With regard to the Study Group on Governance,

*Requests* the Study Group to report back to its fifteenth session.

## Annex I

### Report on Cluster D (1): Applications for victim participation

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## I. Introduction

1. The Working Group on Lessons Learnt (“WGLL”) submits the present report on Cluster D(1): Applications for Victim Participation to the Study Group on Governance (“Study Group”). The WGLL was established in October 2012 pursuant to the Roadmap on Reviewing the Criminal Procedures of the International Criminal Court (“Roadmap”). The Roadmap was drafted by the Study Group and subsequently endorsed by the ASP in November 2012 and as amended in November 2013. The WGLL and the Roadmap were developed in response to a request by States Parties for a mechanism to identify areas for improving the efficiency of judicial proceedings and propose amendments to the legal framework.

2. The Rome Statute of the International Criminal Court (“Statute”) grants victims the right to participate in judicial proceedings by presenting their own views and concerns before the Court. The victim participation scheme is multi-dimensional and includes a victim application system, various modalities of participation, and a reparations regime. The present report focuses on the victim application system, which is a victim’s “point of entry” into the Court’s victim participation scheme. This system establishes a process for determining who qualifies as a victim such that he or she may participate in a judicial proceeding.

3. In 2010, as a result of a growing number of situations and cases, the Court began experiencing a significant increase in the number of applications for victim participation. This increase has strained the Court’s resources, resulting in application backlogs with attendant delays to judicial proceedings.

4. In December 2011, the Assembly of States Parties (“ASP”), recognizing this situation, requested the Court to begin studying victim participation with a view to enhancing its efficiency and efficacy. As a result, the Court began a long-term review of the victim participation scheme, beginning with the victim application system.

5. In parallel, several Chambers began devising, on a case-by-case basis, different approaches to the victim application system. Through these various approaches, the Chambers sought not only to address inefficiencies in the victim application system, but also to substantively improve the application process so as to ensure the safe and meaningful participation of victims. As a result, the Court has tested at least five different victim application systems.

6. The present report provides the relevant legal background for understanding potential reforms to Cluster D(1). The judges are currently in the process of evaluating the victim application system with a view to identifying key challenges and articulating appropriate reforms. The WGLL shall update the SGG in the future on proposed reforms.

7. This report proceeds in three main parts. Part I describes the applicable legal framework. Part II discusses the standard victim application system (“Standard System”), implemented during the Court’s first decade of operation. Part III summarizes the emergence of four alternative systems implemented by Chambers beginning in 2012.

## II. The Legal Framework

8. The victim participation scheme set forth in the Statute was unprecedented at the time of the Court’s founding.<sup>1</sup> The law and practice of the *ad hoc* international criminal tribunals established prior to the Court have principally restricted the participation of victims in judicial proceedings to the role of witness.<sup>2</sup> By contrast, the Statute gives victims

<sup>1</sup> The inclusion of such a scheme in the Statute was, in part, a product of developing international standards recognizing greater rights for victims of crimes. This context is reflected in the fact that the language of article 68(3) draws heavily from article 6(b) of the 1985 Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power. GA Res. 40/34. See David Donat-Cattin, “Article 68”, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 1279, 1287 (Otto Triffterer ed., 2d ed. 2008); William A. Schabas, “Article 68”, in THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 821, 827 (2010).

<sup>2</sup> See Gilbert Bitti & Hakan Friman, “Participation of Victims in the Proceedings”, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 456, 456 n. 66 (Roy S. Lee

a greater role at the Court by granting them the right to participate in their own right and to present their own views and concerns.<sup>3</sup> The application system regulates the exercise of that right by establishing a process for determining who qualifies as a victim in a particular situation or case such that he or she may participate in a judicial proceeding before the Court.

9. The Legal Framework of the Court:

- (a) The Statute established the Court and articulates its functions and powers. The Statute was adopted at the Rome Diplomatic Conference on 17 July 1998 and entered into force on 1 July 2002 upon ratification by 60 States. Amendments to the Statute require a two-thirds majority of States Parties;
- (b) The Rules of Procedure and Evidence (“Rules”) are an instrument for the application of the Statute and are to be read in conjunction with and subject to the Statute. The Rules entered into force on 9 September 2002 upon adoption by a two-thirds majority of States Parties. Amendments to the Rules also enter into force upon adoption by a two-thirds majority of States Parties;
- (c) The Regulations of the Court (“RoC”) are regulations necessary for the Court’s routine functioning and are to be read subject to the Statute and Rules. The RoC entered into force on 26 May 2004 upon adoption by an absolute majority of the judges. Amendments to the RoC also enter into force upon adoption by an absolute majority of the judges; and
- (d) The Regulations of the Registry (“RoR”) govern the operation of the Registry and are to be read subject to the Statute, Rules, and the RoC. The RoR entered into force upon approval by the Presidency on 6 March 2006. Amendments to the RoR also enter into force upon approval by the Presidency.

10. Article 68(3) of the Statute grants victims the right to participate in judicial proceedings before the Court, providing:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.<sup>4</sup>

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ed., 2001) (noting that “victims in previous military or ad hoc tribunals appeared primarily as witnesses and had no independent role”); *see also* Donat-Cattin, “Article 68,” *supra* note 1, at 1277 (stating that “the inclusion of norms on victims’ participation in the Court’s proceedings (*cf.* article 68 para. 3) was the result of widespread and strong criticism against the lack of provisions of this kind in the Statutes and Rules of Procedure and Evidence of the *ad hoc* Tribunals”); Schabas, “Article 68,” *supra* note 1, at 822 (noting that “[a]t Nuremberg, only a few victims actually testified, and their role was insignificant”). The Extraordinary Chambers in the Courts of Cambodia (“ECCC”) and the Special Tribunal for Lebanon (“STL”), which were established after the Court’s founding, have also articulated schemes to permit victims to participate in their respective judicial proceedings. *See* ECCC, Internal Rules (Rev. 8), rules 23, 91(1) (12 June 2007), *as revised* 3 Aug. 2011; STL, art. 17, U.N. Doc. S/RES/1757 (30 May 2007). For a description of the victim application processes at the ECCC and STL, *see Report of the Court on the review of the system for victims to apply to participate in proceedings*, ICC-ASP/11/22 (5 Nov. 2012), at Annex.

<sup>3</sup> The Court also departed from the *ad hoc* international criminal tribunals established prior to it by recognizing the right of victims to reparations. *See* David Donat-Cattin, “Article 75,” in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 1399, 1401 (Otto Triffterer ed., 2d ed. 2008) (“Governmental delegations . . . in Rome . . . created the legal conditions for the first ‘reparation regime’ ever realized in the history of international criminal jurisdiction.”); William A. Schabas, “Article 75,” in THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 878, 879 (2010) (“[N]o previous international criminal tribunal has had the authority to grant reparations or any other form of compensation or satisfaction to victims of the crimes.”). The right to participate and the right to reparations are distinct, implicating different stages of a judicial proceeding and entailing different considerations. Accordingly, they are addressed in separate articles of the Statute. The present report concerns only the Court’s application system for victim participation; reparations form their own sub-cluster within Cluster D.

<sup>4</sup> In addition to the general right of victims to participate in Court proceedings under article 68(3), the Statute specifies two particular circumstances where victims may participate. First, article 15(3) provides that “[v]ictims may make representations to the Pre-Trial Chamber, in accordance with the Rules” where the Prosecutor submits a request for authorization of an investigation *proprio motu*. Second, article 19(3) provides that victims may “submit observations to the Court” in “proceedings with respect to jurisdiction or admissibility”. The Rules separately

11. The Rules specify the procedure governing victim participation. Rule 89 addresses the application system for determining who may participate pursuant to article 68(3) and provides:

- (a) In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.
- (b) The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.
- (c) An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.
- (d) Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

## A. The Application for Victim Participation

12. Victims who wish to participate in a judicial proceeding “shall make written application to the Registrar” pursuant to rule 89(1).<sup>5</sup> The Rules set no limitation on when a victim may submit such an application.<sup>6</sup>

13. Rule 92, which addresses “Notification to victims and their legal representatives”, sets out two distinct instances when the Court must notify victims “[i]n order to allow victims to apply for participation in proceedings in accordance with rule 89”. In the first instance, the Court must “notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53.”<sup>7</sup> In the second instance, the Court must “notify victims regarding its decision to hold a hearing to confirm charges pursuant to article 61.”<sup>8</sup> Rule 92 does not, however, “limit the participation of victims to the stages mentioned in . . . the rule.”<sup>9</sup>

14. Victims submit their written applications for participation to the Court via the Registrar.<sup>10</sup> The RoC flesh out the role of the Registrar in this respect. Pursuant to RoC 86(1), the Registrar is tasked with developing standard application forms for victim

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address the respective procedures governing victim participation pursuant to these two articles, which are distinct from the application system for victim participation that is the subject of this report. *See* rules 50, 59; *see also, e.g., The Prosecutor v. Simone Gbagbo*, PTC I, Decision on the conduct of the proceedings following Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo, 15 Nov. 2013, ICC-02/11-01/12-15, para. 9; *Situation in the Republic of Côte d’Ivoire*, PTC III, Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute, 6 July 2011, ICC-02/11-6.

<sup>5</sup> In accordance with rule 102, a victim may also submit an application “in audio, video or other electronic form,” where he or she “is unable, due to a disability or illiteracy” to communicate in writing.

<sup>6</sup> RoC 86(2) does provide that “[v]ictims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate.” Moreover, some Chambers have set deadlines for the submission of applications for participation. *See, e.g., The Prosecutor v. Bosco Ntaganda (“Ntaganda”)*, PTC II, Decision Establishing Principles on the Victims’ Application Process, 28 May 2013, ICC-01/04-02/06-67, para. 40; *The Prosecutor v. Laurent Gbagbo (“Gbagbo”)*, PTC I, Second decision on issues related to the victims’ application process, 5 Apr. 2012, ICC-02/11-01/11-86, para. 37.

<sup>7</sup> Rule 92(2).

<sup>8</sup> Rule 92(3).

<sup>9</sup> *Situation in the Democratic Republic of the Congo (“DRC”)*, PTC I, Decision on the Applications for Participation in the Proceedings, 17 Jan. 2006, ICC-01/04-101-tEN-Corr, para. 49.

<sup>10</sup> In practice, it is the Victims Participation and Reparations Unit, “a specialized unit dealing with victims’ participation and reparations”, which receives and processes applications for participation. RoC 86(9).



participation which “shall, to the extent possible, be used by victims.”<sup>11</sup> RoC 86(2) prescribes the information that the standard application must contain “to the extent possible.” This information includes:

- (a) The identity and address of the victim, or the address to which the victim requests all communications to be sent; in case the application is presented by someone other than the victim in accordance with rule 89, sub-rule 3, the identity and address of that person, or the address to which that person requests all communications to be sent;
- (b) If the application is presented in accordance with rule 89, sub-rule 3, evidence of the consent of the victim or evidence on the situation of the victim, being a child or a disabled person, shall be presented together with the application, either in writing or in accordance with rule 102;
- (c) A description of the harm suffered resulting from the commission of any crime within the jurisdiction of the Court, or, in case of a victim being an organization or institution, a description of any direct harm as described in rule 85 (b);
- (d) A description of the incident, including its location and date and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the harm as described in rule 85;
- (e) Any relevant supporting documentation, including names and addresses of witnesses;
- (f) Information as to why the personal interests of the victim are affected;
- (g) Information on the stage of the proceedings in which the victim wishes to participate, and, if applicable, on the relief sought; and
- (h) Information on the extent of legal representation, if any, which is envisaged by the victim, including the names and addresses of potential legal representatives, and information on the victim’s or victims’ financial means to pay for a legal representative.<sup>12</sup>

15. The Registrar may, in accordance with RoC 86(4) “request further information from victims [...] in order to ensure that such application contains, to the extent possible” the information above.<sup>13</sup> The Registrar may also “seek additional information from States, the Prosecutor and intergovernmental or non-governmental organizations.”<sup>14</sup>

## B. The Transmission of Applications

16. Once the Registrar has received an application, he must “transmit [it] to the relevant Chamber” pursuant to rule 89(1). The RoC also elaborate on the role of the Registrar with respect to this transmission. RoC 86(5) provides that the Registrar is to present applications to the Chamber “together with a report thereon.”<sup>15</sup> This provision also stipulates that the Registrar “shall endeavour to present one report for a group of victims, taking into consideration the distinct interests of the victims.” A Chamber may order the Registrar to “submit one report on a number of applications received . . . to assist that Chamber in issuing only one decision on a number of applications in accordance with rule 89, sub-rule 4.”<sup>16</sup>

<sup>11</sup> RoR 104(2) permits the Registry to “propose amendments to the standard application forms on the basis of, *inter alia*, experience in using the forms and the context of specific situations.” The standard application forms and proposed amendments are subject to approval by the Presidency pursuant to RoC 23(2).

<sup>12</sup> RoR 104(1) further prescribes that the standard application forms and explanatory material “be made available in the language(s) spoken by the victims” and that they are “in a format that is accessible, that can be used by the Court” and that can be stored in an electronic database described in RoR 98. *See infra* note 13.

<sup>13</sup> The RoR include several regulations directed at protecting the information and communications received from victims. *See* RoR 97-100. RoR 98(1), for example, directs that the Registry “maintain a secure electronic database for the storage and processing of information” and communications received from or in respect of victims.

<sup>14</sup> RoC 86(4).

<sup>15</sup> Pursuant to RoR 109(2), “[t]he format and content of the report . . . shall be determined to the extent possible in consultation with the Chamber.”

<sup>16</sup> RoC 86(6).

17. The Registrar must also, pursuant to rule 89(1), provide a copy of applications submitted by victims to the Prosecutor and the defence, “who shall be entitled to reply within a time limit to be set by the Chamber.” RoR 99(1) directs that prior to such disclosure, the Registry must “review the application and assess whether . . . disclosure . . . may jeopardise the safety and security of the victim concerned or any third person.” The Registry must then “inform the Chamber” of its assessment and “may make recommendations regarding the disclosure of all or part of the information provided by the victim”.<sup>17</sup>

### C. The Assessment of Applications

18. Once the Registrar has transmitted the applications (and the accompanying report) to the Chamber, rule 89(2) provides that the Chamber “on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled.”<sup>18</sup> Rule 89(2) further provides that “[a] victim whose application has been rejected may file a new application later in the proceedings.”

19. The Appeals Chamber has set forth that applicants must “demonstrate . . . that they are victims within the meaning of rule 85”.<sup>19</sup> Rule 85 defines “victims” with respect to both natural persons as well as organizations and institutions:

- (a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

20. A note on applicants who qualify as victims:

- (a) Applicants who qualify as victims pursuant to rule 85 are not automatically entitled to participate in a judicial proceeding before the Court. Rather, the first sentence of article 68(3) provides:
- (b) Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. (emphasis added)
- (c) The Appeals Chamber has clarified that this article 68(3) assessment follows the rule 85 assessment.<sup>20</sup> In other words, *after* applicants have “demonstrate[d] that they are victims within the meaning of rule 85” pursuant to “the procedure of rule 89(1)”, they *then* “pursuant to article 68(3) . . . have to demonstrate that their personal interests are affected by the [proceedings] in order to be permitted to present their views and concerns”.<sup>21</sup> The Chambers have held that victims must make this

<sup>17</sup> RoR 99(3).

<sup>18</sup> RoC 86(7) provides that “[b]efore deciding on an application, the Chamber may request . . . additional information from, *inter alia*, States, the Prosecutor, the victims or those acting on their behalf”. Pursuant to RoC 86(6), where “information is received from States or the Prosecutor, the Chamber shall provide the relevant victim or victims with an opportunity to respond.”

<sup>19</sup> *The Prosecutor v. Thomas Lubanga Dyilo* (“*Lubanga*”), AC, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victim’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para. 61.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; see also INTERNATIONAL CRIMINAL COURT, VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT: A GUIDE FOR THE PARTICIPATION OF VICTIMS IN THE PROCEEDINGS OF THE COURT 13-14 (explaining that Chambers “go through two steps” in determining who can participate: “STEP 1: Is the applicant a victim, according to the ICC’s rules” and “STEP 2: If yes, is the victim entitled to participate at the particular stage of proceedings?”). In a 19 December 2008 decision, the Appeals Chamber interpreted article 68(3) to mean that “[a] person has the right to participate in proceedings if . . . his/her personal interests are affected by the proceedings in hand, i.e. by the issues, legal or factual, raised therein.” *Situation in the DRC*, AC, Judgment on victim participation in the investigation stage of the proceedings, 19 Dec. 2008, ICC-01/04-556, para. 57. The Pre-Trial and Trial Chambers have further clarified that article 68(3)’s reference to victim participation at “stages of the proceedings” refers to

demonstration via “a discrete written application”.<sup>22</sup> The present report focuses on the first of these two steps – the rule 85 assessment – as it concerns the application process set forth in rule 89.<sup>23</sup>

21. The Court’s jurisprudence has held that an applicant qualifies as a victim pursuant to rule 85(a) under the following criteria:

- (a) His or her identity as a natural person appears duly established;
- (b) The events described in the application constitute(s) one or more crimes within the jurisdiction of the Court and with which the suspect is charged; and
- (c) The applicant has suffered harm as a result of the crime(s) with which the subject is charged.<sup>24</sup>

22. In determining whether an applicant meets the above criteria, the Court’s jurisprudence directs that the Chambers are to undertake a *prima facie* assessment.<sup>25</sup>

23. With respect to the first criterion, the Chambers have permitted applicants to establish their identities as natural persons through a range of means. In doing so, they have adopted slightly varying requirements tailored to case-specific circumstances as to which

“specific procedural activities, those being activities such as the examination of a particular witness or the discussion of a particular piece of evidence.” *The Prosecutor v. Abdallah Banda Abakaer Nourain (“Banda”)*, TC IV, Decision on the participation of victims in the trial proceedings, 20 Mar. 2014, ICC-02/05-03/09-545, paras. 15-16 (emphasis in original). Until the 19 December 2008 Appeals Chamber decision, the Pre-Trial Chambers had accorded victim status to applicants requesting to participate in the investigation stage of a situation. *See Situation in Darfur, Sudan*, Corrigendum to Decision on the Applications for Participation in the Proceedings, 14 Dec. 2007, ICC-02/05-111-Corr, p. 23; *Situation in Uganda*, Decision on victims’ applications for participation, 10 Aug. 2007, ICC-02/04-101, para. 9; *Situation in the DRC*, PTC I, ICC-01/04-101-tEN-Corr, *supra* note 9, at para. 63. The Appeals Chamber decision explicitly held that “an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime” and that a Pre-Trial Chamber “cannot grant the procedural status of victim entailing a general right to participate in the investigation” (although “victims are not precluded from seeking participation in any judicial proceedings . . . affecting investigations, provided their personal interests are affected by the issues arising for resolution”). *Situation in the DRC*, AC, ICC-01/04-556, *supra* note 21, at paras. 45, 56-57. The impact of the decision was to substantially narrow the class of victims permitted to participate in Court proceedings.

<sup>22</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo (“Bemba”)*, TC III, Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr, para. 25 (quoting *Lubanga*, TC I, Decision on Victims’ Participation, 18 Jan. 2008, ICC-01/04-01/06-1119, para. 96).

<sup>23</sup> The second step, which addresses the actual nature of victim participation, falls more appropriately within cluster D(2): Participation in the Proceedings. Accordingly, it will be the subject of separate consideration by the WGLL at a later time.

<sup>24</sup> *See, e.g., The Prosecutor v. Charles Blé Goudé*, PTC I, Decision on victims’ participation in the pre-trial proceedings and related issues, 11 June 2014, ICC-02/11-02/11-83, para. 13 (citing *Gbagbo*, PTC I, Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, 4 June 2012, ICC-02/11-01/11-138, para. 20; *Bemba*, TC III, Decision on 772 applications by victims to participate in the proceedings, 18 Nov. 2010, ICC-01/05-01/08-1017, para. 38; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (“Banda & Jerbo”)*, PTC I, Decision on Victims’ Participation at the Hearing on the Confirmation of the Charges, 29 Oct. 2010, ICC-02/05-03/09-89, para. 2); *Ntaganda*, PTC II, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 Jan. 2014, ICC-01/04-02/06-211, para. 18 (citing, *inter alia*, *The Prosecutor v. Bahar Idriss Abu Garda*, (“*Abu Garda*”) PTC I, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, 25 Sept. 2009, ICC-02/05-02/09-121, para. 11; *The Prosecutor v. Joseph Kony, Vincent Oti, Okot Odhiambo, Dominic Ongwen*, (“*Kony et al.*”) PTC I, Decision on victims’ applications for participation, 10 Aug. 2007, ICC-02/04-01/05-252, para. 12; *Situation in the DRC*, PTC I, ICC-01/04-101-tEN-Corr, *supra* note 9, at para. 79). The criteria for establishing that an organization or institution qualifies as a victim pursuant to rule 85(b) are substantively similar. *See, e.g., Banda and Jerbo*, PTC I, ICC-02/05-03/09-89, *supra* note 24, at para. 45; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (“Katanga & Ngudjolo”)*, TC II, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23 Sept. 2009, ICC-01/04-01/07-1491-Red-tENG, para. 57. A person bringing an application on behalf of an organization or institution must “submit . . . relevant documents in order to prove his or her identity and his or her *locus standi* to act on its behalf.” *Bemba*, TC III, ICC-01/05-01/08-1017, *supra* note 24, at para. 45.

<sup>25</sup> *See, e.g., Ntaganda*, PTC II, ICC-01/04-02/06-211, *supra* note 24, at para. 19; *Gbagbo*, PTC I, ICC-02/11-01/11-138, *supra* note 24, at para. 21; *Banda*, TC IV, Decision on 19 applications to participate in the proceedings, 12 Dec. 2013, ICC-02/05-03/09-528, at para. 22. Such an analysis “will not consist in assessing the credibility of the [applicants’] statement[s] or engaging in a process of corroboration *stricto sensu*’ but will assess the applicants’ statements first and foremost on the merits of their intrinsic coherence, as well as on the basis of the information otherwise available to” the Chamber. *Abu Garda*, PTC I, ICC-02/05-02/09-121, *supra* note 24, at para. 14 (quoting *Situation in the DRC*, ICC-01/04-101-tEN-Corr, *supra* note 9, at para. 101); *see also Kony et al.*, AC, Judgment on the appeals of the Defence against the decisions entitled “Decision on victims’ applications for participation” of Pre-Trial Chamber II, 23 Feb. 2009, ICC-02/04-179, para. 38.

documents will be accepted to prove an applicant's identity.<sup>26</sup> The Chambers have also differed as to whether child victims may apply on their own behalf,<sup>27</sup> and whether a successor may apply in place of a deceased applicant.<sup>28</sup>

24. In terms of the second criterion, the Chambers have held it "necessary that a link between the events described by the victim applicants and the case brought by the Prosecutor against the suspect be established".<sup>29</sup>

25. Finally, with respect to the third criterion, the Court's jurisprudence instructs that "harm" shall "denot[e] injury, loss, or damage" and may include physical injury, emotional suffering and economic loss.<sup>30</sup> Such "harm" may be indirectly or directly suffered, but must be "suffered personally by the victim."<sup>31</sup> The harm must also have a causal link to the crime. In this respect, the Chambers have emphasized that "the standard of causation . . . cannot be established with precision *in abstracto* but can only be assessed on a case-by-case basis in light of the information provided in the application form."<sup>32</sup> Nevertheless, they have held it to be "sufficient if the applicant demonstrates that the alleged crimes could have objectively contributed to the harm suffered".<sup>33</sup>

26. In evaluating whether an applicant qualifies as a victim pursuant to rule 85, the Trial Chambers have encountered the issue of determining whether the assessment at the pre-trial stage should apply equally at the trial stage. The Chambers have varied in their approach to

<sup>26</sup> The Chambers have typically permitted applicants to submit a relatively broad variety of documents. See, e.g., *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ("Muthaura, Kenyatta & Ali") PTC II, First Decision on Victims' Participation in the Case, 31 Mar. 2011, ICC-01/09-02/11-23, paras. 7-8 (accepting as proof of identity "(i) Passport; (ii) National Identity Card; (iii) Birth Certificate; and (iv) Driver's Licence" and "[i]n case such documentation is not available to victim applicants . . . (i) National ID Waiting Card; (ii) Chief's Identification Letter which provides certain basic information: (a) the full name, date and place of birth, and gender of the victim applicant; and (b) the name of the Chief, his or her signature and the use of an official stamp; (iii) Notification of Birth Cards (for minors); (iv) Clinic Cards (for minors); (v) Kenya Police Abstract Form (for lost national identity cards or Kenyan passports); (vi) a signed declaration from two witnesses attesting to the identity of the victim applicant"); *Bemba*, TC III, ICC-01/05-01/08-1017, *supra* note 24, at paras. 41-43 ("[W]hile determining whether the applicant is a 'natural or legal person,' the Chamber 'will seek to achieve a balance between the need to establish an applicant's identity with certainty, on the one hand, and the applicant's personal circumstances, on the other. In this regard, the Chamber notes that . . . numerous CAR citizens, living in rural areas, do not possess any official identity document and that others face difficulties in obtaining identity documents . . . Therefore, whenever the documents appended by the applicants have similar features as the ones listed above and the Chamber is satisfied that at this stage they sufficiently establish the applicants' identity, they will be accepted as proof of identity.")

<sup>27</sup> Compare, e.g., *Katanga & Ngudjolo*, TC II, Decision on the treatment of applications for participation, 26 Feb. 2009, ICC-01/04-01/07-933-ENG, para. 39 ("The Chamber observes that the provisions of rule 89(3) of the Rules do not preclude a minor from applying on his or her own behalf to participate in the proceedings as a victim.") with *Situation in Uganda*, PTC II, Decision on victims' applications for participation, 21 Nov. 2008, ICC-02/04-172, para. 20 ("[I]t has to be noted that both Applicants were minor not only at the time when the relevant events took place, but also at the time of the submission of the application. Accordingly, since their applications should have been presented by somebody acting on their behalf, [they] are not granted the status of victim of the Case.")

<sup>28</sup> Compare, e.g., *Kenyatta et al.*, PTC II, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 26 Aug. 2011, ICC-01/09-02/11-267, para. 47 ("[T]he [Chamber] is of the view that a deceased person cannot participate, through his or her relatives, in the proceedings before the Court. Therefore, an application for participation cannot be submitted on behalf of a deceased person.") with *Bemba*, TC III, ICC-01/05-01/08-807-Corr, *supra* note 22, at para. 83 ("Given that legal representatives can act for participating victims under Article 68(3) of the Statute, it is an unexceptional extension of that approach to allow an appropriate individual . . . to provide the Chamber with relevant information (reflecting the views and concerns of the victim who died), whether through counsel or otherwise.")

<sup>29</sup> *Ntaganda*, PTC II, ICC-01/04-02/06-211, *supra* note 24, at para. 25; see also *Gbagbo*, PTC I, ICC-02/11-01/11-138, *supra* note 24, at para. 27; *Banda*, TC IV, ICC-02/05-03/09-528, *supra* note 25, at para. 21.

<sup>30</sup> See *Lubanga*, AC, ICC-01/04-01/06-1432, *supra* note 19, at paras. 31-32; see also *Ntaganda*, PTC II, ICC-01/04-02/06-211, *supra* note 24, at paras. 28-33; *Gbagbo*, PTC I, ICC-02/11-01/11-138, *supra* note 24, at paras. 28-30.

<sup>31</sup> *Lubanga*, AC, ICC-01/04-01/06-1432, *supra* note 19, at paras. 30, 32.

<sup>32</sup> *Gbagbo*, PTC I, ICC-02/11-01/11-138, *supra* note 24, at para. 31; see also *Ntaganda*, PTC II, ICC-01/04-02/06-211, *supra* note 24, at para. 29; *Bemba*, PTC III, Fourth Decision on Victims' Participation, 12 Dec. 2008, ICC-01/05-01/08-320, para. 77.

<sup>33</sup> *Gbagbo*, PTC I, ICC-02/11-01/11-138, *supra* note 24, at para. 31; see also *Bemba*, PTC III, ICC-01/05-01/08-320, *supra* note 32, at para. 76 ("[T]he circumstances surrounding the crime(s) . . . must be appropriate to bring about the harm alleged and are not entirely outside the range of expectation or probability, as viewed *ex post* by an objective observer."); see also *Abu Garda*, PTC I, ICC-02/05-02/09-121, *supra* note 24, at para. 13 (finding that "the alleged harm will be held as 'resulting from' the alleged incident when the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent"); *Lubanga*, TC I, ICC-01/04-01/06-1119, *supra* note 22, at para. 99 ("[T]he Chamber will merely ensure that there are, *prima facie*, credible grounds for suggesting that the applicant has suffered harm as a result of a crime committed within the jurisdiction of the Court.")

this issue, permitting automatic authorization in some cases<sup>34</sup> while, in other cases, reviewing again the applications of those permitted to participate at the pre-trial stage.<sup>35</sup>

#### D. Legal Representation of Victims

27. The Court's victim participation scheme makes provision for the legal representation of victims. Specifically, the second sentence of article 68(3) provides that the "views and concerns" of victims "may be presented by the[ir] legal representatives . . . where the Court considers it appropriate in accordance with the Rules of Procedure and Evidence."<sup>36</sup>

28. Article 68(3) suggests that legal representation is limited to victim participation in the judicial proceedings and does not extend to the victim application process. However, in practice, and as described in Part II.B, some Chambers have permitted the appointment of legal representatives to represent victims during the application process. In addition, some Chambers have ordered the Registry to organize legal representation at the outset of proceedings and, as such, to consult with victims during the application process. Accordingly, the management of legal representation can be a significant component of the victim application system.

### III. The Standard Victim Application System ("Standard System")

29. The Standard System describes the application process implemented by Chambers in judicial proceedings during the Court's first decade of operation.<sup>37</sup>

#### A. The Application Process

30. Individuals complete and submit to the Registry a standard application form for participation ("Standard Form") pursuant to rule 89(1) and RoC 86(1)-(2).<sup>38</sup>

31. Upon receiving applications, the Registry reviews them before transmission to the Chamber.<sup>39</sup> In the earliest proceedings, Chambers limited the Registry's review to a determination of whether an application was complete.<sup>40</sup> In later proceedings, however,

<sup>34</sup> See, e.g., *Bemba*, TC III, Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants, 22 Feb. 2010, ICC-01/05-01/08-699, paras. 17-22 (holding that automatic authorization is permitted pursuant to RoC 86(8), which provides that a decision on an application to participate "shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1"). Those Chambers that permit automatic authorization do carve out an exception for those applicants who allege harm suffered that "was not, *prima facie*, the result of the commission of at least one crime within the charges confirmed by the Pre-Trial Chamber." *Bemba*, TC III, ICC-01/05-01/08-699, *supra* note 34, at para. 19.

<sup>35</sup> See, e.g., *Lubanga*, TC I, ICC-01/04-01/06-1119, *supra* note 22, at para. 112 ("The victims who have the opportunity to participate . . . are those who currently have been allowed to participate by Pre-Trial Chamber I . . . subject to a review by the Chamber of their applications to participate . . .").

<sup>36</sup> Rule 90, RoC 79-80, and RoR 112 elaborate further on the appointment of legal representatives for victims.

<sup>37</sup> This section of the report discusses the Standard System by primarily referencing the decisions in *Lubanga*, *Katanga & Ngudjolo*, and *Bemba*. See, e.g., *Bemba*, TC III, ICC-01/05-01/08-807-Corr, *supra* note 22; *Katanga & Ngudjolo*, TC II, ICC-01/04-01/07-933-tENG, *supra* note 27; *Bemba*, PTC III, ICC-01/05-01/08-320, *supra* note 32; *Katanga & Ngudjolo*, PTC I, Decision on the Applications for Participation in the Proceedings of Applicants, 2 Apr. 2008, ICC-01/04-01/07-357; *Lubanga*, TC I, ICC-01/04-01/06-1119, *supra* note 22; *Lubanga*, PTC I, Decision on the Applications for Participation in the Proceedings, 29 June 2006 (notified on 20 July 2006), ICC-01/04-01/06-172.

<sup>38</sup> For the most up-to-date version of the Standard Form, see Annex C. The Court originally required victims to submit "separate application forms for participation and reparation" but in October 2010 instituted "a joint application form", whereby an applicant can "indicate whether his/her application related to participation, reparations or both." Bureau of the ASP, *Report of the Bureau on victims and affected communities and Trust Fund for Victims*, ICC-ASP/10/31 (22 Nov. 2011), at para. 19. A separate but substantively similar form exists for organizations applying to participate as victims in judicial proceedings. See Annex D. Both forms are available on the Court's website and are also provided upon request by the Registry. The Standard Forms were designed by the Registry and approved by the Presidency, pursuant to RoC 23(2). See *supra* note 11.

<sup>39</sup> In undertaking this assessment, the Registry applies the standards as "spelled out" by the Chamber. *Situation in the Republic of Kenya*, PTC II, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, 3 Nov. 2010, ICC-01/09-24, para. 19; see also, e.g., *Bemba*, TC III, ICC-01/05-01/08-699, *supra* note 34, at paras. 35-36.

<sup>40</sup> See, e.g., *Katanga & Ngudjolo*, TC II, ICC-01/04-01/07-933-tENG, *supra* note 27, at para. 19 ("[T]he Chamber . . . alone [is] in a position to assess, on a case-by-case basis, the merits of the applications transmitted to it."); *Lubanga*, TC I, Decision on the implementation of the reporting system between the Registrar and the Trial

Chambers expanded the scope of the Registry's review, instructing the Registry to also conduct an initial assessment of whether the applicants meet the requirements of rule 85.<sup>41</sup>

32. Following its review of the applications, the Registry transmits them to the Chamber, together with a report, in accordance with rule 89(1) and RoC 86(5).<sup>42</sup> The format for the report "has been developed in consultation with . . . various Chambers".<sup>43</sup> This format is "individual" in nature, meaning that it presents the information contained in each application for participation, enabling the Chamber "to verify whether the applications fall within the scope of rule 85".<sup>44</sup>

33. The Registry also transmits copies of the applications, redacted as necessary, to both the Defence and the Prosecutor pursuant to rule 89(1).<sup>45</sup> The Registry does not typically transmit copies of its reports to the parties.<sup>46</sup>

34. The parties are entitled to make observations on the applications and to contest those that they do not believe meet the legal requirements for participation.<sup>47</sup>

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Chamber in accordance with Rule 89 and Regulation of the Court 86(5), 9 Nov. 2007, ICC-01/04-01/06-1022, para. 20 (stating that the Registry's reports on its review of the applications "should not contain any comment or expression of views on the overall merits of the application to participate"). The Registry also follows up on incomplete applications. See *Katanga & Ngudjolo*, TC II, ICC-01/04-01/07-933-tENG, *supra* note 27, at para. 25; *Bemba*, PTC III, ICC-01/05-01/08-320, *supra* note 32, at para. 80 ("The [Chamber] emphasises that for efficiency purposes it is the responsibility of the Registry . . . to ensure that *all* applications are filled in with pertinent information and completely and, in case of missing information, request such information or documentation in time before the application is submitted to the relevant Chamber.").

<sup>41</sup> See, e.g., *Situation in the Republic of Kenya*, PTC II, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, 3 Nov. 2010, ICC-01/09-24, paras. 19-20 ("The [Registry] will . . . perform an analysis of the applications following the requirements of rule 85 of the Rules. . . . The initial rule 85 assessment will be subject to the Chamber's final determination."); *Bemba*, TC III, ICC-01/05-01/08-699, *supra* note 34, at pages 21-22 ("[T]he Trial Chamber should receive only those completed applications that appear, *prima facie*, to be linked with the charges confirmed against the accused."); see also ICC-ASP/11/22, *supra* note 2, at para. 9 n. 11 (reporting to the ASP in November 2012 that the Registry "has been tasked by the Court to conduct an initial assessment of the applications in light of Rule 85 RPE"). It should be noted that the Trial Chamber in *Bemba* instructed the Registry to refrain from transmitting applications that appear *prima facie* not to meet the rule 85 requirements and instead to file "a report indicating the reasons why the application was not filed with the Chamber." *Bemba*, TC III, ICC-01/05-01/08-699, *supra* note 34, at para. 37. By contrast, the Pre-Trial Chamber in the Kenya situation instructed the Registry to continue transmitting copies of all completed applications to the Chamber, regardless of its *prima facie* rule 85 assessments. *Situation in the Republic of Kenya*, PTC II, ICC-01/09-24, *supra* note 41, at paras. 20-21.

<sup>42</sup> See, e.g., *Lubanga*, TC I, ICC-01/04-01/06-1022, *supra* note 40, at para. 19. In *Lubanga*, the Trial Chamber requested that the Registry group "applications in one report when there are links founded on such matters as time, circumstance or issue". *Id.* This request presaged the more explicit grouping of applications in later systems. See Annex A, Parts I & III (discussing the Gbagbo Pre-Trial System and the Ntaganda Pre-Trial System).

<sup>43</sup> See, e.g., *Katanga & Ngudjolo*, TC II, ICC-01/04-01/07-933-tENG, *supra* note 27, at para. 4 (noting that this format "has been used by Pre-Trial Chambers I, II and III and Trial Chamber I").

<sup>44</sup> *Id.* at paras. 5-6.

<sup>45</sup> The Chambers have instructed the Registry that "the scope of redactions should not be excessive and cannot exceed what is strictly necessary . . . and must allow for a meaningful exercise by the Prosecution and the Defence of their right to reply to the application for participation". See *Bemba*, PTC III, Second Decision on the question of victims' participation requesting observations from the parties, 23 Oct. 2008, ICC-01/05-01/08-184, para. 15; see also, e.g., *Katanga & Ngudjolo*, TC II, ICC-01/04-01/07-933-tENG, *supra* note 27, at para. 52 ("The Chamber concurs with the reasoning of Trial Chamber I . . . in *Lubanga*, and will see to it that the principle of proportionality is scrupulously applied, by satisfying itself that the redactions only restrict the rights of the accused to the extent necessary, and that they constitute the only possible and sufficient measure."). The Chambers have typically required that both parties receive redacted copies in the Standard System, even in circumstances where the Prosecutor has requested unredacted copies. See, e.g., *id.* at para. 53 ("The Chamber . . . concurs with the conclusion of Trial Chamber I . . . whereby the principle of equality of arms requires that the same versions be disclosed to the Prosecution and to the Defence."); *Bemba*, PTC III, ICC-01/05-01/08-184, *supra* note 45, at paras. 12-14 (holding that both parties must receive redacted copies of victim applications in order to, *inter alia*, "respect[ ] the principle of fair and equal treatment of the Prosecutor and the Defence"); *Lubanga*, TC I, Decision inviting the parties' observations on applications for participation, 6 May 2008, ICC-01/04-01/06-1308, para. 30 ("Redacted applications are to be transmitted to both parties alike in light of fundamental considerations of fairness (namely, the need to preserve the equality of arms) . . ."). In later systems, however, the Chambers have permitted the Prosecutor to obtain unredacted copies of the victim applications from the Registrar. See Annex A, paras. 4, 9, 19, 32 & accompanying notes.

<sup>46</sup> See, e.g., *Bemba*, PTC III, ICC-01/05-01/08-184, *supra* note 45, at para. 6 (noting receipt of a "confidential *ex parte*" report on victims applications filed by the Registrar); *Katanga & Ngudjolo*, PTC I, Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case", 10 June 2008, ICC-01/04-01/07-579, pp. 5-6 (noting receipt of several "confidential and *ex parte*" reports on victims' applications filed by the Registrar); *Lubanga*, TC I, ICC-01/04-01/06-1022, *supra* note 40, at paras. 21-27 ("[T]he reports prepared by the [Registry] are not to be provided to the parties and participants unless the Trial Chamber orders otherwise.").

35. The Chamber assesses and decides each application individually, taking into consideration the observations submitted by the parties.<sup>48</sup>

## B. Legal Representation

36. The Chambers within the Standard System have taken various approaches to the legal representation of applicants. In some proceedings, Chambers have determined that applicants are not entitled to a legal representative during the application process.<sup>49</sup> In other proceedings, Chambers have determined that they may appoint the Office of Public Counsel for Victims to represent applicants until a decision has been rendered on their applications.<sup>50</sup>

37. The Chambers have also taken diverse approaches to the organization of the legal representation of victims. In some proceedings, the Chambers have permitted victims who have already been admitted to participate to organize counsel of their own choosing.<sup>51</sup> In other proceedings, the Chambers have resorted to the organization of common legal representation.<sup>52</sup> When arranging common legal representation, some Chambers have organized representation early enough in the proceedings so as to bear upon the victim application process.<sup>53</sup>

38. In 2011, the Registry “commenced a process of establishing a systematic approach to common legal representation which aims to incorporate”, *inter alia*, “early action on common legal representation” and “meaningful consultation with victims.”<sup>54</sup> Importantly,

<sup>47</sup> See, e.g., *Bemba*, PTC III, ICC-01/05-01/08-184, *supra* note 45, at para. 8; *Katanga & Ngudjolo*, TC II, ICC-01/04-01/07-933-t-ENG, *supra* note 27, at para. 54 (citing *Lubanga*, TC I, ICC-01/04-01/06-1308, *supra* note 45, at paras. 33-34).

<sup>48</sup> See, e.g. *Bemba*, TC III, ICC-01/05-01/08-1017, *supra* note 24, at para. 36 (“A case-by-case analysis of each application for participation is appended thereto and should thus be read in conjunction with the present decision.”); *Katanga & Ngudjolo*, TC II, ICC-01/04-01/07-1491-Red-t-ENG, *supra* note 24, at para. 19; *Lubanga*, TC I, ICC-01/04-01/06-1119, *supra* note 22, at para. 84.

<sup>49</sup> See, e.g., *Situation in the DRC*, PTC I, Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims’ Participation and Legal Representation, 17 Aug. 2007, ICC-01/04-374, para. 42 (holding that Rule 90 and RoC 80-81, which pertain to the legal representation of victims, “refer to persons who have been accorded the procedural status of victims to participate”); *Kony et al.*, PTC II, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation, 1 Feb. 2007, ICC-02/04-01/05-134, paras. 11-12 (“[A]pplicant victims cannot claim to have an absolute and unconditional right to be provided with the assistance of a legal representative in respect of the phase preceding the Chamber’s decision on the merits of the application.”).

<sup>50</sup> See, e.g., *Bemba*, TC III, Decision on the Observations on legal representation of unrepresented applicants, 9 Dec. 2009, ICC-01/05-01/08-651, para. 18 (ordering that OPCV shall continue to represent the victim applicants it currently represents and those “who have not chosen a legal representative until a decision is made on their application to participate”); *Bemba*, PTC III, Decision on Victim Participation, 12 Sept. 2008, ICC-01/05-01/08-103-t-ENG, p. 5 (instructing that “where no legal representative has been appointed by the victims, the Office of Public Counsel for Victims shall, as assigned by the Registry, act as legal representative of the victims *from the time they submit their applications for participation*”) (emphasis added).

<sup>51</sup> At the pre-trial stage in *Lubanga*, for example, the Pre-Trial Chamber authorized four victims, three of whom were represented by one legal team and one of whom was separately represented by another legal representative, to participate in the confirmation of charges hearing. See *Lubanga*, PTC I, Decision on applications for participation in proceedings in the case of *Lubanga*, 20 Oct. 2006, ICC-01/04-01/06-601-t-EN. Similarly, at the pre-trial stage in *Banda & Jerbo*, the Pre-Trial Chamber authorized 89 victims, represented by five separate legal teams, to participate in the pre-trial proceedings. See *Banda & Jerbo*, Registry, ICC-02/05-03/09-134, *supra* note 51, at paras. 3, 6.

<sup>52</sup> At the pre-trial stage in *Bemba*, for example, the Pre-Trial Chamber held that in application of rule 90(2) of the Rules, and considering the number of victims recognised as participants in the present case, a presentation of their views and concerns by a single common legal representative is deemed appropriate in order to ensure effectiveness of pre-trial proceedings.

*Bemba*, PTC III, Fifth Decision on Victims’ Issues Concerning Common Legal Representation of Victims, 16 Dec. 2008, ICC-01/05-01/08-322, para. 7. Similarly, at the trial stage in *Katanga & Ngudjolo*, the Trial Chamber held “it both necessary and appropriate to group all victims who have been admitted to participate in this case, with the exception of [a small group of former child soldiers], into one group represented by one common legal representative.” *Katanga & Chui*, TC II, Order on the organisation of common legal representation of victims, 22 July 2009, ICC-01/04-01/07-1328, para. 13.

<sup>53</sup> For example, in *Bemba*, having observed that approximately 1200 applications for participation remained pending, the Trial Chamber endorsed the Registry’s proposal “for grouping the victim applicants.” *Bemba*, TC III, Decision on Common Legal Representation of Victims for the Purpose of Trial, 10 Nov. 2010, ICC-01/05-01/08-1005, paras. 6, 18-21.

<sup>54</sup> The Registry undertook this process in the context of preparations for pre-trial proceedings in *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang* (“*Ruto, Kosgey & Sang*”) / *Muthaura, Kenyatta & Ali* and trial proceedings in *Banda & Jerbo. Ruto, Kosgey & Sang*, Registry, Proposal for the common

the Registry emphasized that “its preferred means of operating would involve a much greater emphasis on discussions with the *applicants* and victim communities.”<sup>55</sup> As discussed below, the Registry has reiterated, and the Chambers have endorsed, this recommendation in subsequent proceedings.

#### IV. Alternatives to the Standard System

39. As the number of situations and cases before the Court began to grow, so too did the number of victim applications for participation.<sup>56</sup> The chart below tracks the number of victim applications submitted to the Court by situation and year.<sup>57</sup>

**Table: Victim applications for participation received per year per situation**

	2006	2007	2008	2009	2010	2011	2012	2013	2014
Dem. Rep. of the Congo	213	209	273	315	47	1132	0	1670	259
Central African Republic	0	0	139	50	1720	3587	169	64	11
Uganda	49	108	216	277	446	26	24	90	31
Darfur, Sudan	5	18	0	120	114	4	2	1	0
Kenya	---	---	---	0	69	2571	945	427	724
Libya	---	---	---	0	0	1	6	0	6
Côte d'Ivoire	---	---	---	0	0	0	197	123	249
Mali	---	---	---	---	---	---	0	0	119
Registered Vessels	---	---	---	---	---	---	---	140	92
<b>Total</b>	<b>267</b>	<b>335</b>	<b>628</b>	<b>762</b>	<b>2396</b>	<b>7321</b>	<b>1343</b>	<b>2515</b>	<b>1491</b>

40. As the table indicates, the Court experienced a noticeable surge in applications beginning in 2010. The following year, the Court reported to the ASP that the increasing number of victim applications had begun to exert a significant strain on the Court. Specifically, the Court reported that “it would not be possible to continue the current way of operation given the continuous rise in the number of victims participating and existing resources, and that a systemic change was required.”<sup>58</sup> In December 2011, the ASP responded by:

*Not[ing] with concern* reports from the Court on the continued backlogs the Court has had in processing applications from victims seeking to participate, a situation which might impact on effective implementation of the rights of victims under the Rome Statute, and *underlin[ing]*, in this regard, the need to consider reviewing the victim participation system with a view to ensuring its sustainability, effectiveness and efficiency.<sup>59</sup>

41. In November 2012, the Court again reported that the increasing “number of victims applying” had “put a strain on the Court”.<sup>60</sup> In particular, the Court noted that it was experiencing difficulties processing applications in a timely manner so as to keep pace with

legal representation of victims, 1 Aug. 2011, ICC-01/09-01/11-243, para. 3; *see also Banda & Jerbo*, Registry, Report on the organization of common legal representation, 5 Aug. 2011, ICC-02/05-03/09-187; *Muthaura, Kenyatta & Ali*, Registry, Proposal for the Common Legal Representation of Victims, 1 Aug. 2011, ICC-01/09-02/11-214.

<sup>55</sup> *See Ruto, Kosgey & Sang*, Registry, ICC-01/09-01/11-243, *supra* note 54, at para. 8 (emphasis added).

<sup>56</sup> In 2011, the Registry reported that the proliferation in applications was due not only “to the increase in the number of situations and cases” but “also to the scope of the charges in each case.” ICC-ASP/10/31, *supra* note 38, at para. 22 n.8.

<sup>57</sup> The Registry records the number of applications received by situation, rather than by case, as applicants do not always specify which case(s) they wish to participate in and, in some instances, a case to which a victim may be linked may open after an application is received.

<sup>58</sup> ICC-ASP/10/31, *supra* note 38, at para. 22.

<sup>59</sup> ASP Res. ICC-ASP/10/Res.5, 10th Sess. (21 Dec. 2011), para. 49 (emphasis in original).

<sup>60</sup> ICC-ASP/11/22, *supra* note 2, at paras. 5-6, 12-13.



the proceedings and enable victims to effectively exercise their rights under the Statute.”<sup>61</sup> It pinpointed as “[o]ne of the main reasons for this difficulty . . . the lack of appropriate resources in the Registry, parties, legal representatives of applicants and Chambers to deal with the volume of applications.”<sup>62</sup>

42. Against this backdrop, several Chambers began in 2012 to devise alternative approaches to the standard victim application system. Summarized below are the key features of each alternative approach.<sup>63</sup>

## A. Early Approaches

43. The Gbagbo Pre-Trial and Kenya Trial Chambers were the first to break away from the Standard System, implementing diverging alternative approaches in 2012.

### 1. The Gbagbo Pre-Trial System: Exploring a Collective Approach

44. The Pre-Trial Chamber in *Gbagbo* asked the Registry to consider a collective approach as a means of reducing the backlog in processing applications.<sup>64</sup>

45. The Registry submitted that an exclusively collective approach was incompatible with the Rules but proposed a partly collective approach, adopted by the Chamber, whereby:<sup>65</sup>

- (a) Applicants may:
  - (i) Individually submit a Standard Form; or
  - (ii) Join with others to submit a “Group Form”, together with short “Individual Declarations”.<sup>66</sup>
- (b) All applications – whether individual or collective – are processed and assessed in the same manner as those in the Standard System.

46. The Chamber also adopted the Registry’s proposal to organize common legal representation as soon as possible and instructed the Registry to consult with applicants for this purpose.<sup>67</sup>

### 2. The Kenya Trial System: Delegating the Assessment of Applications

47. The Trial Chamber in the Kenya Cases took a different approach. It identified that a major inefficiency might stem from the Chamber’s assessment of applications and accordingly devised a system delegating this requirement, as follows:<sup>68</sup>

- (a) Applicants who wish to participate
  - (i) Without appearing before the Chamber submit a “Registration Form”;<sup>69</sup>
  - (ii) By appearing before the Chamber submit a Standard Form.
- (b) The Common Legal Representative (“CLR”) determines whether each applicant qualifies as a victim.

<sup>61</sup> *Id.* at para. 6.

<sup>62</sup> *Id.*

<sup>63</sup> The elements of each alternative system are explored in greater detail in Annex A.

<sup>64</sup> *Gbagbo*, PTC III, Decision on issues related to the Victims’ application process, 6 Feb. 2012, ICC-02/11-01/11-33, para. 1.

<sup>65</sup> *Gbagbo*, Registry, Organization of the Participation of Victims, 6 Feb. 2012, ICC-02/11-01/11-29-Red; *Gbagbo*, PTC I, ICC-02/11-01/11-86, *supra* note 6.

<sup>66</sup> See Annexes E-F.

<sup>67</sup> *Gbagbo*, PTC I, ICC-02/11-01/11-86, *supra* note 6, at para. 44.

<sup>68</sup> *Ruto & Sang*, TC V, Decision on victims’ representation and participation, 3 Oct. 2012, ICC-01/09-02/11-460; *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on victims’ representation and participation, 3 Oct. 2012, ICC-01/09-02/11-498. The two decisions are substantively similar; accordingly, the analysis of the Kenya Trial System will henceforth cite only to the *Ruto & Sang* decision.

<sup>69</sup> See Annex G.

48. The Chamber organized common legal representation from the outset of the proceedings and, as indicated above, decided that the CLR would be responsible for the assessment of applications.<sup>70</sup>

## B. Review and Adaptation

49. In 2013 and 2014, the Pre-Trial and Trial Chambers in *Ntaganda* respectively implemented two further alternative systems. In developing these systems, they consulted closely with the Registry and asked it to reflect critically on the advantages and disadvantages of the Gbagbo Pre-Trial and Kenya Trial Systems.

### 1. The Ntaganda Pre-Trial System: Abandoning the Collective Approach

50. In 2013, the Pre-Trial Chamber in *Ntaganda* asked the Registry for its observations on the partly collective approach implemented by the Pre-Trial Chamber in *Gbagbo*.<sup>71</sup>

51. The Registry submitted that one clear lesson was that the collective route – *i.e.* applicants grouping themselves to submit a single Group Form – was not always “feasible or advisable”.<sup>72</sup> It noted that applicants may not be able to group themselves for logistical or security reasons and that the collectivization of applications renders inflexible their processing by permanently fixing applicants within particular groups of victims.<sup>73</sup>

52. The Registry proposed, and the Chamber accordingly adopted, a system returning to the individual application process but whereby:<sup>74</sup>

- (a) Applicants submit a “Simplified Form”;<sup>75</sup>
- (b) The Registry groups applications according to various criteria;
- (c) The applications are otherwise processed and assessed as those in the Standard System.

53. The Chamber also ordered the organization of common legal representation as soon as possible and instructed the Registry to consult with applicants for this purpose.<sup>76</sup>

### 2. The Ntaganda Trial System: A Hybrid Approach

54. In 2014, the Trial Chamber in *Ntaganda* asked the Registry to reflect more broadly on the Court’s victim application system.<sup>77</sup>

55. The Registry presented what it considered to be two viable options moving forward:

- (a) The Ntaganda Pre-Trial System; or
- (b) A new hybrid approach.<sup>78</sup>

56. In reflecting on the Ntaganda Pre-Trial System (and more generally on the individual application approach), the Registry submitted that the most time and resource consuming elements have been:<sup>79</sup>

- (a) Assessing applications, which requires the Registry to prepare initial assessments “followed by the Chamber conducting its own review . . . and preparing decisions in light of the observations made by the parties”; and

<sup>70</sup> *Ruto & Sang*, TC V, ICC-01/09-02/11-460, *supra* note 68, at paras. 41-43.

<sup>71</sup> *Ntaganda*, PTC II, Decision Requesting the Victims Participation and Reparations Section to Submit Observations, 26 Apr. 2013, ICC-01/04-02/06-54, paras. 3-5.

<sup>72</sup> *Ntaganda*, Registry, Registry Observations in compliance with the Decision ICC-01/04-02/06-54-Conf, 6 May 2013, ICC-01/04-02/06-57, para. 8.

<sup>73</sup> *Id.* at paras. 9-10.

<sup>74</sup> *Ntaganda*, PTC II, ICC-01/04-02/06-67, *supra* note 6.

<sup>75</sup> See Annex H.

<sup>76</sup> *Ntaganda*, PTC II, ICC-01/04-02/06-67, *supra* note 6, at paras. 45-46.

<sup>77</sup> *Ntaganda*, TC VI, Order Scheduling a Status Conference and Setting a Provisional Agenda, 21 July 2014, ICC-01/04-02/06-339, para. 5, p. 6.

<sup>78</sup> *Ntaganda*, Registry submission to “Order Scheduling a Status Conference and Setting a Provisional Agenda”, 14 Aug. 2014, ICC-01/04-02/06-350.

<sup>79</sup> *Id.*

(b) Redacting applications (and initial assessments) for transmission to the parties

57. The Registry recommended, and the Chamber ultimately adopted, a hybrid approach. This approach effectively blends (a) the Ntaganda Pre-Trial System's Simplified Form with (b) the Kenya Trial System's delegation of the Chamber's assessment of applications:<sup>80</sup>

- (a) Applicants submit a "Simplified Form";
- (b) The Registry assesses whether each applicant qualifies as a victim based on principles and criteria established by the Chamber;
- (c) The Registry transmits all applications, together with a report, to the Chamber;
- (d) The Registry transmits only those applications for which it could not make a clear determination, together with a report, to the parties, who may make observations;
- (e) The Chamber assesses those applications for which the Registry could not make a clear determination and ratifies the Registry's assessments of all other applications barring a clear and material error.

58. The Registry highlighted one critical distinction between the hybrid approach and the Kenya Trial System:

- (a) The Registry, not the CLR, assesses whether applicants qualify as victims;<sup>81</sup>
- (b) The Registry submitted that because it operated as a neutral body, this delegation "would provide a greater degree of oversight to the Court, facilitate the work of the legal representatives in the field and ensure that the criteria established by the Chamber are systematically applied by the Court."<sup>82</sup>

59. The Chamber opted, following consultations with the victims, to maintain the common legal representation scheme implemented at the pre-trial stage.<sup>83</sup>

60. Elements Common to All Four Alternative Victim Application Systems:

- (a) *Shorter Application Form*: All four alternative systems limit the amount of information gathered from applicants. In the Gbagbo Pre-Trial System, individuals choosing to join with others also submit short Individual Declarations, linking to the information in the Group Form.<sup>84</sup> The Registry, in reviewing this approach at the request of the Pre-Trial Chamber in *Ntaganda*, specifically recommended the Individual Declaration as a basis for the Simplified Form.<sup>85</sup> The Trial Chamber in *Ntaganda* opted to continue using the Simplified Form in implementing a new alternative system. Finally, in the Kenya Trial System, victims who wished to participate without appearing before the Chamber were required to register with the Court. The registration process included the submission of a Registration Form, which substantively resembles the Individual Declaration and the Simplified Form,<sup>86</sup>
- (b) *Chambers' Delegation of Rule 85 Assessment*: The Chambers in all four alternative systems – as well as Chambers in later Standard System cases – have delegated some or all responsibility for assessing victim applications. Almost all of these Chambers have expanded the Registry's role in reviewing applications to include a rule 85 assessment.<sup>87</sup> In most instances, such as the Pre-Trial Chamber in the Kenya Situation (Standard System), as well as the Pre-Trial Chambers in *Gbagbo* and *Ntaganda*, the Chambers have instructed the Registry to conduct an initial rule 85

<sup>80</sup> *Id.* at para. 15; *Ntaganda*, TC VI, Decision on victims' participation in trial proceedings, 6 Feb. 2015, ICC-01/04-02/06-449, para. 32.

<sup>81</sup> *Ntaganda*, Registry, ICC-01/04-02/06-350, *supra* note 78, at para. 21.

<sup>82</sup> *Id.*

<sup>83</sup> *Ntaganda*, TC II, Second decision on victims' participation in trial proceedings, 16 June 2015, ICC-01/04-02/06-650, paras. 28-32.

<sup>84</sup> See Annex F.

<sup>85</sup> *Ntaganda*, PTC II, ICC-01/04-02/06-67, *supra* note 6, para. 9; see Annex H.

<sup>86</sup> See Annex G.

<sup>87</sup> The one exception is the Kenya Trial System, where the Trial Chamber vested the CLR with the responsibility of ensuring that applicants fulfil the rule 85 criteria.

assessment and transmit applications together with the assessment to the Chamber.<sup>88</sup> The Trial Chamber in *Ntaganda* fully delegated the rule 85 assessment to the Registry, which assesses the applications on the basis of principles and criteria established by the Chamber. While the Registry continues to transmit applications to the Chamber, the Chamber only individually assesses those applications where the Registry cannot make a clear determination;

- (c) *Fewer Redactions*: As a general matter, limiting the information collected from applicants has the corresponding effect of reducing the scope of required redactions. Indeed, the Pre-Trial Chamber in *Ntaganda*, in adopting the Simplified Form, noted that it should “prove significantly instrumental in streamlining the process of redactions . . . ultimately allowing for the transmission of such information to the parties in non-redacted form, to the extent possible.”<sup>89</sup> The Trial Chamber in *Ntaganda* went one step further, instructing that only Simplified Forms for which the Registry could not make a clear determination be transmitted to the parties, thereby reducing the number of applications requiring redactions. In implementing this approach, the Chamber noted that “the redaction process necessary to provide all victim applications to the parties would be ‘time and resource intensive’.”<sup>90</sup> The Trial Chamber in the Kenya cases went even further, essentially obviating the need for redactions altogether. In the Kenya Trial System, only applications of those who wish to appear before the Chamber (and are authorized to do so) are transmitted to the parties. The Chamber instructed that the applicants’ identities should be disclosed to the parties at this stage, indicating that redactions would be largely unnecessary;
- (d) *Early Organization of Common Legal Representation*: All four alternative systems have embraced the organization of common legal representation for victims from the outset of proceedings, in other words, in conjunction with the victim application process. The Pre-Trial Chamber in *Gbagbo* and the Pre-Trial and Trial Chambers in *Ntaganda*, endorsing the approach developed by the Registry in later Standard System cases, instructed the Registry to consult with applicants on the question of legal representation and to propose common legal representation schemes on the basis of those consultations.<sup>91</sup> The Kenya Trial System, while also considering the organization of common legal representation together with the victim application process, contemplated CLRs as playing a critical role in the application process itself.<sup>92</sup>

<sup>88</sup> See para. 28 & n.42 and Annex A, paras. 4, 8, 30. The Trial Chamber in *Bemba* (Standard System), diverged slightly from this approach, instructing the Registry to only transmit complete applications appearing *prima facie* to meet the rule 85 requirements, together with its assessment. *Bemba*, TC III, ICC-01/05-01/08-699, *supra* note 34, at para. 37.

<sup>89</sup> *Ntaganda*, PTC II, ICC-01/04-02/06-67, *supra* note 6, para. 22.

<sup>90</sup> *Ntaganda*, TC VI, ICC-01/04-02/06-449, *supra* note 80, para. 28 (emphasis added).

<sup>91</sup> See Annex A, paras. 11, 34, 48 and accompanying notes.

<sup>92</sup> See *id.* at paras. 16-23. Specifically, the Kenya Trial System provides that CLRs are to assess whether applicants fulfil the rule 85 criteria.

## Annex II

### **Report of the Working Group on Lessons Learnt to the Study Group on Governance: Cluster I: Expediting the Criminal Process: Progress Report on Clusters A, B, C and E**

#### **I. Introduction**

1. The Working Group on Lessons Learnt (“WGLL”) hereby submits the present report to the Study Group on Governance (“Study Group”). The WGLL was established in October 2012 pursuant to the Roadmap on Reviewing the Criminal Procedures of the International Criminal Court (“Roadmap”), which was drafted by the Study Group and subsequently endorsed by the ASP in November 2012 and as amended in November 2013. The WGLL and the Roadmap were developed in response to a request by States Parties for a mechanism to identify areas for improving the efficiency of judicial proceedings and propose amendments to the legal framework. The Court identified nine clusters in its “First report of the Court to the Assembly of States Parties” as the most useful areas for discussion. The present report updates the Study Group on recent initiatives taken at the Court with a view to expediting judicial proceedings with regard to clusters A (“Pre-trial”), B (“Pre-trial and trial relationship and common issues”), C (“Trial”) and E (“Appeals”).

2. The Appeals Division, the Trial Division and the Pre-Trial Division have each been intensively involved in efforts to enhance the Court’s efficiency and effectiveness. To this end, the judges of the Court participated in a retreat at Nuremberg in June 2015 (see section III below) which focussed on practice-based approaches to enhancing efficiency, as well as exploring certain proposals for amendments to the Court’s legal texts. Many agreements were facilitated by the extensive discussions at Nuremberg, which focussed on trial and pre-trial proceedings. Subsequently, the achievements of Nuremberg have been consolidated through ongoing efforts in The Hague. For example, several judges are acting as focal points to co-ordinate the harmonisation of practices in relation to specific issues such as victims’ applications for participation and procedures for admission, drafting style and the use of protocols or practice directions for non-contentious technical aspects of proceedings (see paras. 12, 47 and 49 below). In addition, efforts are ongoing in all three divisions to continue to pursue enhanced efficiency through the Court’s jurisprudence, further identification of expeditious practice changes and improved working methods.

#### **II. Changes to the composition, methodology and approach of the WGLL**

3. The WGLL, in 2015, has undertaken reform of both the process and the output of the lessons learnt project.<sup>1</sup>

4. Process-wise, the composition and methodology of the WGLL have been reformed in 2015 to maximise judicial involvement in the lessons learnt process and optimise the interaction between the WGLL and the Advisory Committee on Legal Texts (“ACLT”). The WGLL is now chaired by President Fernández de Gurmendi and has a variable composition. This composition consists of the members of the Presidency, those judges who are members of the ACLT and those judges who volunteer to act as focal points in relation to specific issues currently under considerations.

5. Further clarification has been achieved regarding the interaction between the WGLL and the ACLT in respect of proposals for amendments. It has been re-iterated that, as had previously occurred, proposals for reform to the legal framework originating from the judiciary shall continue to be submitted first to the WGLL which will serve to prioritise and ensure sufficient support (of at least 5 judges) to proposals that are to be sent to the ACLT. It has now been clarified that the WGLL will act as a co-ordinating body for such proposals

<sup>1</sup> As highlighted by President Fernández de Gurmendi, in her remarks to the New York Working Group of the Bureau of the ASP on 10 April 2015.

but will not discuss their substance. Such substance will be addressed by the ACLT. The judges who are members of the ACLT have confirmed their commitment to ensuring appropriate consultations with all the judges in their respective divisions concerning the proposals before the ACLT.

6. Turning to the output of the lessons learnt project, past experience has demonstrated that amending the Rules of Procedure and Evidence is highly complex and cumbersome. It is a time-consuming approach to enhancing efficiency and one which carries no guarantees of success.<sup>2</sup> Even when adopted, scattered amendments to certain rules have a limited capacity to have a real impact on proceedings. In view of this reality, the WGLL, in 2015, has pursued a holistic approach to enhancing and expediting proceedings which considers a range of options, including addressing entire clusters of issues together, considering whether enhanced efficiency can be achieved mainly through the internal adoption of best practices and amendments to the Regulations of the Court. Still, some amendments to the Rules of Procedure may be necessary in certain cases. As developed below, a proposed amendment to the Rules has been presented, following the Nuremberg retreat, and is now being considered by the ACLT.

### III. The Nuremberg Retreat

7. The successful pursuit of enhancing the efficiency of the Court's proceedings requires the participation of all judges. Accordingly, as indicated at para. 2 above, the judges of the Court held a retreat in Nuremberg, Germany from 18 to 21 June 2015 ("Nuremberg Retreat") in order to collectively and extensively reflect upon how to enhance the efficiency and effectiveness of pre-trial and trial proceedings and to identify both best practices and potential amendments to the Court's legal framework in this regard and to reflect on how to increase external awareness of the Court's work. The focus on trial and pre-trial proceedings reflected the previous identification by both the WGLL and the Study Group of Cluster B as integral to achieving overall enhancements to the system.<sup>3</sup> Given the limited time available for the retreat, it was considered best to leave out discussions concerning appeals proceedings. The Nuremberg Retreat also considered potential enhancements to the structure and working methods of chambers in order to pursue increased cohesion and efficiency. The programme of the Nuremberg Retreat can be found in appendix I to this report.

8. The judges prepared extensively in order to optimise what could be achieved at the Nuremberg Retreat. The retreat took place on the basis of discussion papers circulated by the Presidency in consultation with the judges of each of the Pre-Trial and Trial Divisions, various written contributions made by individual judges and the "Pre-Trial Practice Manual" prepared by the judges of the Pre-Trial Division, which is further developed below.

#### A. The Pre-Trial Practice Manual

9. The Pre-Trial Practice Manual ("Practice Manual") resulted from discussions held among the judges of the Pre-Trial Division in May and June 2015 with a view to expediting agreement on certain matters at the Nuremberg Retreat. The approach of the Practice Manual reflects the approach outlined in paras. 2 and 6 above in which priority is given to pursuing internal best practices considering, as a whole, the inter-related and complex issues facing the Pre-Trial Division. In order to facilitate the discussion at Nuremberg, the Practice Manual was usefully originally prepared to follow the structure of the relevant discussion paper circulated by the Presidency.

10. At the Nuremberg Retreat, the judges welcomed the preparation of the Practice Manual by the Pre-Trial Division. They endorsed the Practice Manual and agreed that it would be published on the website of the Court, following its restructuring. Accordingly, the Practice Manual was made available on the Court's website on 4 September 2015. The

<sup>2</sup> At the thirteenth session of the ASP in December 2014, recommendations of the WGLL on proposals to introduce rule 140 *bis* and to amend rules 76(3), 101(3) and 144(2)(b) of the Rules of Procedure and Evidence were not adopted.

<sup>3</sup> ICC-ASP/13/28, para. 26.

judges agreed that the Pre-Trial Manual itself achieved a sort of codification of a range of practice-based matters, particularly those discussed in section IV, part A below. A copy of the Practice Manual can be found in appendix II to this present report.

11. The Practice Manual is intended to be a dynamic and living document to be updated and expanded to other issues and phases of proceedings as agreement is achieved on further best practices. The judges of the Pre-Trial Division will meet on a regular basis to assess the need for any modifications.

## **B. The Inter-Divisional Committee on Drafting Style**

12. In parallel to the above efforts, the importance of internal practice-based changes was similarly reflected in the establishment, in March 2015, of an Inter-Divisional Committee on Drafting Style to explore, *inter alia*, greater standardisation in matters of drafting and style across chambers and divisions.

13. At the Nuremberg Retreat, the focal point of the Committee presented two provisional documents: (i) a number of recommendations on drafting style, in both English and French, together with template decisions for a number of basic procedural matters (*i.e.* time limits, the classification of documents, arrangements for status conferences) and (ii) a provisional English language citation guide (“ICC Chambers’ Style Guide”).

14. Subsequent to the Nuremberg Retreat, work continued on the above draft documents. Recommendations on drafting style have been finalised by the Committee and will constitute an internal working document for the judges. The English-language ICC Chambers’ Style Guide is being finalised and will be imminently available for application on a provisional basis. The French-language version of the Guide will then be prepared. Following its finalisation in both languages, the ICC Chambers’ Style Guide will be made publicly available.

## **IV. Harmonisation of practice related to confirmation of charges proceedings**

### **A. The Charges**

15. At the Nuremberg Retreat, there was broad agreement among the judges with respect to several issues related to the charges and the basis of the trial.

16. It was reaffirmed that the confirmation decision is binding with respect to the scope and extent of the charges confirmed, *i.e.* the facts and circumstances described in the charges.<sup>4</sup> The binding nature of the confirmation decision requires that such decision be unambiguous as to the charges confirmed. The binding effect of the confirmation decision attaches only to the charges, and not to the reasoning of the Pre-Trial Chamber in support of its findings, including references to evidence and evidentiary/subsidiary facts. In order to ensure such clarity, the Practice Manual establishes an outline for the structure of a decision on the confirmation of charges. This structure includes an operative part, the only section binding on the Trial Chamber, in which the Pre-Trial Chamber shall reproduce *verbatim*

<sup>4</sup> See articles 61(7)(a) and 74(2) of the Rome Statute; Regulation 55(1) of the Regulations of the Court. See *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* (“Gbagbo and Blé Goudé”), “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters”, 11 March 2015, ICC-02/11-01/15-1, para. 57; *The Prosecutor v. Laurent Gbagbo* (“Laurent Gbagbo”), “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters”, 11 March 2015, ICC-02/11-01/11-810, para. 57; *The Prosecutor v. Charles Blé Goudé* (“Blé Goudé”), “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters”, 11 March 2015, ICC-02/11-02/11-222, para. 57. The binding nature of the charges (or any amendment thereto) has been confirmed by the Appeals Chamber: *The Prosecutor v. Thomas Lubanga Dyilo* (“Lubanga”), “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’”, 8 December 2009, ICC-01/04-01/06-2205, para. 88. See also the finding of the Appeals Chamber that “there can be no doubt that the decision on the confirmation of the charges defines the parameters of the charges at trial”, *Lubanga*, “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction”, 1 December 2014, ICC-01/04-01/06-3121-Red, para. 124.

those charges presented by the Prosecutor which are confirmed. The inclusion of the charges confirmed in an operative part has the advantage of precisely delineating the parameters of the trial. At the Nuremberg Retreat, the judges endorsed this proposed structure.

17. At the Nuremberg Retreat, the judges underlined that the responsibility to formulate the charges rests with the Prosecutor. These charges should be clearly identified in either a separate filing or a separate section of the Document Containing the Charges (“DCC”) in order to distinguish them from other submissions included in the same document (evidentiary/subsidiary facts, description of surrounding circumstances, analysis of evidence etc.). These requirements have been codified in the Practice Manual.

18. The Practice Manual reflects, in this regard, recent practice in *The Prosecutor v. Laurent Gbagbo* (“*Laurent Gbagbo*”) and *The Prosecutor v. Charles Blé Goudé* (“*Blé Goudé*”), in which the Pre-Trial Chamber requested that the DCC clearly and comprehensively identify and set out the material facts and circumstances underlying the charges, with these being distinguished from facts of a subsidiary nature (factual allegations which aim to demonstrate or support the existence of material facts).<sup>5</sup>

19. At the Nuremberg Retreat, the judges took the view that, before the commencement of the confirmation hearing, the Pre-Trial Chamber is obliged to ensure that the formulation of the charges by the Prosecutor is consistent with the right of an accused person, pursuant to article 67(1)(a) of the Rome Statute, to “be informed promptly and in detail of the nature, cause and content of the charges”. Accordingly, in the event that the Pre-Trial Chamber considers the charges to be defective, the Pre-Trial Chamber must send the charges back to the Prosecutor with instructions to remedy such defects. This should occur prior to the commencement of the hearing on the confirmation of charges and should occur even if such referral would result in the postponement of such commencement.

20. For example, Pre-Trial Chamber II, in *The Prosecutor v. Dominic Ongwen* (“*Ongwen*”), clarified that, in order to ensure the proper conduct of proceedings and to safeguard the rights of a suspect, questions concerning the form, completeness and clarity of the charges should be settled before the commencement of the confirmation hearing.<sup>6</sup>

21. At the Nuremberg Retreat, the judges agreed that the defence may bring challenges to the charges which do not touch upon the merits, nor require consideration of the evidence, at the latest, as procedural objections pursuant to rule 122(3). Such challenge must be made prior to the opening of the confirmation hearing.

22. The judges agreed that the confirmation decision may not expand the factual scope of the charges presented by the Prosecutor, although minor adjustments to the charges may be made to ensure conformity with findings in the confirmation decision.<sup>7</sup> This is consistent with recent practice in the *Laurent Gbagbo* and *Blé Goudé* cases which replicated the Prosecutor’s charges *verbatim* with only minor adjustments to ensure conformity with its findings.<sup>8</sup>

23. The judges agreed that the fact that the charges are confirmed by the Pre-Trial Chamber, does not preclude a Trial Chamber from requesting or allowing the presentation of supplementary documents by the Prosecutor explaining her case in which the evidence and arguments may be revised, adapted or updated so long as the description of the material facts and circumstances of the charges does not differ from that contained in the operative part of the confirmation decision.

<sup>5</sup> Pre-Trial Chamber I, *Blé Goudé*, “Decision establishing a system for disclosure of evidence”, 14 April 2014, ICC-02/11-02/11-57, paras. 11-12; Pre-Trial Chamber I, *Laurent Gbagbo*, “Decision on the date of the confirmation of charges hearing and proceedings leading thereto”, 17 December 2012, ICC-02/11-01/11-325, paras. 27-28.

<sup>6</sup> *The Prosecutor v. Dominic Ongwen* (“*Ongwen*”), Transcript of the status conference of 19 May 2015, ICC-02/04-01/15-T-6-ENG, p. 20, lines 21-24.

<sup>7</sup> The judges agreed that this is predicated on the DCC clearly distinguishing between the charges (material facts and circumstances and their legal characterisation) and the Prosecutor’s submissions in support of the charges, as indicated at paras. 16-17 above.

<sup>8</sup> Pre-Trial Chamber I, *Blé Goudé*, “Decision on the confirmation of charges against Charles Blé Goudé”, 11 December 2014, ICC-02/11-02/11-186; Pre-Trial Chamber I, *Laurent Gbagbo*, “Decision on the confirmation of charges against Laurent Gbagbo”, 12 June 2014, ICC-02/11-01/11-656-Red.



24. The judges agreed that while the facts and circumstances described in the charges cannot be modified without formal amendment to the charges, the legal characterisation should be more flexible in order to avoid delays to the proceedings that may result from the use of regulation 55 of the Regulations of the Court at the trial level.

25. The judges agreed that, upon request by the Prosecutor, Pre-Trial Chambers will confirm alternative charges (including alternative modes of liability) where the evidence is sufficient. Such alternative charging may render resort to regulation 55 exceptional. In the practice of the Court, more recent confirmation decisions have adopted a flexible approach by confirming alternative legal characterisations of modes of liability and/or alternative legal characterisations for certain crimes.<sup>9</sup> In the event of the confirmation of alternative charges, it is for the Trial Chamber, on the basis of the trial proceedings, to determine which, if any, of the confirmed alternatives is applicable.

## **B. Evidence in pre-trial proceedings**

### **1. Live evidence**

26. In practice, the confirmation hearing has proceeded primarily on the basis of written evidence. At the Nuremberg Retreat, the judges agreed that the use of live evidence at the confirmation hearing should be exceptional and allowed only if such testimony cannot be replaced by a written statement or other documentary evidence. This reflects recent decisions of the Pre-Trial Chambers.<sup>10</sup>

### **2. Format for the presentation of evidence**

27. Rule 121(3) and (6) refer to the provision of a “list of evidence”. To date, two different models for the presentation of such lists have emerged: a simple list presenting the items of evidence consecutively or a chart linking factual or legal claims with their supporting evidence.

28. Noting that there is no express basis by which a Pre-Trial Chamber could impose a particular modality for the presentation of evidence upon the parties, the Practice Manual, as endorsed by the judges at the Nuremberg Retreat, indicates that it is sufficient for the parties to provide a simple list with the items of evidence set out consecutively in any clear order, for example, by categories of evidence.

29. The judges agreed that no charts or tables (including “in-depth analysis charts”) of the evidence disclosed and/or relied upon should be requested from either party.

30. The judges have also taken note of recent practice of the Prosecutor by which factual allegations have been accompanied by footnotes which include hyperlinks to the evidence in support.<sup>11</sup> The Practice Manual considers that such practice is potentially useful and should be encouraged.

<sup>9</sup> See a summary of developing practice in ICC-ASP/13/28, Annex II, paras. 21-23; See also Pre-Trial Chamber I, *Blé Goudé*, “Decision on the confirmation of charges against Charles Blé Goudé”, 11 December 2014, ICC-02/11-02/11-186, para. 182

<sup>10</sup> See the finding in *Laurent Gbagbo* that “the Single Judge expects that oral testimony at the hearing, if any, will be narrowly relied on and only to the extent that it cannot be properly substituted by documentary evidence or a written statement”, Pre-Trial Chamber I, *Laurent Gbagbo*, “Decision requesting observations from the parties on the schedule of the confirmation of charges hearing”, 4 May 2012, ICC-02/11-01/11-107, para. 11; *Blé Goudé*, Transcript of 1 May 2014, ICC-02/11-02/11-T-4-Red-ENG, p. 10, lines 13-16; Pre-Trial Chamber I, *Laurent Gbagbo*, “Decision on the ‘Requête de la Défense du Président Gbagbo en vue d’une prorogation de délais pour la soumission d’informations relatives à la présentation de témoignages viva voce lors de l’audience de confirmation des charges’”, 15 May 2012, ICC-02/11-01/11-115, para. 11.

<sup>11</sup> *Ongwen*, Transcript of the status conference of 19 May 2015, ICC-02/04-01/15-T-6-ENG, p. 21, lines 22-23; Pre-Trial Chamber I, *Blé Goudé*, “Decision establishing a system for disclosure of evidence”, 14 April 2014, ICC-02/11-02/11-57, para. 13.

### 3. Extent of disclosure at the pre-trial stage and extent of the communication of evidence to the Pre-Trial Chamber

31. Rule 121(2)(c) provides that “[a]ll evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber”. Differing interpretations have emerged as to the scope of evidence which must be communicated to the Pre-Trial Chamber: everything disclosed between the parties during pre-trial proceedings<sup>12</sup> or only that which the parties intend to rely on during the hearing on the confirmation of charges.<sup>13</sup>

32. In order to provide clarity on the interpretation of rule 121(2)(c), the Practice Manual specifies that this provision requires the disclosure of all evidence disclosed between the parties during all pre-trial proceedings, *i.e.* from the person’s initial appearance before the Court (or earlier, in certain instances) to the issuance of the decision on the confirmation of charges. This clarification was supported by the judges at the Nuremberg Retreat, who noted the need to both harmonise previously divergent practice and ensure simplicity.

33. At the Nuremberg Retreat, the judges discussed the requisite extent of the disclosure of incriminating evidence for the purpose of the confirmation of charges. The judges agreed, as stated in the Pre-Trial Manual endorsed by the judges, that the Court’s statutory regime leaves the ultimate determination of such extent to the Prosecutor, although she must take into account the scope and purpose of the confirmation proceedings and the applicable standard of proof.

## V. Streamlining practices related to the relationship between trial and pre-trial and common issues

### A. The Prosecutor’s trial-readiness

34. In the practice of the Court, investigations by the Prosecutor have often continued even after the decision confirming the charges, with such lack of trial-readiness delaying the commencement of trial.

35. The Appeals Chamber has held that:

“Ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing ... However, ... this is not a requirement of the Statute. The Appeals Chamber accepts the argument of the Prosecutor that in certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence – particularly in situations where the ongoing nature of the

<sup>12</sup> See e.g. Pre-Trial Chamber II, *Ongwen*, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 27 February 2015, ICC-02/04-01/15-203, para. 11; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda* (“*Ntaganda*”), “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 12 April 2013, ICC-01/04-02/06-47, paras. 9-10; Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (“*Muthaura, Kenyatta and Ali*”), “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 7 April 2011, ICC-01/09-01/11-44, paras. 5-6; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 7 April 2011, ICC-01/09-02/11-48, paras. 6-7; Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties”, 31 July 2008, ICC-01/05-01/08-55, paras. 42-44.

<sup>13</sup> See e.g. Pre-Trial Chamber III, *Laurent Gbagbo*, “Decision establishing a disclosure system and a calendar for disclosure”, 24 January 2012, ICC-02/11-01/11-30, para. 15; Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana* (“*Mbarushimana*”), “Decision on issues relating to disclosure”, 30 March 2011, ICC-01/04-01/10-87, paras. 9-10; Pre-Trial Chamber I, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Decision on issues relating to disclosure”, 29 June 2010, ICC-02/05-03/09-49, paras. 5-6; Pre-Trial Chamber I, *The Prosecutor v. Bahar Idriss Abu Garda*, “Second Decision on issues relating to Disclosure”, 17 July 2009, ICC-02/05-02/09-35, paras. 9-10; Pre-Trial Chamber I, *Lubanga*, “Decision on the Final System of Disclosure and the Establishment of a Timetable”, 16 May 2006, ICC-01/04-01/06-102, paras. 54-58.

conflict results in more compelling evidence becoming available for the first time after the confirmation hearing”.<sup>14</sup>

36. In *The Prosecutor v. Kenyatta*, a majority of Trial Chamber V has determined that the Prosecutor’s capacity to continue investigations after charges have been confirmed is not unlimited, noting the expectation that the Prosecutor present a reliable narrative of events at the confirmation hearing and emphasising that any post-confirmation investigations should not involve the collection of evidence which should reasonably have been obtained prior to the confirmation of charges.<sup>15</sup> Trial Chamber VI has also recently emphasised, in *The Prosecutor v. Bosco Ntaganda* (“*Ntaganda*”), that investigations should be largely completed prior to the confirmation hearing.<sup>16</sup>

37. A majority of Pre-Trial Chamber I, in the *Laurent Gbagbo* case, has indicated that it “must assume that the Prosecutor has presented her strongest possible case based on a largely completed investigation”.<sup>17</sup>

38. More generally, Pre-Trial Chamber II, in the *Ongwen* case, emphasised, in the context of addressing the timing for review, disclosure and redactions, that the right of an accused to be tried without undue delay, pursuant to article 67(1)(c) of the Rome Statute, demands that “no efforts must be spared to render this right effective by reducing to a minimum the time between the end of the pre-trial phase and the commencement of the trial”.<sup>18</sup> In this case, the Pre-Trial Chamber postponed the date of the confirmation hearing in order to allow further investigations, in the form of re-interviewing witnesses, so as to enable the Prosecutor to collect the best evidence for the purposes of the confirmation hearing.<sup>19</sup>

39. As a matter of policy, the judges at the Nuremberg Retreat considered that it would be highly desirable for cases to be as trial-ready as possible and for the Prosecutor to complete the necessary investigations to the extent possible, by the time of the confirmation hearing. This would enable the case to proceed to trial within a short period after any confirmation of the charges.

40. In this regard, the judges welcomed the commitment of the Prosecutor, evident in both the OTP Strategic Plan for 2012-2015 and draft Strategic Plan for 2016-2018, to be as trial-ready as possible from the earliest phases of proceedings, such as at the stage of seeking a warrant of arrest and no later than the confirmation of charges hearing.

41. At the Nuremberg Retreat, the judges further discussed methods for implementing the policy that the Prosecutor should be ready to proceed to trial as early as possible following the confirmation of the charges. There was broad agreement that Trial Chambers should seek to establish a clear final deadline for the disclosure of incriminating evidence in advance of the commencement of the trial. It was also recognised that, in practice, the setting of the trial date creates natural time limits for disclosure. It was also understood by the judges that any deadlines – codified or otherwise – would be without prejudice to the possibility of admitting new relevant evidence.

<sup>14</sup> *Lubanga*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence’”, 13 October 2006, ICC-01/04-01/06-568, para. 54. The desirability of the investigation being largely complete by the time of the hearing on the confirmation of charges has been later confirmed by the Appeals Chamber in *Mbarushimana*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’”, 30 May 2012, ICC-01/04-01/10-514, para. 44.

<sup>15</sup> *The Prosecutor v. Uhuru Muigai Kenyatta*, “Decision on defence application pursuant to Article 64(4) and related requests”, 26 April 2013, ICC-01/09-02/11-728, paras. 119-121.

<sup>16</sup> *Ntaganda*, “Decision on Prosecution requests to vary the time limit for disclosure”, 22 July 2015, ICC-01/04-02/06-740-Red, para. 12.

<sup>17</sup> *Laurent Gbagbo*, “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”, 3 June 2013, ICC-02/11-01/11-432, para. 25.

<sup>18</sup> *Ongwen*, “Decision Postponing the Date of the Confirmation of Charges Hearing”, 6 March 2015, ICC-02/04-01/15-206, para. 30.

<sup>19</sup> ICC-02/04-01/15-206, para. 31.

## B. Unified systems

42. A key element of the harmonisation of practices involves the need to encourage more unified practices concerning certain technical aspects of proceedings. This would enable less repetition of judicial work and greater unification: (1) across different stages of the proceedings (*i.e.* from pre-trial to trial) and (2) across different cases at the same level (e.g. amongst Trial Chambers acting in different cases).<sup>20</sup>

43. At the Nuremberg Retreat, the judges broadly agreed on the need to maximise the degree of effective continuity between pre-trial and trial levels in relation to case management, mindful of the need to avoid any appearance on the part of the Trial Chamber of prejudgment on a substantive question that is material to the Trial Chamber's ultimate responsibility to make the determination as guilt or innocence.

44. An example of the need for continuity can be seen in the Court's seeking increased efficiency in respect of redactions regimes. There has been considerable diversity in the practice of Pre-Trial Chambers in relation to the system for authorising redactions to evidence disclosed to the defence pursuant to rule 81(2) and (4).<sup>21</sup> A number of models have emerged, including:

- (a) Review of specific redactions proposals of the Prosecutor by the Pre-Trial Chamber;<sup>22</sup>
- (b) The Chamber only making determinations on individual redactions where a dispute thereon arises between the parties;<sup>23</sup> and/or
- (c) Redactions implemented by the Prosecutor without the need for prior authorisation for certain standard categories of information.<sup>24</sup>

45. This latter approach was implemented by Pre-Trial Chamber II in the *Ongwen* case, with the Single Judge noting such system to be "efficient as well as equitable".<sup>25</sup> This approach was modelled on that adopted in recent trials.<sup>26</sup> The Practice Manual, endorsed by the judges at the Nuremberg Retreat, adopts the approach used in *Ongwen*. For certain standard categories of information, redactions can be implemented by the Prosecutor without the need for prior authorisation by the Pre-Trial Chamber, the latter becoming seized of the question only in the event of a challenge by the defence which cannot be resolved *inter partes*. The burden of justifying such redaction remains with the Prosecutor. The non-disclosure of the identity of a witness during pre-trial proceedings, pursuant to rule 81(4), must be specifically authorised by the Chamber upon receipt of a motivated request by the Prosecutor. This requirement applies similarly to the non-disclosure of any entire item of evidence by the Prosecutor (*i.e.* the defence is not informed of the very existence of this evidence).

46. More generally, the judges agreed that efficiency could be maximised by ensuring that certain technical aspects of case management are governed by systems established during pre-trial proceedings which remain applicable in any subsequent trial. This might take the form of protocols or standard directions to be included in the decisions of Pre-Trial Chambers. The types of technical aspects potentially amenable to such regulation include, *inter alia*, the modalities of disclosure between the parties; the authorisation of exceptions

<sup>20</sup> See Trial Chamber I, *Laurent Gbagbo*, "Decision on the Protocol establishing a redaction regime", 15 December 2014, ICC-02/11-01/11-737, paras. 3, 15.

<sup>21</sup> See further discussion of developing practice in this regard in ICC-ASP/13/28, Annex II, paras. 26-29.

<sup>22</sup> Pre-Trial Chamber I, *Lubanga*, "Decision on the Final System of Disclosure and the Establishment of a Timetable", 16 May 2006, ICC-01/04-01/06-102.

<sup>23</sup> Pre-Trial Chamber I, *Blé Goudé*, "Second decision on issues related to disclosure of evidence", 6 May 2014, ICC-02/11-02/11-67, paras. 12-13; Pre-Trial Chamber III, *Laurent Gbagbo*, "Decision establishing a disclosure system and a calendar for disclosure", 24 January 2012, ICC-02/11-01/11-30, paras. 48-51; Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui ("Katanga and Ngudjolo")*, "Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules", 25 April 2008, ICC-01/04-01/07-428-Corr, paras. 139-146.

<sup>24</sup> Pre-Trial Chamber II, *Ongwen*, "Decision on issues related to disclosure and exceptions thereto", 23 April 2015, ICC-02/04-01/15-224.

<sup>25</sup> ICC-02/04-01/15-224, para. 3.

<sup>26</sup> Trial Chamber I, *Laurent Gbagbo*, Annex A to "Decision on the Protocol establishing a redaction regime", 15 December 2014, ICC-02/11-01/11-737-AnxA; Trial Chamber VI, *Ntaganda*, Annex A to "Decision on the Protocol establishing a redaction regime", 12 December 2014, ICC-01/04-02/06-411-AnxA.

to disclosure requirements; the modalities of victims' applications for disclosure and the procedure for their admission; the modalities for the handling of confidential information; and the modalities for contact with the witnesses of the opposing party.

47. To pursue the potential efficiency gains to be made from such continuity of technical systems, the judges, at the Nuremberg Retreat, decided to create a working group, to be chaired by a judge who volunteered to act as a focal point, tasked with identifying to what extent protocols and/or directions on non-contentious and technical aspects could be adopted across proceedings. This group is currently producing draft documents related to a number of the topics identified by the judges as appropriate for a unified approach, including exploring the possibility of taking further steps to consolidate the procedures for "standard" and "non-standard" justifications for redactions. The working group has produced a draft Standard Directions on Redactions and a draft "Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant", which will be added to the Pre-Trial Practice Manual pending their approval by all judges.

48. The judges also noted that the e-Court protocol should be uniformly and consistently applied in all cases.

### C. Harmonisation of practice concerning victim applications

49. At the Nuremberg Retreat, the judges decided to create a working group, to be chaired by a judge who volunteered to act as a focal point, to pursue the harmonisation of practice with respect to victims' applications for participation in the proceedings and the procedure for their admission. Such working group has before it the Report on Cluster D(1): Applications for Victim Participation dated 25 August 2015. The work of this group is currently ongoing and the WGLL will report to the Study Group thereon in subsequent reports.

## VI. Streamlining practices related to trial proceedings

### A. Single Judge at trial level

50. The WGLL has taken note of the desire of the Study Group to receive information on the implementation, in practice, of amendments to the Rules of Procedure and Evidence which have been previously adopted in the context of the lessons learnt process.

51. Rule 132 *bis*, concerning the designation of a Single Judge for the preparation of the trial, was adopted by the ASP in November 2012.<sup>27</sup>

52. A Single Judge for the preparation of trial has been appointed by Trial Chamber I in *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* (as well as in the individual cases prior to their joinder).<sup>28</sup> By way of example, the types of procedural decisions which have been taken by the Single Judge are on issues such as: access to confidential materials,<sup>29</sup> time limits,<sup>30</sup> word limits,<sup>31</sup> the scheduling of and arrangements for status

<sup>27</sup> ICC-ASP/11/Res.2.

<sup>28</sup> *Gbagbo and Blé Goudé*, "Decision notifying the election of the Presiding Judge and designating a Single Judge", 25 March 2015, ICC-02/11-01/15-13; *Blé Goudé*, "Decision designating a Single Judge pursuant to Rule 132 *bis* of the Rules of Procedure and Evidence", 12 February 2015, ICC-02/11-02/11-199-Anx; *Laurent Gbagbo*, "Decision designating a Single Judge pursuant to Rule 132 *bis* of the Rules of Procedure and Evidence", 23 October 2014, ICC-02/11-01/11-700.

<sup>29</sup> *Gbagbo and Blé Goudé*, "Second decision on objections concerning access to confidential material on the case record", 21 July 2015, ICC-02/11-01/15-150; *Gbagbo and Blé Goudé*, "Decision on objections concerning access to confidential material on the case record", 24 June 2015, ICC-02/11-01/15-101; *Laurent Gbagbo*, "Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record", 19 January 2015, ICC-02/11-01/11-749; *Laurent Gbagbo*, "Order on the notification of confidential filings to the Legal Representative of victims", 20 November 2014, ICC-02/11-01/11-724.

<sup>30</sup> *Blé Goudé*, "Order reducing the time limit to file responses to ICC-02/11-02/11-201", 28 January 2015, ICC-02/11-02/11-202; *Laurent Gbagbo*, "Decision granting extension of time", 24 November 2014, ICC-02/11-01/11-727-Red; cf. *Gbagbo and Blé Goudé*, "Decision on requests for clarification concerning review of the case record and extension of time", 13 April 2015, ICC-02/11-01/15-30.

<sup>31</sup> *Gbagbo and Blé Goudé*, "Decision on urgent Prosecution request for an extension of the word count limit for the Pre-Trial brief", 15 July 2015, ICC-02/11-01/15-138.

conferences,<sup>32</sup> the establishment of a protocol for redactions,<sup>33</sup> the request of submissions from parties and participants,<sup>34</sup> the reclassification of documents<sup>35</sup> and the seeking of leave to appeal in respect of largely procedural decisions.<sup>36</sup> Issues which, pursuant to the limitations contained in rule 132 *bis*, have been decided by all three judges of the Chamber include: joinder,<sup>37</sup> the review of detention pursuant to article 60(3) of the Rome Statute<sup>38</sup> and the trial date.<sup>39</sup> The application of rule 132 *bis* has enabled the majority of decisions, which concern the preparation of the case for trial, to be taken by the Single Judge.

53. A Single Judge has also recently been elected by Trial Chamber VII in *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (“*Bemba et. al.*”).<sup>40</sup>

54. At the Nuremberg Retreat, the judges discussed a number of matters related to the operation of rule 132 *bis*. There was agreement that the project of standardising systems and protocols, as discussed above at paras. 46-47, which has been referred to a working group, could encourage and simplify further use of rule 132 *bis* by providing a more uniform approach to the issues which a Single Judge may address under rule 132 *bis* (5). The judges agreed that the determination of whether a Single Judge procedure is useful is to be made by each Trial Chamber on a case-by-case basis.

## B. Evidence in trial proceedings

55. At the Nuremberg Retreat, the judges exchanged ideas regarding potential tools at the disposal of Trial Chambers for reducing the future duration of the presentation of witness evidence at trial, in addition to discussing a number of other evidence-related issues.

### 1. Prior recorded testimony

56. Potential tools for reducing the duration of trial proceedings discussed by the judges at Nuremberg included prior recorded testimony under rule 68(2)(a) and (3). Rule 68(3) allows for the introduction of previously recorded testimony where: the witness is in agreement, is present before the Trial Chamber and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings. Rule

<sup>32</sup> *Laurent Gbagbo*, “Scheduling order and agenda for the status conference on 4 December 2014”, 27 November 2014, ICC-02/11-01/11-730; cf. *Gbagbo and Blé Goudé*, “Order setting the final agenda for the status conference of 21 April 2015”, 17 April 2015, ICC-02/11-01/15-40.

<sup>33</sup> *Laurent Gbagbo*, “Decision on the Protocol establishing a redaction regime”, 15 December 2014, ICC-02/11-01/11-737.

<sup>34</sup> *Gbagbo and Blé Goudé*, “Order for submissions by the defence for Mr Blé Goudé concerning potentially privileged material”, 26 June 2015, ICC-02/11-01/15-104; *Gbagbo and Blé Goudé*, “Order requesting the parties’ and participants’ observations under Article 60(3) of the Statute”, 11 May 2015, ICC-02/11-01/15-61; *Laurent Gbagbo*, “Order requesting the parties and participants’ observations under Article 60(3) of the Statute”, 20 January 2015, ICC-02/11-01/11-750.

<sup>35</sup> *Laurent Gbagbo*, “Order reclassifying documents”, 10 March 2015, ICC-02/11-01/11-806.

<sup>36</sup> *Gbagbo and Blé Goudé*, “Decision on request for leave to appeal the ‘Decision on objections concerning access to confidential material on the case record’”, 10 July 2015, ICC-02/11-01/15-132; *Laurent Gbagbo*, “Decision on Defence’s requests seeking leave to appeal the ‘Decision on the Legal Representative of Victims’ access to certain confidential filings and to the case record’ and seeking suspensive effect of it”, 11 March 2015, ICC-02/11-01/11-809.

<sup>37</sup> *Gbagbo and Blé Goudé*, “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters”, 11 March 2015, ICC-02/11-01/15-1; *Laurent Gbagbo*, “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters”, 11 March 2015, ICC-02/11-01/11-810; *Blé Goudé*, “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters”, 11 March 2015, ICC-02/11-02/11-222; See also *Gbagbo and Blé Goudé*, “Decision on Defence requests for leave to appeal the ‘Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters’”, 22 April 2015, ICC-02/11-01/15-42.

<sup>38</sup> *Gbagbo and Blé Goudé*, “Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute”, 8 July 2015, ICC-02/11-01/15-127-Red; *Laurent Gbagbo*, “Eighth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute”, 11 March 2015, ICC-02/11-01/11-808.

<sup>39</sup> *Gbagbo and Blé Goudé*, “Order setting the commencement date for trial”, 7 May 2015, ICC-02/11-01/15-58.

<sup>40</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (“*Bemba et. al.*”), “Decision Notifying the Election of a Presiding Judge and Single Judge”, 25 August 2015, ICC-01/05-01/13-1181-Corr.

68(2)(a) allows for the introduction of previously recorded testimony even where the witness is not present before the Trial Chamber if both the Prosecutor and the defence have had the opportunity to examine the witness during the recording.<sup>41</sup>

## 2. Focussed examination by the parties

57. At the Nuremberg Retreat, the judges broadly agreed that there is room to require sharper focus on the part of parties and participants during their examination of witnesses. For example, Chambers could more actively determine timelines for the parties.<sup>42</sup> The judges also exchanged ideas regarding the modes of questioning.

## 3. Active role for the Chamber in witness examination

58. At the Nuremberg Retreat, there was widespread agreement that judges could, where appropriate, take a more active role in relation to the conduct of proceedings, with suggestions including direct questioning of witnesses by a Chamber and curtailing ineffective questioning by the parties.

## 4. Agreed facts

59. At the Nuremberg Retreat, many judges agreed on the potential utility of agreed facts in trial proceedings, particularly in relation to background or contextual elements. Rule 69 provides that “[t]he Prosecutor and the defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims”.

60. By way of recent example, in *Ntaganda*, at the prompting of Trial Chamber VI, a list of 82 agreed facts was jointly submitted by the parties, with the Chamber noting such facts and considering that rule 69 did not demand a more complete presentation of the evidence thereon.<sup>43</sup> Trial Chambers have further emphasised that the need for the parties to seek agreement on non-contested facts is ongoing.<sup>44</sup>

## 5. Experts

61. At the Nuremberg Retreat, the judges discussed the application of regulation 44 of the Regulations of the Court empowers a Chamber, *inter alia*, to both direct the joint instruction of an expert by the participants and instruct an expert *proprio motu*. In this regard, it is to be noted that, in *Bemba et. al.*, Trial Chamber VII prompted the parties to explore the possibility of jointly instructing experts.<sup>45</sup>

## 6. Admissibility of evidence

62. At the Nuremberg Retreat, the judges generally agreed on the desirability of providing further guidance on the admissibility of evidence to the parties, with it being

<sup>41</sup> Rule 68 of the Rules of the Procedure and Evidence was amended by ICC-ASP/12/Res.7, although such amendments made no substantive changes to the provisions currently under discussion. What is now rule 68(2)(a) has been used on one occasion in the *Lubanga* case: ICC-01/04-01/06-Rule68Deposition-Red2-ENG, 16-18 November 2010. Although rule 68(2)(a) and (3) have not been extensively used, there is recent practice in relation to the use of prior recorded testimony pursuant to rule 68(2)(c) and (d) in: Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang (“Ruto and Sang”)*, “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, 19 August 2015, ICC-01/09-01/11-1938-Red-Corr.

<sup>42</sup> See e.g. Trial Chamber V(A), *Ruto and Sang*, “Decision No. 2 on the Conduct of Trial Proceedings (General Directions)”, 3 September 2013, ICC-01/09-01/11-900, paras. 25-27.

<sup>43</sup> *Ntaganda*, “Decision on Prosecution and Defence joint submission on agreed facts”, 22 June 2015, ICC-01/04-02/06-662.

<sup>44</sup> Trial Chamber I, *Gbagbo and Blé Goudé*, “Order setting the commencement date for trial”, 7 May 2015, ICC-02/11-01/15-58, para 27; Trial Chamber V(A), *Ruto and Sang*, “Decision on the Conduct of Trial Proceedings (General Directions)”, 12 August 2013, ICC-01/09-01/11-847-Corr, para. 31.

<sup>45</sup> *Bemba et. al.*, Transcript of 24 April 2015, ICC-01/05-01/13-T-8-Red-ENG, p. 34.

particularly important for the parties to have a clear understanding of admissibility requirements prior to the commencement of trial. The judges considered that the most efficient methodology and timing for addressing the admissibility of evidence must be determined by the Chamber on a case-by-case basis.<sup>46</sup>

### C. Witness protection

63. The disclosure of the identity of a witness is often dependent on the completion of the assessment of the Victims and Witnesses Section (VWS)<sup>47</sup> and/or the implementation of any necessary protective measures. This has the potential to delay proceedings given that it takes an average of two to three months from referral of a witness to relocation in the context of the ICC Protection Programme, longer when multiple requests must be processed simultaneously.<sup>48</sup>

64. At the Nuremberg Retreat, the judges noted that the lack of effective witness protection may have serious implications for the materialisation of evidence at trial, for example, by witnesses becoming unwilling to testify. It was noted that Trial Chambers have a range of measures available to address witness protection issues, ranging from minimising delays in hearing oral testimony to the implementation of in-court protective measures.<sup>49</sup> For example, in *Ntaganda*, Trial Chamber VI ordered the Prosecutor to file a provisional list of trial witnesses six weeks prior to the filing of its final list, thus potentially assisting the work of the VWS.<sup>50</sup>

65. The judges generally agreed that these matters are an appropriate subject for further discussion among the judiciary, the Prosecutor, defence representatives and the Registrar. The judges noted that the time required to ensure witness protection is already a priority area for reform within the VWS, but noted that Trial Chambers could aid further expedition, for example by taking measures to prompt more timely referrals of witnesses to the VWS by the Prosecutor.

## VII. Practice changes related to Appeals

66. As discussed at para. 2 above, as part of the follow-up to the Nuremberg Retreat, the Appeals Division employed concerted efforts to enhance the efficiency of proceedings, including though changes to its jurisprudence; this is notwithstanding that improvements in appeals proceedings did not form part of the discussions at the Nuremberg Retreat, due to time constraints..

67. On 31 July 2015, the Appeals Chamber issued a decision in which it took significant steps to minimise procedural delays and enhance the efficiency of its proceedings in respect of the participation of victims in interlocutory appeals.<sup>51</sup> The Appeals Chamber modified its previous practice, which had required victims to seek its authorisation to participate in an interlocutory appeal. The Appeals Chamber adopted an approach by which an interlocutory appeal is considered to be an extension of the proceedings before the Pre-Trial Chamber or Trial Chamber in question and thus victim participation for the purposes of an interlocutory appeal will be assumed for those victims authorised by the originating chamber in the

<sup>46</sup> At the Pre-Trial level, Chambers have found that there is no obligation to undertake an assessment of the admissibility of each piece of evidence in accordance with article 69(4) of the Statute: Pre-Trial Chamber II, *Bemba et. al.*, “Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 11 November 2014, ICC-01/05-01/13-749, para. 14; *Ntaganda*, Pre-Trial Chamber II, “Decision on Admissibility of Evidence and Other Procedural Matters”, 9 June 2014, ICC-01/04-02/06-308, para. 25.

<sup>47</sup> Formerly known as the Victims and Witnesses Unit.

<sup>48</sup> Pre-Trial Chamber I, *Katanga and Ngudjolo*, “Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules”, 25 April 2008, ICC-01/04-01/07-428-Corr, para. 61.

<sup>49</sup> For a recent example of the latter see, Trial Chamber VI, *Ntaganda*, “Decision on Prosecution request for in-court protective measures”, 10 August 2015, ICC-01/04-02/06-774-Red.

<sup>50</sup> *Ntaganda*, “Corrigendum of ‘Order Scheduling a Status Conference and Setting the Commencement Date for the Trial’”, 28 November 2014, ICC-01/04-02/06-382-Corr, para. 9(a).

<sup>51</sup> *Gbagbo and Blé Goudé*, “Reasons for the ‘Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention (ICC-02/11-01/15-134-Red3)’””, 31 July 2015, ICC-02/11-01/15-172.



proceedings underlying the appeal. If the personal interest of victims are not affected by issues arising in a specific interlocutory appeal or the participation of victims is otherwise inappropriate, the Appeals Chamber could render an order to such effect.<sup>52</sup>

68. This significantly reduces the procedural steps in such appeals and enables the Appeals Chamber to move more expeditiously towards its substantive determination thereof. For example, under the previous system, a victim wishing to participate in an appeal was required to make an application for participation, following which the Appeals Chamber would usually issue an order setting a deadline for responses to such application. The parties would then file such responses and the Appeals Chamber would issue a decision granting or denying the application to participate. Once a victim's participation had been authorised, such victim would then make his or her submissions on the interlocutory appeal. The replacement of this lengthy procedure by one in which victim participation is automatic for those victims authorised in respect of the underlying proceeding at trial or pre-trial level means that participating victims simply file their substantive response to the Document in Support of the Appeal within time limits pre-established by regulations 64 and 65 of the Regulations of the Court.

## VIII. Amendments to the legal framework

69. As emphasised at paras. 2 and 6 above, the focus of the WGLL since its 2014 Reports has been on enhancements to efficiency through practice-based changes, harmonisation, developments in jurisprudence and improvements in working methods.

70. In addition, some amendments to the Court's legal framework, which were aimed at contributing to the sound management of proceedings, were discussed by the judges at the Nuremberg Retreat.

### A. Rule 165 of the Rules of Procedure and Evidence

71. Article 70 of the Rome Statute concerns offences against the administration of justice. Rule 165 of the Rules of Procedure and Evidence concerns the investigation, prosecution and trial of such offences. Trial Chamber VII is currently seized with Article 70 offences in the *Bemba et. al.* case.

72. In view of the limited pool of judges, which creates potential difficulties in ensuring the availability of sufficient judges to conduct the current and pending trials before the Court, a proposal was sent to the ACLT in July 2015 concerning the amendment of rule 165 of the Rules of Procedure and Evidence. The proposal is for a reduced number of judges to address article 70 offences at each of the pre-trial, trial and appeal phases. As indicated above, this proposal is currently under consideration by the ACLT, pursuant to the procedure outlined in the Roadmap.<sup>53</sup>

### B. Amendment to the Regulations of the Court

73. A further idea discussed at Nuremberg concerns the exploration of options to reduce the time required for the Trial Chamber's decision under Article 74 of the Rome Statute. At Nuremberg, a judge was appointed as a focal point to develop a proposal in this regard. Such draft proposal is currently before the WGLL.

## IX. Conclusion and further steps

74. Although the original focus of the WGLL was on the outstanding issues within cluster B,<sup>54</sup> it became apparent that such issues were closely connected to those in clusters A and C. Accordingly, in 2015, the WGLL considered all outstanding issues in clusters A, B and C of the Roadmap. In addition, the WGLL has considered certain initiatives in the Appeals Chamber, which fall within the scope of cluster E. The WGLL has gone beyond

<sup>52</sup> ICC-02/11-01/15-172, paras. 15-19.

<sup>53</sup> See ICC-ASP/12/37/Add.1, para. 5.

<sup>54</sup> ICC-ASP/13/28, para. 26.

the description of clusters C and E contained in the current Roadmap, incorporating additional issues derived from the inter-related and common issues in clusters B and D and the imperative of pursuing enhancements which could have a real impact on proceedings as a whole. The WGLL did not restrict itself to exploring proposals for the amendment of the Rules of Procedure and Evidence, but rather focussed on practice-based solutions to problems impeding the efficiency of the Court.<sup>55</sup>

75. A number of concerted and concrete efforts have been introduced during the period covered by this report. The Nuremberg Retreat provided a unique opportunity for all the judges of the Court to comprehensively engage with the expedition of the criminal process, contributing their own experiences and expertise. As outlined throughout this report, the Nuremberg Retreat has resulted in the identification and adoption of certain best practices, especially at the pre-trial level, and has enabled the identification of possible areas for future efficiency gains, especially at the trial level. The establishment of working groups on unified systems, the harmonisation of practices in relation to victim applications, and drafting style is further intended to ensure an ongoing focus on key issues which may enhance efficiency across clusters A, B, C and E. The harmonisation of practice in the Pre-Trial Division in the form of a dynamic manual which has been made publicly available is particularly noted.

76. Further to the progress described in this Report, the WGLL has also been active in cluster D during 2015. As indicated in para 49 above, the working group pursuing harmonisation across the modalities of victims' applications for participation has before it the Report on Cluster D(1): Applications for Victim Participation dated 25 August 2015. Further, the Presidency will circulate an additional report on cluster D(2) concerning the legal representation of victims. This latter report, which describes the different systems that have been applied at the Court so far, is intended to assist in discussions to be undertaken by judges in the near future, with a view to harmonizing practices in this regard.

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<sup>55</sup> ICC-ASP/13/28, paras. 7, 21-22.

## Appendix I

### ICC Judges Retreat, Nuremberg, 18-21 June, Programme

**Goal:** Enable all judges to reflect together on how to enhance the efficiency and effectiveness of Pre-Trial and Trial proceeding, to identify best practices and potential amendments to the legal framework on those issues, and to reflect as well on how to increase external awareness and support for the Court.

#### Thursday, 18 June

- 13.50        Arrival at the Nuremberg airport
- 14.00        Transportation to the hotel
- 14.30        Arrival at the hotel and check-in
- 14.45-15.30 Lunch at the hotel restaurant
- 16.00-18.00 Guided tours: Documentation Centre and Rally Grounds or Old Town
- 19.30        Mayor of Nuremberg's opening Reception and Dinner for all participants, members of the Academy and other distinguished visitors.

#### Friday, 19 June: Revision of pre-trial and trial proceedings (with interpretation)

- 9.00-10.30    Session I: Common Issues to Pre-Trial and Trial Proceedings (on the basis of the discussion document circulated by the Presidency)
- 10.30-11.00   Coffee break
- 11.00-13.00   Continuation of Session I on the Pre-Trial Stage
- 13.00-13.30   Tour of the Memorium Nuremberg Trials museum in the Courtroom 600 building
- 13.30-15.00   Lunch (including brief remarks by Ambassador Bernd Borchardt ( Founding Director) on the objectives of the International Nuremberg Principles Academy)
- 15.00-16.30   Session II: The Trial Stage (on the basis of the discussion document circulated by the Presidency)
- 16.30-17.00   Coffee break
- 17.00-18.30   Continuation of Session II on the Trial Stage
- 19.30        Dinner (Judges only)

#### Saturday, 20 June (without interpretation)

- 9.00-10.30    Session III: Organization and Methods of Work of Legal Support Staff (on the basis of the discussion document circulated by the Presidency)
- 10.30-11.00   Coffee break
- 11.00-13.00   Continuation of Session III on Organization and Methods of Work of Legal Support Staff
- 13.00-14.30   Lunch
- 14.30-17.00   Session IV: The Role of Judges in Creating a More Effective ICC: Looking Outward- (on the basis of the discussion document circulated by the Presidency); Presenter: Adama Dieng (Special Adviser to the UNSG on the Prevention of Genocide)
- 17.00-17.30   Coffee Break

17.30-19.00 Session V: Conclusions and recommendations:

- (a) Proposals for remedy-for the short and longer terms-that will assist in ensuring that multiple trials can hold at once with immediate effect.
- (b) Retreats and professional development of judges and staff
- (c) Presentation of Report on sessions on legal proceedings prepared by legal team.

20.00 Dinner for all participants

**Sunday, 21 June**

09.00 Departure of the participants

## Appendix II

### Pre-trial practice manual, September 2015

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## Why this Pre-Trial Practice Manual?

The present manual is the product of discussions held among the Judges of the Pre-Trial Division – Judges Marc Perrin de Brichambaut, Antoine Kesia-Mbe Mindua, Péter Kovács, Chang-ho Chung and myself – since April 2015 with a view to identifying solutions to challenges faced in the first years of the Court and build on the experience acquired so far. Indeed, after more than 10 years of activity, it was considered vital to reflect on the at times inconsistent practice of the different Pre-Trial Chambers, and record what has been identified as best practice to be followed in pre-trial proceedings.

The manual is first and foremost directed at the Pre-Trial Judges themselves, while certain issues are also of relevance to the trial stage of the case, and therefore of interest to the Judges of the Trial Division. It also states the expectations that pre-trial Judges have from the Prosecutor and Defence counsel. The final goal of the manual is therefore to contribute to the overall effectiveness and efficiency of the proceedings before the Court.

The manual was presented to and shared with all Judges of the Court in advance of the Judges' retreat that took place in Nuremberg, Germany, from 18 to 21 June 2015. At the retreat, after discussion, the Judges endorsed the manual and recommended that it be made public as soon as possible.

Needless to say, this manual is a living document. It will be updated, integrated, amended as warranted by any relevant development and therefore the Judges of the Pre-Trial Division will meet on a regular basis in order to discuss the need for any such update. The first update will concern issues with respect to the modalities of victims' applications for participation in the proceedings and the procedure for their admission, on which the Judges of the Division are currently working together with the other Judges of the Court.

Thanks to the colleagues of Pre-Trial Division I have the honour to preside and to the staff members of the Division for their valuable contribution to the preparation of this manual.



Cuno Tarfusser  
President of the Pre-Trial Division

## **I. Issuance of a warrant of arrest/summons to appear**

### **A. The ex parte nature of proceedings under article 58**

1. The application of the Prosecutor under article 58 of the Statute and the decision of the Pre-Trial Chamber are submitted and issued *ex parte*. Even if the proceedings are public (which is however not recommended), the person whose arrest/appearance is sought does not have standing to make submissions on the merits of the application.

### **B. The warrant of arrest/summons to appear**

2. A warrant of arrest/summons to appear should be issued as a single, concise document, by which the arrest of the person is ordered or the person is summoned to appear before the Court at a specified date and time, respectively. Its content is regulated by article 58(3) of the Statute, which states that it shall contain: (i) the name of the person and any other relevant identifying information; (ii) a specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and (iii) a concise statement of the facts which are alleged to constitute those crimes. Any detailed discussion of the evidence or analysis of legal questions is premature at this stage and should be avoided.

3. If the person presumably speaks either of the working languages of the Court (English or French), and/or, if applicable, the language of the State on the territory of which the person might be found is either of these languages, the warrant of arrest/summons to appear should preferably be issued directly in such working language.

4. On the basis of the warrant of arrest, the Registrar, in consultation with the Prosecutor, transmits a request for arrest and surrender under articles 89 and 91 of the Statute to any State on the territory of which the person may be found. As recently instructed by the Judges of the Pre-Trial Division, every time that information of travel into the territory of a State Party, whether planned or ongoing, of a person at large who is the subject of a warrant of arrest is related to the Court or one of its organs, the Registrar shall transmit to the concerned State Party a request for arrest or surrender of the person or, in case such request has already been transmitted, a *note verbale* containing a reminder of the State's obligation to cooperate with the Court in the arrest and surrender of that person. In case the person at large is expected to travel into the territory of a non-State Party, the Registrar shall request the State's cooperation in the arrest and surrender of the person, informing or reminding it that it may decide to provide assistance to the Court in accordance with article 87(5)(a) of the Statute with regard to the arrest and surrender to that person, or reminding the State of any obligation arising from any Security Council resolution referring the situation to the Prosecutor, in case any such obligation has been imposed.

## **II. The first appearance**

### **A. Timing of the first appearance**

5. The person's first appearance before the Chamber or the Single Judge, in accordance with article 60(1) of the Statute and rule 121(1) of the Rules, should normally take place within 48 to 96 hours after arrival at the seat of the Court upon surrender, or on the date specified in the summons to appear.

### **B. Language that the person fully understands and speaks**

6. Under article 67(1)(a) of the Statute, the person proceeded against has the right to be informed of the nature, cause and content of the charge in a language which they fully understand and speak.

7. Even if not raised by the parties, the Pre-Trial Chamber should verify at the first appearance that the person fully understands and speaks a working language, or determine

what other language the person fully understands and speaks. In cases of controversy, a report of the Registrar can be ordered. The meaning of “fully understands and speaks” needs to be further refined in practice.

### **C. The right to apply for interim release**

8. Article 60(1) of the Statute expressly mentions that, at the first appearance, the Pre-Trial Chamber must be satisfied that the person has been informed of the right to apply for interim release pending trial.

9. The Pre-Trial Chamber should specifically inform the person of this right. This is important because periodic review of detention does not start unless the Defence makes its first application for interim release (*i.e.* the 120-day time limit under rule 118(2) runs from the Chamber’s ruling on any such application). Applications for interim release should be disposed of as a matter of urgency and, ordinarily, decided within 30 days.

### **D. The date of the confirmation hearing**

10. According to rule 121(1) of the Rules, at the first appearance, the Pre-Trial Chamber shall set the date of the confirmation hearing. The typical target date for the confirmation hearing should be around 4-6 months from the first appearance. Efforts should be made to reduce the average time that passes between the first appearance and the commencement of the confirmation of charges hearing.

11. However, this depends on the circumstances of each particular case. In particular, it must be borne in mind that sometimes more time may be necessary in order to ensure that the pre-trial proceedings fully execute their mandate in the procedural architecture of the Court. Also, it may typically occur again that a person would be arrested and surrendered to the Court long time after the issuance of the warrant of arrest, reviving a case that would have been dormant for long. In these circumstances, giving more time to the Prosecutor in order to properly prepare the case should be considered. Indeed, in certain circumstances, allowing more time for the parties’ preparation for the confirmation of charges hearing may have the counterintuitive consequence of making the proceedings more expeditious, as it would tend to avoid adjournments of the confirmation of charges hearing, other obstacles at the pre-trial stage and problems at the initial stage of the trial.

12. In this context, the Pre-Trial Chamber should consider that, as recognised by the Prosecutor herself, it would be desirable, as a matter of policy, that the cases presented by the Prosecutor at the confirmation hearing be as trial-ready as possible. This would allow the commencement of the trial, if any, within a short period of time after confirmation of the charges. Therefore, in setting the date of the confirmation hearing, the Pre-Trial Chamber should take into account that it is indeed preferable that, to the extent possible, the Prosecutor conduct before the confirmation process the investigative activities that he/she considers necessary. At the same time, the Chamber shall be mindful that the Appeals Chamber, in line with the system designed by the Court’s legal instruments, held that the Prosecutor’s investigation may be continued beyond the confirmation hearing, and determined that finding that, barring exceptional circumstances, the Prosecutor’s investigations must be brought to an end before the confirmation hearing constitutes an error of law.

## **III. Proceedings leading to the confirmation of charges hearing**

### **A. Review of the record of the case following the initial appearance**

13. At the latest from the moment of the first appearance, the Defence acquires all procedural rights and becomes a party to proceedings that have thus far been conducted *ex parte*. For this reason, the Pre-Trial Chamber should conduct a review of the record of the case and make available to the Defence as many documents as possible, and, at a minimum, and without prejudice to the necessary protective measures, the Prosecutor’s application under article 58 of the Statute and any accompanying documents.



## **B. Time limit for responses under regulation 24 of the Regulations of the Court**

14. The general 21-day time limit for responses (see regulation 34(b) of the Regulations) is incompatible with the fast pace of pre-trial proceedings. In order to avoid delay and to pre-empt the need to issue numerous procedural orders shortening the general time limit, the Pre-Trial Chamber should order that, throughout the entire proceedings leading to the confirmation hearing, any responses shall be filed within five days, or within another appropriately short time limit. The power to make such order stems from the *chapeau* of regulation 34.

## **C. Informal contact with the parties and the Registry**

15. In order to streamline proceedings, some minor or peripheral matters can be dealt with by email communication, reducing the need for written submissions and orders. Variation of time and page limits, or leave to reply, can often be decided in this way, and the party can then refer to the communication by email in its filing. Similarly, orders to the Registrar can regularly be given by way of email, such as to reclassify documents in the record or to submit reports on particular issues.

16. The Chamber should, however, make sure that no substantive litigation takes place by email, and should order the submission of formal filings in such cases.

## **D. Victims' issues**

17. At the retreat in Nuremberg between 18 and 21 June 2015, the Judges agreed to create a working group to pursue harmonisation of practice across the proceedings with respect to the modalities of victims' applications for participation in the proceedings and the procedure for their admission. The present manual will be updated on these matters in light of the outcome of the work of the working group.

## **E. Status conferences**

18. Pre-Trial Chambers should make full use of the possibility to hold status conferences with the parties. Oral orders and clarifications in relation to the conduct of the proceedings can be provided to the parties during such status conferences, increasing efficiency and eliminating the need for cumbersome written decisions. Parties' procedural requests can also be received, debated and decided at status conferences.

# **IV. Disclosure of evidence and communication to the Pre-Trial Chamber**

## **A. Disclosure of evidence between the parties**

19. Disclosure of evidence between the parties takes place through the Registry in accordance with the E-court protocol developed for this purpose. Until the E-court protocol is somehow codified, the current version of the E-court protocol should be put on the record of the case as soon as possible after the first appearance.

20. The Prosecutor has the duty to disclose to the Defence "as soon as practicable" and on a continuous basis, all evidence in his/her possession or control which he/she believes shows or tends to show the innocence of the person, or mitigate the guilt of the person or may affect the credibility of the prosecution evidence (cf. article 67(2) of the Statute), or is material to the preparation of the defence (cf. rule 77 of the Rules).

21. As far as the incriminating evidence is concerned, it is the Prosecutor's own choice to disclose to the Defence as much as he/she considers warranted. The disclosure of incriminating evidence by the Prosecutor is subject to the final time limit set out in rule

121(3) – *i.e.* 30 days before the confirmation hearing – and, in case of new evidence, in rule 121(5) – *i.e.* 15 days before the confirmation hearing.

22. Likewise, the Defence may disclose to the Prosecutor (and rely upon for the confirmation hearing) as much as it considers it necessary in light of its own strategy. The time limits for the Defence disclosure are set out in rule 121(6).

23. No submission of any “in-depth analysis chart”, or *similia*, of the evidence disclosed can be imposed on either party.

24. The Chamber should advise the Defence to take full advantage of the disclosure proceedings at the pre-trial stage to enable adequate preparation for both pre-trial and trial stage. In this regard, the Defence may also be warned that, subject to consideration of the rights contained in article 67(1)(b) and (d) of the Statute, if the counsel of the Defence representing the person at the pre-trial stage is replaced by any new counsel for the trial stage, the new counsel may still be subject to strict scheduling of the date the commencement of trial.

## **B. Exceptions to disclosure in the form of redaction of information**

25. Under rules 81(2) and (4) of the Rules, the Prosecutor may redact information from evidence disclosed to the Defence. In following with the practice developed by Trial Chambers, at least for certain standard categories of information (if not for all kinds of information) such redactions can be implemented without need for a prior authorisation of the Chamber, which is seized of the matter only upon challenge by the Defence. In this case, the Prosecutor retains the burden of proof to justify the challenged redaction. For any redaction applied, the Prosecutor shall indicate the category by including in the redaction box the code corresponding to each category, unless such indication would defeat the purpose of the redaction.

26. Redaction of the identity of a witness (*i.e.* anonymity) at the pre-trial stage of the proceedings under rule 81(4) of the Rules must be specifically authorised upon motivated request by the Prosecutor. This applies also to non-disclosure of an entire item of evidence by the Prosecutor with the Defence not being informed of its existence.

## **C. Extent of communication of disclosed evidence to the Pre-Trial Chamber**

27. According to rule 121(2)(c) of the Rules, all evidence disclosed between the parties “for the purposes of the confirmation hearing” is communicated to the Pre-Trial Chamber. This should be understood as encompassing all evidence disclosed between the parties during the pre-trial proceedings, *i.e.* between the person’s initial appearance (or, in particular circumstances, even before) and the issuance of the confirmation decision.

28. Communication of evidence to the Pre-Trial Chamber, by way of Ringtail, shall take place simultaneously with the disclosure of such evidence. The evidence communicated to the Pre-Trial Chamber forms part of the record of the case, irrespective of whether it is eventually included in the parties’ lists of evidence under rules 121(3) and (6) of the Rules.

29. Nevertheless, for its decision on the confirmation of charges the Pre-Trial Chamber considers only the items of evidence that are included in the parties’ lists of evidence for the purpose of the confirmation hearing. The determination of what and how much to include in their respective lists of evidence falls within the discretion of each party.

30. Other items of evidence that were communicated to the Pre-Trial Chamber but have not been included in the lists of evidence could only be relied upon by the Pre-Trial Chamber for the confirmation decision provided that the parties are given the opportunity to make any relevant submission with respect to such other items of evidence.

## V. The charges

### A. The factual basis of the charges

31. The Prosecutor may expand the factual basis of the charges beyond that for which a warrant of arrest or a summons to appear was issued.

32. However, the Pre-Trial Chamber must ensure that the Defence be given adequate time to prepare (cf. article 67(1)(b) of the Statute providing that the person has the right “[t]o have adequate time and facilities for the preparation of the defence”). While rule 121(3) of the Rules establishes the presumption that 30 days between the presentation of the detailed description of the charges and the confirmation are sufficient, the Pre-Trial Chamber may order, in light of the particular circumstances of each case, that the Defence be informed, by way of a formal notification in the record of the case, of the intended expanded factual basis of the charges in order not to be confronted at the last possible moment with unforeseen factual allegations in respect of which the Defence could not reasonably prepare. This advance notice – to be made by way of a short filing – would include only, and no more than, a concise statement of the relevant facts, *i.e.* the time, location and underlying conduct of the crimes with which the Prosecutor will charge the suspect. The detailed description of the charges exhaustively setting out the material facts and circumstances would, in any case, be provided in the document containing the charges 30 days before the confirmation hearing. How much in advance before the confirmation hearing any advance notice of the charges would need to be provided will depend on the particular circumstances of each case, including the total amount of time foreseen between the person’s initial appearance and the confirmation hearing and the extent of the proposed expansion of the factual basis of the case. Failure to provide such notice within the time frame set by the Pre-Trial Chamber would make impermissible the bringing of any charges going beyond the factual basis of the warrant of arrest or summons to appear in the particular confirmation proceedings, without prejudice to these other charges being brought as part of new or other proceedings conducted separately.

33. Such notice would also constitute the basis for the Pre-Trial Chamber to request in time, through the Registrar, that the surrendering State provides a waiver of the rule of speciality under article 101 of the Statute, if applicable (*i.e.* if the person was surrendered to the Court), as well as the basis for the admission of victims of the alleged crimes to participate in the proceedings.

### B. Distinction between the charges and the Prosecutor’s submissions in support of the charges

34. The charges on which the Prosecutor intends to bring the person to trial to be presented prior to the confirmation hearing (cf. article 61(3)(a) of the Statute) shall be spelt out in a clear, exhaustive and self-contained way and shall include all, and not more than, the “material facts and circumstances” (*i.e.* the facts and circumstances that must be described in the charges (cf. article 74(2) of the Statute) and which are the only facts subject to judicial determination to the applicable standard of proof at confirmation and trial stages, respectively) and their legal characterisation.

35. There shall be no confusion between the material facts described in the charges and the “subsidiary facts” (*i.e.* those facts that are relied upon by the Prosecutor as part of his/her argumentation in support of the charges and, as such, are functionally “evidence”). Indeed, the Prosecutor may present submissions by which he/she proposes a narrative of the relevant events and an analysis of facts and evidence in order to persuade the Pre-Trial Chamber to confirm the charges. However, these submissions in support of the charges should not be confused with the charges. These submissions/argumentation can be included either in the same document containing the charges or in a separate filing (a sort of a “[pre-]confirmation brief”). If the Prosecutor chooses to include submissions in the document containing the charges rather than in a separate filing, the two sections – “charges” and “submissions” – must be kept clearly separate, and no footnotes containing cross-references or reference to evidence must be included in the charges.

36. The Pre-Trial Chamber may remedy defects in the formulation of the charges either *proprio motu* or upon request by the Defence, by instructing the Prosecutor to make the necessary adjustments. The Defence may bring any formal challenge to the charges – *i.e.* challenges which do not touch upon the merits of the charges and do not require consideration of the evidence – at the latest as procedural objections under rule 122(3) of the Rules prior to the opening of the confirmation hearing on the merits.

37. In any case, the Pre-Trial Chamber shall bear in mind that the decision on what to charge, as well as on how the charges shall be formulated, is fully within the responsibility of the Prosecutor. The Pre-Trial Chamber’s interference with the charges by ordering the Prosecutor to remedy any identified deficiency should be strictly limited to what is necessary to make sure that the suspect is informed in detail of the nature, cause and content of the charge (cf. article 67(1)(a) of the Statute). This will necessarily depend on the particular circumstances of each case. In particular, the required specificity of the charges depends on the nature of the case, including the degree of the immediate involvement of the suspect in the acts fulfilling the material elements of the crimes, and no threshold of specificity of the charges can be established *in abstracto*. What the Pre-Trial Chamber must verify is that the charges enable the suspect to identify the historical event(s) at issue and the criminal conduct alleged, in order to defend him- or herself.

38. At the commencement of the confirmation hearing on the merits, any questions on the form, completeness or clarity of the charges must be settled. If the Defence does not raise any challenge to the format of the charges at the latest as procedural objections under rule 122(3) of the Rules, it is precluded to raise it at a later stage, being the confirmation hearing or the trial.

## **VI. The confirmation hearing**

### **A. Presentation of evidence for the purposes of the confirmation hearing**

39. The parties’ respective lists of the evidence relied upon for the confirmation hearing (rule 121(3) and (6) of the Rules) shall indicate the items of evidence consecutively in any clear order, for instance by ERN or by categories of evidence (with, *e.g.*, statements/transcripts grouped by witness, official documents grouped by source, etc.). In order to serve its purpose, a list of evidence should not be presented in the form of a chart linking the factual allegations of the Prosecutor and the evidence submitted in support thereof.

40. The inclusion, in the Prosecutor’s submissions for the purpose of the confirmation hearing (and possibly in any Defence submission under rule 121(9) of the Rules) of footnotes itemising the evidence supporting a factual allegation – preferably with hyperlinks to Ringtail – is encouraged.

41. No footnote (whether internal cross-references or hyperlinks to the evidence) can be included in the charges, as they shall be fully self-contained and shall exhaustively set out all, and no more than, the material facts and their legal characterisation. As stated above, how the Prosecutor’s evidence substantiates the charges belongs to the “submissions” part, not to the “charges” section. This applies regardless of whether the Prosecutor decides to include his/her submissions in the document containing the charges or in a separate filing.

42. It is up to the parties to determine the best way to persuade the Chamber: there is no basis for the Chamber to impose on the parties a particular modality/format to argue their case and present their evidence. For example, no submission of any “in-depth analysis chart”, or *similia*, of the evidence relied upon for the purposes of the confirmation hearing can be imposed on either of the parties.

### **B. Live evidence at the confirmation hearing**

43. Use of live evidence at the confirmation hearing should be exceptional and should be subject to specific authorisation by the Pre-Trial Chamber. The parties must satisfactorily demonstrate that the proposed oral testimony cannot be properly substituted by a written statement or other documentary evidence.

### C. Procedural objections to the pre-confirmation hearing proceedings

44. Under rule 122(3) of the Rules, the Prosecutor and the Defence, prior to the opening of the confirmation hearing on the merits, may “raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing”.

45. As clarified above, formal challenges by the Defence to the charges – *i.e.* challenges which do not touch upon the merits of the charges and do not require consideration of the evidence – fall within the scope of the procedural objections under rule 122(3) of the Rules as they relate to the respect of the person’s right to be properly notified of the charges. Procedural objections under rule 122(3) of the Rules may also include, for examples, challenges as to the proper time given for the parties’ preparation for the confirmation hearing or to the exercise of disclosure obligations by the opposing party, including the propriety of redactions.

46. Decisions taken by the Pre-Trial Chamber on procedural objections under rule 122(3) become *res judicata* and are also to be considered as preparatory for the ensuing trial. The Pre-Trial Chamber’s rulings under rule 122(3) which are joined, pursuant to rule 122(6), to the merits, will be set out in the operative part of the confirmation decision, including for easiness of retrieval by the parties and the Trial Chamber.

47. According to rule 122(4) of the Rules, “at no subsequent point may the objections and observations made under sub-rule 3 be raised or made again in the confirmation or trial proceedings”. Arguably, the parties are precluded to raise at subsequent points (whether at confirmation or trial) procedural matters related to the proper conduct of the pre-trial proceedings prior to the confirmation hearing, also when they have chosen not to do it before the hearing on the merits is opened, while being in a position to do so.

### D. The conduct of the confirmation hearing

48. The parties should be encouraged, as appropriate, to make use of the opportunity to lodge written submissions on points of fact and on law in accordance with rule 121(9) of the Rules in advance of the confirmation hearing. The filing of such written submissions presenting the full set of the parties’ arguments on the merits of the charges would allow them to focus their oral presentations at the hearing to the issues that they consider most relevant. In order to properly organise the conduct of the confirmation hearing, the Pre-Trial Chamber should consider requesting that in these written submissions the parties also provide advance notice of any procedural objections or observations that they intend to raise at the beginning of the hearing pursuant to rule 122(3) of the Rules before the commencement of the hearing on the merits.

49. In any case, at the opening of the confirmation hearing, after the reading out of the charges as presented by the Prosecutor, the Presiding Judge will request the parties whether they have any procedural observations or objections with respect to the proper conduct of the proceedings leading to the confirmation hearing that they wish to raise under rule 122(3) of the Rules. The parties will be informed that no such matter might be raised at any subsequent point – whether at confirmation or at trial – if they choose not to do it before the hearing on the merits is opened.

50. As part of the confirmation hearing on the merits, the parties (and the participating victims) shall be allocated a certain amount of time in order to make their respective presentations, without the need that each and every item of evidence be rehearsed at the hearing. In any case, the Pre-Trial Chamber, for the decision on the confirmation of charges, will consider all the evidence that is included in the parties’ lists of evidence, and, as explained above, any other evidence disclosed *inter partes* provided that the parties are given an opportunity to be heard on any such other item of evidence.

51. As soon as the parties (and the participating victims) finish with their respective oral presentations the Pre-Trial Chamber will consider whether it is appropriate to make a short adjournment (few hours or one/two days maximum) before the final observations under rule 122(8) of the Rules. In these final observations, the parties could only respond to each other’s submissions: no new argument can be raised. After the final oral observations at the

hearing, the confirmation hearing will be closed. No further written submissions from the parties and participants will be requested or allowed.

52. The 60-day time limit for the issuance of the decision on the confirmation of charges in accordance with regulation 53 of the Regulations of the Court starts running from the moment the confirmation hearing ends with the last oral final observation under rule 122(8) of the Rules.

## **VII. The confirmation decision**

### **A. The distinction between the charges confirmed and the Pre-Trial Chamber's reasoning in support of its conclusions**

53. According to article 61(7)(a) of the Statute, the Pre-Trial Chamber, when it confirms those charges in relation to which it has determined that there is sufficient evidence, "commit[s] the person to a Trial Chamber for trial on the charges as confirmed". In terms of the factual parameters of the charges, article 74(2) provides that the article 74 decision "shall not exceed the facts and circumstances described in the charges".

54. The charges on which the person is committed to trial are those presented by the Prosecutor (and on the basis of which the confirmation hearing was held) as confirmed by the Pre-Trial Chamber. Accordingly, the confirmation decision constitutes the final, authoritative document setting out the charges, and by doing so the scope of the trial.

55. The description of the facts and circumstances in the charges as confirmed by the Pre-Trial Chamber is binding on the Trial Chamber. Any discussion in terms of form of the charges (clarity, specificity, exhaustiveness, etc.) and in terms of their scope, content and parameters ends with the confirmation decision, and no issues in this respect can be entertained by the Trial Chamber.

56. As clarified above, this requires that the charges presented by the Prosecutor and those finally confirmed by the Pre-Trial Chamber are clear and unambiguous, and that any procedural challenge to the formulation of the charges be brought before the Pre-Trial Chamber, at the latest, as objections under rule 122(3) of the Rules.

57. Correspondingly to the distinction between the charges presented by the Prosecutor and the Prosecutor's submissions in support of the charges, in the confirmation decision the charges confirmed by the Pre-Trial Chamber must be distinguished from the Chamber's reasoning in support of its findings.

58. In a decision confirming the charges the operative part shall reproduce *verbatim* the charges presented by the Prosecutor as confirmed by the Pre-Trial Chamber.

59. As already clarified, the charges presented by the Prosecutor, as confirmed by the Pre-Trial Chamber and reproduced in the operative part, set the parameters of the trial: after the charges are confirmed (in whole or in part) by the Pre-Trial Chamber there shall be no discussion or litigation at trial as to their formulation, scope or content. The binding effect of the confirmation decision is attached only to the charges and their formulation as reflected in the operative part of decision. No such effect is attached to the reasoning provided by the Pre-Trial Chamber to explain its final determination (narrative of events, analysis of evidence, reference to subsidiary facts, etc.). The subject-matter of the confirmation decision is limited to the charges only, and does not extend to the Prosecutor's argumentation/submissions as such, whether provided in the same document containing the charges or in a separate brief.

60. Findings on the substantial grounds to believe standard are made exclusively with respect to the material facts described in the charges, and there is no requirement that each item of evidence or each subsidiary fact relied upon by either party be addressed or referred to in the confirmation decision – nor would this be realistic or otherwise providing any benefit. In decisions confirming the charges, in order not to pre-determine issues or pre-adjudicate probative value of evidence which will be fully tested only at trial, the Pre-Trial Chamber should keep the reasoning strictly limited to what is necessary and sufficient for the Chamber's findings on the charges. Decisions declining to confirm the charges may

require, depending on circumstances, a more detailed analysis, given that, as a result thereof, proceedings are terminated.

61. In a decision confirming the charges, the Pre-Trial Chamber may make the necessary adaptations to the charges in order to conform to its findings. By doing so, the Pre-Trial Chamber cannot expand the factual scope of the charges as presented by the

62. Prosecutor. Its interference should be limited to the deletion of, or adjustment to, any material fact that is not confirmed as pleaded by the Prosecutor. This must be done transparently and be clearly identifiable in the confirmation decision, by presenting the charges as formulated by the Prosecutor at the beginning of the confirmation decision and the charges as confirmed in its operative part.

## B. The structure of the confirmation decision

63. It is fundamental that the structure of the confirmation decision makes clear the distinction between the Chamber's reasoning, on the one hand, and the Chamber's disposition as to the material facts and circumstances described in the charges and their legal characterisation as confirmed, on the other hand.

64. Typically a decision on the confirmation of charges should be structured as follows:

- (a) The *identification of the person* against whom the charges have been brought by the Prosecutor.
- (b) The *charges* as presented by the Prosecutor.
- (c) A brief reference to the relevant *procedural history* of the confirmation proceedings.
- (d) *Preliminary/procedural matters*, including consideration of any procedural objections or observations raised by the parties under rule 122(3) of the Rules that the Pre-Trial Chamber, pursuant to rule 122(6) of the Rules, decided to join to the examination of the charges and evidence.
- (e) *Factual findings* ("the facts"), in which the Pre-Trial Chamber provides a narrative of the relevant events (whether chronologically or otherwise), determining whether there are substantial grounds to believe with respect to the material facts and circumstances described in the charges presented by the Prosecutor, both in terms of the alleged criminal acts and the suspect's conduct. Reference to evidence (including to subsidiary facts) is made to the extent necessary and sufficient to support the factual findings on the material facts.
- (f) *Legal findings* ("the legal characterisation of the facts"), in which the Pre-Trial Chamber provides its reasoning as to whether the material facts of which it is satisfied to the required threshold constitute one or more of the crimes charged giving rise to the suspect's criminal responsibility under one or more of the forms of responsibility envisaged in the Statute and pleaded by the Prosecutor in the charges.
- (g) The *operative part*, the only part of the confirmation decision which is binding on the Trial Chamber. In a decision confirming the charges the operative part shall reproduce *verbatim* the charges presented by the Prosecutor that are confirmed by the Pre-Trial Chamber (both the material facts and circumstances described in the charges confirmed and the confirmed legal characterisation(s)). No footnote or cross-reference shall be added. The operative part should also include the Pre-Trial Chamber's decision on any procedural objections or observations addressed before the determination of the merits.

## C. Alternative and cumulative charges

65. In the charges, the Prosecutor may plead alternative legal characterisations, both in terms of the crime(s) and the person's mode(s) of liability. In this case, the Pre-Trial Chamber will confirm alternative charges (including alternative modes of liability) when the evidence is sufficient to sustain each alternative. It would then be the Trial Chamber, on the basis of a full trial, to determine which one, if any, of the confirmed alternative is applicable to each case. This course of action should limit recourse to regulation 55 of the

Regulations, an exceptional instrument which, as such, should be used only sparingly if absolutely warranted. In particular, it should limit the improper use of regulation 55 immediately after the issuance of the confirmation decision even before the opening of the evidentiary debate at trial.

66. The Prosecutor may also present cumulative charges, *i.e.* crimes charged which, although based on the same set of facts, are not alternative to each other, but may all, concurrently, lead to a conviction. In this case, the Pre-Trial Chamber will confirm cumulative charges when each of them is sufficiently supported by the available evidence and each crime cumulatively charged contains a materially distinct legal element. In doing so, the Pre-Trial Chamber will give deference to the Trial Chamber which, following a full trial, will be better placed to resolve questions of concurrence of offences.

## **VIII. Transfer of the case from pre-trial to trial**

### **A. The continuation at trial of “systems” adopted at pre-trial**

67. As concerns certain specific more technical aspects of proceedings (*e.g.* modalities of disclosure of evidence between the parties, including registration in the e-Court system; procedure for authorisation of exceptions to disclosure, including implementation of redactions under rules 81(2) and (4); modalities of victims’ applications for participation in the proceedings and procedure for their admission; regime for the parties’ handling of confidential information and contact with witnesses of the opposing party) the Pre-Trial Chamber will set up regimes that are capable of being applied throughout the proceedings.

68. Considering that nothing in the procedural system of the Court precludes the continued validity of procedural orders of the Pre-Trial Chamber after the transfer of the case to a Trial Chamber, such procedural regimes should continue to apply, subject to necessary adjustments by the Trial Chamber. This will simplify proceedings and make them more efficient.

### **B. The record transmitted to the Trial Chamber**

69. Following confirmation of charges and the assignment of the case to a Trial Chamber, the record is transmitted to the Trial Chamber pursuant to rule 130 of the Rules. This includes all evidence which has become part of the record by way of its communication to the Pre-Trial Chamber following *inter partes* disclosure (cf. also rule 121(10) of the Rules).

70. Considering that the evidence would then be individually considered for formal admission during trial, its inclusion in the record of proceedings before professional judges is not problematic. The transmission of the complete record with all its contents is also the preferred solution because of its simplicity.



## Annex III

### SGG Work Program 2015

1. Pursuant to the General Roadmap for Facilitations<sup>1</sup> the Chairpersons of the Study Group on Governance, Ambassador María Teresa Infante Caffi (Chile) and Ambassador Masaru Tsuji (Japan), hereby submit for consideration the program of work for the Study Group on Governance for the period until the 2015 session of the Assembly of States Parties.

#### A. Cluster I: Increasing the efficiency of the criminal process

##### 1. Mandate

2. The mandate for Cluster I in 2015 is derived from the annex to the First Report of the Court on Lessons Learnt (ICC-ASP/11/31/Add.1).

3. States Parties should be aware of annex I of the “Omnibus Resolution” (ICC-ASP/13/Res.5: Strengthening the International Criminal Court and the Assembly of States Parties), para. 10 (a): *With regard to Victims and affected communities, reparations and Trust Fund for Victims, [the Assembly of States Parties]:*

(a) *invites* the Bureau to explore, through its Study Group on Governance and based on a report the Court is requested to submit in 2015, the need for possible amendments to the legal framework for the participation of victims in the proceedings;

4. Furthermore, States Parties should also be aware of the decision of the Assembly of States Parties contained in para. 7 (c) of annex I of the Omnibus Resolution: *With regard to proceedings of the Court, [the Assembly of States Parties]:*

(c) *decides* to include a specific item on the efficiency and effectiveness of Court proceedings on the agenda of the fourteenth session of the Assembly with a view to strengthening the Rome Statute system;

5. In order to fulfil this mandate Cluster I proposes a program of work focused on the three areas set out below: Participation of victims; Streamlining of the Roadmap; and Other matters related to increasing the efficiency of the criminal process.

##### 2. Participation of victims

###### (a) Goal

6. A goal of the facilitation in Cluster I would be to discuss and study, in an open-ended manner, the Court’s expected report on the participation of victims in proceedings and any proposals for amendments to the legal framework.

7. While waiting for the report from the Court, Cluster I would propose that the Court provide the Cluster with background information on this matter and deliver updates on the work of the Court towards the presentation of its report.

###### (b) Working Methods

8. Discussions with States Parties.

9. Consultation with the Court (Working Group on Lessons Learnt).

10. Consultation with all relevant stakeholders, including civil society.

<sup>1</sup> ICC-ASP/13/Res.5, annex IV, General Roadmap for Facilitations.

(c) *Timeline*

11. By the end of March: Submission of the Program of Work.
12. 7 April: Discussion of the Program of Work at the first meeting of the SGG.
13. By the end of April / May: Consultations with the Court and stakeholders.
14. By the end of August: Receive updates from the Court on the preparation of its report and (if available) consider the report.
15. By the end of September: Submission of the Report of the Study Group on Governance.

**3. Streamlining of the Roadmap**

(a) *Goal*

16. In order to facilitate the process for future amendments to the Rules of Procedure and Evidence, Cluster I would review the “Roadmap on reviewing the criminal procedures of the International Criminal Court” (ICC-ASP/12/37, annex 1) with a view to identifying possible changes in order to streamline the process.

(b) *Working Methods*

17. Discussions with State Parties.
18. Consultation with the Court (Working Group on Lessons Learnt).
19. Consultation with all relevant stakeholders, including civil society.

(c) *Timeline*

20. By the end of March: Submission of the Program of Work.
21. 7 April: Discussion of the Program of Work at the first meeting of the SGG.
22. By the end of April / May: Consultations with the Court and stakeholders.
23. By the end of August: Complete review of the Roadmap.
24. By the end of September: Submission of the Report of the Study Group on Governance.

**4. Other matters related to increasing the efficiency of the criminal process**

(a) *Goals*

25. Cluster I would ask the Court to provide information on the implementation of amendments to the Rules of Procedure and Evidence adopted in the past, as well as changes in practice being implemented in the proceedings.

26. Cluster I would also receive and consider further reports from the Court on progress made regarding pre-trial and trial relationship and common issues.<sup>2</sup>

27. Cluster I would also discuss possible input for the specific item on the efficiency and the effectiveness of Court proceedings (cf. op. 7 c) of Annex I to the Omnibus-Resolution.

28. Cluster I would aim to convene a lecture on matters related to Cluster I. This could provide an opportunity for interaction, and exchange of ideas, between representatives of the Court, States Parties, civil society and academia.

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<sup>2</sup> These issues were set out in “Cluster B” of the first report of the Court to the Assembly of States Parties on Lessons Learnt (ICC-ASP/11/31/Add.1). The Court provided two progress reports on this topic in 2014 but further report(s) are anticipated in 2015.

*(b) Working Methods*

29. Discussions with State Parties.
30. Consultation with the Court (Working Group on Lessons Learnt).
31. Consultation with all relevant stakeholders, including civil society.

*(c) Timeline*

32. By the end of March: Submission of the Program of Work.
33. 7 April: Discussion of the Program of Work at the first meeting of the SGG.
34. By the end of April / May: Consultations with the Court and stakeholders.
35. By the end of September: Submission of the Report of the Study Group on Governance, including possible input for the specific item on the efficiency and the effectiveness of Court proceedings (cf. op. 7 c) of Annex I to the Omnibus-Resolution.

**B. Cluster II: Governance and Budgetary Process****1. Mandate**

36. The specific mandate for Cluster II this year is derived from Section I OP 5 of resolution ICC-ASP/13/Res. 1, the Budget Resolution, which stipulates:

”5. Taking note of the recommendation in paragraph 44 of the report of the Committee on Budget and Finance on the work of its twenty-third session, invites the Bureau in consultation with the Court to consider the recommendation, in the context of the review of the budgetary process, taking into account the draft OTP Strategic Plan 2016-2018.”

37. Para. 44 of the CBF-report reads as follows:

“44. The Committee also recommended that States Parties consider whether a financial target or envelope should be set at each Assembly meeting that would define the anticipated outer limits of the budget for the year following the one immediately thereafter. The Committee was of the view that this would enhance budget planning and transparency and allow the Court to establish priorities more clearly.”

38. Furthermore, Annex 1 of the Omnibus Resolution, in op. 7 b, refers to the SGG as follows:

“(b) requests the Court to intensify its efforts to develop qualitative and quantitative indicators that would allow the Court to demonstrate better its achievements and needs, as well as allowing States Parties to assess the Court’s performance in a more strategic manner, bearing in mind existing recommendations and discussions, in particular in the context of the Study Group on Governance and the Committee on Budget and Finance.”

39. From this OP, which contains a mandate directed to the Court, it is inferred that the SGG has a role to play in providing recommendations to the Court on this topic. In light of the SGG’s mandate, Cluster II may therefore serve as an interface for the dialogue between the Court, the States Parties and the SGG on this topic.

40. Any relevant findings in this regard would inform the organization of the “specific item on the efficiency and effectiveness of Court proceedings”, to be included on the agenda of the fourteenth session of the Assembly, pursuant to op. 7 c) of Annex I to the Omnibus-Resolution.

**2. The issue of a “financial target or envelope” for the subsequent budget proposal***(a) Goals*

41. The goal of the facilitation within Cluster II would be to study and analyze the matter in an open-ended way and to report on its findings well in advance of the start of the budget negotiations. In so doing, Cluster II would consider the recommendation of the establishment of a financial envelope or target in the context of enhancing the predictability and transparency of the financial development of the Court.

*(b) Working Methods*

42. Discussions with States Parties.

43. Consultation with the organs of the Court.

44. Consultation with the CBF.

45. Briefings on the relevant experiences of other criminal courts and tribunals, on the international and national level, if relevant.

*(c) Timeline*

46. By end of March: Submission of the Program of Work.

47. 7 April: Discussion of the Program of Work at the first meeting of the SGG.

48. By end of May: Consultations with the organs of the Court and the CBF.

49. In June: Informal meeting of Cluster II, possibly in the form of a seminar, with briefings by the organs and a discussion between the Court and States Parties.

50. In July: Submission for consideration and discussion of a report on the the outcome of the discussions regarding the recommendation of a financial target or envelope and discussion.

51. By end of August: Finalization of the report.

52. By end of September: Submission of the Report of the Study Group on Governance, including possible elements for the Omnibus-Resolution. The report on the outcome of the discussions regarding the recommendation of a financial target or envelope will be annexed to the Report of the Study Group on Governance.

**3. Good governance and the issue of qualitative and quantitative indicators***(a) Goal*

53. The primary goal of the facilitation would be to serve as an interlocutor for the Court and to provide for a forum of discussion between the Court and States Parties on the topic. Cluster II could consider how indicators could help to assess the Court’s performance and needs without compromising its independence. On this basis, Cluster II could formulate recommendations to the Court, if appropriate.

54. The discussions of Cluster II on this topic would also inform the organization of the specific item on the efficiency and effectiveness of the Court proceedings included in the agenda of the fourteenth session of the Assembly, pursuant to op. 7 c) of Annex I to the Omnibus-Resolution.

*(b) Working Methods*

55. Discussions between the Court and States Parties.

56. In cooperation with the Court, if possible, organization of a seminar to present the issue.

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57. Facilitating a wider discussion on indicators, on the basis of the experience of other courts and tribunals in The Hague as well as of national jurisdictions.

(c) *Timeline*

58. By end of March: Submission of the Program of Work.

59. 7 April: Discussion of the Program of Work at the first meeting of the SGG.

60. By end of June: Update by the Court on progress achieved.

61. Seminar/discussion on indicators. Date TBC

62. By end of September: Submission of the report on the progress achieved so far and possible input for the specific item on the efficiency and the effectiveness of Court proceedings (cf. op. 7 c) of Annex I to the Omnibus- Resolution.

## Annex IV

### Concept Paper June 2015

#### A. Preliminary issues

- (a) The interpretation of the mandate  
[Background information given by the CBF on paragraph 44 of its report, ICC-ASP/13/15]

##### Point of departure

- (b) Discussions will be held to identify objective elements which can be used to anticipate the Court's needs while determining the feasibility/political will to establish a financial envelope.
- (c) Among other elements if there are objective or physical limitations (i.e. the number of work stations) to the capacity of the Court as an institution?
- (d) What are the differences/similarities between said envelope and a biennial budget?

#### B. Considerations on the political desirability on the establishment of a financial target or envelope

- (a) What factors determine the adoption of the ICC budget?
- (b) Average cost of a case ("skeleton-case"); GDP; budget allocation/increase to national courts.
- (c) Predictability vis-à-vis flexibility.

#### C. The technical feasibility of the establishment of a financial target or envelope

- (a) Predictability of expenses – definition and methodology
- (b) Best practice: Biennial Budget – the ICTY.
- (c) Best practice: UN system – Budget Outline.
- (d) Best practices: International Court of Justice (ICJ) experience

#### D. The implication of the new strategic plan of the OTP 2016-2018

- \* The concept of a "*basic size*" (OTP)

## Annex V

### OTP's Basic Size

# Basic size of the OTP

09 July 2015

James Stewart – Michel De Smedt

## Agenda

- Reasons for basic size
- Methodology & preliminary findings
- Comparison other institutions
- Budget 2016
- Way forward

## Reasons for basic size model

- New strategy with rightly staffed teams leads to results
- Prioritization of quality over quantity is not tenable
- Basic size model provides stability and predictability

## Reasons for basic size proposal

- New strategy with rightly staffed teams leads to results

CONFIRMATION PERFORMANCE	Previous strategy 2003-June 2012		Strategy June 2012-2015		Performance increase
	Total	%	Total	%	
<b>Per charges</b>					
Confirmed	50	62.5	206	85.83	+23.33%
Not confirmed	30	37.5	34	14.17	
<b>Total</b>	<b>80</b>	<b>100</b>	<b>240</b>	<b>100</b>	
<b>Per accused</b>					
Confirmed	10	71.43	8	100	+28.57%
Not confirmed	4	28.57	0	0	
<b>Total</b>	<b>14</b>	<b>100</b>	<b>8</b>	<b>100</b>	

- Prioritization of quality over quantity is not tenable
- Basic size model provides stability and predictability



## Reasons for basic size proposal

- Rightly staffed teams leads to results
- **Prioritization of quality over quantity is not tenable**
  - Needed investigations are on hold impacting on effectiveness and legitimacy
  - Delay in investigations is leading to loss of evidence and of impact, and to extra costs
  - Non-trial-readiness of hibernated investigations leads to delays, extra costs & risk of not getting trial-ready in time
  - Quality of work and staff affected by constant overstretch
- Basic size model provides stability and predictability

## Reasons for basic size proposal

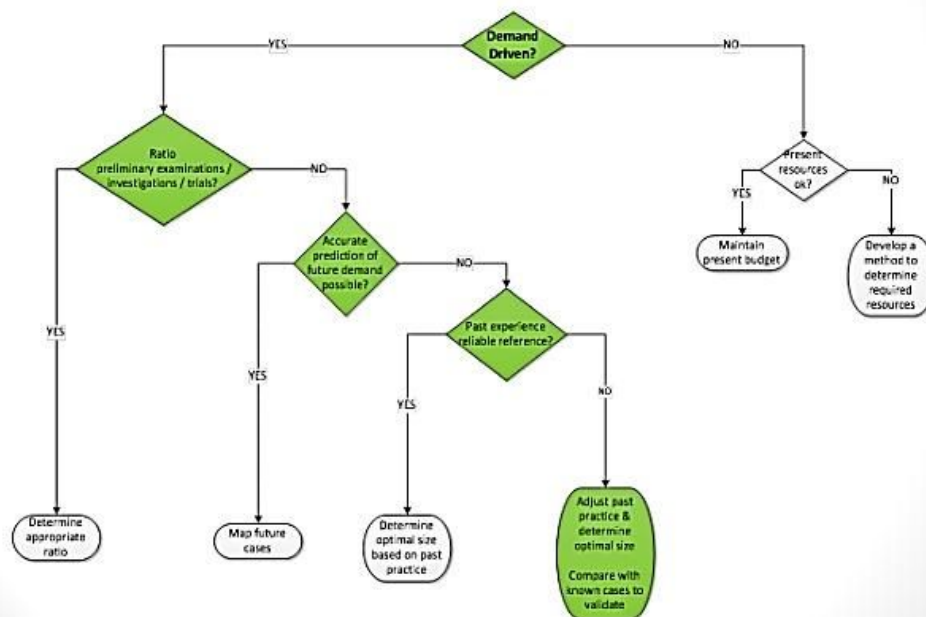
- New strategy with rightly staffed teams leads to results
- Prioritization of quality over quantity is not tenable
- **Basic size model provides stability and predictability**
  - **Stability:**
    - Appropriate level of resources to meet quality and quantity demand in a flexible way
    - Defendable level of case prioritization
  - **Financial predictability**
    - Detailed justification in basic size report => basis to decide on future size
    - Decision on timeline for achieving basic size will create predictability
    - Financial stabilization once basic size is reached (exceptional circumstances excl.)

# How to determine the basic size?

- Two key questions:
  - What is the expected demand for the OTP’s intervention in the coming years?
  - What level of resources is needed to meet the demand with the required quality and efficiency?

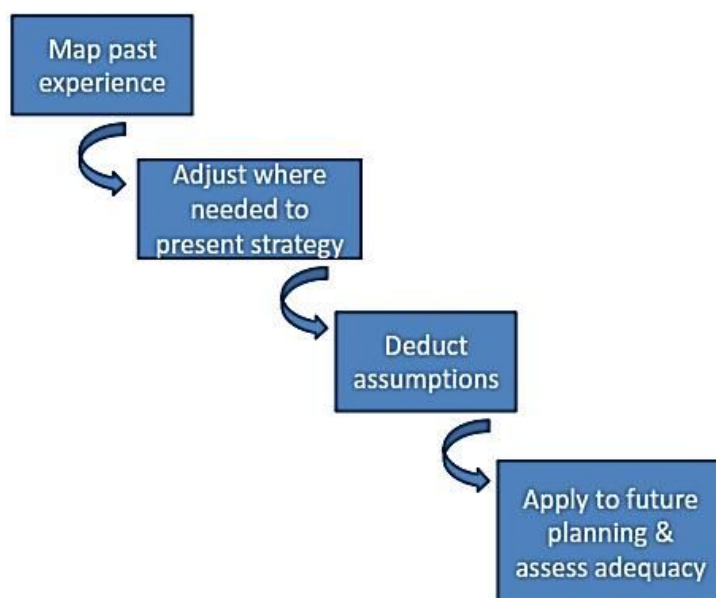
*Question 1: determining demand*

## Selected approach



*Question 1: determining demand*

## Performing the right extrapolation

*Question 1: determining demand*

## Deducted assumptions

- Assumptions
  - Based on past experience and present strategy
  - Review 3 years (e.g. more data; efficiency gains; important shifts in demand)
- Preliminary examinations
  - 9 per year
  - 2 open / 2 close per year
  - Duration: undeterminable
- New situation under investigation: 1 per year
- Active investigations
  - 6 per year
  - In principle parallel investigations in each situation
  - Duration: 3 years
  - Investigations going to trial directly: 75%

Question 1: determining demand

# Deducted assumptions

- Hibernated investigations
  - 9 per year
  - De-hibernation: 1 every 3 years
  
- Prosecutions
  - Pre-trial: 5 per year
  - Trial: 5 per year
  - Appeals 2-3 per year
  - Duration
    - Prosecutions (confirmation + trial) 3.5 years
    - Appeals 2 years

Question 1: determining demand

# Planning 2016 - 2018

Per activity	2015		2016		2017		2018	
	Serv 1	Serv 2	Serv 1	Serv 2	Serv 1	Serv 2	Serv 1	Serv 2
<b>Investigations</b>	2	2	3	3	4	4	5	5
1. Support - ICC								
2. SAR								
3. SAR								
4. SAR								
5. SAR								
6. SAR								
7. SAR								
8. SAR								
9. SAR								
10. SAR								
11. SAR								
12. SAR								
13. SAR								
14. SAR								
15. SAR								
16. SAR								
17. SAR								
18. SAR								
19. SAR								
20. SAR								
<b>Hibernated (Served) Cases</b>	0	0	0	0	0	0	0	0
1. SAR								
2. SAR								
3. SAR								
4. SAR								
5. SAR								
6. SAR								
7. SAR								
8. SAR								
9. SAR								
10. SAR								
11. SAR								
12. SAR								
13. SAR								
14. SAR								
15. SAR								
16. SAR								
17. SAR								
18. SAR								
19. SAR								
20. SAR								
<b>Prep. Litig.</b>	2	2	3	3	4	4	5	5
1. SAR								
2. SAR								
3. SAR								
4. SAR								
5. SAR								
6. SAR								
7. SAR								
8. SAR								
9. SAR								
10. SAR								
11. SAR								
12. SAR								
13. SAR								
14. SAR								
15. SAR								
16. SAR								
17. SAR								
18. SAR								
19. SAR								
20. SAR								
<b>Total</b>	4	4	6	6	8	8	10	10
1. SAR								
2. SAR								
3. SAR								
4. SAR								
5. SAR								
6. SAR								
7. SAR								
8. SAR								
9. SAR								
10. SAR								
11. SAR								
12. SAR								
13. SAR								
14. SAR								
15. SAR								
16. SAR								
17. SAR								
18. SAR								
19. SAR								
20. SAR								
<b>Appeals</b>	0	0	1	1	1	1	2	2
1. SAR								
2. SAR								
3. SAR								
4. SAR								

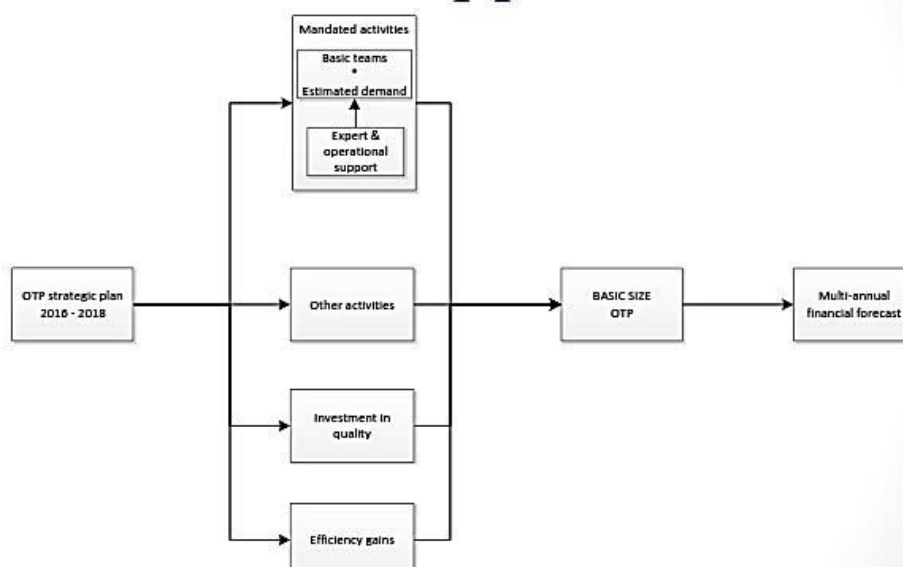
- Planning combines what is already happening + impact of assumptions
  
- Model expected to stable over longer period (2016-2021 projection made)
  
- Reality will differ from planning. The basic size absorbs unforeseen events through reallocation with an acceptable level of prioritization.

# How to determine the basic size?

- Two key questions:
  - What is the expected demand for the OTP's intervention in the coming years?
  - What level of resources is needed to meet the demand with the required quality and efficiency?

*Question 2: matching resources & demand*

## Overall approach



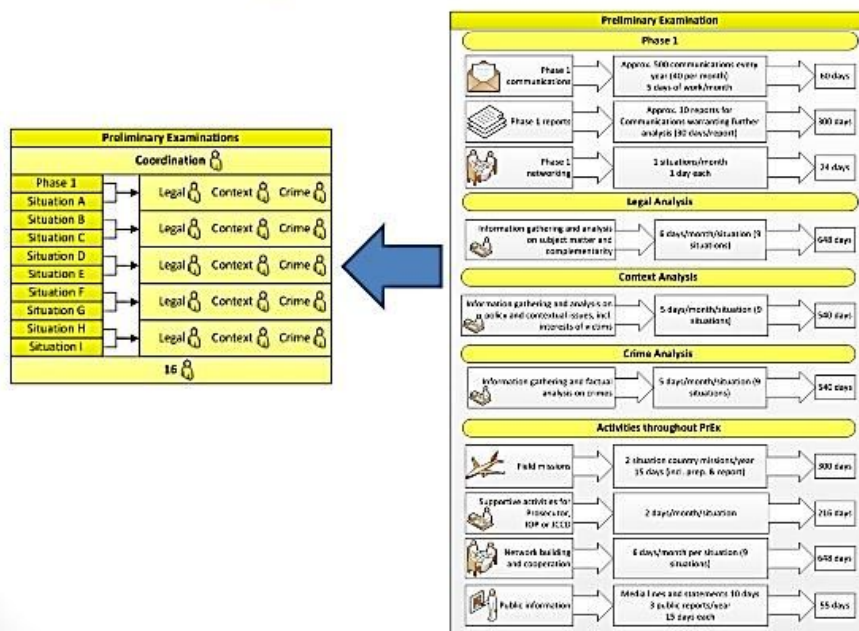
Question 2: matching resources & demand

# Activities and resources

- Basic teams for mandated activities similar to
  - OTP strategy June 2012-2015
  - Budget proposals 2014 and 2015
- Detailed justification for all activities based on
  - workload indicators & productivity standards as much as possible
  - or detailed description of activities

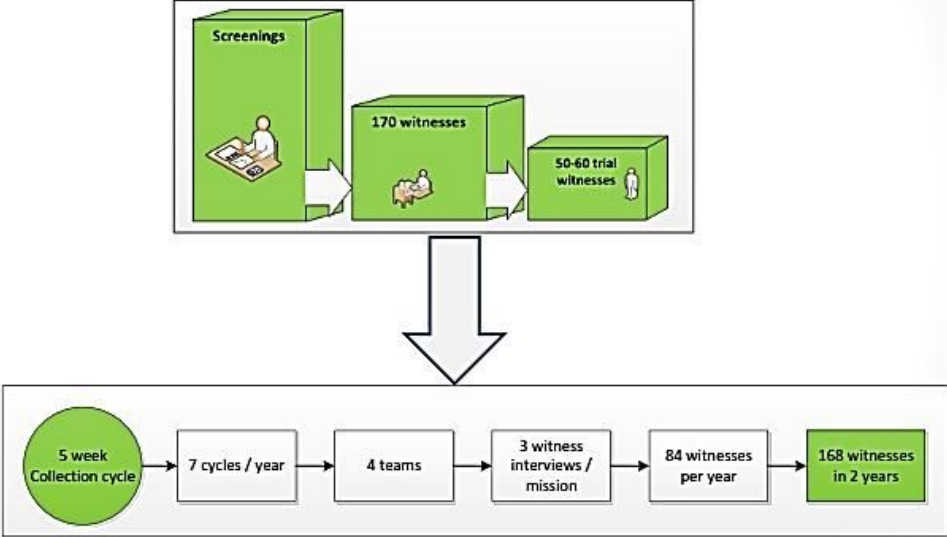
Question 2: matching resources & demand

# Example of justification



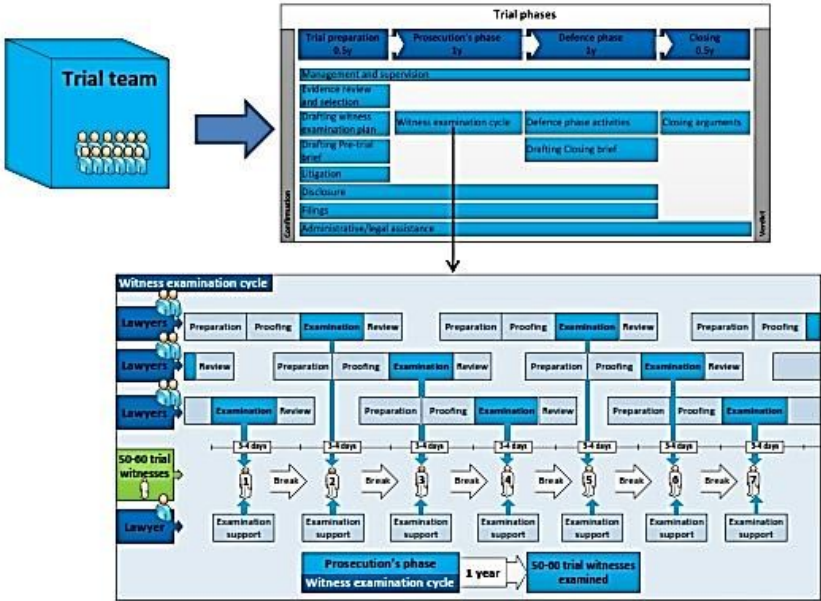
Question 2: matching resources & demand

# Example of justification



Question 2: matching resources & demand

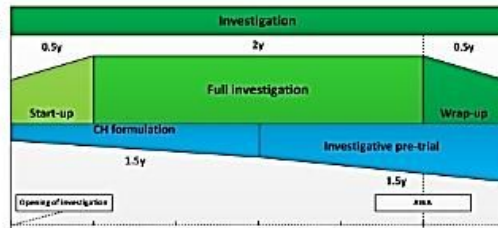
# Example of justification



## Question 2: matching resources &amp; demand

# Quality and efficiency

- Quality: other aspects next to right-sizing the teams
  - Training
  - Equipment
  - Networking for (1) know how and (2) outsourcing
  
- Efficiency remains central to the model
  - Past efficiency gains included into the model
  - Sufficiently certain new gains also included
  - Yearly inclusion of new gains
    - OTP efficiency group
    - Synergies



## Comparison

- Comparison with
  - other international tribunals
  - complex, high profile national investigations
  
- Need for caution due to
  - lack of data
  - difference in circumstances
  
- Positive findings for basic size



# Budget 2016

- Basic size model forms the basis
- Evolution towards basic model
  - Increase of activities
  - Step towards right-sizing existing activities

# Basic size – way forward

- OTP – basic size report
  - Presently scheduled for end of July 15
  - Content:
    - Methodology
    - Expected demand
    - Detailed justification of resources
    - Financial impact and proposed timeline
    - Permanent premises
    - Conversions
- Other organs
  - Coordination has taken place throughout project and needs to continue
  - High level impact analysis included in the basic size report
  - Financial impact required for April 2016
- Decision-making requires integrated Court-wide proposal

## Annex VI

### Questions proposed to guide discussions

Taking into consideration that the concept of “*basic size*” was developed in an aim to provide States Parties with elements that could better explain what the budgetary needs of the Court are and therefore determine whether a financial envelope or target could be met, the following questions are a proposal that, if consider appropriate by State Parties, may guide the discussion for the meeting on July 16:

- (a) Is the concept of basic size a useful tool to enhance predictability?
- (b) Are the elements considered therein helpful in determining if a financial envelope or target is attainable?
- (c) What kind of considerations (technical, political, etc.) should be taken into account to establish an indicative target?
  - (i) Among other elements are there objective or physical limitations (i.e. the number of work stations) to the capacity of the Court as an institution
  - (ii) What factors determine the adoption of the ICC budget
  - (iii) What is the average cost of a case (“skeleton-case”)
- (d) What kind of impediments may hinder establishing a financial envelope or target?
- (e) Would State Parties consider that the concept of Basic Size developed by the OTP addresses the concerns which led to the recommendation of a financial envelope or target in a sufficient manner?
- (f) What other tools aimed at increasing the predictability of the budgetary process might be implemented?

## Annex VII

### OTP's written answers to questions proposed

Taking into consideration that the concept of “*basic size*” was developed in an aim to provide States Parties with elements that could better explain what the budgetary needs of the Court are and therefore determine whether a financial envelope or target could be met, the following questions were proposed to guide discussion for the meeting held on July 16, 2015. As per request formulated by a State Party during said meeting, answers in writing were provided by the OTP.

- (a) Is the concept of basic size a useful tool to enhance predictability?

Yes. It indicates the size and resources the OTP should have to be able to absorb its work with the required quality and efficiency without having to (1) systematically resort to the contingency fund, and (2) over-prioritize amongst pending activities. The closer the Office gets to the Basic Size model, the more stable and predictable the budget process would become, as long as the parameters underlying the basic size model remain unchanged.

The model will be revisited every three years in connection with the review the Office's Strategic plan, if major shifts in the parameters would occur (e.g. higher level of demand for the Court's intervention as estimated, situations of exceptional proportion coming under Court's jurisdiction), then the model would have to be reviewed accordingly.

The Basic Size exercise responds to the demand by some States Parties and the CBF to have an estimate of the financial impact of the new strategy of the OTP. Once the other organs have completed their analysis, then the result of such exercise will provide an estimate of the overall budgetary needs of the ICC in response to the OTP's Basic Size model.

- (b) Are the elements considered therein helpful in determining if a financial envelope or target is attainable?

Rather than setting an abstract budgetary ceiling, the Basic Size presents the estimated demand for Court's intervention and corresponding resource needs per activity and per phase of the operations. With the best possible accuracy (as the figures are after all estimates) all resources (direct and indirect) are justified and accounted for using a model based on clearly defined indicators. In this regard, it would offer a certain kind of a ceiling, but which also answers to the concerns expressed by many States, whereby the Court should be able to have the resources it needs to perform its mandate.

The Basic Size provides a model to estimate the cost of the resources needed to have the OTP operate effectively having reached a required stable size. Ideally, the Basic Size would be achieved by the end of 2018, in line with the duration of the OTP Strategic Plan for 2016-2018. A longer phasing in period might be required, however, in light of the outcome of the Court-wide impact analysis and pending on the States Parties' annual decision to support the budget proposal that will be presented with the aim of reaching the Basic Size.

Once the Basic Size is achieved, fluctuations in the activities of the Court would be managed and absorbed within these same resources, as long as the underlying parameters remain the same. This will be possible thanks to the more flexible reallocation of resources within a larger pool of activities and staff resources as well as by the cyclical closing and opening of cases and/or by the changing of phases in the operations and proceedings.

- (c) What kind of considerations (technical, political, etc...) should be taken into account to establish an indicative target?
- (i) Among other elements are there objective or physical limitations (i.e. the number of work stations) to the capacity of the Court as an institution

The Court is an institution of last resort. In this sense, the demand for its intervention should determine, with a reasonable level of prioritization of its activities, its size.

The maximum OTP capacity in the new premises amounts up to 557 workstations. This was also mentioned in the Basic Size document. When the move takes place in December, the new premises will be delivered with 524 workstations which, in accordance with the relevant office space regulatory frameworks, can be expanded to 557. This means that the growth towards Basic Size can be managed even before considering the impact of the working from home policy. At this moment in time, no physical limitations of a similar nature are identified that would hamper any future OTP expansion towards the Basic Size. The Registry is currently working on the assessment of the capacity that organ will require in the context of the Court-wide impact of the Basic Size. In their tentative estimation Registry has indicated that they will be able to fit any required staff until the end of the 2018, when the current OTP Strategic plan 2016-2018 will be again reviewed.

- (ii) What factors determine the adoption of the ICC budget

The ICC budget is based on the *budget assumptions* discussed and agreed by the Court's organs by the end of February/mid-March every year. The budget assumptions are the factors/events that have an impact on the assessment of resources needed to perform the activities of the Court in any given fiscal period. Examples of budget assumptions are: number of investigations, number of trials, and number of appeals. For the OTP, the Basic Size document provides detailed justifications and explanations for the processes and level of resources required to fulfill its mandated activities, which are indeed reflected in these budget assumptions.

Additionally, the Court uses *parameters* to fine-tune the assessment of resources needed to conduct its operation in the next fiscal year's budget. Example of such parameters are: court-rooms days foreseen for the trials, number of witnesses to be brought to the Court or to be included in the Protection Programme, number and type of languages required to assist in the proceedings, etc.. In order to provide a better understanding of the budget proposal, the Court also identifies the main *cost drivers* of the budget. In the context of the ICC's budget, the cost drivers can be seen as categories of costs, that highlight where the increase (or decrease) of costs comes from and whether such variation is under the direct control of the Court. Examples of cost drivers in the 2016 Proposed Programme Budget (2016 PPB) are: prosecution and judicial activities (i.e.: preliminary examinations, investigations, trials and appeals), new premises (i.e.: maintenance, security, utilities, etc.), UN Common System.

- (iii) What is the average cost of a case ("skeleton-case")

The Court is not yet in a position to provide a reliable average cost for the cases. The Court in the past has tried to capture the cost of the cases using accounting tools. The main system used by the ICC is SAP, which has been implemented in 2008. Due to several circumstances, including budget constraints, not all the modules have been implemented yet. Therefore, the Court has also used alternative tools to assess the average cost of a case. One of them is the Activity Based Costing (ABC) model developed with the assistance of external consultants. Unfortunately, due to lack of available resources for the project, the ABC model is not yet finalized. The Court has reported on the progress of this project to the Committee of Budget and Finance (CBF) on a regular basis.

The Basic Size model can provide a good conceptual framework to eventually estimate the average cost of a case (with all the due caveats of the unique circumstances of each case considered). To support the model by cost information

data extracted by SAP, the Court will need to analyse the current structure of the data and assess whether changes to SAP are necessary.

- (d) What kind of impediments may hinder establishing a financial envelope or target?

As long as the Basic Size is not reached, the OTP will face unpredictable events that it will not be able to fully absorb. Contingency fund requests triggered by the opening of new situations or the sudden appearance of fugitives will continue to have negative impact on the predictability. Once the Basic Size is reached, this problem should become much less frequent. Additionally, should the demand for Court's intervention substantively expand beyond what has been estimated, the Basic Size, just as any financial target or envelope, would need to be revisited.

- (e) Would State Parties consider that the concept of Basic Size developed by the OTP addresses the concerns which led to the recommendation of a financial envelope or target in a sufficient manner?

- (f) What other tools aimed at increasing the predictability of the budgetary process might be implemented?

As mentioned under point 4), once the assumptions are clear and the model to calculate the resource needs that follow is defined, the predictability of the budget is strongly enhanced. Additional tools might include the refinement of the accounting system to enable the Court's management to extract the relevant information for the decision making process, as well as for the monitoring of the implementation of the budget. Accurate information on the existing operations can help forecasting future needs.

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