

**EXPERT INITIATIVE ON
PROMOTING EFFECTIVENESS AT THE
INTERNATIONAL CRIMINAL COURT**

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WITH THE SUPPORT OF



MEMBERS OF THE PANEL OF

INDEPENDENT EXPERTS

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RAISON D'ÊTRE AND EXECUTIVE SUMMARY

Why this Expert Paper?

The International Criminal Court is the first permanent international criminal tribunal that might one day become universal in its reach. The promise of universal accountability for those responsible for mass atrocities brings high expectations and necessarily involves overcoming great challenges.

Over the past decade, the Court has methodically built reality into the promises contained in its Statute. It has tried and tested its own procedures, produced an impressive body of jurisprudence and started to create a place for itself in a highly complex political and diplomatic environment. In so doing, the Court has solidified the idea of international criminal justice and has built upon the legacy of other contemporary international criminal tribunals. For the purpose of the present paper, the extreme complexity of the situations and cases before the Court has at all times been borne in mind in the search for and formulation of recommendations. Furthermore, it is essential to ensuring the ability of the Court to deal with those peculiar challenges to realise, at this point, that the Court might never be able to adequately fulfil its mandate if significant reforms of its practices are not promptly and effectively carried out to address the problems and shortcomings highlighted in this paper.

Where the Court has been less successful is in the manner in which justice has been delivered. In other words, the Court has been performing less effectively than it should be. Problems of “effectiveness” are understood for the purpose of the present report as those affecting the prompt, competent and economical delivery of justice.

The *raison d'être* of the present paper is to identify, from the point of view primarily of practitioners, the principal problems of effectiveness affecting the work of the Court with a view to offer practical and realistic solutions intended to improve upon the quality, cost and expeditiousness of ICC proceedings. The following recommendations are made in order to enhance the effectiveness of the Court while, at the same time, preserving the fairness of the proceedings.

This study is also intended to serve a spurring function by moving the debate over the performance of the ICC to a place where shortcomings affecting the Court are called by their name and where fresh ideas and possible solutions are being discussed openly and candidly to try to resolve those challenges.

The difficulties affecting the Court's effective fulfilment of its mandate are of different types. The present paper has focused on those thought to have the greatest prejudicial effect on the ability of the Court to operate at the level expected of a permanent international criminal court. These primary areas of concern have been identified by clusters as follows:

- Investigations at the ICC;
- The Confirmation Process;
- Disclosure at the ICC;
- Presentation and Admission of Evidence;
- Interlocutory Appeals;
- Orality;
- Victim's Participation before the ICC;
- Defence before the ICC and Issues of Effectiveness;
- Institution Building and Administration;
- Cooperation and Witness Protection.

The Court has already taken many positive steps to improve its performance in relation to some of these issues. The recent arrival of new heads of organs and new professionals in various sections of the Court have brought visible improvement and contributed a great deal to creating a healthier work environment. The present paper is intended to offer practical solutions and suggestions to build upon those encouraging signs.

A critical insight of this report is that various challenges are interconnected. Solutions will need to consider all aspects of a problem and all of the relevant actors. Solutions must be comprehensive in scope or they will not succeed.

This study does not purport to be an exhaustive accounting of all issues impacting the Court's efficient operation. Nor does it claim to have identified the *only* possible solutions to resolving some of the issues identified. In that sense, it should be regarded as an invitation to an open and frank discussion on the performance of the Court with a view to ensuring that the Court, its organs and all participants in the proceedings perform to the level of competence, effectiveness and professionalism that is expected of such an institution. Other initiatives intended to contribute to the same purpose should be welcomed and in fact promoted.

The possibility and need for a transformative period leading up to an improvement in the performance of the Court will require a different, and for a time more critical, approach to evaluating the Court.¹ The ICC is facing great internal and external challenges of the sort that other international criminal tribunals have had to confront over the course of their own existence. Ignoring or remaining silent about those difficulties contributes to the perpetuation of these problems and the weakening of the Court's standing and reputation. Shortcomings identified in the way the Court functions should therefore be publicised, not to embarrass the Court, but to start the process of dealing with those and ultimately to improve upon the Court's performance.

The present paper is an attempt to help that process by offering interested stakeholders the combined views and opinion of a group of experts in this field.

¹ See T. Meron, *The Making of International Criminal Justice - A View from the Bench: Selected Speeches* (OUP, 2011), p. 266: "Courts are public institutions and should not be immune from criticism. Indeed, there are occasions when such criticism is beneficial. Constructive criticism facilitates self-examination and self-improvement of the judiciary".

The Group of Experts

The group of experts responsible for the present paper are international practitioners and/or law professors with many years of experience in the field of international criminal law and a proven record of legal practice and scholarship. They come from different legal traditions and professional backgrounds. All of them have practised in international criminal tribunals and domestic jurisdictions. Importantly, they are independent from the Court and are therefore free to offer their best and most independent evaluation of the performance of the Court. The proposals and recommendations in this report are the result of internal discussions and debates within the group. Whilst individual preferences might on some issues have been crafted differently, members of the group agree on the overall substance of the analysis and conclusions.

Members of the group are:

- Dr Guénaél Mettraux
- Judge Shireen Avis Fisher
- Dermot Groome
- Professor Alex Whiting
- Gabrielle McIntyre
- Jérôme de Hemptinne
- Professor Göran Sluiter

They were ably assisted by:

- Bettina Spilker
- Kiat Wei Ng

Guiding Principles Underlying this Study

Problems of effectiveness presently facing the Court are real and concrete. Solutions were therefore sought in the common experience of the Experts and those whom they have consulted. The recommendations offered here are grounded in practice and seek to avoid, as much as possible, the necessity of revising or amending the Court's Statute and Rules so that these problems may be resolved by the Court itself and so as to avoid the political and diplomatic hurdles that statutory or regulatory changes would involve. They are, therefore, for the most part, recommendations that could be implemented promptly, and in some cases, immediately by the Court and by States. As is clear in the report, many of the recommendations will be effective only if they are implemented together with other recommendations. Therefore, the Court and States Parties should consider the extent to which various recommendations or sets thereof need to be implemented together to ensure their effectiveness. In addition, while some of the recommendations might imply limited structural or institutional changes, the implementation of many and perhaps most of those recommendations would require no new resources or regulatory amendments. Most importantly, the effective implementation of changes at the Court will require a willingness to look afresh at the problems facing the Court and the will to approach those problems with new solutions to make necessary and sometimes unpopular changes.

Should practical solutions not involving any regulatory amendment prove to be inadequate or insufficient to resolve the Court's problems, States Parties might have to

consider implementing necessary changes through statutory or regulatory amendments.

The “target audience”

The present paper is intended primarily for the Court itself and its senior management. Proposed solutions have been tailored in such a way that the head of organs and/or senior management could consider implementing them within the realm of their respective competence. From the point of view of the Court, its primary focus and all of the Court’s resources should now be turned as a matter of some urgency towards seeking to improve upon its effectiveness.

The paper is also intended for State Parties. Whilst claiming full support for the Court, States have sometimes been much more ambiguous about how effective and independent a Court they were willing to support and promote. To enable the Court to develop a vibrant culture of judicial competence and independence, States need to endow the Court with the necessary support and resources essential to the effective performance of its mandate. For instance, States should provide adequate financing of the Prosecutor’s investigations, a most critical aspect of the Court’s effective functioning. For the same reason, the selection of first-rate candidates for judicial appointment is an area where States could make a profound contribution to the well-being of the Court and where their actions would demonstrate a genuine commitment to the work of the Court.

Furthermore, whilst demanding improvement from the Court and putting in place means of evaluating the Court’s response to those demands, States should ensure that they do not thereby undermine the Court’s ability to focus its energy and resources on fulfilling its judicial functions. Nor should States’ legitimate demands for greater effectiveness undermine the Court’s ability to conduct its *judicial* affairs in a wholly independent manner. From the point of view of the Court and its organs, it should more readily welcome external evaluation of its performance where its *judicial* independence in dealing with cases before the Court is not at stake.

NGOs and other interested stakeholders too should do more to help the Court. The reluctance shown in some quarters over the past decade to publicly and critically evaluate the performance of the Court has contributed to the perpetuation of its problems. These important stakeholders could make a genuine contribution to the better functioning of the Court by promoting a candid and transparent discussion regarding the performance of the Court and ways to improve upon it.

Acknowledgment

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RECOMMENDATIONS

A. Preliminary/General Recommendations

1. States Parties should ensure that, in the future, they receive regular expert evaluation of the performance of the Court and that they do not depend solely on information provided by the Court to measure its performance.
2. States Parties should also put a mechanism in place to monitor the Court's efforts to implement changes that States consider necessary to improving upon the performance of the Court. The recommendations outlined below, insofar as they are endorsed by States Parties, could serve as a benchmark to evaluate the extent of the Court's efforts in that regard.
3. States Parties should further ensure that any evaluation of the performance of the Court is based on credible and reliable data. Undertaking or "policy" papers issued by the Court or its organs, whilst useful, are not sufficient. States should therefore demand that all the organs of the Court should collect information relevant to evaluating the quality and effectiveness of the work they perform and, where requested by the ASP provide that information.
4. States Parties should ensure that the Court continues to receive all necessary support and resources with a view to guarantee its ability to deliver quality justice in an effective and efficient manner.
5. States Parties should ensure that in their relation with the Court, they continue to treat the Court as an independent judicial body. In return, the Court and its organs will have to demonstrate a greater readiness to have others evaluate their performance in a transparent and critical way. It is essential to the success of the Court that States, the Court and all those interested the success of the Court should contribute to the creation of a truly judicial culture of competence and effectiveness.
6. States are invited to consider the present report and its recommendations as possible benchmark to evaluate the current and future performance of the Court.
7. A system of 'internal' auditing (discussed in this paper) is essential to ensuring that the Court, of its own accord and initiative, conducts a diligent review of its internal functioning. Should States Parties feel that they could assist that process and with a view also to ensuring their own fiscal accountability, they could consider conducting a review of those aspects of the Court that affect their financial involvement with the Court. To that end, States Parties should:
 - a) identify individuals with the necessary skills and competence to conduct an evaluation of relevant aspects of the performance of the Court;

- b) provide adequate resources to them to conduct a diligent and informed evaluation of any relevant aspect of the Court's performance insofar as relevant to the States parties;
- c) ensure that those charged with that responsibility have access to all relevant information necessary to perform their mandate;

and thus support the Court's own internal efforts to audit its performance and improve upon it.

B. Investigations at the ICC

a) To Chambers

- 8. It is not recommended *at the present time* that the Statute should be amended to impose judicial oversight over investigations undertaken by the Prosecutor (see below, at paragraph 36). Instead, using the existing regime, it is suggested to Pre-Trial Chambers should systematically to query the Prosecution at the time of the confirmation hearing and take steps to ensure that investigations are substantially completed at that point.
- 9. Another possible measure to ensure the prompt completion of investigations under the current regime would be for the Pre-Trial Chamber to require the Prosecution to provide periodic *ex parte* reports on the status of an investigation that is currently before the Chamber.

b) To the Office of the Prosecutor

- 10. The Prosecution should employ a 'vertical prosecution' model of processing cases. It should organise its work so that once an incoming complaint has been preliminarily screened it is assigned to a core team of qualified prosecutors, investigators and analysts who remain constant and make recommendations to the chief prosecutor at each stage of the case. The core team would remain in charge of the case all through the proceedings. During the life of the case the core team should be supplemented with additional personnel as needed.
- 11. It is recommended that the OTP continue to explore ways to make the investigation and prosecution teams more efficient and focused, in particular by exploring the costs/benefits of different management structures.
- 12. The Prosecution should streamline its management of investigations. As set forth in the Prosecution's new strategy document, the structure should ensure that senior managers have sufficient timely information to make strategic decisions about the conduct and course of investigations yet empower experienced investigative staff with the appropriate level of authority to exercise their discretion in tactical and operational matters without unnecessary bureaucracy. Cumbersome and unnecessary micro-management must be avoided.

13. The Prosecution should, as a matter of policy, largely conclude primary investigations prior to the confirmation hearing. The Prosecution should ordinarily limit its post-confirmation investigations to newly discovered evidence it could not have reasonably discovered earlier and investigations necessitated by developments in the case.
14. The Prosecution should model its investigative practices on generally accepted (“best”) standards and practices.
15. The Prosecution should limit its use of NGO reports. Such reports should not ordinarily be considered a substitute for the Prosecution conducting its own independent investigation.
16. The Prosecution should cease in principle to rely on evidential use of anonymous hearsay. Investigators must find the source of the hearsay and conduct their own independent interview and assessment of the witness.
17. The Prosecution should not delegate its investigative responsibilities. Using intermediaries to make initial contact with witnesses is an acceptable way of working in a hostile environment. However, intermediaries should in principle only be used to convey a request to speak with a potential witness and not in the selection of witnesses themselves.
18. The Prosecution should take credible steps to check the reliability and credibility of its witnesses.
19. Investigations should place a greater emphasis on the acts and conducts of the accused, i.e., on linkage rather than crime base evidence. Investigations must be comprehensive and effective in obtaining all reasonably available evidence of an accused’s guilt/innocence prior to initiating a prosecution.
20. Every effort should be made to build a case with sufficient depth that the prosecution can succeed despite the loss of a witness or other evidence.
21. The Prosecution should conduct more proactive investigations and rely less on aggregating the work of NGOs and journalist to meet its burden. The Prosecution must use this material to develop its own investigation plans which are designed to identify, locate and preserve the evidence itself, whether that evidence is in the form of testimony, documents or physical objects.
22. The Prosecution should establish field offices in each country where it is conducting investigations to facilitate and support the latter, whenever the security risks to personnel and costs can be appropriately managed.
23. The Prosecution should develop and publish easily-usable model communication and protocol to facilitate the filing of complaints, the preservation of information as well as a review of them, alongside detailed instructions about how the communication form should be completed.

24. The Prosecution should develop a classification system for investigative paperwork to facilitate review, assist the investigation and guarantee prompt and effective disclosure.
25. The Prosecution should properly classify, record and analyse its evidence and disclosure exculpatory material. In particular, the OTP must continue to be extremely careful when entering into confidentiality agreements under Article 54(3)(e) ICC Statute. The Prosecutor should negotiate Article 54(3)(d) and (e) agreements in a way that protects the interests of the provider or state while ensuring that the Prosecutor can meet her other obligations under the Statute.
26. The Prosecution should have a core team of highly experienced staff assigned to each case for the duration of the case (see above). The Prosecutor and its staff should have significant experience supervising national or international criminal investigations and in-depth knowledge of relevant legal standards. Analysts should have significant experience in working on investigations involving complex criminal organisations.
27. The Prosecution can build capacity and improve investigation capacity and competence by greater incorporation of experts from Justice Rapid Response. The Prosecution should increase its reliance on this resource whenever necessary to supplement its own staff in mounting a quick response to a new situation or case. The Prosecution should work with JRR to customise its training programs to meet the needs of the Prosecution.
28. The Prosecutor should also have the possibility of incorporating seconded staff into her work to bolster its investigative and prosecutorial capacities. Human resources should be consulted on the appropriate mechanism to use to incorporate seconded staff into the work of the OTP.
29. The Prosecution should improve the quality of its internal review process and supplement its own internal review process with an independent confidential review of its investigations and cases by outside professionals. This internal review process should make a determination at the time of the confirmation hearing whether or not there is a reasonable possibility that the Prosecution will be able to meet its burden at trial with the evidence that is currently available.
30. The Prosecution should conduct its investigations in a manner which facilitates the sharing of evidence with national courts when appropriate to do so.

c) To States Parties & the ASP

31. The ASP should ensure that the Prosecution is adequately funded to conduct quality investigations.
32. States parties should recognise that referrals to the court by the UN Security Council have very significant resource implications for the ICC. The ASP should enforce the provision under Article 115(b) ICC Statute in cases of UNSC referrals and seek to gain the support from non-States Parties for funding for UNSC referrals.

33. States parties should ensure that the Prosecution has the ability to quickly acquire new or additional staff that are needed urgently without having to compromise the work on existing cases by drafting in core staff to meet short-term exigencies. States Parties who are members of the JRR should consider creating their own roster of JRR trained nationals who could be seconded to the ICC when needed either through the JRR or directly to the Prosecution.
34. States Parties must explore ways to amend hiring practices to allow greater flexibility in responding to urgent and time-sensitive needs of the Prosecution.
35. The ASP should support the work of the JRR and develop a more formal relationship with it. To the extent that doing so may contravene the requirements of ASP/4/Res. 4, Annex II, section 2 ('Gratis Personnel Rule'), States parties may need to amend the gratis personnel rule to allow the Prosecution to accept seconded and temporary staff on a short term basis to meet the exigencies of a new investigation.
36. *At this time*, the ASP need not consider the possibility of amendments that would require judicial oversight of an investigation. There are clear indications that the current Prosecutor has taken significant steps to improve the conduct and quality of investigations. Before any significant changes are made to the existing investigative framework this Prosecutor must be given a fair opportunity to demonstrate her capacity to improve the quality of investigations.

d) To the UN Security Council

37. UNSC referrals should be adequately funded by the UNSC and after seeking the views from the Prosecution with respect to the anticipated costs of conducting the particular mandate from the UNSC.

C. The Confirmation Process

a) To Chambers

38. Pre-Trial Chambers should more actively seek to control and regulate the process of confirmation and not hesitate to demand more of the parties with a view to achieving that goal. The PTC should also consider using its inherent powers to shape the process so as to ensure prompt and effective resolution of the process of confirmation. It could do so by:
 - a) having heard parties on this matter, deciding which of the proposed witnesses should be called and restricting the list to those who are core to the case;
 - b) making greater use of the possibility for the Chamber to call its own evidence during the confirmation process; and/or

- c) more actively seeking to ‘police’ the scope of the confirmation process by
 - (i) limiting the scope of the hearing to issues not already subject to written submissions; (ii) putting specific questions to the parties for that hearing that they are required to focus upon and answer; and (iii) strictly limiting the possibility of subsequent and supplementary written pleadings after the hearing.
39. To promote greater effectiveness and expeditiousness of proceedings, the Pre-Trial Chamber should ensure that, in all cases, detailed and timely notice of the charges (i.e., each and every material fact making up the charges) has been duly and clearly provided. Pre-Trial Chambers should endeavour (with the assistance of the Prosecution and within the scope of the facts outlined in the DCC) to make it absolutely clear what material facts have been confirmed and what they consist of exactly. Pre-Trial Chambers should thus focus on making clear and focused findings of material facts relevant to the case (and thus not confirming imprecise allegations). Pre-Trial Chamber should consider in that context either:
- a) drafting and attaching to their decisions the equivalent of a charging document or ‘indictment’, with a short, precise and detailed description of the confirmed material factual allegations and connected legal allegations;
 - b) providing an edited/amended version of the text of the DCC with relevant parts struck out or amended as the case may be;
 - c) in order to reduce the potential prejudicial effect of re-characterisation of charges effected pursuant to Regulation 55 and so as to enable the parties and the Trial Chamber to focus their respective efforts, confirming each/all pleaded crimes and modes of liability contained in the DCC if supported by the evidence.
40. Pre-Trial Chambers should do more to streamline the trial process. *Obiter dicta* and ‘scholarly’ discussions in article 61(7) decisions should in principle be avoided in confirmation decisions so that charges are narrowly and clearly set out and the scope of what material facts have been confirmed is clearly identifiable.
41. Another way to expedite the confirmation process would be for the Court to take the view – as may be implied as a possibility from the terms of the Statute – that the right to challenge the confirmation of charges may be waived by a defendant.
42. The pre-trial phase should also be used to a greater extent by the Pre-Trial Chamber as a way to make the case ready for trial through genuine pre-trial management efforts, thus saving time if and when the case proceeds to trial.
43. To avoid undue delays and litigations caused by late disclosure, Pre-Trial Chambers should ensure that disclosure process is completed as promptly and as effectively as possible during the pre-trial phase. The practice of issuing schedules of disclosure should be systematically applied. Deadlines should be strictly enforced.

44. Trial Chambers could also do more to make the pre-trial/confirmation process more relevant in streamlining the trial process. Trial Chamber Judges should consult and build upon the case record transferred from the Pre-Trial Chamber.
45. When a Trial Chamber identifies an issue relevant to Regulation 55 at an early enough stage of proceedings, instead of making use of that regulation, the Chamber could consider referring issues pertaining to the scope of confirmation of charges back to the Pre-Trial Chamber with a request for the Pre-Trial Chamber to specify in more detail and/or more specifically the exact nature and scope of its confirmation in relation to certain factual allegations.
46. Trial Chambers should carefully consider the need and effectiveness (and not just the possibility) of revising issues rather than seeking to build upon the Pre-Trial Chamber decisions. A more coherent hand-over and transition between the two phases, which should be considered as a whole, should be promoted and more actively pursued by Trial Chambers with a view to promoting greater effectiveness of the pre-trial/trial process.
47. Trial Chambers should ensure that the trial starts as soon as practical after confirmation, having ensured that the accused has had adequate time to prepare for trial.

b) To Chambers and the Parties to the Proceedings

48. Parties and the Judges should consider working out a format for In-Depth Analysis Charts (see paragraph 52 below) that is useful to all involved.

c) To the Office of the Prosecutor

49. The Prosecution should put in place a stricter and more critical reviewing process of the case it considers putting forth for confirmation. In that context:
 - a) It should ensure that it conducts its internal evaluation by strictly adhering to the standard that the PTC (and the Appeals Chamber) has determined was relevant to confirmation (and/or a higher standard);
 - b) It should also consider inviting outside experts to provide an independent review process of their cases prior to submitting them for confirmation;
 - c) From an early point in its investigation and preparation, it should integrate the need for ‘in-depth-analysis chart’ and should consider using software and mapping tools that better allow it to identify evidentiary weaknesses and gaps;
 - d) In consultation with Judges and the Defence, the Prosecution should seek to develop a uniform, efficient, and effective tool to present the evidence and how it relates to the charges and elements of crimes at the time of confirmation.

50. The Prosecution should not seek to proceed with the confirmation process until the case is effectively ready to proceed to trial if confirmed.
51. The Prosecution should draft a clear, tight and precise DCC, describing the factual allegations in detail together with the relevant legal requirements and reference to relevant evidential support for each material allegation so as to enable the Pre-Trial Chamber to identify precisely what factual allegations are proposed for confirmation. The Regulations of the Court could be amended to allow the Prosecution to submit a document longer than 20 pages (the limit currently applicable).
52. The Prosecution should produce clear evidential charts (in-depth-analysis charts) outlining the evidence that, it alleges, goes to proving each material allegation making up its case. These documents should be submitted as early as practical before the commencement of the conformation of charges hearing.
53. The Prosecutor must respect (and where necessary Chambers should enforce) her obligation under article 54(1)(a) of the Statute and investigate incriminating and exonerating circumstances *equally* with a view to establishing the *truth* - and not to making a case.
54. The investigation by the Prosecutor needs to be comprehensive and conducted with a view to proceeding to trial. There should not be 'phased'/short-term investigations which satisfy the needs for the current stage of the proceedings.
55. The Prosecution should prioritise its disclosure obligations in relation to exculpatory material pursuant to Article 67(2) and should ensure that collections are reviewed with a view to identifying such material and to disclosing it to the Defence as soon as it has been identified as such and long enough in advance of the confirmation hearing to enable the Defence to effectively prepare.

d) To States Parties & the ASP

56. Should the measures and recommendations listed above not succeed in resolving effectiveness-related issues with the confirmation process, States should duly consider revisiting and revising the Statute to create a more effective confirmation/pre-trial process. Various alternative models could be considered:
 - a) Abolition of the current confirmation process, replacing it with an *ex parte* confirmation process similar to the one applied at the *ad hoc* tribunals.
 - b) A court-driven, rather than parties-driven, pre-trial and confirmation process and/or a system giving the PTC a greater role in the pre-trial and confirmation process.
57. Should Chambers and States come to be satisfied that the quality of Prosecution investigation has significantly improved over time, they could consider – either through judicial reconsideration of past rulings or through an amendment of the Rules – adjusting the approach of the Pre-Trial Chamber to its evaluation of the evidence.

D. Disclosure at the ICC

a) To Chambers

58. In order to ensure a more consistent or uniform approach to disclosure management, the Chambers should develop a standard Practice Direction for disclosure both during the pre-confirmation phase and prior to trial that would allow the parties to organise their cases appropriately.
59. In order to streamline the redaction process, Chambers should adopt a uniform Redaction Protocol to be applied to all cases for both pre-trial and trial. Even if a uniform Redaction Protocol is not adopted at the pre-confirmation stage, consideration should be given to permitting disclosure of Article 67(2) ICC Statute and Rule 77 ICC RPE material in summary form for the purposes of the confirmation hearing.
60. The Chambers should ensure that full disclosure takes place sufficiently in advance of the scheduled trial date to avoid delays necessitated by Defence investigations.
61. Strict deadlines should be imposed on the disclosure of evidence following the confirmation hearing, so as to provide adequate time for the Defence to prepare for trial.
62. Chambers, together with the Prosecution, need to devise a system whereby disclosure becomes an enforceable priority to ensure fair and expeditious proceedings.
63. Chambers should continue to explore ways it can focus the burden of translation on key documents.

b) To the Office of the Prosecutor

64. The Prosecutor should use Article 54(3)(e) ICC Statute sparingly and only in exceptional circumstances. The Prosecution should actively press providers of information pursuant to Article 54(3)(e) to consent to full disclosure to the Chambers at the time of providing the information. Where the information may be particularly relevant or exculpatory, strict efforts should be made to obtain the provider's consent to disclosure to the Defence.
65. The Prosecution should take a presumptive approach to disclosure and make available to the Defence in electronic form all non-confidential materials (i.e. all materials for which there are no grounds to withhold or delay disclosure) obtained pursuant to an investigation.
66. The Prosecutor should place all evidence collected pursuant to an investigation that does not require protective measures in a searchable electronic database. Electronically disclosed materials must be specifically indexed with Article 67(2) ICC Statute and Rule 77 ICC RPE materials identified and searchable by key words.

67. The Prosecution should conduct a comprehensive review of its own practices with regard to evidence collection, organisation or indexing, and ongoing review for purposes of disclosure, with a view to improving existing practices to meet its disclosure obligations in a timely, efficient, and accurate manner. Consultations with outside experts, including prosecutors from other international criminal courts and from national jurisdictions, may also help to identify best practices in this regard.
68. With respect to Defence investigations, the Prosecution should be required to assist the Defence whenever the Defence satisfies the Chamber that it cannot access evidence absent the assistance of the Prosecutor.
69. The Prosecutor should ensure that it exercises due diligence in seeking to have relevant key materials translated into one of the official working languages of the Court, and where the Prosecutor has credible information that the accused does not sufficiently understand English or French it should proactively begin translation of relevant key materials into the native language of the accused.
70. The Prosecutor should provide unofficial translations while it is obtaining official translations of the documents.
71. The Chambers should develop a regime of credible sanctions to be applicable to disclosure violations regardless of whether or not the belatedly disclosed evidence is admitted at trial.
72. The imposition of sanctions is within the inherent discretion of a Chamber. The Chamber should make it clear that it would and will impose sanctions where disclosure obligations are not met and the circumstances otherwise warrant, in order to increase the degree of compliance with disclosure obligations.

E. Presentation and Admission of Evidence

a) To Chambers

73. Whilst taking into account the Court's specificities, the ICC should more actively seek to learn from and rely upon the experience of other international tribunals in dealing with large-scale evidential records. In all cases, the Court should ensure that solutions adopted are consistent with relevant human rights standards.
74. Pre-Trial and Trial Chambers should ensure specificity and detailed particularisation of charges, enabling the Trial Chamber to rule promptly and effectively on the admissibility of evidence and to reject evidence that does not evidently go to prove a fact material or directly relevant to the charges. PTC should clearly outline what allegations have been confirmed as opposed to those that have not. Detailed notice of the nature and scope of the former must be provided.

75. The Pre-Trial Chamber should ensure that details of the case against the accused (i.e., all ‘material facts’ that make up the case which the accused must confront) should come in a form suitable for that purpose. In doing so, several possibilities are open:
- a) The PTC could itself clearly and explicitly summarise the charges, insofar as they have been confirmed by the PTC (if necessary, as an attachment to its confirmation decision);
 - b) The PTC could edit the DCC based on its confirmation (striking, adding or amending accordingly) and attach it to its confirmation decision in that form;
 - c) In the alternative, the PTC could order the Prosecution to produce an amended document containing the charges with clear instructions to stick to the scope of confirmed charges and provide a “detailed” notification of each and all material facts confirmed by the PTC.
76. Before the confirmation of charges, the Pre-Trial Chamber should verify the Prosecution’s compliance with its obligations under Article 54(1) ICC Statute. In particular, the PTC should take steps to obtain information regarding the following:
- a) The various lines of investigations pursued in compliance with the Prosecution’s obligation to investigate Article 54(1)(a)’s ‘exonerating circumstances’.
 - b) If and when the PTC is satisfied that relevant lines of investigation of ‘exonerating circumstances’ have been diligently and sufficiently pursued, the PTC should be responsible for verifying the Prosecution’s compliance with its responsibilities under Article 54(1)(a).
 - c) To verify whether the Prosecution has complied with its obligation under Article 54(1)(a) in relation to proposed witnesses and exhibits, the PTC should, where the circumstances so warrant, order the Prosecution to disclose what steps were taken to verify the reliability/credibility of a (proposed) witness or exhibit. If the efforts are regarded as inadequate, the PTC should have the discretion to either refuse to admit that evidence or order further investigations regarding any issue which the Chamber believes should have been subject to such an investigation.
77. Subject to necessary protective measures, full disclosure of all information relevant to investigating and testing the Prosecution evidence should be effected to the Defence at the earliest opportunity.
78. In order that they keep control over the evidential scope of the case, Trial Chamber Judges need to have at least a general understanding of the evidence that will be presented to them before the commencement of trial. Several possible procedural instruments are capable of helping Trial Chambers achieving that desirable goal:

- a) A (quasi-) ‘dossier’ approach: Trial Chambers could demand of the Prosecution that it should provide prior to trial copies of witness statements, expert reports and exhibits that it proposes to use at trial. Chambers could also consider inviting the Defence to share its views on the nature of the evidence provided by the Prosecution at this early stage;
 - b) In-depth analytical chart: It should include reference to relevant documentary evidence as well as witness evidence;
 - c) Footnoted DCC;
 - d) More proactive management of the evidential process from the Bench: Judges should more actively query with the parties the relevance of certain lines of questioning and what facts they seek to establish at an early stage in the case;
 - e) More proactive management of the procedure on admission of evidence: Judges should be encouraged to take a stricter approach and to require the parties to demonstrate a sufficient linkage between the witness and documents that a party proposes to introduce through a witness.
79. Trial Chambers should manage the process of evidence production at trial more stringently to ensure expeditious proceedings and should embrace a more proactive judicial attitude towards the evidential process. This could be achieved by adopting the following principles:
- a) Focusing the evidential process to central issues in dispute: Trial Chambers should actively urge the parties to focus their cases on core – ‘material’ – issues in the case and disallow evidence or lines of questioning on collateral issues, by:
 - i. requiring more specificity in pleadings on the part of the Prosecution (so that the Trial Chamber can evaluate the relevance of the proposed evidence from both sides);
 - ii. requiring the Prosecution to lead evidence relevant to the case as delineated in the charging documents, rather than to let the case grow and evolve as the proceedings progress;
 - iii. requiring the Defence to more clearly provide the outline of its case at the commencement of proceedings;
 - iv. requiring the Prosecution in advance of trial to link each proposed piece of evidence to the fact(s) which it is intended to prove.
 - b) Preventing the eliciting of irrelevant, duplicative or only remotely relevant evidence: Trial Chambers should actively question the parties in the early stages of the proceedings about particular lines of questioning and facts which they seek to prove to be able to control the direction and scope of

- the evidential process and rule out a line of questioning if not relevant to central issues in the case;
- c) Make greater use of Chamber's evidence: It should do so after having given the parties an opportunity to be heard and, in particular, where its calling evidence could result in an overall saving of time.
80. Judges would be in a position to significantly reduce the duration of proceedings by, *inter alia*:
- a) ruling evidence inadmissible, thereby eliminating evidential debris and reducing the overall size and duration of cases;
 - b) ruling out evidence as duplicative, where it has been able to satisfy itself that evidence merely repeats evidence already on record (without providing credible corroboration);
 - c) shortening excessively long testimonies;
 - d) restricting the number of witnesses that are not crucial to the establishment of the guilt or innocence of the accused.
 - e) refusing to hear witnesses that are not likely to cast any light on the allegations made by the Prosecution.
81. To reduce the amount of evidential debris from the record without prejudicing the ability of either party to put their case forward, and thereby contributing to shortening the length of proceedings, the following measures are recommended:
- a) Clear, uniform and sufficiently demanding conditions of admissibility of evidence should be set out to enable Trial Chambers to exclude evidence of poor quality, questionable or unverifiable origin, or evidence that is unjustifiably duplicative in character, etc. More important than the standard itself will be the readiness and actual *enforcement* of those standards by Trial Chambers in a consistent and effective manner so as to create a genuine disincentive for parties to attempt to produce large quantities of evidence of poor quality or questionable origin and to focus, instead, on the core of their respective cases.
 - b) A strict burden should be placed on the tendering party to establish that the conditions of admissibility of its proposed evidence are all met in relation to each piece of evidence.
 - c) There should be stricter policing of those conditions by the Court, which should, *inter alia*, require:
 - i) parties to justify the need for duplicative evidence and exclude such evidence when no sufficient reasons exist for leading evidence to the same effect multiple times.

- ii) the Chamber to strictly control the lines of questioning by the parties to ensure that:
 - (a) the Prosecution stays within the framework of the case as confirmed; and
 - (b) the Defence does not venture into lines of questioning that are not directly relevant to the case.
82. To reduce the amount of (unnecessary or not sufficiently credible) expert evidence (and in order to reduce the cost associated therewith – in time and expenses), Trial Chambers should consider:
- a) taking a much narrower view of (i) what may be said to constitute ‘expertise’ for the purpose of the evidential process and (ii) what issues could/should be subject to expert evidence. In particular, Trial Chambers should not permit parties to call, under the guise of ‘expert’ evidence, evidence that in fact encroaches on its responsibility as fact-finder.
 - b) seeking submissions from the parties as regards fields of expertise relevant to the case and what questions should be asked of the expert and what material should be submitted to him/her.
 - c) once the Chamber has ruled that a particular area/issue warrants the introduction of expert evidence, the Chamber should:
 - i) select an expert (having considered the parties’ submissions regarding the choice of an expert);
 - ii) provide a set of ‘instructions’ taking into account, where relevant, the submissions of the parties; and
 - iii) provide the selected expert with all necessary material, taking into account, where relevant, the material identified by the parties for that purpose.
 - d) The Chamber should not allow parties in principle to call other experts in relation to the issue subject to the report of the Chamber’s expert. Nor, unless exceptional circumstances are shown, should it allow other kinds of expert evidence to be led at trial unless it again follows that Chamber-based approach.
83. In this context, Trial Chambers should consider making greater use of the procedural possibilities of Regulation 44 of the Regulations of the Court with a view to expediting and reducing the scope of the proceedings.
84. In the determination of whether to make use of Regulation 55, Trial Chambers should consider whether the same evidence as has already been led in relation to the *original* charge or (partly) different evidence would be relevant to the new allegation. In the latter case, Trial Chambers should in principle refrain from re-

characterising the charges so as to avoid a second evidential track from developing and prolonging the proceedings.

85. The practice of introducing a ‘no-case-to-answer’ stage should be adopted systematically in all cases.

b) To the Office of the Prosecutor

86. The first and most important way in which the quality of evidence could be improved (and to focus the evidential process on that sort of evidence) is to improve the quality of investigations (see above).

87. Like the Defence, the OTP should exercise strict and diligent professional judgement in setting aside evidence of poor quality or limited corroborative value.

c) To the Defence

88. The Defence should also be encouraged to focus its own evidential effort on issues that are truly relevant to the case. This could be done, inter alia, by –

- a) requiring the Defence, prior to the commencement of trial, to state, at least in general terms, the nature of its case and which of the material facts making up the charges it is taking issue with.
- b) disallowing evidence and lines of questioning that are not directly relevant to the case (for example, a political defence) or not a valid legal defence to the charges (for example, *tu quoque*).

d) To States Parties & the ASP

89. States Parties should carefully consider the content and tenor of Regulation 55 with a view to determining (i) whether the provision finds a valid and sufficient legal basis in the Statute and the Rules, (ii) whether, as presently drafted and interpreted, it is consistent with the effective protection of defendants’ rights. If States Parties are not satisfied that this is the case, they should consider amending the Rules to prohibit, limit or qualify the use that Trial Chambers can make of that provision.

90. Should the view be taken that Trial Chambers do not have the inherent power to restrict the number of witnesses that are not crucial to the establishment of the guilt or innocence of the accused (see paragraph 80 d) above), States Parties should consider amending the Court’s Rules to add to that effect.

91. If deemed necessary, States Parties should consider an amendment of the Rules in order to introduce a ‘no-case-to-answer’ stage.

F. Interlocutory Appeals

a) To the Presidency

92. A separate Trial Chamber responsible for granting leave to appeal should be created. It could be composed of the Presiding Judges of the Trial Chambers, which would have the benefit of ensuring consistency of approach between Trial Chambers. It would also ensure that one member of the Trial Chamber that rendered the impugned decision would participate so as to ensure that full consideration would be given to both the effect of a possible appeal on trial proceedings and the effect of resolving the matter thereupon.

b) To Chambers

93. It is suggested that the Appeals Chamber of the ICC should make its working methods public so that their adequacy and efficiency may be evaluated and so that improvement can occur in that context.

94. Where appropriate, instead of extensive written litigation, and once seized of an application for leave to appeal, the Appeals Chamber (or the Pre-Trial or Trial Chamber, should they retain the competence to decide leave to appeal) should consider ordering an oral hearing at short notice to hear the parties' arguments. This could also be done in place of or in addition to written filings by the parties so as to: (a) enable judges to ask any residual questions they might have; and (b) expedite the process of discussion and deliberations among them.

95. Judges should set themselves a strict timeframe to decide the issue of leave to appeal and should avoid any unwarranted delay in doing so (whether as a matter of practice or by binding themselves in the Regulations):

- a) The time used by Pre-Trial or Trial Chambers to issue their order on an application for leave should not exceed 15 days from the date of the application for leave to appeal;
- b) Decisions on leave to appeal should be simplified and should address the arguments of the parties only to the extent strictly necessary;
- c) The Pre-Trial or Trial Chamber seized of an application for leave to appeal should duly consider issuing a scheduling order reducing the time given to the parties (and/or participating victims) to respond or reply so as to expedite the timeframe relevant to full briefing of the matter.

96. With a view to expediting the decision-making process, Judges should consider imposing upon themselves strict deadlines to resolve interlocutory appeals. They could decide to do so either informally or by amending their regulations. On that basis, the Appeals Chamber should: (a) as a matter of good practice; and/or (b) by amending its regulations, set a limit of 45 days to render an interlocutory decision. The Appeals Chamber should maintain some discretion in relation to particularly complex appeals, which might warrant extensive research and careful drafting.

97. The Appeals Chamber should strive to issue narrower, more focused decisions, which would also contribute to creating a more modest and incremental approach to the Court's jurisprudence. In particular, decisions should be strictly limited in principle to issues that have been fully litigated by the parties and which are necessary for the resolution of the appeal.
98. The Appeals Chamber should resolve all contentious matters that are in issue on appeal, in particular where such matters are likely to arise in other cases and/or might otherwise impact negatively on the duration of proceedings.
99. Where interlocutory appeals raise relatively straightforward issues or where an interlocutory issue effectively prevents the continuation of trial proceedings, the Appeals Chamber should consider rendering its decision orally. Where guidance regarding the basis of its decision needs to be further expanded, the Appeals Chamber could consider rendering a written decision at a later stage.
100. Restrictions on victims' participation in interlocutory appeals proceedings should be duly considered to expedite these proceedings and to reduce the amount of written filings. The Appeals Chamber could, however, exercise its discretion in exceptional circumstances to allow victims to make limited submissions if the issue on appeal could have a clear and important effect on their position in the proceedings.

c) To States Parties & the ASP

101. By amending the Rules of Procedure and Evidence, States Parties could adopt a rule imposing upon the Judges strict deadlines to resolve interlocutory appeals.
102. Adequate staffing of the Appeals Chamber should be guaranteed. Considering the number of appeals reaching the Appeals Chamber and the complexity of some of them, States Parties should carefully consider whether more resources (in the form of additional staff) should be put at the disposal of the Appeals Chamber.

G. Orality

a) To the Presidency, Chambers and the Registry

103. It is recommended that the President, with input from the Chambers, develop targets for desirable timeframes (in days) between the date of the submission of a party's first filing and the date of the issuance of the decision.
104. The Registrar should assemble monthly data by judge, shared among all the judges, as to actual time taken for each decision rendered by that judge (either individually or as part of a panel) relevant to the targets, in order for realistic adjustments to be made to the targets, and so as to inform the Judges as to areas where time might be saved, and encourage discussion within the Chambers as to best practices in that regard.

b) To Chambers

105. Chambers should seek to rely less on written proceedings and more on orality to try to expedite proceedings. Judges should consider actively seeking to promote a culture of orality:

- a) Judges could expressly invite the parties during hearings (and, if necessary, schedule hearings) to address the court orally rather than in writing. For routine matters or matters that are not factually or legally complex, Chambers should expect parties to address the Court orally (motions, responses and replies) either in the courtroom, or through recorded conference calls or on-the-record meetings held with the Chamber's legal officers.
- b) During the pre-trial phase, in particular, the Pre-Trial Chamber might benefit from regularly scheduled informal working meetings for the parties to air issues and debate them in front of the Court. Such meetings need not occur in court, but may instead be organised in a more informal setting with less resources.
- c) To expedite and simplify the decision-making process, judges should consider and be encouraged to render oral decisions on the record instead of (often lengthy) written decisions, in particular for routine or secondary 'house-keeping' matters, reserving written decisions for disputes that involve matters of greater legal significance.

c) To Chambers and the Parties to the Proceedings

106. Judges should create incentives for greater collegiality among parties and prompt them to seek to cooperate between themselves with a view to eliminating or narrowing issues in dispute, in particular:

- a) Working meetings ordered by the Court where parties would try to resolve or reduce the scope of outstanding issues between the parties (if necessary with the assistance of the Court) could become a regular feature in all cases to try to narrow down the scope of what remains in dispute between parties and what must be formally decided by Chambers.
- b) An expectation (verifiable by Judges) that the parties have attempted to resolve outstanding issues *before* bringing them to the attention of the Court could be encouraged by the Chamber and the Registry.

d) To Chambers and the Registry

107. In order to encourage and facilitate a culture of orality, it is also recommended that the Registry and Chambers work together to develop tools to assist judges to distinguish and prioritise filings, save time on routine matters and relieve them of duties that could be performed by legal officers under their supervision. For example:

- a) The creation of a form cover page by which the litigant is required to disclose in brief the reason for the filing, certifying that s/he has discussed the substance of the filing with opposing counsel and stating whether or not opposing counsel wishes to contest;
- b) The creation of a form by which the judge or panel expresses whether, based on the cover page, the matter should be heard without further filings, heard after further filings (with deadlines and limitations on length), diverted for further settlement discussions during the next status/pre-trial conference, including the date thereof, or decided on the papers (with deadlines and limitations on length);
- c) For routine and simple procedural matter (for example, setting deadlines or fixing hearing dates), Chambers should consider issuing decisions by and in the form of an email.

e) To the Registry and the Office of the Prosecutor

108. In the selection and designation of counsel for all parties, the competent organs of the Court (the Registry for Defence counsel and representatives for victims, the Office of the Prosecutor for Prosecution counsel) should ensure that counsel selected to play a part in the proceedings are professionally and institutionally able as a matter of principle to litigate matters orally and effectively in court.
109. From the point of view of counsel appearing for the Prosecution, it should be expected that, where an issue comes up in court that pertains to a case-specific issue (as opposed to a matter of policy of the Office), counsel should in principle be capable of taking a position without the need to report and obtain instructions from his/her hierarchy.

f) To the Registry

110. With a view to ensuring transparency of decision-making and to safeguard the jurisprudential heritage of the Court, oral decisions should be duly and properly recorded and made accessible in principle to all.

g) To States Parties & the ASP

111. An essential criterion for judges to be assigned to Pre-Trial and Trial Chambers should be significant experience in managing complex criminal cases. In their selection of candidates and election of Judges at the ICC, States Parties are therefore invited to consider this factor as central to their decision.
112. States Parties are also invited to consider abolishing the system of List A and B (Article 36(3) and (5) of the Statute) and to amend the Statute to focus, instead, on candidates' expertise and competences – as judges, practitioners or in other capacities – in handling and managing complex criminal litigation.

H. Victim's Participation before the ICC

a) To Chambers

113. Chambers should set and enforce a clearer separation between the role and competence of victims and the Prosecutor and limit victims' involvement to issues that are not within the mandate of the Prosecution. ICC Chambers should ensure that victims' participation in the proceedings is at all times consistent with the following principles:

- a) Victims are not permitted to act as second prosecutors;
- b) Victims are not permitted to question witnesses and/or elicit evidence pertaining to the (alleged) responsibility of the accused or to his sentence;
- c) Victims' questioning of witnesses should never duplicate the Prosecution's questioning and may be objected to on that basis; and
- d) Victims can only make submissions on an issue of law or fact and/or ask questions of a witness with leave of the Trial Chamber having established to the Court's satisfaction that a "personal interest" of victims is at stake, which the Prosecution is not able or mandated to cover.

114. It is recommended that the Court should adopt these principles (either as part of its regular practice and/or through an amendment of its Regulations). They should also regulate the scope of permissible victims' submissions, particularly regarding opening and/or closing statements.

115. The Court should more clearly set out the areas in relation to which victims may legitimately elicit and call evidence and Chambers should take a more active role in exploring the issues of relevance to victims regardless of victims' requests to that effect. Victims' participation should start where the Prosecution's own responsibilities end and be limited in substance to those areas where they can legitimately claim to have a personal interest, namely:

- a) establishing the harm or injury done to them; and
- b) establishing what relief would be appropriate to remedy the harm done to them.

116. Particularly important to save time and resources is the Court's readiness and ability to police and regulate: (i) filings by victims, and (ii) the scope of questioning by their representatives:

- a) Victims should only be permitted to make written (and/or oral) submissions in relation to issues falling within either or both issues (paragraph 115 a) – b) above).

- b) Pursuant to Rule 91(3), questions may only be asked by victims' representatives if they are expressly authorised to do so by the Chamber. Before leave is granted to ask questions, the Chamber should satisfy itself that the requesting victim has demonstrated with a sufficient degree of likelihood that the witness is capable of giving evidence of either or both both issues above (paragraph 115 a) – b)). Where leave is granted, the Chamber could require victims' representatives to submit their lists of questions for prior approval by the Chamber.
117. It is recommended that the Court should adopt these principles either as part of its regular practice and/or as a result of an amendment of its Regulations.
118. The Court should adopt a realistic and economical view of the manner and scope of victims' participation. In particular, whenever a victim applies to examine a witness in accordance with Rule 91(3)(a):
- a) The Court should insist that victims demonstrate that the proposed areas of questioning:
 - (i) are within the scope of their "personal interests" (paragraph 115 a) – b));
 - (ii) cannot reasonably be thought to fall within the scope of questioning by the Prosecution. If necessary, the Chamber could seek information from the Prosecution as to whether or not it intends to ask questions of the witness in relation to these areas.
 - b) Victims' representatives should explain why, in every case, written submissions would be inadequate to outline their views and concerns;
 - c) The Chamber should also consider, in every case, whether it could and should ask questions of witnesses that are thought to be of relevance to victims so as to obviate the need for their presence if the issue in question is a narrow and circumscribed one.
 - d) Where leave to ask questions has been granted, the Court could also require victims' representatives to submit general outlines of questioning to the Chamber in advance of their examination to enable the Chamber to ensure compliance with the tenor of its order.

Participation by victims' representatives in the trial should only be permitted in particular procedural or evidential litigation by leave of the Chamber, if and where the conditions outlined herein have been met.

119. The regime could be relaxed at the reparation phase of the proceedings where the "personal interests" of victims (as distinct from those of the Prosecution) are clearer and might justify broader participatory rights for victims.
120. The ability of victims to call witnesses should likewise be scrutinised by the Court in order to avoid any fraudulent applications. Thus, when seeking leave to

call victim witnesses, the LRVs (or proposed joint “Office for Victims”) should be expected to have investigated their proposed witnesses’ account and, if requested, be ready to provide information regarding their diligent efforts in that regard.

121. Subject to the Chamber’s prior and reasoned approval, victims should only be permitted to call evidence that pertains to issues a) – b) identified at paragraph 115, and could only instruct relevant experts for either or both of those purposes. In the alternative or in addition to this, the Chamber should consider calling its own witnesses (including expert witnesses) in relation to issues of relevance to establishing the harm done to victims and ways to address it.
122. The need for victims’ participation at trial (and associated costs) could be further obviated should the Trial Chamber have in its possession a reliable record of the “views and concerns” of victims *to start with*. Before the commencement of trial, the Office for Victims (see paragraph 128) should be ordered to prepare (if necessary under the supervision of a judicial officer from the Chamber) a report summarising the views and concerns of victims as appear in their individual applications. In addition, where necessary and justified, the Trial Chamber could call a number of victims to give evidence or it could make an order authorising a court official to take an affidavit on the Chamber’s behalf. The Office for Victims would then be tasked to prepare a detailed report outlining victims’ views and concerns.
123. It is recommended that Chambers coordinate with the proposed joint Office for Victims regarding deadlines for submissions of applications by victims.
124. Should an amendment of the ICC Regulations be deemed necessary to set up a unified ‘Office for Victims’, Judges should adopt it accordingly.
125. Should an amendment of the ICC Regulations be necessary to reform the process of individualised victims’ applications (paragraphs 132-133), Judges should adopt it accordingly.

b) To the Registrar

126. In order to ensure in the future the effective participation of victims in the proceedings, the Registrar should enforce strict requirements of competence and knowledge of international (criminal) law and procedure to be eligible to represent victims before the ICC. The selection of counsel should be based on competence and experience so as to ensure the highest level of expertise and effectiveness in the representation of victims; the process of selection and appointment should be fair and transparent. It should be subject to judicial review, if necessary.
127. In relation to their involvement in the reparation phase, the Registry should ensure that victims’ representatives have been given resources commensurate to their responsibilities in the context of that phase.

128. The VPRS and the OPCV should be merged into a unified ‘Office for Victims’ to avoid duplication of resources and expenses. This would ensure a single line of responsibility in relation to matters pertaining to victims’ participation. The nature, focus and priorities of the proposed ‘Office for Victims’ should be tailored so as to ensure effective participation of victims in the proceedings. It is proposed that the mandate of the proposed ‘Office for Victims’ should adopt and integrate the following principles:
- a) The mandate of the unified Office for Victims should replicate the responsibilities (currently given to the two different offices) to the new, unified office subject to the qualifications outlined below;
 - b) The unified Office for Victims should provide effective support for victims and victims’ representatives, with two major (and primary) functions:
 - i. Provide logistical and administrative support to enable victims to claim and establish their entitlement to participate (see below);
 - ii. Provide support (legal and technical) to victims’ representatives in the exercise of their mandate once they have been appointed.
 - c) The Office for Victims should not be involved in the representations of victims before the Court and staff of the Office should not be appointed as legal representatives of victims granted participation status. It should only intervene on issues pertaining to the interests of the participating victims as applicants, such as protection, redactions of application forms, and issues on dual status of victim/witness.
129. The Office for Victims should play a much greater outreach function, in coordination with other organs of the Court and it should coordinate its outreach efforts with the other sections and organs of the Court that are engaged in outreach efforts on behalf of the Court.
130. The Office for Victims should be tasked to conduct satisfaction surveys in affected communities to verify and ensure that affected communities are provided with relevant information regarding the Court and its proceedings and that they are given an opportunity to give an informed view of the performance of the Court in relation to these communities.
131. The Office for Victims should play an active role in connecting with relevant victims communities so as to: (a) provide them with relevant information about the Court and the scope of victims’ right to participate, and (b) provide them with the requisite information and assistance in filling in application forms. If necessary, the Office for Victims should re-draft and simplify the model application forms and make them more accessible to applicants.
132. The process of individualised victims’ application should be reformed so as to avoid wasting of time and resources by all involved.

133. Individualised victims applications should be abolished in stages before the reparation stage and replaced by a much simpler system of collective registration, which would be handled by the Office for Victims. This practical way may however have to be qualified where a victim wishes to exercise substantive rights (for example, adduce evidence or testify).
134. The Office for Victims should play a much greater role in reviewing and analysing victims' applications to participate in the proceedings. It should be made competent to record, maintain and register applications, with a view to ensuring that all forms meet all the necessary formal and substantive pre-requisites.
135. In relation to each registration, the Office for Victims would then be responsible for conducting an individual review of each application and for:
- a) producing a detailed account of steps taken to evaluate the validity of each application, ensuring, in particular, that they relate to the underlying facts of that case; if necessary, it should interview applicants and/or conduct any follow-up evaluation of the validity of the application;
 - b) producing an individual recommendation regarding the merit of each application and whether it passes the requisite threshold;
 - c) identifying any residual issue (of law or fact) raised by individual applications;
 - d) on that basis, preparing a summary report of its findings, fulfilling the requirements of Rule 89(1).
136. The Office for Victims could be directed to adopt a meaningful standard (of proof) when it comes to these applications, so as to eliminate upfront applications that are unlikely to warrant participation and reparation. The following standard should be considered as basis for further discussion:

“Applicants bear the onus of establishing their entitlement to participate. They must establish, on the balance of probabilities, that their claim of harm or injury and entitlement to relief is demonstrated by the information provided to the Office for Victims. Victims have no right or entitlement to appeal against or challenge the determination made by the Office for Victims regarding their entitlement to participate in the proceedings.”

Both the Prosecutor and Defence would then be invited to identify any error and/or shortcomings in the evaluation conducted by the Office for Victims. Any such challenge, and only in such cases, would be subject to a strict and narrow review by the Court on grounds of: (a) unreasonableness; or (b) clear error of law. The parties would not be required to review individual applications, but would only be reviewing (and, as the case may be, challenging) the summary report. The issue of and potential challenge to individual applications would only arise if and when the accused is convicted and the matter proceeds to the reparation stage.

137. The Registry should be asked by States Parties to take all necessary steps to put in place the necessary re-structuring of this Office.

c) To States Parties & the ASP

138. Should the Court fail to adopt the principles set out above, States Parties should consider amending the Court's Rules and/or Statute to more clearly circumscribe the scope of permissible victims' involvement in the proceedings.
139. Should the Court fail to adopt the principles set out at paragraphs 114-115 above, States Parties should be invited to consider amending the Court's Rules of Procedure to that effect.
140. States Parties should request the Registrar to provide full and transparent information regarding the overall cost of victims' participation.
141. States Parties should consider giving victims greater access to the Trust Fund to provide a more open and less aggressive venue than a criminal trial for victims of the entire situation to air their views and seek compensation.
142. States Parties should consider amending the Statute to remove the requirement that reparation for victims is conditioned upon the conviction of the accused so that victims could focus more effectively on establishing the harm done to them and establishing the consequences thereof on their lives and that of their community.
143. Should the above recommendations prove insufficient to ensure and guarantee that victims' participation is truly effective and that such participation does not unduly impair the effectiveness of trial proceedings, States Parties should consider whether a re-foundation of the architecture of victims' participation before the ICC should be considered. This could include, for instance:
- a) abolishing victims' participation altogether (a course of action *not* recommended here as this would impact on the credibility and overall legitimacy of the Court);
 - b) setting up a specialised Chamber responsible for dealing with all issues pertaining to victims' participation and reparation;
 - c) amendment of the Statute and/or the Rules to specify that victims' participation should only occur after trial, i.e., during the reparation phase, if and when the accused has been convicted (or without the need for conviction if the recommendation to abolish that condition is heeded – see above, at paragraph 142).

I. Defence Before the ICC and Issues of Effectiveness

a) To Chambers

144. Where there are indications that steps taken by the Registry are insufficient to ensure effective representation of the accused, Chambers (in particular, the Pre-Trial Chamber) should step in, in particular:
- a) by making regular inquiries (in particular, during the pre-trial process and early into the trial process) regarding the level of preparedness of the Defence and verifying (if necessary by seeking and obtaining information from both the Defence and Registry) that basic preparatory steps have been taken;
 - b) by regularly ‘checking in’ on Defence preparation and preparedness for trial;
 - c) by verifying that the Defence is provided with adequate resources (of all necessary and relevant sorts) for the effective performance of its duties;
 - d) where there are indications that counsel’s representation or the functioning of a Defence team might negatively affect the right of the accused to effective representation, by requesting the Registry to look into this matter and to take steps to address this issue (including, if necessary, by removing counsel).

b) To the Registry

145. The current structure of the OPCD / CSS should be re-organised to ensure greater effectiveness and quality of representation and to reduce costs associated with legal aid practices. An independent Defence Office should be set up, centralising and including both the Legal Aid Unit (CSS) and the Legal Advisory Unit (OPCD) within its ambit. The new structure should ideally be placed under the authority of an independent Head of the Defence Office. Pending any necessary regulatory or statutory amendment to achieve that desirable model, a combined (CSS-OPCD) office should be integrated under the authority of the Registrar but function independently of him in regard to the performance of its functions (subject to the necessary administrative and fiscal oversight).
146. The work of the Legal Advisory Unit would have to be performed independently of the Legal Aid Unit. The Legal Advisory Unit should, however, advise the Legal Aid Unit in connection with the practical and legal requirements of devising a legal aid policy that aims to achieve effective representation.
147. The tendency exhibited by the Court to address victims’ and Defence issues under the same umbrella fails to address the different roles played by the two in the proceedings. The needs and resources necessary and justified for each should be dealt with individually and in light of their respective role so as to ensure that they each play a meaningful part in the proceedings commensurate with their role and responsibilities. Since the Legal Aid Unit would be based

within the Defence Office, legal aid and assignment issues for the Defence should be addressed separately from those concerning the victims, and in accordance with different criteria.

148. It would also be appropriate and advisable to administer separate lists for victims and Defence counsel, although it would be possible for counsel to be included on both if they meet the criteria for doing so.
149. In setting up a new, joint Defence Office, the Registrar (or States Parties, if the Statute is amended to create an independent Defence Office) should ensure that it is given competencies and resources commensurate with the importance of its mandate and one which will ensure that it will make a genuine contribution to the effective Defence and representation of Defence interests. As part of its mandate, the Defence Office should have:
 - a) the ability to participate in the Coordination Council, which is responsible for discussing and deciding on administrative issues;
 - b) the right to be a member of the Advisory Committee on Legal Texts and to possess the equivalent participatory powers of the Prosecutor in this body;
 - c) the power to negotiate and conclude memoranda of understanding or co-operation agreements with external entities, on issues of concern to the Defence;
 - d) the right of audience before the ASP and the right to engage in a discussion with States directly as regards issues affecting the work of the Defence. In the alternative, a representative of the Defence Office could appear alongside the Registrar with a view to addressing any Defence-related issues or questions.
150. The quality and experience of the staff hired would also be essential to the effectiveness and usefulness of the work of the Defence Office. Staff should only be employed in principle if they have relevant experience in managing complex criminal cases.
151. The ICC Registry should adopt a proactive attitude towards vetting the quality and effectiveness of counsel. In particular, and in addition to the criteria already provided in the Rules and Regulations, it should look at the following criteria when deciding whether to grant a candidate admission to counsel's list:
 - a) demonstrated competence and professional proficiency in complex criminal litigations;
 - b) demonstrated familiarity with the international practice of law;
 - c) prior practice in international criminal tribunals;
 - d) adequate training (see below).

152. The Defence Office should take active steps to verify the record, availability and experience of the candidate, including where necessary by making formal requests for information from relevant peers. The Registry should have the discretion to refuse to assign counsel.
153. Before appointing the requested counsel, all counsel should participate in and pass a training course, which would be equivalent in character to a bar qualification.
154. The defendant should have a clear understanding of the choices relevant to guaranteeing him an effective defence, in particular:
 - a) necessity for him/her to make an informed choice as regard his/her selection of counsel;
 - b) his or her ability to understand the nature of proceedings and associated necessary preparations involved;
 - c) his or her instructions to counsel regarding the composition of the team;
 - d) the extent to which he or she may rely on existing resources at his disposal through the Defence Office (or otherwise through the Registry office).
155. It is recommended that the Registrar commission a manual for defendants, prepared in clear and non-legalistic language, which should be translated into the languages of the defendants. This manual could be prepared by independent Defence experts, and could set out objective advice concerning, *inter alia*:
 - a) the particular requirements of international criminal proceedings, and how these requirements impact on the qualities that a defendant might be looking for in counsel;
 - b) considerations which are relevant to the composition of a Defence team, in particular, the need to cover the bases in terms of the skills required for the case.
 - c) concretely, what each phase of the proceedings means for the Defence, and the type of activities which are generally performed at these phases;
 - d) a template check list of questions for the defendant to put to his Defence team at the different phases of the proceedings, so that the defendant is empowered to participate in his or her Defence.
156. In addition to providing the defendant with such a manual, the Defence Office/OPCD could be directed to meet with suspects in order to provide them with competent and impartial advice as to the particular nature of international criminal proceedings, and any specific factual or legal issues in their case which could be relevant to their choice of counsel.

157. Having consulted with relevant stakeholders (in particular, Defence Office/OPCD; associations of counsel), the Registry should adopt a Strategic Plan for the Defence, which would set out a definition of and transparent/objective benchmarks for what would qualify as “effective representation” for the purpose of ICC proceedings. Such a policy should guide the Registry’s decision on appointment of counsel and support staff.
158. The Registry (under the authority and control of Chambers) should play a more active role in overseeing the performance of Defence teams with a view to ensuring the effective representation of defendants and, in turn, the overall efficiency and fairness of proceedings.
159. Where the successfully qualified candidate has been found to meet the requirements imposed by the Strategic Plan, the Registry should condition appointment on counsel’s immediate provision of a working plan for preparation and a list of personnel that he or she would seek to have assigned to his or her team (or the criteria for support staff that counsel would wish to appoint). On that basis, the Registry could verify that not only counsel, but the team itself, would function in such a way as to ensure effective representation.
160. Where the Registry is not satisfied of the likelihood of effective representation, it should refuse appointment in clearly defined circumstances, in accordance with the grounds which are set out in the Regulations and Code of Conduct (and as elaborated in the Strategic Plan), subject to the possibility of judicial review. The accused – though not necessarily the proposed counsel – should be able to challenge the matter before Chambers, which should exercise its responsibilities in ensuring that the rights of the accused are guaranteed and protected in an effective manner.
161. The Registry should take active steps to ensure that counsel are not soliciting accused persons or suspects, which might result in a defendant opting for less than adequate counsel.
162. The Registry/Defence Office should take steps to ensure that each and all critical aspects of the preparation are being carried out (without unduly interfering with the responsibilities of counsel).
163. The Registry should tie the legal aid scheme of the Court to the Strategic Plan for the Defence. Such a Plan should provide guidance and benchmarks regarding “effective representation” and how the responsibility to ensure effective representation will be monitored and enforced by the Registry and/or a new Defence Office. This plan should and must in turn be administered by persons who possess actual experience working as Defence counsel or in a Defence team or have equivalent experience.
164. The Registry/Defence Office should closely scrutinise the work plans submitted by Defence teams and follow up on any inquiry that it might have made about that plan and its implementation.

165. With a view to reducing the costs associated with the Defence, the Registry should take a longer view of preparation needs – rather than a practice of last-minute decisions that have affected Defence preparation and increased cost.

c) To Defence Counsel

166. Whilst the present paper is not dealing *in extensu* with the practice of individual Defence teams, counsel for the accused as well as members of Defence should ensure at all times that a) they are – individually and as a team – capable of providing effective assistance to the accused, b) that they focus all relevant resources onto preparing the case for trial and presenting it in the most effective of ways, c) that they refrain from delaying tactics, d) that they refrain from mounting political or other legally-irrelevant defences, e) that they commit all the necessary time to the defence of their client, f) that they carefully investigate all possible avenues of defence, g) that they comply at all times with their professional and ethical obligations towards their clients and the Court, h) that they conduct all necessary investigation of relevant factual issues relevant to their case, i) that counsel should not delegate to others his or her core responsibilities.

d) To States Parties & the ASP

167. States should consider creating an independent Defence Office as a separate organ of the Court with its own Head and with a mandate similar in kind and nature to the mandate of the Defence Office before the Special Tribunal for Lebanon.

J. Institution Building and Administration

a) To the Presidency, the Office of the Prosecutor & the ASP

168. It is recommended that the Presidency, the Prosecutor, and the ASP, with a view to signify their commitment to promoting and protecting the independence of the Court, adopt and publicise a set of rules of conduct establishing transparency in the communications and relationships between the Court, its officials, staff and practitioners who appear before it, and the States Parties/ASP. This should include, in particular:

- a) Explanations as to the reasons for and existence of boundaries between case-related subject matter and administrative information;
- b) Rules ensuring transparency of lobbying or interventions by representatives of States Parties and/or the ASP, either in their personal or official capacities regarding the hiring of ICC staff and other ICC human resources issues.

b) To the Presidency

169. It is recommended, that the President and the Presidency, with a view to enhancing a distinctive and collegial ICC judicial culture of excellence essential to the effectiveness of the Court:
- a) Impress among Judges and Court staff that cooperation and information sharing between and among judges and panels is a priority;
 - b) Encourage Judges to promote collegiality including among their staff ;
 - c) Establish annual retreats off-site in which Judges from all three divisions can engage together in problem solving sessions;
 - d) Assign mentoring Judges to new Judges for the first year of appointment to integrate the new judges into the emerging judicial culture;
 - e) Regularly schedule formal opportunities to share the Judges' expertise with one another;
 - f) Regularly Schedule formal opportunities to bring in experts in technical areas relevant to the management of the cases in order to keep the judges up-to date with the latest research and innovations;
 - g) Seek and promote discussion of common structural and institutional problems with colleagues from other International Courts and Tribunals.
170. It is recommended, that the Presidency, with a view to promoting jurisprudential consistency and reducing the risk of repeated litigation and conflicting outcomes in relation to the same issue, should:
- a) Make positive efforts to encourage consensus on harmonising conflicting practice through regulation, where appropriate;
 - b) Fast track adjudicatory resolution of conflicting interpretation and practice on which consensus and regulation are not appropriate or achievable so that the Appeals Chamber can definitively rule on issues that have given rise to differing lines of jurisprudence between Trial Chambers;
 - c) Consider the feasibility of specialised chambers to create a single line of jurisprudence on matters ancillary to the merits of the cases, or, alternatively, Judges from different chambers could sit "*en banc*" in relation to these issues to make a unified ruling in relation to them.
171. The Presidency, in cooperation with the Judges, should:
- a) inventory the expertise and talents existing on the current bench and identify those factors beyond the basic statutory competencies which the Court requires of its new judges, based on the loss of those skills created by the

vacancies and the need for those skills relative to the nature of the tasks presently before the Court;

- b) based on this input, submit a list of additional required skills to the Secretariat of the ASP, so that they may be transmitted to the States Parties in the form of criteria accompanying the invitations for nominations.
172. The Presidency should actively support the Prosecution and Registrar's outreach efforts. More particularly, it is recommended that the Presidency, in cooperation with Chambers and with the Registry and with a view to bridging the knowledge gap regarding the ICC's caselaw and making its jurisprudence more accessible:
- a) Provide on the Court's website an easy and effective search engine enabling users to search its caselaw;
 - b) Regularly publicise on the Court's website important jurisprudential advances, such as publication on the website of a weekly or monthly newsletter reporting upon its caselaw;
 - c) Provide regular analytical reports pertaining to the most important developments of its jurisprudence.
173. The Presidency should –
- a) in partnership with the Prosecutor, initiate an institution-wide Independent Sexual Harassment Audit at all levels of the Court and share the results of the audit with the Study Group on Governance and the Bureau of the ASP;
 - b) institute an on-going Gender Bias Task Force;
 - c) invite the heads of departments and statutory officials to provide public information on steps being taken in relation to this important matter.
174. The Presidency, working together with Chambers and Registry, and with the assistance of outside expertise, should construct and oversee a judge-led framework for the highest judicial performance, addressing:
- a) Agreed administrative principles such as identification of the elements of judicial excellence and agreement on the Court's administrative priorities;
 - b) Practical performance goals for Chambers, Benches, and individual Judges, (for example, goals regarding scheduling, timeframes for decision making, objective criteria for achieving skill balance in panel appointments, ratio of time spent on cases to time spent on other court related work; etc.);
 - c) Measurement tools to assess progress of Chambers, Benches, and individual Judges toward reaching these goals;

- d) A Performance Management structure whereby the Presidency monitors performance of Chambers, Benches and individual Judges, based on the data generated by the measurement tools, shares that data internally with the judges, and identifies and eliminates personal and institutional barriers to progress;
 - e) Periodic Progress reports to the ASP reflecting the composite progress of the Court as a whole in reaching each identified goal, based on the data generated by the measurement tools, and addressing the benchmarks identified above.
175. It is recommended, that the Presidency, with a view to ensuring that the Court is staffed with the best and most suitable candidates only and that stagnation of staff does not come at the expense of the effectiveness of the Court, instruct the Registry to:
- a) put in place a transparent, merit- and need-based recruitment process for all positions within the Court; for mid- and high-ranking positions, the Registry should also be expected to seek suitable external advice about candidates;
 - b) adopt a policy clarifying to prospective staff that they should not plan to make their career at the Court, while adopting a policy which would allow for one promotion of current staff members and for a second promotion under exceptional circumstances and subject to external assessment. If need be, staff regulations should be amended accordingly.
- c) To States Parties & the ASP**
176. In order to foster the necessary understanding of the independence of the Court amongst State representatives, diplomats and public officials involved in regular interactions with Court staff and officials and so as to avoid any suggestions of impropriety, States Parties should ensure that representatives of States are adequately briefed on the Rules and Guidelines mentioned at paragraph 168 above and that their conduct is in line therewith.
177. With a view to enhancing the effectiveness and speediness of the Rule amendments process, States Parties and the ASP should consider the following:
- a) For those amendments recommended by the Judges or the Prosecutor, a simplified procedure should be enacted whereby one single body representing the interests of the ASP and possessing the necessary technical skills, works with the ACLT (and, if necessary, outside experts) to reach a consensus as to the form and substance of the proposed Rule or amendment; at the same time, the ASP should consider the cancellation of the ASP working groups currently involved in the amendment process (i.e., SGG, WGA);

- b) Shorter timeframes for completion of (a) above should be set and respected. If no consensus is reached within that timeframe, the Rule change would go no further. If consensus is reached, voting by the ASP would either accept (by the statutory two-third majority) the proposed Rule as written or reject it;
 - c) Consideration should be given to convening “electronic” sessions of the ASP between annual meetings to ensure necessary amendments can be dealt with promptly;
 - d) Drafting assistance from outside experts should be available to Judges, the Prosecutor and States Parties in preparing their recommended amendments;
 - e) With a view to enabling the Court to expeditiously adapt its regulatory regime to its needs, consideration should be given to the possibility, in the future, of amending Article 51(2) of the Statute to provide that Rules proposed by the Judges or the Prosecutor are adopted by the ASP unless rejected by a two-thirds majority.
178. It is recommended, that States Parties, on the basis of the skill sets requested in the invitations for nominations and when seeking to identify suitable candidates for judicial appointment, should:
- a) actively seek to identify, approach and encourage suitable candidates fulfilling all necessary and relevant requirements;
 - b) incorporate the requested skills, as well as general trial management skills, into a transparent and publicised recruitment process at the national level;
 - c) demonstrate the fulfilment by the candidate of the statutory and additional competencies and skills when referring the candidate to the ASP and to the Advisory Committee on Nominations;
 - d) instruct the Advisory Committee on Nominations to consider both the statutory competencies and the additional skills in evaluating candidates and referencing those competencies and skills in its recommendations to the ASP.
179. It is recommended, in the longer-term, that States Parties should consider amending Articles 36(3) and (5) of the Statute with a view to abolishing the List A-B system and providing a more nuanced criteria based on the practical experience of the Court.
180. It is recommended that each State Party:
- a) design and implement an outreach plan for their State to provide their population with accurate information on the work of the Court;

- b) support the allocation of funding sufficient for the Registry to create the system of jurisprudential dissemination recommended above.
181. It recommended that the ASP fund the necessary expertise to assist the President in instituting the measures mentioned at paragraph 173 above.
182. It is recommended that the ASP:
- a) designate within the ASP individuals responsible for conducting a yearly review of the performance of the Court *vis-à-vis* the above Progress Reports (paragraph 174 e)) and Benchmarks.¹ States Parties and the relevant organs of the Court should also consider seeking the advice of experienced Judges, Prosecutors and Court Officials for the purpose of assisting that process of review;
 - b) fund the necessary expertise to assist the Presidency in instituting these measures, and support the President and the Presidency in exercising their roles in effectively managing the work of Chambers, Judges and staff.
183. It is recommended, in the absence of an internally generated independent audit, that States Parties initiate an independent sexual harassment audit at all levels and in all branches of the Court.
184. In the absence of a judge-led framework for establishing, evaluating and reporting judicial performance, States Parties should –
- a) identify individuals with the necessary skills and competence to audit and evaluate the performance of an international criminal court;
 - b) set up an auditing body either within the ASP or within the Court itself and vest it with the competence to set benchmarks for performance, conduct an evaluation of the Court's performance in accordance with those benchmarks, and to report to the ASP on a yearly basis. That body should be independent of the Court and the ASP;
 - c) provide sufficient resources to this auditing body;
 - d) vest this auditing body with the authority to seek and obtain any information from the Court's organs necessary to the accomplishment of its task and that is not covered by the confidentiality of the judicial proceedings;
 - e) vest this auditing body with the authority to report and notify the ASP in case of refusal by an organ of the Court to provide sought information;
 - f) task this auditing body to adhere to the highest standards of transparency, to ensure that, in the event a confidential publishing of the report is necessary, a public redacted version be simultaneously issued.

¹ See *Institution Building and Administration*, para. 63; *Benchmarking*, para. 3.

185. The ASP should consider putting in place a list (or hiring a pool) of high-level experts from which it can tap if and when the need is felt to conduct an evaluation of particular aspects of the work of the Court. Such a group could advise the Court and/or the ASP/States Parties with a view to ensure better performance.

K. Cooperation and Witness Protection

a) To the Office of the Prosecutor

186. The Prosecutor should actively lobby and press States Parties to adopt (political and economical) sanctions and other measures against non-cooperating States Parties with a view to securing full cooperation from that State.
187. Where a situation has been referred to the Court by the United Nations Security Council, the Prosecutor is mandated by the referral resolutions to regularly report to the Council. In this context, the Prosecutor has the inherent ability to ask the Council to report the State in violation of a Council resolution. The Prosecutor should also be understood as having the inherent ability to seek from the Council to adopt necessary measures and sanctions to secure that State's compliance with its obligations. Where appropriate, the Prosecutor should make use of that authority.
188. The Prosecutor should ensure that the Council provides all necessary support in relation to (referred) investigations. Where the Council fails to do so, the Prosecutor should not hesitate to suspend its investigation of that case and to give public notice of that fact to the Security Council together with its reasons for doing so.

b) To States Parties & the ASP

189. States Parties should consider how they manage requests for cooperation from the Court and whether there are ways to act more efficiently and expeditiously with respect to those requests. In particular, States Parties should consider adopting the following measures:
- a) Each State Party should designate a contact person/office within its competent offices specifically tasked with and competent to deal with requests for assistance from the Court or a party in the proceedings.
 - b) Necessary legislations should be adopted to ensure that this office is permitted to respond to such requests without undue delay and/or procedural impediments.
 - c) The Prosecutor should have the inherent authority to report a non-cooperating State Party to the ASP. To the extent that the view is taken that an explicit legal basis should be provided to enable the Prosecutor to

do so, States Parties should consider amending the Rules and/or Statute accordingly.

190. States Parties should consider further how to enhance their support for the Court. In particular, they should devise mechanisms to ensure that situation countries and other countries with potentially significant evidence at their disposal should cooperate fully with the Court. Those States Parties with influence over situation countries should be prepared to organise themselves to exert this influence in a sustained and credible manner to secure compliance from a State Party with its obligation to cooperate with the Court:

- a) The ASP could vote to suspend the rights of that State to participate in the ASP. To the extent that this would require an amendment of the Statute, States should consider providing for it.
- b) The ASP could be given the authority to vote sanctions against a non-cooperating State, which could either be binding upon States Parties and/or implementable at their discretion. Such powers would require an amendment of the Statute as well as of the Rules of Procedure and Evidence of the ASP.

191. In cooperation with all organs of the Court, States Parties should undertake a comprehensive review of the witness protection process in order to assess the needs of the Court with respect to personnel, resources, and cooperation. This review should consider the centrality of witness protection to the entire scheme and provide specific recommendations on how to achieve a robust, effective and efficient witness protection system.

192. States Parties should duly consider entering into bilateral agreements with the Court to take sensitive witnesses into their witness protection regimes. Necessary legislation should be adopted at the domestic level for that purpose. The Registrar should be competent to negotiate such agreements (in consultation with the other organs of the Court).

193. In the alternative, the ASP should discuss and consider adopting an ICC-wide witness protection scheme in which States Parties could voluntarily partake. This would have the practical benefit of one uniform system being adopted in relation to each and all States Parties with necessary mechanisms being built into the ICC architecture.

c) To the UN Security Council

194. In order for the Security Council to commit itself to a situation that it refers to the Court, it could provide explicitly in its resolutions referring a matter to the Court for the possibility of sanctions and the nature thereof (and/or any other mechanism that would render sanctions less discretionary in nature and more realistic in practice).

BENCHMARKING

1. One of the key impediments to the ICC's ability to explain and justify its activities, cost, and performance is the absence of readily available benchmarks. Appraising the quality of the work of a court of law and the effectiveness with which it carries out its functions is no easy task:

“A court of law is not a factory. Its output and productivity cannot be accurately measured by counting either the number of items it has produced or the number of hours or days it takes to produce them. While the efficiency of a Court is one aspect of its overall impact, the true measure of a court is in the quality, and not the speed, of its judgments. It is therefore exceedingly difficult to assess the judicial productivity of an active court engaged in ongoing trials. Statistics depicting the number of sitting days and hours and the number of written decisions rendered by the court can only paint a very partial picture of the productivity of a judicial institution.”¹

2. When trying to evaluate the performance of the ICC, one should start from the position that it is a criminal court and should be assessed in that light. In that sense, comparisons, to the extent relevant, with other criminal courts may assist to evaluate the effectiveness of the ICC. By contrast, performance indicators for companies or UN institutions are not or not entirely adequate for that purpose. Furthermore, the fact that the ICC is a criminal court should temper the sometimes-unreasonable expectations that animate the debate around its performance.
3. The ICC should accordingly develop its own criteria as to how its performance can best be evaluated. With a view to rendering itself more accountable to interested communities, the Court should be invited to identify and publicise benchmarks by which it would offer to be judged.² In seeking to establish its own benchmarks, the ICC could consider the following factors:

- i. **Quality and efficiency of judicial management of cases and work of Chambers³ and ability to reduce overall duration of proceedings and to eliminate delays;⁴**

¹ Report on the Special Court for Sierra Leone, submitted by the Independent Expert Antonio Cassese, 12 December 2006, para. 58, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&> (last visited on 12 April 2014).

² Note that these benchmarks are replicated in the following section of this report: *Institution Building and Administration*, para. 61.

³ Indicators could include: the overall duration of proceedings, the existence of “gaps” in the course of proceedings and explanation for those, percentage of courtroom use, proportion of days in/out of court, promptness of decision-making, effectiveness of the evidential process, ability to control and avoid unnecessary delays, etc.

- ii. **Effective use of resources (financial and personnel) and willingness to subject its management thereof to professional auditing;**⁵
- iii. **Transparency of proceedings⁶ and transparency of the Court's activities;**⁷
- iv. **Increased awareness in affected countries of the nature of the Court's work and mandate,⁸ improved reputation and greater jurisprudential relevance;**⁹
- v. **Transparency and fairness of hiring process of staff and ability of the Court to attract leading practitioners and professionals;**¹⁰
- vi. **Active engagement of the Court, its organs and staff with relevant experts in the field;**¹¹
- vii. **Use by the Court, its organs and the parties of evidential, procedural, administrative and professional practices best suited to ensure fair and expeditious proceedings;**¹²

⁴ Registry-collected data should be gathered to provide detailed insight into the Court's functioning, the time taken by the Judges and the parties in court, promoting proactive judicial management of cases (see, for example, Report on the Special Court for Sierra Leone, submitted by the Independent Expert Antonio Cassese, 12 December 2006, para. 85, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&> (last visited on 12 April 2014): "The slowness of proceedings may also stem from deficiencies in courtroom management. Proactive management is all the more important in complex cases where the judicial resources as well as party resources are limited."); evaluation by outside experts of use of court time and delays in proceedings; strict management of courtroom schedule by the President and Presidency to ensure that cases are not unnecessarily delayed).

⁵ In-house or external experts tasked with such an evaluation should be able to seek and obtain all relevant information from relevant organs of the Court, subject to respecting the confidentiality of proceedings and parties' preparation of their cases.

⁶ To be measured, *inter alia*, against the percentage of public vs. confidential filings/hearings, the availability of public-redacted versions, the existence of public records of *ex parte* hearings.

⁷ This would involve public disclosure of the details of its budgetary breakdown, availability of information gathered by the Registry and its organs regarding the performance of their respective mandates.

⁸ For that purpose, States Parties and the Court should engage in outreach efforts in domestic jurisdictions; outreach efforts should themselves be subject to external/expert evaluation.

⁹ This could be achieved, *inter alia*, by taking steps to improve the effectiveness of the Court, explain and justify the high financial costs involved in complex criminal litigation, assert its independence, promote its own judicial culture, guarantee the quality of its judicial output, ensure compliance with relevant international law standards, invite and engage in a public and open discussion of the Court's performance.

¹⁰ Recourse to external experts is recommended for that purpose; in any case, there should be no disadvantage in hiring for external candidates; greater recognition of the relevance and value of domestic judicial/practitioner experience should be promoted; internal review of the *needs* of the Court should be subject to external auditing.

¹¹ This would involve engagement with qualified NGOs, national experts, experts from other international tribunals and a demonstrated willingness on the part of the Court, its organs and its staff to learn from the experience of other institutions and adopt practices and policies from other judicial organs that have proved effective in other courts or tribunals, to the extent that such practices are applicable to the ICC bearing in mind the particularities of its structure.

¹² Peer and expert evaluation of these would be particularly valuable (see below).

viii. Elimination of gender bias and sexual harassment.

4. In evidential terms and regarding the scope of criminality relevant to the cases, ICC cases are, by comparison to cases before other international criminal courts, relatively narrow in scope.¹³ They may, however, be factually quite complex. To be able to orientate itself in its evaluation of the performance of the Court, the ASP and/or State Parties individually should consider seeking expert advice as regard the level of complexity of individual cases before the ICC. The practice of evaluating the level of complexity of cases has been put in place before the *ad hoc* tribunals as a tool to determine the level of remuneration of Defence teams.¹⁴ This tool enables the Registry to make a general determination of the level of resources adequate to enable a Defence team to function effectively. Such practice could be broadened in scope to evaluate the overall amount of resources necessary and justified for each organ of the Court. Cases before the ICTY/ICTR are classified into three levels of complexity (Level 1 (difficult), Level 2 (very difficult), or Level 3 (extremely difficult/leadership)) depending on a number of factors. The following could be used to replicate this exercise at the ICC:

- the position of the accused within the political/military hierarchy;
- the number and nature of counts in the indictment;
- whether the case raises any novel issues;
- whether the case involves multiple municipalities (geographical scope);
- the complexity of legal and factual arguments involved;
- the number and type of witnesses and documents involved.

In addition, the ICC could consider taking into account additional factors, which will typically be relevant for ICC cases and situations (type of referral, geographical distance of situation, potentially ongoing conflict situation on the ground, languages utilised, etc...).

¹³ The *Katanga* case, for instance, contained one charge, pertaining to one criminal incident on one day (see *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Dissenting Opinion of Judge Christine Van Den Wyngaert, 21 November 2012, para. 51). Whilst the *Bemba* case relates to a longer period of time, the charges do not pertain to any suggestion of personal involvement on the accused's part in the commission of the crimes (but *only* as a superior to the alleged perpetrators pursuant to Article 28 of the Statute). The *Lubanga* case was limited to a single charge of unlawful conscription and enlistment of children under the age of 15 or using them to participate actively in hostilities (Art 8(2)(e)(vii) of the Statute). The charges relevant to the *Kenyatta* case pertain to a period of four days (between 24-27 January 2008). Cases for which confirmation was denied were narrow and limited in scope. The cases against Ntaganda, President Al-Bashir (and alleged associates) and LRA members are broader in scope and factual allegations.

¹⁴ See, for example, ICTY Defence Counsel – Appeals Legal Aid Policy, 18 April 2013, available at http://www.icty.org/x/file/About/Defence/appeals_legal_aid_policy_2013_en.pdf (last accessed on 12 April 2014); ICTY Defence Counsel – Trial Legal Aid Policy, 1 November 2009, available at http://www.icty.org/x/file/About/Defence/trial_legal_aid_policy_2009.pdf (last visited on 12 April 2014).

5. States Parties should evaluate the above “benchmarks”, invite the Court to propose its own set of benchmarks, and adopt those considered relevant to evaluating the performance of the Court. Internal evaluation of the Court’s performance should be promoted. Furthermore, in order to support the Court’s own efforts in that respect, State Parties should consider having recourse to external experts to (i) identify and, in cooperation with the Court, set out detailed evaluation benchmarks for each organ of the Court and/or (ii) provide expert peer-review of any relevant aspects of the Court’s performance. The results of such evaluations should in principle be publicly available, and annual reviews should also take into account efforts made by the Court to improve on previously identified areas of weakness.

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I. Summary

1. The Prosecution has demonstrated its capacity to identify and secure evidence under difficult and challenging circumstances. However, ICC Judges have identified a number of specific problems with the conduct and quality of the Prosecution's investigations. With the change of leadership, there are clear indications that the Prosecution is taking concrete steps to improve the quality of its investigations.¹ In particular, the Prosecution has announced, as part of its prosecution strategy, a new approach to investigations that embraces many of the points discussed in this paper.² This paper makes the following recommendations:
 - a) that the Prosecution make structural changes to the way it handles cases.
 - b) that the Prosecution ensures that its investigations are done in a manner that meets generally accepted investigative practices.
 - c) that the Prosecution make some changes in the way it processes and stores evidence to minimise the risk of inadvertent disclosure violations.
 - d) that the Prosecution build capacity and competency, particularly at the early stages of an investigation by incorporating seconded personnel as well as experts from the Justice Rapid Response.
2. This paper also makes the following recommendations to the Assembly of States Parties:
 - a) An international criminal investigation that meets high standards requires significant resources. The ASP must support the Prosecutor's efforts to reform her investigative practices by ensuring that the Prosecution has adequate funds for each investigation.
 - b) The ASP should support the work of the Justice Rapid Response and consider seconding experts to the Prosecution to allow her to respond quickly to new situations.

¹ See, for example, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment, Minority Opinion of Judge Van den Wyngaert, para. 141: "Considering the very serious and seemingly systemic nature of these problems, I can only welcome that, under the leadership of the new Prosecutor and Deputy Prosecutor, the Office of the Prosecutor seems to have acknowledged past shortcomings and has demonstrated a greater willingness to critically assess the strength and weaknesses of the cases that are brought before the Court."

² See Strategic Plan, June 2012-2015, at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf (last visited on 24 April 2014).

II. Current ICC Practice

Overview

3. To date, the Prosecution has completed investigations in seven situations resulting in requests for 31 arrest warrants or summonses. Each of these investigations was conducted under challenging circumstances. All were conducted despite limited access to where the crimes were committed. ICC investigators have had to contend with challenges that investigators in national criminal justice systems are unlikely ever to face. Yet, despite these difficulties, ICC investigators have been able to identify and secure reliable and credible evidence for the effective prosecution of cases.

Office of the Prosecutor Strategic Plan, June 2012-2015

4. The Prosecution has publicly adopted a new strategic plan that seeks to address some of the deficiencies identified in the office's early investigations.³ In particular, the Plan replaces the objective of conducting 'focused investigations' with a principle of 'in-depth, open-ended investigations while maintaining focus.' This change signals an acknowledgment that some investigations to date have been insufficiently thorough. Secondly, the Plan commits the office to ensuring that cases are 'as trial-ready as possible' before the confirmation hearing. The qualification on this goal reflects a recognition that in some cases, the Prosecution might move forward even without all of the evidence in hand if it were confident that the evidence would be available at the appropriate time. Thirdly, the Prosecution recognised that in some instances it will need to focus on mid-level perpetrators if that is where the investigation leads and in order to build cases. Again, this objective recognises that the Prosecution's cases will need to be driven by the available evidence. Finally, the office announced some changes in the structure of the office in order to conduct stronger and better investigations. For example, the office committed to hiring more senior prosecutors to help direct investigations, to enhance the analytical function in the investigations division, to redistribute some of the cooperation tasks to ensure stronger investigative relationships with states, and to reduce some of the management functions of the Executive Committee. All of these changes signal a recognition by the Prosecution that it must adjust its approach to investigations.

³ Strategic Plan, June 2012-2015, at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf (last visited on 24 April 2014). For a discussion of the main points of the Plan, see A. Whiting 'ICC Prosecutor Announces Important Changes in New Strategic Plan', 24 October 2013, at <http://justsecurity.org/2013/10/24/icc-prosecutor-announces-important-strategic-plan/> (last visited on 24 April 2014).

5. In addition, the Prosecution strategy called for an increase in resources to conduct effective investigations. The Assembly of States Parties responded in part in 2013, increasing the Prosecution's budget, especially with regard to investigative capacity.

Criticisms of Investigative Practices

6. The Prosecution's conduct of investigations has come under increasing scrutiny and criticism from Judges. These criticisms are directed at some of the investigative methods used as well as the quality of some of the evidence advanced in proceedings. In some cases, the criticisms fail to recognise the unique challenges of international criminal investigations and reflect unrealistic expectations by the judges. Nonetheless, the criticisms point the way to several areas where improvement could be achieved, as has already been recognised by the Prosecution itself.
7. The charges against 21 accused have been the subject of confirmation proceedings pursuant to Article 61. Judges have confirmed the charges against 17 and have declined against four on the grounds of insufficient evidence.⁴ In one case, the confirmation hearing was adjourned for additional investigation after the Chamber found the evidence presented was unable to sustain any of the charges.⁵ Eventually, the charges were confirmed.⁶ The inability of the Prosecution to sustain the charges at the relatively low threshold required for confirmation in itself indicates infirmities in the investigations.⁷ Of the 17 confirmed charges, one accused has been acquitted after trial, the Prosecution has withdrawn charges against another citing a lack of evidence and is considering withdrawing charges against another.⁸

⁴ Accused against whom charges have been confirmed: DRC: Lubanga (29/01/2007); Katanga and Ngudjolo (30/09/2008); Ntaganda (09/06/2014); Sudan: Abakaer Nourain and Jerbo Jamus (07/03/2011); CAR: Bemba (15/06/2009); Bemba, Kilolo, Mangenda, Babala, Arido (11/11/2014); Kenya: Ruto, Sang, Kenyatta and Muthaura (23/01/2012); Ivory Coast: Gbagbo (12/06/2014). On 18 March 2013, the Prosecution withdrew the charges against Mr Muthaura. Mr Ngudjolo Chui was acquitted after trial. Chambers declined to confirm the charges against the following accused: DRC: Mbarushimana (16/02/2011); Sudan: Abu Garda (08/02/2010); Kenya: Kosgey, Hussein Ali (23/01/2012).

⁵ *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013. The Chamber directed the Prosecution to file an amended Document Containing the Charges by 15 November 2013 with resumption of the confirmation hearing to follow.

⁶ *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014.

⁷ The legal standard of sufficiency for the issuance of an arrest warrant is 'reasonable grounds' that a crime under the Rome Statute has been committed. The standard for confirmation of the charges is 'substantial grounds to believe,' something more than reasonable grounds but less than 'proof beyond a reasonable doubt': *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013.

⁸ See, *The Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute, 18 December 2012 and *The Prosecutor v. Francis Kirimi Muthaura*, ICC-01-09-02/11, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura, 11 March 2013. See also, *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Notifi-

8. To date, Judges at the ICC have levelled criticism with respect to several aspects of the Prosecution's investigative practices:
 - a) the timing and length of investigations;
 - b) the quality of the evidence collected during the investigation and presented in court;
 - c) the inappropriate delegation of investigative functions; for example, the use of intermediaries;
 - d) the failure to adequately discharge the Prosecution's obligation under Article 54 to investigate exculpatory information equally;
 - e) the failure to properly analyse evidence and disclose potentially exculpatory material.

1. The timing and length of investigations

9. A primary concern of the judges has been the continuation of investigations long after the commencement of cases. Some Defence teams have accused the Prosecution of changing their case theory in response to newly acquired witnesses and evidence as the investigation continues late into the process.⁹ It must be recognised that because of the circumstances under which mass atrocity arises and the limited investigative tools of the ICC, it is likely that investigations will always continue even past arrest and the confirmation process. At the ICTY, which is often cited as a success to be emulated, investigations continued in this fashion in all of the cases, even cases that are ongoing today. But it is a matter of degree, and at the ICC, it appears that one of the reasons for significant investigative tasks continuing well into the case has been the short interval of time spent investigating the case before seeking an arrest warrant. The risk when there is such a short investigation at the beginning of the case is that new evidence later discovered will change either subtly or dramatically the theory of the Prosecution, which in turn will result in prejudice to the accused.
10. The Prosecution requested arrest warrants in the Côte d'Ivoire situation only 22 days after commencing the investigation and after 74 days in the Libya situation, though in both cases the Prosecution benefitted from significant cooperation in its investigations, allowing it to move more quickly than it might have in

cation of the Removal of a Witness from the Prosecution's Witness List and Application for an Adjournment of the Provisional Trial Date, 19 December 2013.

⁹ See, for example, *The Prosecutor v. Francis Muthaura and Uhuru Kenyatta*, Case No. ICC-01/09-02/11, Corrigendum to Observations on the Conduct, Extent and Impact of the Prosecution's Investigation and Disclosure on the Defence's Ability to Prepare for Trial with Confidential Annex A, Public Annex B and Public Annex A1; 20 February 2013.

other situations.¹⁰ In addition, in the Libya case in particular, it was imperative to act quickly in order to attempt to interrupt ongoing crimes. Nonetheless, these timeframes indicate that some of the Prosecution's early investigations were too rushed. In addition, the Prosecution may have underestimated the types of evidence that the Judges would require at each stage of the proceedings.

11. The infirmities of these early investigations have been the subject of scrutiny by Pre-Trial Chambers considering whether to confirm the charges. In the Côte d'Ivoire case, after a considerable delay caused in part by a Defence application asserting that Mr. Gbagbo was unfit to stand trial, a first confirmation hearing was held in February 2013.¹¹
12. The Chamber, having assessed the evidence, came to the view that the Prosecution's case was insufficient to meet the substantial grounds test.¹² It considered that although the evidence was insufficient, it did not "appear to be so lacking in relevance and probative value that it leaves the Chamber with no choice but to decline to confirm the charges under article 67(7)(b)". The Chamber decided that the proper course of action was to adjourn the case and request that the Prosecution conduct additional investigation.¹³ The Chamber gave the Prosecution five months to continue its investigation and present a new Document Containing the Charges.¹⁴ Eventually, the charges were confirmed.¹⁵

¹⁰ Also, in fairness to the Prosecution, there are indications that it was receiving information and conducting preliminary inquiries in the Côte d'Ivoire situation as early as April 2009. See, Statement of the Deputy Prosecutor of the International Criminal Court on an Overview of Situations and Cases Before the ICC, 14 April 2009, available at <http://www.icc-cpi.int/NR/rdonlyres/CF9DFD80-5E15-4AA8-BA0D-7E728F0D86DF/280265/140409Capetown.pdf> (last visited on 25 April 2014). See, also, Prosecutor's Speech to the Eighth Session of the Assembly of States Parties, 23 November 2009, available at <http://www.icc-cpi.int/NR/rdonlyres/CDF496C7-7BA7-4AA3-B670-1EE85BC3E3E8/281268/20091118ASPSpeech.pdf> (last visited on 25 April 2014).

¹¹ The legal standard for confirming charges against an accused is somewhat elevated from the 'reasonable grounds' standard for an arrest warrant but still well below the standard of 'proof beyond reasonable doubt' at trial. This standard serves a gate-keeping function, ensuring that only those charges which merit a full trial are allowed to proceed to one. Article 61(7) ICC Statute gives the Chamber three options: a) to confirm the charges; b) to decline to confirm the charges; or c) to adjourn the hearing and request the Prosecution to provide additional evidence or amend the charges.

¹² *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013. The Appeals Chamber has stated that in the application of this standard a 'Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses.' (*The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10 OA 4, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 Dec. 2011 entitled "Decision on the Confirmation of Charges", 3 March 2012.)

¹³ The Chamber in applying the gate-keeping threshold of Article 61(7) ICC Statute considered that the Prosecution must have presented its strongest case resulting from a largely completed investigation. Thus, the appropriate course of action was to adjourn the case for additional investigations (*The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013, para. 25.)

¹⁴ *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013, p. 23. It is important to note that one member of Pre-Trial Chamber I wrote an articulate and persuasive dissent from the majority's decision. Judge Silvia Fernández de Gurmendi took the view that the majority's decision was based on an erroneous understanding of the applicable evidentiary standard for the con-

13. In *Mbarushimana*, the Chamber criticised the Prosecution's broad language in the DCC,¹⁶ which, when specifying the location of crimes used the language 'include but are not limited to...'. The Chamber expressed its concern that this was an attempt by the Prosecution to keep open the possibility of broadening the case through continued investigations.¹⁷
14. The *Kenyatta* Defence recently took issue with the large number of new witnesses that were identified by the Prosecution after the confirmation hearing asserting that they resulted in 'radically altered' allegations.¹⁸ The Chamber in large part rejected this assertion and reaffirmed that the Prosecution was not required to rely on the same evidence at trial that it had adduced during the confirmation process. Nevertheless, the Chamber expressed its concern regarding the "substantial volume of new evidence that was gathered by the Prosecution" after confirmation.¹⁹ The Chamber, citing the *Mbarushimana* Appeal decision, reminded the Prosecution that the investigation should be largely completed by the time of the confirmation hearing.²⁰ One of the judges in her concurring opinion stated that "there are serious questions as to whether the Prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation".²¹ The *Kenyatta* Chamber introduced the legal requirement that all investigations that could have reasonably been completed before confirma-

firmation of charges. She went further to take issue with the Chamber's application of the evidentiary standard to the contextual elements of crimes against humanity. Finally, Judge Gurmendi found that the majority's request to the Prosecution to deal with specific 'questions' and 'issues' was both irrelevant and inappropriate. The Prosecution appealed the *Gbagbo* Adjudgment Decision, making arguments similar to Judge Gurmendi's dissent. The Appeals Chamber summarily dismissed the Prosecution's appeal of the issue related to the evidentiary standard to be applied at a confirmation hearing, finding that the Pre-Trial Chamber had not granted leave for an appeal of this issue (para. 64.) On 13 January 2014, the Prosecution filed its new amended DCC. Between January and April 2014, the confirmation process took place in writing, and the charges were eventually confirmed on 12 June 2014.

¹⁵ *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014.

¹⁶ The Document Containing Charges is defined in Article 61(3) ICC Statute and performs a function similar to the indictment used in many national systems.

¹⁷ *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, paras. 79-83.

¹⁸ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Corrigendum to Observations on the Conduct, Extent and Impact of the Prosecution's Investigation and Disclosure on the Defence's Ability to Prepare for Trial with Confidential Annex A, Public Annex B and Public Annex A1, 20 February 2013, para. 11.

¹⁹ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, 26 April 2013, para. 112.

²⁰ 'The Prosecution should not seek to have the charges against a suspect confirmed before having conducted a full and thorough investigation in order to have a sufficient overview of the evidence available and the theory of the case'. *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, 26 April 2013, para. 119, citing, *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/120 OA 4, 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, para. 44.

²¹ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, Concurring Opinion of Judge Van den Wyngaert, 26 April 2013, para. 1.

tion must be. The Chamber went further stating that the Defence will have remedies available with respect to failures to do this.²² The Prosecution is now on notice that, in the future, Chambers are likely to be less forgiving when investigations prove to be inadequate or tardy.

15. While the concerns addressed by the *Kenyatta* Chamber focused on the procedural unfairness caused by an investigation that continues after confirmation, a failure to adequately investigate a case before commencing a criminal process risks a flawed case that may ultimately have to be withdrawn. This precise situation apparently arose for Kenyatta's co-defendant, Francis Muthaura, for whom charges were also confirmed in January 2012. On 11 March 2013, the Prosecution filed a notice withdrawing all charges against Muthaura.²³ In the filing, the Prosecution informed the Chamber that having considered all of the available evidence, "there is no reasonable prospect of conviction in the case".²⁴ When explaining the underlying reasons for the withdrawal, the Prosecution pointed to the fact that several potential witnesses had died, were killed or had become uncooperative.²⁵ Several months later, the Prosecution asked for an adjournment of the *Kenyatta* case citing a need to assess its ability to meet its trial burden of proof.²⁶ It is difficult to assess the extent to which these problems were foreseeable and could have been overcome by identifying additional witnesses and evidence during the investigation. In the Prosecution's application for an adjournment of the *Kenyatta* trial date, it revealed that at that point in time a single witness, P-0012 "lay at the heart of the Prosecution's evidence, providing a critical link between the Accused and the crimes in Nakura and Naivasha".²⁷
16. One clearly troubling aspect of the Prosecution's *Muthaura* submission is that it explains that one of the contributing causes of the collapse of the *Muthaura* case was that the Kenyan government "failed to assist it in uncovering evidence that would have been crucial". This suggests that the Prosecution may have known at the time of confirmation that it had insufficient evidence for conviction, but proceeded in the hope that such evidence would come into its possession before the start of trial.²⁸

²² See, *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, 26 April 2013, para. 121.

²³ *The Prosecutor v. Francis Kimiri Muthaura*, Case No. ICC-01/09-02/11, Prosecution Notice of Withdrawal of the Charges against Francis Kimiri Muthaura, 11 March 2013.

²⁴ *The Prosecutor v. Francis Kimiri Muthaura*, Case No. ICC-01/09-02/11, Prosecution Notice of Withdrawal of the Charges against Francis Kimiri Muthaura, 11 March 2013, para. 9.

²⁵ To date, there has been no public record of Article 70 ICC Statute proceedings (Offences Against the Administration of Justice) having been instituted against the person who allegedly bribed the witness.

²⁶ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Notification of the Removal of a Witness from the Prosecution's Witness List and Application for an Adjournment of the Provisional Trial Date, 19 December 2013.

²⁷ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Notification of the Removal of a Witness from the Prosecution's Witness List and Application for an Adjournment of the Provisional Trial Date, 19 December 2013, para. 15.

²⁸ *The Prosecutor v. Francis Kimiri Muthaura*, Case No. ICC-01/09-02/11, Prosecution Notice of Withdrawal of the Charges against Francis Kimiri Muthaura, 11 March 2013, para. 11. The Prosecution had acknowledged in a public statement that there were ongoing efforts to undermine its work in Ken-

17. International criminal investigations in conflict areas are unique in that evidence that was unavailable at the start of the investigation may become available as time passes and the conflict subsides. Changes in security, disposition towards the Court, and reaction to court proceedings can all prompt the discovery of new evidence. Investigators are likely to have better access to witnesses, crime scenes and archives as the case progresses.²⁹ While the Prosecution must always seek the most reliable and probative evidence, this goal must be balanced against the accused's right to know the case against him and to prepare a defence. It is likely that Judges at the ICC will develop criteria to help strike the appropriate balance between these competing concerns when new evidence is discovered.³⁰ In any event, at the time of confirmation the Prosecution should have sufficient evidence to ensure that there is a reasonable prospect of conviction after trial.

2. The quality of the evidence presented in court

18. Commencing a prosecution before completing a comprehensive investigation directly impacts the quantum and quality of the evidence available to the Chamber. One of the criticisms of the *Gbagbo* Chamber was the Prosecution's heavy reliance on anonymous hearsay (though Article 61(5) ICC Statute explicitly permits 'summary evidence' at the confirmation hearing). The criticisms noted the lower probative value of such evidence as well as the implications for the right of an accused to know who is providing evidence against him or her.³¹ The Chamber also took issue with the Prosecution's reliance on documentary and summary evidence, such as press articles and NGO reports, and noted that unless the Prosecution were to conduct additional investigations, there was little prospect of the evidence being accepted at trial.³²

ya. See, Statement by the ICC Prosecutor: ICC Witnesses Undergo Rigorous Tests, 17 November 2010.

²⁹ During the trial of Slobodan Milošević it was a frequent occurrence for previously unknown witnesses to come forward and identify themselves in the ICTY's field offices in response to something they saw in the broadcast of the trial. See, A. Whiting, 'In International Criminal Prosecutions, Justice Delayed Can be Justice Delivered', 50 *Harvard Int'l L.J.* 323 2009.

³⁰ ICTY judges have developed criteria to aid in striking the appropriate balance. These criteria include: i) the relevance and importance of the new evidence; ii) whether there is good cause for the late addition of the evidence; iii) whether the Prosecution exercised due diligence in identifying the new evidence; and iv) whether allowing the use of the new evidence will result in prejudice to the accused. See, for example, *The Prosecutor v. Mičo Stanišić and Stojan Župljanin*, Case No. IT-09-91-T, Decision Granting in Part Mičo Stanišić's Motion for Leave to Amend his Rule 65ter Exhibit List, 19 July 2011; and *The Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Defence Motion to Amend 65ter List and Second Bar Table, 1 December 2010.

³¹ Article 67 ICC Statute, Rights of the Accused.

³² The *Gbagbo* Chamber stated: "In light of the above considerations, the Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity". (*The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013, para. 35.)

19. The *Mbarushimana* Chamber also indicated that the anonymous hearsay evidence contained in Human Rights Watch reports would, as a general rule, be ‘given a low probative value’.³³ The *Abu Garda* Chamber followed a similar approach with respect to anonymous evidence and summary statements that the Prosecution tendered in support of its case.³⁴
20. Equally important is the necessity of investigating the credibility and reliability of known witnesses. Ultimately, a Chamber will consider the evidence offered by the Prosecution in light of its assessment of that witness’s credibility and reliability. The *Kenyatta* Chamber recently criticised the Prosecution for failing to adequately review evidence of a witness’s credibility in a timely manner having been placed on notice that there were “potentially serious challenges to the credibility of certain ...key witnesses”.³⁵
21. In addition to the poor quality of some evidence, ICC judges have expressed concern over the paucity or complete lack of evidence on important aspects of the Prosecution case. For example, the *Gbagbo* Chamber found that Prosecution evidence left an ‘incomplete picture’ with respect to the structural links between Gbagbo and the ‘Pro-Gbagbo Forces’ that committed the crimes.³⁶
22. In *Lubanga*, the Chamber was critical of the Prosecution’s failure to adequately investigate the age of alleged child soldiers – something of central importance to the case.³⁷ Similar criticisms were echoed in *Ngudjolo*, another DRC case.
23. In *Mbarushimana*, Prosecution evidence was also found to be lacking.³⁸ In *Abu Garda*, the Chamber characterised the Prosecution evidence regarding some allegations as ‘scant and unreliable’.³⁹ The Chamber remarked that in some cases the evidence adduced not only failed to support the Prosecution’s allegations, but instead supported the accused’s contention that he did not participate in the

³³ *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, para. 78. This is in keeping with law in many national courts, which are reluctant to find probable or reasonable cause based on anonymous information alone. See for example, *Illinois v. Gates*, 462 U.S. 213 (United States Supreme Court, 1983).

³⁴ *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 52.

³⁵ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Prosecution’s application for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, para. 87.

³⁶ *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013, para. 36. The Chamber also noted the lack of evidence regarding the activities of the opposing forces, something it considered relevant to its inquiry.

³⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 175: “Whilst acknowledging the difficult circumstances in the field at the time of the investigation, this failure to investigate the children’s histories has significantly undermined some of the evidence called by the Prosecution”.

³⁸ *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, para. 120.

³⁹ *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 179.

alleged attacks.⁴⁰ The Chamber declined to confirm the charges against Mr. Garda.⁴¹

3. The inappropriate delegation of investigative functions

24. While the reliance on NGO reports has been criticised as an improper delegation of a prosecutorial function, the over-reliance on intermediaries has caused considerable debate over the appropriateness of employing external intermediaries to perform key investigative functions. This issue came dramatically to the fore when the first witness in the *Lubanga* case recanted his earlier testimony. His recantation cast immediate suspicion on those involved in bringing him forward as a witness.
25. The integrity of the intermediaries and the role they played in the investigation was a central issue at trial.⁴² With respect to one intermediary, the Chamber expressed concern that the Prosecution employed a member of the Congolese intelligence service as an intermediary, a person working for the very government that referred the case.⁴³ The Chamber concluded that “the Prosecution should not have delegated its investigative responsibilities to the intermediaries...notwithstanding the extensive security difficulties it faced”.⁴⁴
26. The Prosecution has indicated that it has addressed the issue of intermediaries since the difficulties that arose in the *Lubanga* case. The reality is that the Prosecution will often have to rely on intermediaries to identify potential witnesses where there exist security issues. What is critical, and what the Prosecution has sought to address after *Lubanga*, is ensuring that intermediaries do not undertake investigative functions, and that their work is closely managed and supervised.⁴⁵

4. The failure to conduct a fair investigation pursuant to Article 54

27. The Prosecution has an important independent responsibility to act as a minister of justice. Investigations must be designed to establish the truth of events. It is as important to insulate the innocent from specious criminal prosecutions as it is to convict the guilty. Defence counsel have regularly asserted that the Prosecu-

⁴⁰ *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 228.

⁴¹ *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 236.

⁴² *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”, 7 March 2011, para. 198.

⁴³ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”, 7 March 2011, para. 368.

⁴⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”, 7 March 2011, para. 482.

⁴⁵ In March 2014, guidelines and protocols for dealing with intermediaries were promulgated. This is a positive and important development in investigative practices.

tion fails to conduct its investigations in accordance with Article 54 ICC Statute.⁴⁶ A Pre-Trial Chamber considering the charges in the Kenya situation was troubled by evidence indicating the Prosecution had not met its obligation to conduct a fair investigation. The Chamber, in declining to confirm the charges against Callixte Mbarushimana, expressed its concern regarding interview techniques used by Prosecution investigators which “seem[ed] utterly inappropriate when viewed in light of the objective, set out in article 54(1)(a) ICC Statute, to establish the truth by “investigating incriminating and exonerating circumstances equally”.”⁴⁷

5. The failure to properly analyse evidence and disclose exculpatory material

28. The handling of evidence gathered during the investigation has also been an issue to the extent that it has had implications for the Prosecution’s proper discharge of its disclosure obligations. In *Lubanga*, the Prosecution, during the course of its investigation, sought and received documents from a provider pursuant to Article 54(3)(e) ICC Statute under the condition that they would not be disclosed. Difficulties arose when the information contained material that was arguably potentially exculpatory, which nearly resulted in a termination of the ICC’s first trial.⁴⁸ It was only after the conditions of the original agreement with the provider were re-negotiated that the trial was able to proceed.⁴⁹ The Prosecution in its 2009-2012 Prosecution Strategy acknowledged the problems inherent in accepting confidential materials and announced its policy to no longer seek confidential information from humanitarian organisations.⁵⁰
29. In *Kenyatta*, there is also evidence to suggest that at least in one instance, the Prosecution was unaware of all of the evidence generated during the investigation, including clearly exculpatory material. The Chamber expressed its ‘serious concern’ with respect to the failure to disclose the affidavit and the ‘deficiencies in the Prosecution’s internal structure’.⁵¹
30. These criticisms suggest that the Prosecution needs to focus on its review of information for purposes of disclosure. The Prosecution’s 2012-2015 strategy sets

⁴⁶ See, for example, *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Confirmation Hearing, 30 October 2009, T.72 (Ref. no. ICC-02/05-02/09-T-21-Red) and *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, 26 April 2013, para. 112.

⁴⁷ *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, para. 51.

⁴⁸ *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, para. 51.

⁴⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Reasons for Oral Decision Lifting the Stay of Proceedings, 23 January 2009.

⁵⁰ Prosecution Strategy 2009-2012, 10 February 2010, para. 53.

⁵¹ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Defence Application pursuant to Article 64(4) and Related Requests, 26 April 2013, paras. 94-95.

as a goal to reorganise the information management function within the Office, which should include improvements to the disclosure review process.

III. Perceived Shortcomings or Areas of Possible Improvement

31. The criticisms levelled at the conduct and quality of investigations to date are related to three primary areas. Firstly, the prosecution model used to process cases throughout the process is fragmented and overly-bureaucratic. Secondly, the Prosecution must improve the conduct and quality of its investigations by improving its investigative methods. Finally, the Prosecution needs to address capacity issues and ensure that the staff supervising and managing cases have the necessary expertise and experience to meet the difficult challenges of international criminal investigation.

1. The investigative process requires adjustment

32. The Prosecutor has divided her staff into three major divisions: the Jurisdiction, Complementarity and Cooperation Division, the Investigation Division and the Prosecution Division. The respective responsibility of each division is set out in Prosecution policy documents.⁵²
33. Throughout the process of handling a complaint from intake until the final disposition (in the case of a trial) the primary responsibility shifts or is shared between different divisions in the Prosecution. This model for the handling of complaints creates the potential for inconsistency in the Prosecution's approach and a lack of continuity in the handling of evidence and information received in the process as happened in *Lubanga* and *Kenyatta*.⁵³
34. A criticism of the Office has been that it is excessively bureaucratic. For example, if a witness is considered to be vulnerable, such as a victim of gender and sexual crimes, the Prosecution Regulations require that a face-to-face psycho-social assessment be conducted by an expert prior to any questioning by an investigator.⁵⁴ Such a procedure prevents an investigator with significant training, expertise and experience dealing directly with vulnerable victims from acting when appropriate. An experienced sexual violence or special victim investigator has significant training in how to interview vulnerable witnesses in a way that minimises the chance of re-traumatisation and is alert to indications that professional psycho-social support is necessary.⁵⁵

⁵² The Prosecution sets out its Organisational Structure and the respective areas of responsibility of its three primary divisions in an annex to the 'Paper on Some Policy Issues Before the Office of the Prosecutor': Referrals and Communications.

⁵³ See above, paras. 28-29.

⁵⁴ Regulation 36(3), Prosecution Regulations.

⁵⁵ For example, a properly trained special victims investigator on a mission to interview a known witness in a refugee camp is prevented from interviewing other victims of sexual violence who may make themselves known to the investigator after learning about the Prosecution's presence. In such a case the

35. The objective behind the joint team model was to ensure input throughout the process from persons with different expertise: investigation, prosecution, and cooperation. In addition, cases were carefully managed by the Executive Committee on the theory that the early cases could set the policies and practices of the institution for years to come. However, in practice, these structures have often proven cumbersome. In the 2012-2015 Prosecution Strategy, the office seeks to adjust the roles of the three divisions and states that it will “mov[e] from a joint leadership for investigations and prosecutions to a model where (1) PD has the ultimate responsibility in the team...”⁵⁶ In addition, the plan states that the Executive Committee will delegate more responsibility to the joint teams and will focus more on strategic issues.⁵⁷
36. These are welcome goals and should be implemented in practice. These adjustments to the structure should streamline the work of the Office (thereby ensuring the more efficient use of resources) and will help to ensure that investigations are led from the beginning by a prosecution focus.

2. Some of the investigative methods employed by the Prosecution are flawed

37. As described above, Judges have levelled criticism at the Prosecution’s conduct of investigations. Several of the infirmities identified by Judges appear to be problems with the investigative methods used by the Prosecution.
38. The Prosecution has and will be called upon to investigate situations in very different contexts. Central to a successful investigation is to follow accepted investigation methods that are adapted to the particular context and investigative challenges a particular situation presents. An investigation that does not adhere to fundamental principles of investigation will not yield reliable evidence that can be properly used in proceedings.⁵⁸

3. There is insufficient investigative capacity and a shortage of experienced investigators

39. Several of the problems identified by judges appear to not only be the result of flawed investigative method but of a lack of sufficient capacity to investigate

investigator does not have the discretion to commence an interview (even a brief screening interview) until a psycho-social interview is conducted in a separate mission. Depending upon the outcome of the psycho-social interview the investigator will have to return on a third mission to conduct an initial interview of the witness. This regulation is cumbersome and effectively thwarts a witness’s desire to be interviewed by the qualified investigator.

⁵⁶ Prosecution Strategy 2012-2015, 11 October 2013, para. 31.

⁵⁷ Prosecution Strategy 2012-2015, 11 October 2013, p. 17.

⁵⁸ See D. Groome, *The Handbook of Human Rights Investigations*, Human Rights Press, 2001, pp. 33-49.

these complex crimes. The Prosecution appears to lack the resources it needs to adequately investigate situations to the high standard required.⁵⁹ It appears particularly problematic in the case of new situations that require transferring staff from the cases they are on to take up new responsibilities on a new case.

IV. Recommendations for the Prosecution

40. Problems related to Prosecution investigations can be addressed with several simple yet fundamental changes to its practices, many of which have already been announced by the Prosecution but which must be fully implemented and supported. These changes do not require any amendments to the Statute or the Rules of Procedure and Evidence although they will require changes to the internal regulations and practices of the Prosecution. These recommendations are fundamental in the sense that they do require the Prosecution to continue examining the way in which it discharges its statutory responsibilities and deploys its staff.

1. Structural Changes

a) The Prosecution should employ a ‘vertical prosecution’ model of processing cases

41. The Prosecution organises the investigation and prosecution of its cases according to a variation of the horizontal model of prosecution. In a horizontal model, crimes move through different sections of a prosecution office depending on the stage of proceedings. One prosecutor may supervise the initial investigation and decide whether or not to authorise an arrest. Another prosecutor, in a different department, may make the initial charging decisions and draft the indictment. Finally, a trial team may be composed of different lawyers to conduct the trial of the case.
42. The horizontal model of prosecution can be more efficient in processing a high volume of routine cases such as low-level drug transactions. It allows routine cases that often end with a plea of guilty to be handled efficiently.
43. The Prosecution employs a variation of this model it refers to as a ‘rotational model’.⁶⁰ As a complaint moves through the prosecution process, primary responsibility for the case shifts between each of its three divisions. In an effort to

⁵⁹ This is evidenced by the criticisms of the Prosecution’s investigative practices. See above, paras. 18–23.

⁶⁰ The Office of the Prosecutor refers to this model as the ‘rotational model’. See, Assembly of States Parties, Report on Activities and Programme Performance of the International Criminal Court for the year 2012, para. 57: “The rotational model that moves staff between teams depending on phases, workload and case priorities represented significant savings. In addition, the Prosecution has made recurring efficiency savings.”

maintain some continuity, Joint Teams (for investigation) and Interdisciplinary Teams (for trial) are created and are comprised of staff from each division.

44. This variation of the horizontal prosecution model applies it to a type of case in which there are few net efficiencies to be gained. Each of the Prosecution's cases is complex and presents a unique set of challenges. In the most recent report on the activities of the Court the Prosecution has acknowledged that this model is becoming increasingly less effective.⁶¹
45. Over the last several decades many national prosecution offices have employed a different model: vertical prosecution. The basic principle of vertical prosecution is that a prosecutor of appropriate experience is assigned at the start of the process and remains with the case until the trial is completed. In the context of serious and complex crimes, the same senior prosecutor supervises the investigation and manages the prosecution of the case from start to finish (other lawyers, analysts and investigators should, where required, remain on the team throughout the process). Having a single senior prosecutor ensures a continuity of analysis, decision-making and judgement throughout the life of the case.
46. A vertical model of prosecution was initially employed in cases of special victims such as victims of sexual violence and crimes against children. The model has obvious benefits for victims by limiting the number of different people victims will encounter through the court process.
47. The Expert Group, based on the information before it, concludes that the Prosecution has organised its work in a form of the vertical model of prosecution. Although staff members are rotated in response to the needs of a particular case there is some effort to maintain a core team on each case throughout. The Prosecution should organise its work so that once an incoming complaint has been preliminarily screened it is assigned to a core team of qualified prosecutors, investigators and analysts who remain constant and make recommendations to the chief prosecutor at each stage of the case. The preliminary screening would be limited to an assessment of whether the complaint, on its face, could constitute a crime under the Rome Statute and is sufficiently serious to merit further consideration.
48. This core team should be responsible for conducting the preliminary examination of the situation and making a recommendation to the Prosecutor as to whether the office should seek to open an investigation. The core team should be responsible for conducting the investigation, applying for the arrest warrant, preparing the case for confirmation and ultimately conducting the trial. During the life of the case the core team should be supplemented with additional personnel as needed. For example, during the investigation stage it will be neces-

⁶¹ Assembly of States Parties, Report on Activities and Programme Performance of the International Criminal Court for the year 2012, para. 58 ("The rotational model is, however, at the limit of flexibility for the caseload and has not been without its hidden costs in 2012.").

sary to have additional investigators and analysts added to the team. During the confirmation and trial phase there may be a need for additional trial lawyers.

49. Other specialised functions such as the management of external communications, or support services for victims should be seen as resources to facilitate the team's work that can be called upon when necessary.
50. A vertical model of prosecution has a number of benefits and addresses the "deficiencies in the Prosecution's internal structure" alluded to by the *Kenyatta* Chamber.⁶² First, it ensures greater continuity in the processing of the case as well as in the case theory advanced in court.
51. There are benefits for victims and vulnerable witnesses by limiting the number of different people they encounter in the process. The core team becomes familiar with the particular vulnerabilities of a victim/witness early in the case and ensures appropriate treatment of that witness. By limiting the number of Prosecution staff working with witnesses there is also less likelihood of disclosure problems like in *Kenyatta*. The core team, being the primary contact throughout the case is familiar with the different interviews and interactions the witness has had with the Office.
52. Vertical prosecution is a more efficient model for the handling of complex serious crimes. Gaining detailed knowledge of the facts and evidence regarding a crime requires a substantial investment on the part of staff. The Prosecution staff who are assigned to evaluate the case and make early decisions regarding it should be selected for their ability to see the case through completion.
53. This optimal prosecution management structure comes under strain during times when the core team is needed to assist on other cases, when there is a new situation and when there are several cases on trial. States parties should ensure that the Prosecution has the ability to quickly acquire new or additional staff that are needed urgently without having to compromise the work on existing cases by drafting in core staff to meet short-term exigencies.
54. Finally, in this context, it is recommended that the OTP continue to explore ways to make the investigation and prosecution teams more efficient and focused, in particular by exploring the cost-benefits of different management structures.

b) The Prosecution should streamline its management of investigations

55. In addition to changing the overall structure of how prosecutions are managed the Prosecution should continue to examine its investigation management and

⁶² *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, 26 April 2013, paras. 94-95.

policies generally to determine if they are as effective and efficient as possible. As set forth in the Prosecution's new strategy document, the structure should ensure that senior managers have sufficient and timely information to make strategic decisions about the conduct and course of investigations yet empower experienced investigative staff with the appropriate level of authority to exercise their discretion in tactical and operational matters without unnecessary bureaucracy. Cumbersome and unnecessary micro-management diminishes the effectiveness of experienced staff and increases the cost and resources consumed by an investigation.

2. Methodological Improvements

a) **The Prosecution should, as a matter of policy, largely conclude primary investigations prior to the confirmation hearing**

56. The *Mbarushimana* Appeals Decision indicates that the Prosecution's investigation should be largely completed prior to the holding of the Rule 61 confirmation hearing. It would be good if the Prosecution were able to succeed in its objective to complete all investigative tasks prior to the conduct of a confirmation hearing. Recognising that some circumstances may arise requiring further investigation, the Prosecution should abandon the practice of delaying substantial investigations on issues central to the case until after a confirmation has been held.
57. If the Prosecution is unable to secure evidence necessary to have a reasonable prospect of conviction after trial at the time of confirmation, then absent exceptional circumstances the case should be withdrawn.⁶³ Not all investigations or prosecutions succeed. Allowing cases to proceed to confirmation or beyond in the hope that evidence sufficient for a conviction will come into the Prosecution's possession does international justice a disservice.
58. The Prosecution should ordinarily limit its post-confirmation investigations to newly discovered evidence it could not have reasonably discovered earlier and investigations necessitated by developments in the case (for example, in response to Defence evidence).

b) **The Prosecution should model its investigative practices on generally accepted standards and practices**

59. As the Prosecution well knows, conducting an international criminal investigation is a time-consuming endeavour. The crimes are both serious and complex and require detailed and careful investigation. The investigation of the actual crime itself (i.e., the victims, the direct perpetrators and the primary crime scene

⁶³ It should be acknowledged that in some cases, new evidence may become available at an inopportune time. See also, *Disclosure at the ICC*, paras. 57-62.

if available) must be done as carefully and to the same high standard as that applied by professional national police services.

60. There can be little doubt that the new Prosecutor and her senior staff are acutely aware of the need to improve the conduct and quality of investigations. As noted above, there are several tangible indications to outside observers that senior management is actively taking concrete steps to build investigative capacity and improve quality. These efforts should be commended and supported by States parties. The following are some concrete suggestions regarding how to improve investigations.

i) Less reliance on the use of NGO reports

61. The Prosecution must limit its use of NGO reports. Such reports provide invaluable assistance at the beginning of an investigation. The reports can orient investigators to crimes to be investigated and provide valuable investigative leads pointing to where evidence and witnesses might be found. Such reports should not ordinarily be considered a substitute for the Prosecution conducting its own independent investigation.⁶⁴

ii) Cease reliance on evidential use of anonymous hearsay

62. Anonymous hearsay can also be of great assistance in the early stages of an investigation. It can provide important leads to identify witnesses and evidence as well as provide background to orient investigators to the context and nature of the crimes.⁶⁵
63. By contrast, anonymous hearsay should rarely, if ever, be adduced as proof to sustain the Prosecution's burden at any stage of a criminal proceeding. It inherently lacks sufficient reliability and is very often factually inaccurate. Many in-

⁶⁴ See, for example, *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, para. 35 (“the Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with Article 54(1)(a) of the Statute. Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges.”).

⁶⁵ Many of the investigations at the ICTY were commenced after a review of reports from the media and non-governmental human rights organisations. See, for example, Human Rights Watch: ‘*War Crimes in Bosnia-Herzegovina*’, Vol. I, 1 August 1992; ‘*War Crimes in Bosnia-Herzegovina: Bosanski Samac, Six War Criminals Named by Victims*’, 1 April 1994; and ‘*Yugoslav Government War Crimes in Racak*’, 15 July 1999. See also, Amnesty International, ‘*Bosnia-Herzegovina: To Bury My Brothers’ Bones*’, 9 July 1996. The ICTY also had the benefit of the Bassiouni Commission, an *ad hoc* commission established by the UN Security Council to conduct preliminary non-judicial investigations. Commission of Experts’ Final Report, 27 May 1994, UN doc. S/1994/674, available at http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf (last visited on 25 April 2014).

ternational crimes occur in the context of a conflict in which propaganda, allegedly based on anonymous hearsay, is a frequently used tool.⁶⁶ The anonymity of the information makes it impossible for a chamber to assess the credibility and reliability of the person providing the information.⁶⁷

64. A competent investigation requires more than aggregating several sources of hearsay and presenting it to the Court. Investigators must find the source of the hearsay and conduct their own independent interview and assessment of the witness.

iii) No delegation of investigative functions – intermediaries

65. The Chamber has criticised the Prosecution's use of intermediaries, in particular as regard the breadth of responsibilities given to them. Using intermediaries to make initial contact with witnesses is an acceptable way of working in a hostile environment. In some situations making direct contact with witnesses may jeopardise their safety and give them the impression that investigators are unprofessional and insensitive to their security. Using intermediaries to make initial contact with witnesses is an acceptable way of working in a hostile environment. In some situations making direct contact with witnesses may jeopardise their safety and give them the impression that investigators are unprofessional and insensitive to their security.
66. As the Prosecution has already recognised, however, the intermediary should only be used to convey a request to speak with a potential witness and not in the selection of witnesses themselves.⁶⁸ They should not be involved in any interviews. If intermediaries are to be used, the investigator must carefully consider whom to use. Employing third parties against financial rewards requires that strong safeguards be put in place to limit the risk of improprieties. The Prosecution has the responsibility to control all aspects of the investigation and vigorously protect its integrity.⁶⁹

⁶⁶ In the context of the former Yugoslavia, one of the more egregious reports intended to inflame passions that was proven to be false was a claim that Serb babies were being fed to the lions in the Sarajevo zoo. The original broadcast by Rada Djokić can be seen on Youtube at <http://www.youtube.com/watch?v=LzUqQxNb8qw> (last visited on 24 April 2014). Borislav Herak, one of the early infamous perpetrators of crimes in the Sarajevo area, claimed that he was motivated in part by the reports of Serb babies being fed to the lions at the zoo (The Dallas Morning News, 5 May 1993).

⁶⁷ The Prosecution's heavy reliance on anonymous hearsay in cases deprived the Chambers of the ability to check the information against other known sources. A Chamber that must evaluate evidence that is predominantly anonymous is unable to cross-check the evidence because it is difficult to assess whether seemingly corroborative evidence is truly corroborative or simply another formulation of the same information from the same anonymous source.

⁶⁸ Intermediaries should not have a financial incentive capable of affecting the quality or reliability of the information provided.

⁶⁹ It should be welcomed that in March 2014, after a lengthy consultation process, *Guidelines Governing the Relationship Between the Court and Intermediaries* were finally adopted, alongside a *Code of Conduct for Intermediaries* and a *Model Contract for Intermediaries*. Because the present drafting process was largely finalised at the time of their adoption and publication, these documents have not been considered in the drafting of this paper.

iv) Checking the reliability and credibility of witnesses

67. Despite the Prosecution having deemed it necessary to use intermediaries to identify and then interview potential child soldiers in *Lubanga*, the Prosecution has been subject to judicial criticism for not adopting adequate safeguards. For future purposes, it should consider taking steps to verify the quality, reliability, credibility and authenticity of information received through intermediaries. Factors such as age and other factors capable of affecting the reliability of information collected should be carefully verified by the prosecution.

v) Investigations that place greater emphasis on the acts and conduct of the accused

68. It is well-known that international criminal investigations involve two important components: investigations designed to establish that international crimes have been committed (commonly referred to as ‘crime base evidence’) and investigations designed to establish which senior officials may be criminally liable for those crimes (referred to as ‘linkage evidence’). While in practice these investigations have great overlap and occur simultaneously, prosecutors and investigators must ensure that the second and more difficult component is adequately investigated to the high standards required for establishing culpability at trial.
69. Investigations must be comprehensive and effective in obtaining all reasonably available evidence of an accused’s guilt prior to initiating a prosecution. Every effort should be made to build a case with sufficient depth that the prosecution can succeed despite the loss of a witness or other evidence.

c) The Prosecution should conduct more proactive investigations and rely less on aggregating the work of NGOs and journalist to meet its burden

70. As described above, the Prosecution has in several cases relied largely on the work product of other organisations. The Prosecution has assembled material available from journalists, UN bodies, humanitarian relief organisations and human rights NGOs. While all of this material is very useful, if not essential, in the early stages of an investigation, it is not generally suitable as evidence to be tendered in support of the Prosecution’s case in proceedings. The Prosecution must use this material to develop its own investigation plans which are designed to identify, locate and preserve the evidence itself, whether that evidence is in the form of testimony, documents or physical objects. The Prosecution must be more proactive in the collection of evidence it needs to meet its burden of proof.

d) The Prosecution should establish field offices to facilitate and support its investigations

71. In keeping with the need to be more proactive, the Prosecution should consider establishing a field office in each country where it is conducting investigations. Whenever the security risks to personnel and costs can be appropriately managed, the Prosecution should establish a field office in those countries in which it is working. Field offices should be located in business districts with significant pedestrian traffic to facilitate the ability of witnesses to access the office and to do so discreetly if necessary. The ICTY at the height of its work had six field offices in the former Yugoslavia.⁷⁰
72. In the experience of the ICTY the field offices were not only an important tool in outreach, they provided a relatively secure way for witnesses to bring themselves to the Prosecution and for investigators to efficiently screen these witnesses. When witnesses would come forward, an investigator permanently assigned to the field office would conduct a brief screening interview. The notes of this interview would be sent to the investigation team in The Hague for review and decision on whether a more substantive interview should proceed. This proved to be a useful and efficient means of identifying and screening potential witnesses.
73. In cases in which witnesses are reimbursed for travel expenses to and from the field office adequate records should be maintained to allow later possible disclosure and review if appropriate. While this model may not work in every situation, it should be considered because it offers the possibility of significant evidentiary gain.

e) The Prosecution should develop and publish a model communication for the submission of complaints

74. It has become common practice for human rights bodies to publish model communication forms and guidelines for filing complaints. This practice ensures that the monitoring body has the information it needs to make an initial assessment of the case as well as the additional information that would allow further investigation if deemed necessary. The Prosecution should develop a model communication and protocol to facilitate the filing of complaints as well as a review of them.
75. At a minimum the Prosecution should develop a model communication and detailed instructions about how the communication form should be completed.

⁷⁰ These offices were located in: Belgrade, Sarajevo, Zagreb, Banja Luka, Pristina and Skopje. See, 'Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991', UN doc. A/56/352, 17 September 2001, para. 197, available at http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2001_en.pdf (last visited on 25 April 2014).

This model communication could be in the format of a downloadable form or an online application. The Prosecution should consider whether such instructions might also include basic information about the preservation of evidence and documenting witness accounts to ensure that any effort to document crimes is done in a way that does not compromise future efforts by the Prosecution. It is important to recognise that model communications which are prepared by eye-witnesses or include identifying information about them can have security implications for these witnesses. The model communication should make clear that information which may have security implications for witnesses should not be included in the communication or provided anonymously at this stage.

f) The Prosecution should develop a classification system for investigative paperwork to facilitate review and disclosure

76. The Prosecution should also develop a classification system for its investigative paperwork. Investigators should be encouraged to use particular electronic forms for specific investigative tasks and procedures. For example, in addition to taking the statement of a witness an investigator may have contact with a witness over the course of an investigation during which the witness provides some additional information related to the case. This information is ordinarily disclosable. Recording this information in a note to the case file or in memo form makes it difficult to find if that person is ultimately selected as a witness for trial. The Prosecution must depend primarily on text searches to try and identify this material. If all contacts with a witness are recorded on electronic form "XX-001" the system can be specifically queried for this form and the documents reviewed for disclosable material. Similarly if administrative paperwork related to an investigator's travel are recorded on form "AA-001" these forms can be excluded, when appropriate, from review making disclosure reviews more efficient.
77. International criminal investigations often involve many investigators and analysts working on different aspects of the investigation. Systems must be put in place to ensure that the evidence gathered is organised and referenced in a way that allows the investigative team to easily access all relevant information related to individual witnesses. Evidence records should contain detailed information about how evidence came into the possession of the Prosecution. Records should include *inter alia*, information about its progeny and restrictions on its use. The information must be available as metadata so that staff can make informed decisions about evidence and be aware of any concerns or sensitivities surrounding the evidence. All of this information should be maintained in a way that allows the Prosecution to query its systems in order to effectively conduct investigations and to discharge its disclosure obligations.

g) Properly analyse evidence and disclose exculpatory material

78. Prosecutors and investigators must continue to be extremely careful when entering into confidentiality agreements under Article 54(3)(e) ICC Statute. It is dif-

difficult to make a decision about the risks involved when entering a confidentiality agreement during the course of the investigation. The legal obligation to disclose potentially exculpatory information is a broad one and will differ depending upon whom the Prosecution ultimately decides to levy charges against. Before entering into confidentiality agreement of the sort relevant to the *Lubanga* case, the Prosecution should carefully consider the risks involved and put in place the requisite and necessary safeguards to protect the integrity and fairness of the proceedings. Articles 54(3)(d) and (e) ICC Statute empower the Prosecutor to enter into agreements and arrangements in order to secure cooperation and evidence. The Prosecutor should negotiate these agreements in a way that protects the interests of the provider or state while ensuring that the Prosecutor can meet her other obligations under the Statute. Ideally, the Prosecution should include a clause in all agreements that should potentially exculpatory material be found, the Prosecution is authorised to submit it for an *ex parte* review by the chamber. If the provider of the information refuses to enter into such an agreement the Prosecution should seriously consider the implications of accepting evidence under Article 54(3)(e).⁷¹

3. Improving the Capacity and Competency of the Prosecution

79. The situations the Prosecution is called upon to investigate are complex and present difficult investigative challenges. These cases would present significant challenges to the most seasoned and experienced of national investigators. These challenges are compounded in the early days of the investigation before permanent staff can be hired to focus on the investigation.

a) The Prosecution should have a core team of highly experienced staff assigned to each case for the duration of the case

80. Each investigation should be adequately staffed with a core team of highly experienced prosecutors, investigators and criminal analysts. The Prosecutor should have significant experience supervising national or international criminal investigations. The investigator should have significant knowledge about international crimes, their elements and experience in investigating them. The analyst should have significant experience in working on investigations involving complex criminal organisations. This core group of staff should remain constant over the course of the case. Other less experienced team members can be guided by this core group in a way that ensures the investigation is conducted to a high standard, and that the less experienced members of the team work in a way that is consistent with good practice.

⁷¹ See also, *Disclosure at the ICC*, paras. 36-42.

b) The Prosecution can build capacity and improve investigation capacity and competence by greater incorporation of experts from Justice Rapid Response

81. One way to build the competency of the Prosecution staff so that it can effectively respond to a new case is to draw on resources available from the Justice Rapid Response.⁷² JRR maintains a roster of vetted experienced professionals. Many have significant experience in international criminal investigations. The Prosecution already incorporates experts from the JRR roster on a temporary basis to a limited extent.⁷³ The Prosecution should increase its reliance on this resource whenever necessary to supplement its own staff in mounting a quick response to a new situation or case. Reliance on JRR may present some human resource challenges in terms of funding and insuring fairness in hiring practices. But as a short-term solution at the beginning of an investigation, it also presents many potential benefits.
82. Drawing on the resources available at the JRR not only allows the Prosecution to meet an immediate short-term need in a cost effective manner, it also builds its competency by enriching its own staff with professionals with experience in the field. The inevitable transfer of knowledge between the JRR and the Prosecution staff will enrich the expertise of the Prosecution staff and create a growing reserve of experienced investigative staff familiar with the Prosecution procedures that can be called upon on short notice. While it is a short-term fix for a short-term need, it does have the potential to provide concrete assistance to the Prosecution during the early days of an investigation – a period of time that in many cases offers numerous fruitful investigative opportunities.
83. The Prosecution should work with JRR to customise its training programs to meet the needs of the Prosecution. With the Prosecution's cooperation, the JRR could incorporate Prosecution protocols and standard operating procedures into its training. Training could be provided on the Prosecution information technology systems using stand-alone versions with mock information. With greater cooperation, JRR would be able to vet, train and help select staff with the experience skills and specialised training to become productive shortly after being sent to the Prosecution.

c) In urgent new situations, the Prosecutor should incorporate staff seconded from States parties

84. The Prosecutor should also have the possibility of incorporating seconded staff into her work. Hiring new staff or even incorporating the experts from the JRR roster into the work of the Prosecution can take time. In situations in which the Prosecutor sees a need to deploy investigative resources more quickly than these two options permit, she should have the discretion to request and receive se-

⁷² For more information on Justice Rapid Response see, <http://www.justicerapidresponse.org/>.

⁷³ See, Prosecution Strategy 2009-2012, 10 February 2010, para. 71.

conded staff from States Parties. Seconded staff could help supplement the core permanent staff she has available to assist in the early days of a case. This staff could be appropriately received from States Parties that do not have an interest in the matter being investigated. Human resources should be consulted on the appropriate mechanism to use to incorporate seconded staff into the work of the OTP.

85. For those states who are members of the JRR, they should consider creating their own roster of JRR trained nationals who could be seconded to the ICC when needed either through the JRR or directly to the Prosecution.
86. In sum, the time it takes for the Prosecution to secure the contribution of qualified personnel to work on new situations or on unforeseen developments on existing situations is too long. States Parties must explore ways to amend hiring practices to allow greater flexibility in responding to urgent and time-sensitive needs of the Prosecution.

d) The Prosecution should improve the quality of its internal review process and supplement its own internal review process with an independent confidential review of its investigations and cases

87. The Prosecution must raise its own standards of review to ensure that its cases are based on sufficient legally admissible evidence capable of sustaining its burden at each stage of the proceedings. This internal review process should make a determination at the time of the confirmation hearing whether or not there is a reasonable possibility that the Prosecution will be able to meet its burden at trial with the evidence that is currently available.
88. There is a growing collegium of professionals in the field of international criminal law and investigation, professionals with a proven track record. This diaspora of former international investigators, analysts and prosecutors now work in other international institutions and national criminal justice systems. In the past, the Prosecution has asked some of these individuals to provide confidential consultations in relation to its work. The Prosecutor should consider ways of regularly engaging these professionals in a way that benefits her work and creates a system of confidential 'peer review'.
89. For example, one of the most critical junctures of a criminal investigation is the development of an investigation plan. A good investigation plan can improve the chances that an investigation will be successful. The best investigation plans are the product of experienced professionals thinking creatively to solve investigative problems. ICC investigations could only improve by setting up a mechanism for some confidential external review of investigative plans, periodic evidence reviews and assessments regarding the sufficiency of evidence. Such an exercise would not only improve investigations but would facilitate a transfer of knowledge between external reviewers and permanent staff. Funds necessary to

cover the costs of external reviews should be included in the Prosecutor's budget.

90. As time goes on and the Prosecution is able to establish better investigative standards and demonstrate greater success investigating international crimes there will be less need for such reviews. During this period when it is striving to improve the quality of its investigations creating avenues for confidential external feedback on their investigations will be an invaluable asset.

4. Improving the Capacity and Competency of National Courts

Conduct investigations in a manner which facilitates the sharing of evidence with national courts when appropriate to do so

91. After a successful investigation the Prosecution is likely to seek charges against a few senior officials. It is likely that in the process the Prosecution will have gathered evidence of the conduct of many people, from the direct perpetrators and all those linking the crime to senior officials. Justice is best served by the Prosecution conducting its investigations in a way that facilitates a transfer of evidence to national authorities in support of their investigations.⁷⁴

V. Recommendations for States parties

1. The ASP should ensure that the Prosecution is adequately funded to conduct quality investigations.

92. The success of the institution depends upon the quality of the investigations. The quality of investigations has a direct relationship to the manner in which the trial is conducted and the quality of the judgements entered by the Chambers. If investigations are conducted to a high standard than credible reliable evidence of an event will be secured and judges will be in the best position to make accurate and just findings. The better the quality of the evidence the shorter and more efficient the trial is likely to be. The *Lubanga* Chamber noted the significant time it expended to scrutinise the Prosecution's practice of using intermediaries and the evidence it yielded. Such considerations are eminently relevant to adopting effective investigative practices. A better-resourced investigation is a good investment and will likely benefit the process throughout.⁷⁵
93. Anecdotal evidence suggests that the Prosecution responds to new investigations by having to spread resources thinner – shifting staff from one case to an-

⁷⁴ For example, the Memorandum of Understanding between the Office of the Prosecutor and Libya: see Security Council, 7509th Meeting, 14 November 2013, p. 3, available at <http://daccess-dds-ny.un.org/doc/UNDOC/PRO/N13/564/35/PDF/N1356435.pdf?OpenElement> (last visited on 25 April 2014).

⁷⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 482.

other and asking staff to serve on more than one case. Given the differences between cases, this practice is unlikely to be effective or efficient. The knowledge that staff members have gained from working on a case is squandered if they are subsequently transferred to an unrelated case. When staff members are asked to work on two cases simultaneously their efforts are diluted.

94. The Prosecution must have at its disposal mechanisms to access the resources necessary to commence new investigations in a professional manner.⁷⁶

2. The UN Security Council should fund referrals

95. States parties should recognise that referrals to the Court by the UN Security Council have very significant resource implications for the ICC. While the long term financial implications can be managed in the regular budget process the short-term requirements of the Prosecutor to commence an investigation are not. UNSC referrals should be adequately funded by the UNSC and after seeking the views from the Prosecution with respect to the anticipated costs of conducting the particular mandate from the UNSC.
96. The ASP should enforce the provision under Article 115(b) ICC Statute in cases of UNSC referrals and seek to gain the support from non-States Parties for funding for UNSC referrals.

3. The ASP should support the work of the JRR and develop a more formal relationship with it

97. States parties should see JRR as an organisation that has significant potential to play an important role in facilitating urgent investigations and supporting the work of the ICC Prosecutor. The ASP should consider a closer and more formal relationship to the JRR.
98. To the extent that doing so may contravene the requirements of ASP/4/Res. 4, Annex II, section 2 ('Gratis Personnel Rule'), States parties may need to amend the gratis personnel rule to allow the Prosecution to accept seconded and temporary staff on a short term basis to meet the exigencies of a new investigation.⁷⁷

⁷⁶ While it is acknowledged that there is a contingency fund, it is recommended that these funds should be made available expeditiously to the Prosecution.

⁷⁷ Section 2 currently reads: "Conditions under which gratis personnel may be accepted 2.1 Each organ of the International Criminal Court (hereinafter: "the Court") may accept gratis personnel only on an exceptional basis to provide expertise not available within the organ, for very specialized functions for which such expertise is not required on a continuing basis (hereinafter "specialized functions"), as identified by the respective organ and for a limited and specified period of time." Section 2.3 could be added to give the Prosecutor greater flexibility: "Notwithstanding the limitations of 2.1 the Prosecutor may seek and accept gratis personnel for a period of one year to enable her to meet any exigencies created by new investigations. The Prosecutor must apply for any posts necessary to investigate and prosecute a new case in the next budget cycle."

4. The ASP should not consider amendments that would require judicial oversight of an investigation at this time

99. The question sometimes arises as to whether ICC investigations would benefit from judicial oversight. Creating an oversight structure would require amendments to the Statute and Rules and would introduce another layer of procedure into a criminal process already struggling under a cumbersome procedural regime.
100. The recommendation at this time is that there be no effort to impose judicial oversight over investigations undertaken by the Prosecutor. There are clear indications that the current Prosecutor has taken significant steps to improve the conduct and quality of her investigations. She has made important changes in personnel, is dealing forthrightly and candidly with some of the problems in prior cases and is making changes in the way investigations are conducted.
101. The statutory framework for the initiation and conduct of investigations is not inherently flawed. It has many features that have proved effective in national and international courts. Before any significant changes are made to this framework this Prosecutor must be given a fair opportunity to demonstrate her capacity to improve the quality of investigations.
102. One possible measure that might be suggested to Pre-Trial Chambers in the absence of a specific rule change is to query the Prosecution at the time of the confirmation hearing regarding whether investigations are substantially completed.
103. Another possible measure would be for the Pre-Trial Chamber to require the Prosecution to provide periodic *ex parte* reports on the status of an investigation that is currently before the Chamber. Doing so would create an incentive for the Prosecution to make and record regular processes in its investigations, and to document, in a general way, the investigative steps taken by the Prosecution that can be made available to the Defence and reviewed by the Chamber at a later stage if necessary.
104. If investigations do not improve then the States parties, at that time, should give consideration as to whether changes to the statutory framework which would impose judicial oversight of investigations are necessary.

VI. Conclusion

105. The Prosecution can best build on its investigative successes to date by dealing directly and forthrightly with the problems identified by judges. This process necessitates a careful reconsideration of the Prosecution's internal structure and investigation methodologies. The relevant sections of the Prosecution should carefully appraise the present report and consider whether to adopt some of the recommendations made. The Prosecution should also identify core priorities so

as to ensure that ongoing investigations or forthcoming ones are conducted in a manner consistent with the relevant best practices.

THE CONFIRMATION PROCESS

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I. Introduction

1. The confirmation process – A statutory novelty

1. A novel feature of the Rome Statute in international criminal justice is the creation of the confirmation hearing, a mid-point adversarial evaluation of the evidence presented by the Prosecutor between arrest or surrender and the trial. This procedure was primarily intended to weed out weak cases before they get to trial, with a view to promoting both efficiency and fairness to the person(s) charged, and to allow for greater judicial management of cases in the pre-trial phase, primarily with the aim of ensuring that cases proceed expeditiously. Absent such a process (and absent other procedural means to weed out unmeritorious cases), cases that are evidentially inadequate could otherwise proceed to trial, to the prejudice of the accused and the Court's resources.
2. The ICC has now held confirmation hearings for 21 suspects (confirming the charges against 17 suspects and declining to confirm charges against four suspects).¹ In one case (*Bemba*), the Pre-Trial Chamber adjourned the hearing and requested the Prosecutor to consider, in accordance with Article 61(7)(c)(ii) ICC Statute, re-submitting the document containing the charges under a different head of responsibility considered more appropriate to the case.² The Prosecutor decided to accept the Chamber's invitation and changed the nature of its case. Accordingly, the Pre-Trial Chamber declined to confirm the mode of liability as presented originally by the Prosecutor.³ In a further case (*Laurent Gbagbo*), the Pre-Trial Chamber, by majority, had initially refused confirmation and requested the Prosecutor to consider providing further evidence or conducting further investigations with respect to the context of the crimes charged.⁴ Again, after unsuccessfully appealing against the PTC decision,⁵ the Prosecutor followed the Chamber's proposal and conducted further investigations. Eventually, the charges against Laurent Gbagbo were confirmed on 12 June 2014.⁶

¹ Charges were confirmed against Lubanga (DRC), Ngudjolo and Katanga (DRC), Banda and Jerbo (Sudan/Darfur), Ruto and Sang (Kenya), Kenyatta and Muthaura (Kenya), Bemba (CAR), Laurent Gbagbo (Côte d'Ivoire), Ntaganda (DRC) and Bemba et al. (CAR, Contempt Proceedings). Charges were not confirmed against Abu Garda (Sudan/Darfur), Kosgey (Kenya), Ali (Kenya), and Mbarushimana (DRC).

² *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, 3 March 2009.

³ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009.

⁴ *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013.

⁵ *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", 16 December 2013.

⁶ *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014.

3. Therefore, the process has succeeded in weeding out four cases, with two other cases having been adjourned, showing the Pre-Trial Chamber's commitment to perform effectively its filtering function. The process could, however, be streamlined further with a view to reducing the amount of resources spent by all parties in that process whilst at the same time trying to ensure that the confirmation process contributes to the greatest possible extent to making the trial process shorter and more effective.
4. The present paper will focus on these issues of effectiveness and efficiency. Issues pertaining to the validity or otherwise of legal standards adopted by various ICC Chambers in relation to the confirmation process are not considered here.

2. Background

5. The confirmation of charges procedure is principally governed by Article 61 ICC Statute. After arrest or surrender, and 'within a reasonable time', the Pre-Trial Chamber (comprised of three judges) is required to hold a hearing to determine if there exists 'sufficient evidence to establish substantial grounds to believe that the person committed the crime charged'.⁷ This 'substantial grounds' standard is an intermediate evidential standard;⁸ it is more demanding than the 'reasonable grounds' one required for an arrest warrant or summons, but a lot less demanding than the 'beyond a reasonable doubt' standard required for conviction.⁹
6. In advance of the confirmation hearing, the Prosecution is required to provide the suspect with the 'document containing the charges on which the Prosecutor intends to bring the person to trial' as well as the evidence upon which the Prosecutor will rely.¹⁰ The Prosecution may rely on *viva voce* witnesses or documentary or summary evidence, and the suspect is expressly permitted to object to the charges, challenge the evidence presented by the Prosecutor and to present evidence of his or her own.¹¹ The Pre-Trial Chamber may confirm charges, decline to confirm them, or adjourn the hearing to allow the Prosecution to conduct additional investigations or to amend the charges.¹²

⁷ Article 61 ICC Statute.

⁸ See, for example, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-OA, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 3 February 2010, para. 30; *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, paras. 16-18 (with further reference to ICC jurisprudence in the footnotes); see also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras. 27 *et seq.* in which Pre-Trial Chamber II makes reference to the 'fundamental human rights of the person charged' who is in detention during the confirmation of charges stage.

⁹ Compare Article 61 to Article 58 (arrest warrant and summons) and Article 66 (trial) of the ICC Statute.

¹⁰ Article 61(3) ICC Statute.

¹¹ Article 61(6) ICC Statute.

¹² Article 61(7) ICC Statute.

Charges that are confirmed are sent to the Trial Chamber for trial.¹³ Pre-Trial Chambers may also combine the various options, including to confirm some and reject other charges, or to confirm some and to adjourn the hearing on other charges (see also Rule 127 ICC RPE). In case none of the charges are confirmed, the suspect is released from detention.¹⁴

7. With a view to reducing the scope and length of that process, parties have been ordered by the Pre-Trial Chamber at times to focus or reduce the case they wished to call for the purpose of confirmation.¹⁵
8. At the same time, the scope and breadth of the hearing is not clearly spelled out in the Statute, and in fact Article 61 includes some contradictory indications regarding how it should proceed.¹⁶ Therefore, Pre-Trial Chambers (and the Appeals Chamber when issues have reached it) have had to define the critical details of the confirmation hearing process. They have done so within the context of a new and developing institution, with Pre-Trial Judges defining their roles and their functions with respect to the Trial Chamber and to the Prosecutor.¹⁷

¹³ Article 61(11) ICC Statute.

¹⁴ *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the confirmation of charges, 16 December 2011, p. 149. This order was confirmed by the Appeals Chamber (Case No. ICC-01/04-01/10 OA 3), Decision on the appeal of the Prosecutor of 19 December 2011 against the “Decision on the confirmation of the charges” and, in the alternative, against the “Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana” and on the victims’ request for participation, 20 December 2011; Appeals Chamber (Case No. ICC-01/04-01/10 OA 3), Reasons for “Decision on the appeal of the Prosecutor of 19 December 2011 against the ‘Decision on the confirmation of the charges’ and, in the alternative, against the ‘Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana’ and on the victims’ request for participation” of 20 December 2011, 24 January 2012.

¹⁵ See, for example, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/011, Order to the Defence to Reduce the Number of Witnesses to be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, 25 July 2011, para. 19. The number of witnesses was reduced to two each (Kosgey wanted to call three, Ruto 25 and Sang 15 witnesses).

¹⁶ S. de Smet, ‘A Structural Analysis of the Role of the Pre-Trial Chamber in the Fact-Finding Process of the ICC’ in C. Stahn and G. Sluiter, *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, 2009, p. 418 (structure of confirmation hearing process result of diplomatic compromise and therefore not clear on all points).

¹⁷ See W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, pp. 734-35 (suggesting that the prominence of the confirmation hearing process has been the result, in part, of the judges having insufficient work). The length of confirmation hearings varies considerably: *Lubanga* (three weeks); *Katanga and Ngudjolo* (three weeks); *Bemba* (one week); *Abu Garda* (one and a half weeks); *Banda/Jerbo* (one day); *Ruto et al.* (one week); *Muthaura et al.* (two weeks); *Mbarushimana* (one week); *Laurent Gbagbo* (one and a half weeks); *Ntaganda* (one week). The Prosecutor called one witnesses in the *Lubanga* case (see *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the schedule and conduct of the confirmation of charges hearing, 7 November 2006) and three witnesses in the *Abu Garda* case (see *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision Amending the Schedule for the Confirmation Hearing, 16 October 2009, Annex 1) to testify at the confirmation of charges hearing. In the case of the *The Prosecutor v. William Samoei Ruto et al.* as well as the case of *The Prosecutor v. Francis Kirimi Muthaura et al.*, the Pre-Trial Chamber allowed a maximum of two live witnesses per suspect (see *The Prosecutor v. William Samoei Ruto*, Case No. ICC-01/09-01/11, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, 25 July 2011; *The Prosecutor v. Francis*

II. Issues identified regarding the confirmation of charges process

1. Issues of effectiveness affecting the confirmation process

9. From an effectiveness point of view the following considerations are relevant:
- a) As discussed above, the Prosecution has expended a great deal of resources on investigating and preparing cases, and then presented cases that did not meet the standard of proof relevant to confirmation.
 - b) Confirmation decisions are lengthy.¹⁸ This, in itself, is not necessarily problematic. What is more problematic is the apparent imbalance between what contributes to making the charges clearer and the trial more focused on the one hand, and what may be characterised as *obiter* or scholarly digression.¹⁹ Pre-trial decisions should and could be more precise and more narrowly focused on making clear which factual allegations have been confirmed and, as the case may be, to what precise extent. For instance, Article 61(7) decisions sometimes remain vague as regards the time of the alleged crimes, the place where they are alleged to have occurred, the identity of the perpetrators, the exact nature of the alleged contribution of the accused and the identity of the alleged victims. As discussed below, difficulties associated with achieving that desirable purpose is not to be placed solely at the door of Pre-Trial Chambers, but also involve the Prosecution which could do more to place before the Chamber clearer and more specific factual allegations. Lack of a clear indication of what factual allegations have been confirmed at the

Kirimi Muthaura et al., Case No. ICC-01/09-02/11, Order for the Defence to Reduce the Number of the Viva Voce Witnesses and to Submit an Amended List of Viva Voce Witnesses, 10 August 2011).

¹⁸ *Lubanga* – 157 pages (*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007); *Katanga and Ngudjolo* – 213 pages (*The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008); *Bemba* – 186 pages (*The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba-Gombo, 15 June 2009). Later decisions became shorter: *Abu Garda* – 98 pages (*The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the confirmation of charges, 8 February 2010); *Banda/Jerbo* – 75 pages (*The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011); *Muthaura/Kenyatta/Ali* (three suspects) – 155 pages (*The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the confirmation of charges, 23 January 2012); *Ruto, Kosgey and Sang* (three suspects) – 139 pages (*The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012).

¹⁹ The *Katanga and Ngudjolo* confirmation decision reflects this tension. The decision is 213 pages long (not including a partly dissenting opinion by one of the Judges). Almost 50 pages are devoted to laying down and explaining various evidential matters from a purely legal and theoretical point of view (“Matters relating to the admissibility of evidence and its probative value”). Almost 25 pages are devoted to a lengthy, scholarly, discussion of the definition of modes of liability coming under Article 25(3)(a) ICC Statute. This compares to about 20 pages devoted to actual findings of fact regarding allegations made against both accused.

confirmation stage means that the confirmation process contributes little to providing notice of charges to the accused and to making trials fairer and faster, leaner and more focused on core factual issues relevant to the case. The length of the process also affects the right of the accused to a speedy trial and, where he is detained, the overall length of his detention. This, of course, affects the rights of the accused as well as the ability of the Court and its organs to render effective and timely justice. The aim should be that at the end of the confirmation of charges process (sometimes several years after the Prosecutor has requested a warrant of arrest), the material facts that make up the case are clearly defined. Such an approach will indeed fulfil the requirements of Article 67(1)(a) ICC Statute, provide clarity for the Trial Chamber as to the ‘facts and circumstances’ within the meaning of Article 74(2) ICC Statute, facilitate an admissibility determination under Article 17 ICC Statute, expedite trial proceedings by focusing litigation and evidential efforts on clearly identified factual issues that are and remain the subject of an evidential dispute (and related/connected legal issues).

- c) The confirmation process generates important duplications and repetitions that do not contribute to the effectiveness of the process.²⁰ This results, in particular, from the fact that (i) the entire DCC is again discussed in the hearing (context, crimes, modes of liability); (ii) parties insist on comprehensively discussing the case orally before the Chamber; (iii) Judges do not intervene and identify in advance those issues which deserve to be discussed concisely in the confirmation hearing; (iv) Judges do not always raise with the parties those points which may have been identified as weaknesses during the preparation phase prior to the hearing. Furthermore, parties have systematically requested to make further written submissions after the hearing, which often duplicates submissions and layers of information and prolongs that stage of the proceedings.²¹

²⁰ *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10 OA 4, 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, para. 40.

²¹ The Pre-Trial Chambers are under the obligation to issue the Article 61(7) decision within 60 days after the confirmation of charges hearing (see Regulation 53 ICC Regulations). In practice, the deadline commences after the Chamber has received the last written submission of the Defence after the end of the hearing.

2. Identifying unmeritorious cases

10. As indicated above, the Pre-Trial confirmation process has succeeded in its primary function of weeding out “weaker” cases that were not fit to proceed to trial.²² Out of 21 suspects who have gone through the confirmation process to completion, the cases against four have not been confirmed (19%).²³ The fact that at least one case has passed the confirmation process but resulted in an acquittal (Ngudjolo Chui) is not necessarily an indication of the failure of the confirmation process. Instead, it is also an expression of the difference in standard of proof applying at two different stages of the proceedings.
11. The fact that such a high proportion of cases are considered (rightly or wrongly) inadequate for the purpose of confirmation by Pre-Trial Chambers should be duly taken on board by the Prosecution. In particular:
 - a) The Prosecution should put in place a stricter and more critical reviewing process.²⁴ In that context:
 - i) It should ensure that it conducts its internal evaluation by applying the standard that the Pre-Trial Chamber (and the Appeals Chamber) has determined was relevant to confirmation (and/or a higher standard). To this end, it must be clear to the Office of the Prosecutor that the evidentiary standard at the confirmation of charges stage is a relatively high standard. Should the charges be confirmed, the Office must ordinarily be ready to present the case soon thereafter before a Trial Chamber.
 - ii) It should also consider inviting outside experts (in particular, current or former international Prosecutors and Judges) to provide an independent review process of their cases prior to submitting them for confirmation. Whilst senior experienced counsel work for the Office of the Prosecutor, it might be most helpful to have an independent and critical view that is unaffected by considerations unrelated to the evidence. This could also help the Prosecution identify areas of evidential weaknesses that they might have neglected to consider.
 - iii) From an early point in its investigation and preparation, the Prosecution should integrate the need for ‘in-depth-analysis chart’.

²² V. Nerlich, ‘*The Confirmation of Charges Procedure at the International Criminal Court: Advance or Failure?*’, 10 *Journal of International Criminal Justice* 1339 (2012), p. 1354 (The confirmation process “fulfils its principal objective of filtering out those cases where the evidence is too weak to justify a trial, thus protecting suspects from unnecessary and potentially lengthy exposure to trial, and preserving the Court’s resources.”).

²³ The comparison with the *ad hoc* tribunals is instructive: whereas the percentage of acquittals at the *ad hoc* tribunals is around 12%, the percentage of non-confirmation of charges is around 19%, even though the standard of proof applicable for the purpose of confirmation of charges is significantly lower than that for conviction.

²⁴ See also, *Investigations at the ICC*, paras. 87-90.

The in-depth analysis chart is a law-driven tool from which the facts can easily be extracted for the DCC. The Prosecution should consider using software and mapping tools that better allow it to identify evidentiary weaknesses and gaps. These tools would also assist in the presentation of the evidence and law at the time of confirmation. It will in turn be of great value to the Pre-Trial Chamber at the time of confirmation and will help expedite that process and make it more effective (see above).

- b) The Prosecution should generally not seek to proceed with the confirmation process until the case is effectively ready to proceed to trial if confirmed.²⁵ From an effectiveness point of view, the assumption should be that if the case is ready to proceed, it will pass confirmation muster and could proceed to trial without unnecessary delays.²⁶ This is what in recent jurisprudence has been described as cases being ‘trial ready’.²⁷ This would contribute a great deal to shortening the period of time between confirmation and commencement of trial, which will necessarily be delayed if the Prosecution effectively continues carrying out a full investigation and disclosure as if no confirmation had occurred.²⁸ Such practice is not resource-effective insofar as it drags the process of investigation over lengthy periods and triggers repeated resource needs at the Defence level (need for Defence investigations, disclosure review, etc) and unavoidable related litigation. In exceptional

²⁵ See, for example, *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, paras. 87-88.

²⁶ *The Prosecutor v. William Samoei Ruto et al.*, Case No. ICC-01/09-01/11, Dissenting Opinion of Judge Hans-Peter Kaul to the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras. 45-52.

²⁷ See, for example, *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10 OA 4, 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, para. 44 (“As previously indicated by the Appeals Chamber, the investigation should largely be completed at the stage of the confirmation of charges hearing. Most of the evidence should therefore be available, and it is up to the Prosecutor to submit this evidence to the Pre-Trial Chamber.”); see also *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision Requesting Observations on the “Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, 29 January 2013, para. 9; *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, para. 25; *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, paras. 87-88.

²⁸ The length of the post-confirmation preparatory phase of the trial, i.e. after the issuance of the confirmation of charges decision until the commencement of the trial, has varied hitherto depending on the circumstances of the case: *Lubanga* case – two years; *Katanga and Ngudjolo* case – one year, two months; *Bemba* case – one year, five months; *Banda* case – three years, two months (trial scheduled to open on 5 May 2014, see *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, 6 March 2013); *Ruto and Sang* case – one year, seven months. In the *Kenyatta* case, Trial Chamber V(b) vacated the trial commencement date of 5 February 2014. At the time of writing, it is unclear when the trial will commence, as the Prosecutor has asked for an adjournment *sine die* on 8 October 2014.

circumstances, the Prosecution might however come to discover new material as part of its preparations which it might then seek to use at trial.

- c) The Prosecution should draft a clear, tight and precise Document Containing the Charges so as to enable the Pre-Trial Chamber to identify precisely what factual allegations are proposed for confirmation.²⁹ Judges (or the Defence) should not have to resort to the evidence in order to understand the facts of the case. As the Pre-Trial Chamber is not vested with investigative powers, it is barred from examining other facts than those described in the DCC. The Regulations of the Court could be amended to allow the Prosecution to submit a document longer than 20 pages (the limit currently applicable), to do away with motions for extensions of pages and to give the Prosecution enough space to clearly and precisely lay out the case it offers for confirmation.
 - d) The Prosecution should present its case in a fashion that clearly and efficiently identifies what evidence relates to each element of the crimes and modes of liability alleged. With a view to enabling the Pre-Trial Chamber to perform its function most effectively, the Prosecution should as a matter of course produce detailed evidential charts outlining the evidence that, it alleges, goes to proving each material allegation making up its case. The so-called list of evidence (Rule 121(3) ICC RPE) should be organised according to the legal requirements of the charges and relevant material allegations. The DCC should contain in footnotes the evidence reference number which forms the basis for each factual allegation. Lastly, as already noted, it is worth considering introducing the ‘in-depth analysis chart’ as a tool for pre-trial proceedings. Should the Prosecution resist requests for greater evidential clarity or should its efforts prove inadequate in that regard, Rule 121(3) and Regulation 52 could be amended to specifically require the Prosecution to organise its evidence with a view to connecting it to each specific material allegation making up the charges. In-depth analysis charts should thus become the rule. These charts should be as clear and detailed as possible, making it clear for each material fact alleged what evidence is submitted in support of that fact. The DCC should reflect accurately the information as contained in the Chart.
 - e) In-depth analysis charts will only be useful, however, if they serve their purpose to map the evidence against the charges which the Prosecution has asked the Pre-Trial Chamber to confirm. To ensure that such documents are useful in outlining the case and expediting proceedings and are not unwieldy, cumbersome documents, parties and the Judges should consider working out a format that is useful to all involved.
12. Should Chambers and States Parties come to be satisfied that the quality of Prosecution investigation has significantly improved over time, they should consider – either through judicial reconsideration of past rulings or through an

²⁹ See Regulation 52 ICC Regulations.

amendment of the Rules – adjusting how Pre-Trial Chambers evaluate the evidence to determine if it satisfies the requisite statutory standard. Rather than seeking to resolve apparent inconsistencies or contradictions in the evidence on the basis of an incomplete and largely paper record, the Pre-Trial Chamber could instead, in evaluating whether the Prosecution’s case meets the ‘substantial grounds’ standard in Article 61, assess the Prosecution’s evidence at its highest unless it is conclusively refuted. The test would be, not whether a Trial Chamber *would* convict beyond reasonable doubt but rather whether it *could*.³⁰ Such an approach would be demanding enough to weed out ‘bad’ cases whilst at the same time avoiding the risk of the confirmation process turning into a mini-trial. It would also revive the distinction between the confirmation hearing and the trial and help reduce the overall scope and length of that confirmation process.

3. Shaping and narrowing the case that goes to trial

13. In addition to weeding out a number of inadequate cases, Pre-Trial Chambers have contributed to the overall effectiveness of proceedings by narrowing down the scope of charges before they go to trial.
14. Where charges have been confirmed, the factual scope of those cases has been substantially reduced both with regard to their temporal³¹ or territorial³² scope.

³⁰ Such a test is applied before the *ad hoc* tribunals at the “no case to answer” stage of proceedings; see, for example, *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Oral Decision on Defence Motion for Acquittal Pursuant to Rule 98bis, 20 February 2014, p. 9108; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR98bis.1, Judgment, 11 July 2013, paras. 9, 21.

³¹ For example, in the case of the *The Prosecutor v. Francis Kirimi Muthaura et al.*, the Prosecutor charged the suspects for the commission of crimes during the period of 30 December 2007 to 31 January 2008 (one month). In the decision on the confirmation of charges, the Pre-Trial Chamber reduced this period to events which took place overall between 24 and 28 January 2008 (four days), see *The Prosecutor v. Francis Kirimi Muthaura et al.*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras. 21, 428. In the case of the *Prosecutor v. William Samoei Ruto et al.*, the Prosecutor charged the suspects for the commission of crimes during the period of 30 December 2007 until the end of January 2008 (one month). In the decision on the confirmation of charges, the Pre-Trial Chamber reduced this period to events which took place in Turbo town only to 31 December 2007 (one day); in the greater Eldoret area to the period between 1-4 January 2008 (four days); in Kapsabet town to the period between 30 December 2007 to 16 January 2008 (2 weeks); and in Nandi Hills town between 30 December 2007 to 2 January 2008 (four days). The temporal scope was reduced therefore from one month to selected periods ranging from two weeks to one day, see *The Prosecutor v. William Samoei Ruto et al.*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras. 22, 367.

³² For example, in the case of the *Prosecutor v. Francis Kirimi Muthaura et al.*, the Prosecutor charged the suspects for the commission of crimes in the locations ‘in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province)’. In the decision on the confirmation of charges, the Pre-Trial Chamber rejected the notion ‘in or around locations including Nakuru and Naivasha’ but accepted only ‘in or around Nakuru’ and ‘in or around Naivasha’ and extended its analysis of the facts only to those two locations for which evidence had been submitted, see *The Prosecutor v. Francis Kirimi Muthaura et al.*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras. 21, 106. Likewise, in the case of the *Prosecutor v. William Samoei Ruto et al.*, the Pre-Trial Chamber rejected the word “including” and confined its analysis to

This factor should not be disregarded or underestimated as the Pre-Trial Chamber's delineation of the factual scope of the charges has a direct impact on the scope of the trial.³³

15. A problematic aspect of the Prosecutor's presentation of the case (starting even at the stage when the Prosecutor requests the issuance of a warrant of arrest or a summons to appear) and a difficulty faced by the Pre-Trial Chamber when confirming charges is the lack of specificity of factual allegations contained in the Prosecution's Document Containing the Charges, which often derives from the lack of precision in the evidence. The DCC (Article 61(3)(a) ICC Statute) presented by the Prosecutor is binding on the Chamber and the Pre-Trial Judges cannot go beyond the factual allegations presented by the Prosecutor in her DCC. Therefore, the facts described in the Article 61(7) decision mirror the facts as described or referred to by the Prosecutor. Regulation 52(b), in turn, requires the Prosecution to provide in the DCC '[a] statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court'. As the DCC sometimes does not provide any factual allegation or is too imprecise, this type of information is sought independently by the Pre-Trial Chamber in the evidence to which the Prosecutor refers. The most helpful tool in this context has proven to be the 'in-depth analysis chart' which has been requested by various Pre-Trial Chambers.³⁴

those locations that were explicitly referred to in the DCC. It ruled 'the use of the expression "in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town" shall be understood as encompassing exclusively these locations', see *The Prosecutor v. William Samoei Ruto et al.*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras. 22, 99. See also the rejection of the term 'included but not limited to' as a territorial parameter in *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the confirmation of charges, 16 December 2011, paras. 81-83.

³³ See, for example, the findings and explanations in *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Corrigendum of the "Decision on the Confirmation of Charges", 7 March 2011, paras. 32 *et seq*; *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the confirmation of charges, 16 December 2011, paras. 79 *et seq*.

³⁴ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, paras. 64-73; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Submission of an Updated, Consolidated Version of the In-Depth Analysis Chart of Incriminating Evidence, 10 November 2008; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Disclosure of Evidence by the Defence, 5 December 2008; *The Prosecutor v. William Samoei Ruto et al.*, Case No. ICC-01/09-01/11, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, paras. 21-23; *The Prosecutor v. Francis Kimi Muthaura et al.*, Case No. ICC-01/09-02/11, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, paras. 22-24; *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 12 April 2013, paras. 29-32. Recently, Pre-Trial Chamber I in the *Laurent Gbagbo* case followed the practice of Pre-Trial Chamber II in this regard, albeit calling the document the "Element-based Chart", see *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012, paras. 33-34. At the trial stage, this approach was also followed in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-

16. Compounding this specificity issue is the fact that at the confirmation stage, the Prosecutor has been relying upon general information stemming from NGO reports (including anonymous hearsay), media articles and documents of a similar nature. However, this type of evidence might lack detailed factual content (such as dates and places of the commission of the crimes) and might not therefore provide sufficient evidential assistance to the Pre-Trial Chamber for the purpose of promptly and effectively fulfilling its mandate.
17. There are recorded instances in the practice of the Court of allegations made in DCCs, which were found not to have been established,³⁵ or that the evidence proposed in support of factual allegations was found to be irrelevant or insufficient³⁶ to substantiate the charges. This has required the Pre-Trial Chamber to effectively reduce and reformulate the case. In the exercise of their filtering function, Pre-Trial Chambers have thus both weeded out cases and, in some cases, reduced the factual scope of the charges – thereby positively reducing the overall amount of resources invested in those cases.

01/07, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009.

³⁵ For example, the crime of rape in the location of Naivasha was not included in the summary of facts in the summons to appear against Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali as ‘the Prosecutor failed to provide evidence substantiating his allegation that rape was committed as part of the attack in Naivasha’, see *The Prosecutor v. Francis Kimi Muthaura et al.*, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appeal for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, para. 26. Moreover, the Chamber declined to base its summonses to appear for those three suspects on the events that allegedly had taken place in the locations “Kisumu” and “Kibera”. The Chamber held: ‘the Prosecutor (...) failed to provide an accurate factual and legal submission which would require the Chamber to examine whether the acts of violence were part of an attack pursuant to or in furtherance of a State policy. Apart from the foregoing, it is even more compelling that the material presented by the Prosecutor does not provide reasonable grounds to believe that the events which took place in Kisumu and/or Kibera can be attributed to Muthaura, Kenyatta and/or Ali under any mode of liability embodied in article 25(3) of the Statute’, see *The Prosecutor v. Francis Kimi Muthaura et al.*, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appeal for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, paras. 31-32. Similarly, Pre-Trial Chamber II had initially refused to issue a warrant of arrest against Sylvestre Mudacumura because of a lack of specificity in detailing the conduct underlying the alleged crimes and the lack of specific reference to the crimes for which the arrest was sought on the part of the Prosecutor, see Situation in the Democratic Republic of the Congo, No. ICC-01/04, Decision on the Prosecutor’s Application under Article 58, 31 May 2012, paras. 4-8.

³⁶ For example, the Chamber rejected the charges against Henry Kiprono Kosgey as the Prosecutor had presented insufficient evidence to prove the charges against him (see *The Prosecutor v. William Samoei Ruto et al.*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras. 294-297). Similarly, the charges were not confirmed for lack of evidence against Mohammed Hussein Ali (see *The Prosecutor v. Francis Kimi Muthaura et al.*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras. 423-427). In the case of the *Prosecutor v. Callixte Mbarushimana*, the Chamber rejected the charges of crimes against humanity for lack of evidence and, while accepting that war crimes had been committed, rejected the charges nevertheless for lack of evidence substantiating the suspect’s purported contribution to the commission of crimes under article 25(3)(d) of the Statute (see *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the confirmation of charges, 16 December 2011).

18. The Prosecution could therefore greatly contribute to the effectiveness of that process by submitting clearer and more specific Documents Containing the Charges that more clearly tie the proposed evidence to the factual allegations it makes.
19. From the point of view of the Pre-Trial Chamber, more could also be done to streamline the trial process. Discussions of legal issues are relevant and necessary only to the extent that they help the PTC perform its function so that *obiter dicta* and ‘scholarly’ discussions should, in principle, be avoided and charges should be narrowly and clearly set out. It should be acknowledged, however, that with a body of law that is often brand new and with little jurisprudential guidance to rely upon, the PTC might have to delve into certain complicated legal issues. More importantly, the PTC should endeavour (with the assistance of the Prosecution – see above – and within the scope of the facts outlined in the DCC) to clearly set what facts have been confirmed for the purpose of trial. The Appeals Chamber has interpreted Article 74(2) thus:

[T]he term ‘facts’ refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge ... as well as from other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged.³⁷

20. First, confirmation decisions are typically too broad, and too expansive in their reach and discussion to enable the parties (and the Trial Chamber) to figure out exactly in many cases what factual allegations have been confirmed and what have not. This has led to further litigation in some cases,³⁸ and has forced Chambers to order the Prosecution to file what effectively are Prosecution-prepared summaries of confirmation decisions.³⁹ Absent clarity of findings, the

³⁷ *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-01/04-01/06 OA 15 OA 16, 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 characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’, 8 December 2009, note 163.

³⁸ See, for example, the Defence’s challenge to the Prosecution’s characterisation of the facts as confirmed by the Pre-Trial Chamber in *Bemba: The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Requête aux fins d’obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contenant les Charges, 12 February 2010. See also the majority decision to modify the legal characterisation of the facts in *Katanga and Ngudjolo*, and Judge van den Wyngaert’s dissenting opinion that the majority’s approach amounted to an impermissible ‘changement dans l’exposé des faits’ (*The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused person, Dissenting Opinion of Judge Christine Van Den Wyngaert, 21 November 2012, para. 20.

³⁹ See, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Submission of the Prosecution’s Updated Summary of Presentation of Evidence, 30 May 2008; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Prosecution’s Submission of its “Updated Summary of Presentation of Evidence” with Confidential, *Ex Parte*, Prosecution and Defence Only Annexes A, B, C, D and Public Annex E, 30 September 2008.

confirmation decision provides little assistance to the parties and to the Trial Chamber as to what exactly has been confirmed and what may, therefore, be subject to evidence at trial. Clearer and more narrowly focused decisions would greatly contribute to rendering the trial process more focused and thus faster. Clarity of confirmed charges would give clear and detailed notice of charges to the accused and enable Trial Chambers to better regulate the course of proceedings by disallowing lines of inquiry that were not subject to the confirmation process. What the Pre-Trial Chamber should therefore do is make it absolutely clear what material facts have been confirmed and what they consist of exactly.

21. Secondly, if the evidence supports a variety of overlapping charges or modes of liability, should the Pre-Trial Chamber fix just one, or should it confirm multiple and alternative charges and modes? The practice to date has been for the Pre-Trial Chamber to choose and not confirm alternatives, which has then resulted in highly contentious decisions by Trial Chambers to change the legal characterisation of the charges pursuant to Regulation 55 of the Regulations of the Court.⁴⁰ The preferable approach would be for the Pre-Trial Chamber to fix all relevant material facts of the charge (crime alleged, date, place, etc.) and to confirm alternative charges and modes of liability to the extent that they are supported by the evidence. Most recently, this was done by the Pre-Trial Chamber in the case of *Ntaganda*.⁴¹ It is noteworthy that multiplicity of modes of liability is not prohibited in the practice of international criminal tribunals.⁴² The Pre-Trial Chamber should therefore endeavour to specify as much as practical the facts of the case so as to ensure detailed notice of charges as guaranteed under the Statute. This possibility of multiple/alternative charges would of course be subject to the Pre-Trial Chamber exercising its discretion to decline to confirm alternative/multiple charges where doing so would cause unfair prejudice to the accused or where the scope of charges is oppressively or unnecessarily broad.⁴³

⁴⁰ See, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 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, 14 July 2009.

⁴¹ *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, paras. 97 *et seq.*

⁴² See, for example, *Prosecutor v. Goran Hadzić*, Case No. IT-04-75-PT, Second Amended Indictment, 22 March 2012, paras. 19, 23, 40, 44, 47; *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-I, Amended Indictment, 10 May 2005, paras. 9, 10, 11, 33, 36, 42.

⁴³ It should be noted that the possibility to charge an accused person with multiple crimes and/or alternative modes of liability in relation to the same underlying factual allegations should be carefully considered insofar as it might prolong (and complicate) pre-trial and trial proceedings. Judges should therefore exercise their discretion in ensuring that this possibility (i) is not abused, (ii) does not interfere with the fundamental rights of the accused, and (iii) does not unduly prolong or complicate the proceedings. See, for example, Report of Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and International Tribunal for Rwanda, A/54/634, 11 November 1999, para. 162.

4. The confirmation of charges process could be more efficient; it could contribute more to making trials faster and factually more focused

22. The existence of a confirmation process has the overall effect of prolonging the proceedings. To preserve the rights of the accused, and so as to limit as much as possible the amount of time and resources expended on that process, that period of time should be kept to the necessary minimum. As one commentator has written, ‘even if the purpose of confirmation is to protect the suspect from unfounded allegations, the procedure is far too lengthy, especially where the person concerned is in pre-trial detention’.⁴⁴ The average time between first appearance and the final confirmation decision is more than one year, although the reasons for delay vary from case to case.⁴⁵ The time between the confirmation decision and the first day of trial is more than one year and four months.⁴⁶ Finally, as Professor Schabas has pointed out, the confirmation process has resulted in decisions running hundreds of pages,⁴⁷ as well as appeals, and significant briefing by the parties (including disclosure disputes, lengthy documents containing the charges, and briefing before and after the confirmation hearing) and time in court. In particular, Professor Schabas wrote that, “[t]he concerns about such vexatious or erroneous prosecution hardly seem legitimate, given the international context.... [T]he practice of international tribunals has shown that prosecution on wrongful or wholly unfounded charges is not a significant problem, notwithstanding the fact that accused persons are sometimes acquitted. This constitutes a rather poor and unconvincing justification for what has proven to be a rather significant, costly, and time-

⁴⁴ C. Safferling, *International Criminal Procedure*, Oxford University Press, 2012, p. 343.

⁴⁵ See statistics above. See also Ekkehard Withopf’s presentation at *The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges*, 26 September 2012, p. 4, available at <http://www.grotiuscentre.org/resources/1/ICC%20@%2010%20Conference%20-%20webreport.pdf>, (last visited on 17 March 2014). Depending on the basis of calculation (and also whether the period of leave to appeal is counted), the average length of proceedings between the first appearance and the article 61(7) decision is approximately 10 months. The time between first appearance and final confirmation was more than 10 months in *Lubanga*, almost 12 months in *Katanga*, almost eight months in *Ngudjolo*, 11 months in *Bemba*, almost nine months in *Abu Garda*, almost nine months in *Banda and Jerbo*, and more than nine months in the *Kenya* cases. The longest pre-trial phase has been for Laurent Gbagbo, who has been in detention for 26 months without knowing whether the charges will be confirmed (Pre-Trial Chamber initially adjourned the hearing and requested the Prosecutor to consider conducting further investigation), and in *Ntaganda and Ngudjolo* (request of the Prosecutor to postpone the commencement of the confirmation of charges hearing for another approximately five months). As regarded case-specific factors which affect the period of time needed: translation issues in the *Banda* case were critical; the “use” of article 54(3)(e) of the Statute by the Prosecutor in the collection of evidence in the *Lubanga* case was a relevant factor in that regard; in the *Kenyatta* case, various challenges mounted by the Defence affected the duration of that process.

⁴⁶ For example, 22 months in *Lubanga*, 13 months in *Katanga and Ngudjolo*, and more than 14 months in *Bemba*.

⁴⁷ W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 735 (‘Schabas, *International Criminal Court*’) (for example, 157 pages in *Lubanga*, 213 pages in *Katanga and Ngudjolo*, 196 pages in *Bemba*, 103 pages in *Abu Garda*, and 75 pages in *Banda & Jerbo*). See also C. Safferling, *International Criminal Procedure*, Oxford University Press, 2012, p. 337 (‘“neither the Statute nor the Rules oblige the Pre-Trial Chamber to give a reasoned decision when confirming the charges, much less a decision of more than one hundred pages.”’).

consuming process, resulting in decisions numbering in the hundreds of pages.”⁴⁸

23. As discussed further below, an efficient system of disclosure is essential to ensuring that proceedings advance without undue delay. This is particularly important to the pre-trial context. Article 67(2) requires the Prosecution to disclose exculpatory evidence; Pre-Trial Chambers have also requested the Prosecution to prepare extensive charts organising the evidence for the Pre-Trial Chamber.⁴⁹ Moreover, as noted elsewhere, the Appeals Chamber in *Mbarushimana* indicated that “the investigation should largely be completed at the stage of the confirmation of charges hearing. Most of the evidence should therefore be available ... and it is up to the Prosecutor to submit this evidence to the Pre-Trial Chamber.”⁵⁰ Recently, a majority of the Pre-Trial Chamber in the *Gbagbo* case held that the Prosecution should present “her strongest possible case based on a largely completed investigation.”⁵¹ Trial Chambers have also taken steps to ensure that the Prosecution is in fact complying with its obligation to disclose exculpatory evidence “as soon as practicable.”⁵²
24. Failure to disclose exculpatory evidence in a timely fashion and in compliance with the Statute (“as soon as practical”) causes evident delays and wasted resources (primarily for the Defence, but also often in Chambers and Prosecution as this will usually trigger follow-up litigation). Trial Chambers have also taken steps to ensure that the Prosecution is in fact complying with its obligation to disclose exculpatory evidence “as soon as practicable.”⁵³ The Prosecution should do more to disclose that information as soon as it has been identified as potentially exculpatory. The PTC should actively police that requirement as early as possible so that it does not pollute or delay the confirmation process.
25. Pre-Trial Chambers should more actively seek to ‘police’ the scope of the confirmation process by:
 - a) limiting the scope of the hearing to issues not already subject to written submissions;

⁴⁸ Schabas, *International Criminal Court*, pp. 734-35.

⁴⁹ See Ekkehard Withopf’s presentation at The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges, 26 September 2012, available at <http://www.grotiuscentre.org/resources/1/ICC%20@%2010%20Conference%20-%20webreport.pdf>, p. 4 (last visited on 17 March 2014).

⁵⁰ *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, 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, para. 44.

⁵¹ *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, para. 25.

⁵² *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision Establishing a Calendar for the Disclosure of Evidence between the Parties, 17 May 2013, para. 28.

⁵³ *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision Establishing a Calendar for the Disclosure of Evidence between the Parties, 17 May 2013, para. 28.

- b) putting specific questions to the parties for that hearing that they are required to focus upon and answer; and
 - c) strictly limiting the possibility of subsequent and supplementary written pleadings after the hearing.
26. Trial Chambers could also do more to make the pre-trial/confirmation process more relevant in streamlining the trial process. Trial Chambers should carefully consider the benefits for the overall length and effectiveness of proceedings to give greater weight to decisions from Pre-Trial Chambers. Perhaps efficiency could also be improved at trial, if the Trial Chamber Judges were to consult and build upon the case record transferred from the Pre-Trial Chamber.⁵⁴ To this end, proper handover between pre-trial and trial is essential.⁵⁵ This would also help reduce the – so far lengthy – period of time between confirmation of charges and the commencement of the trial.

III. Recommendations

1. General Recommendation

27. The PTC should more actively seek to control and regulate the process of confirmation and not hesitate to demand more of the parties with a view to achieving that goal. The PTC should also consider using its inherent powers to shape the process so as to ensure prompt and effective resolution of the process of confirmation.

2. For the Office of the Prosecutor

28. The Prosecutor should put in place a stricter and more critical reviewing process.⁵⁶ In that context, the Prosecution should:
- a) ensure that it conducts its internal evaluation by applying the standard that the PTC (and the Appeals Chamber) has determined was relevant to confirmation (and/or a higher standard);
 - b) consider inviting outside experts (in particular, current or former international Prosecutors and Judges) to provide an independent review process of their cases prior to submitting them for confirmation;

⁵⁴ See, in this respect, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007.

⁵⁵ There are certain issues which the Pre-Trial Chamber has decided upon and which are not, *in principle*, ruled upon again by the Trial Chamber, such as conditions imposed on the accused, protective measures, including redactions in the evidence, acceptance of victims to participate, or the decision on jurisdiction and admissibility challenges. In this respect, discernible efficiency exists already.

⁵⁶ See also, *Investigations at the ICC*, paras. 87-90.

- c) from an early point in its investigation and preparation, integrate the need for an ‘in-depth-analysis chart’. This tool should enable the Prosecutor to identify weaknesses in her case and direct the investigation towards filling any such gaps. The in-depth analysis chart is a law-driven tool from which the facts can easily be extracted for the DCC. It will in turn be of great value to the Pre-Trial Chamber at the time of confirmation and will help expedite and make that process more effective (see above);
 - d) In consultation with Judges and the Defence, the Prosecution should seek to develop a uniform, efficient and effective tool to present the evidence and how it relates to the charges and elements of crimes at the time of confirmation.
29. The Prosecution should ordinarily not seek to proceed with the confirmation process until it can satisfy itself that the case is effectively ready to proceed to trial. From an effectiveness point of view, the assumption should be that if the case is ready to proceed to trial, it will pass confirmation muster and could proceed to trial without unnecessary delays.⁵⁷
30. The Prosecution should draft a clear, comprehensive and precise Document Containing the Charges describing the factual allegations in detail together with the relevant legal requirements so as to enable the Pre-Trial Chamber to identify precisely what factual allegations are proposed for confirmation. That document should be footnoted with references to the evidence that the Prosecution is advancing to establish each of the material facts relevant to the charges. A footnoted DCC would complement the suggested in-depth analysis charts (see next). It would present, in summary fashion, the nature of the case advanced by the Prosecution, whilst clearly identifying what evidence the Prosecution offers to produce to prove each and all of the material facts that make up its case. This would guarantee both the right of the accused to notice and would provide parties and Chambers with a roadmap of the case to regulate and try to reduce the scope of the proceedings.
31. The Prosecution should produce clear evidential charts (in-depth analysis charts) outlining the evidence that, it alleges, goes to proving each material allegation making up its case. These documents should be submitted as early as practical before the commencement of the confirmation of charges hearing.⁵⁸

⁵⁷ Regarding problems which this could otherwise raise: In *Ruto et al.*, the case against Henry Kiprono Kosgey did not pass confirmation (*The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012). In *Kenyatta et al.*, the case against the accused Mohammed Hussein Ali did not pass confirmation (*The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the confirmation of charges, 23 January 2012) and the case against the accused Francis Kirimi Muthaura was withdrawn shortly after confirmation (*The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, 11 March 2013).

⁵⁸ It is advised that the DCC and the evidence/in-depth analysis chart be submitted 45 to 60 days before the commencement of the hearing.

The in-depth analysis chart ('IDAC') would serve a dual function for both the Pre-Trial and Trial Chambers: first, it would help them understand what the Prosecution case is and how it proposes to prove that case; secondly, when reviewing individual items of evidence, Chambers (as well as the Defence and victims' representatives) would be able to evaluate the purported relevance and credibility of each item based on what it is being offered to prove. This would enable Chambers and parties to prepare effectively and to try to reduce upstream the amount of unnecessary and wasteful evidential debris.⁵⁹ In order to ensure that such a document is actually helpful to all and contributes to guaranteeing the effectiveness of proceedings, the parties and Judges should seek ways to discuss the best possible format for any such document.

32. The Prosecutor must respect her obligation under Article 54(1)(a) ICC Statute and investigate incriminating and exonerating circumstances *equally* with a view to establishing the *truth* – and not to making a case. The Prosecutor should ensure in all instances that it is presenting a clear, complete, undistorted and fair evidential picture of reality.⁶⁰
33. The investigation by the Prosecutor needs to be comprehensive and conducted with a view to proceeding to trial. There should not be 'phased'/short-term investigations which satisfy the needs for the current stage of the proceedings. Rather, long-term vision is necessary in the organisation of the work of the Office of the Prosecutor.
34. The Prosecution should prioritise its disclosure obligations in relation to exculpatory material pursuant to Article 67(2) and should ensure that collections are reviewed with a view to identifying such material and to disclosing it to the Defence as soon as it has been identified as such and long enough in advance of the confirmation hearing to enable the Defence to effectively prepare. If necessary, the Pre-Trial Chamber could establish a calendar of disclosure to be respected by the Prosecution.⁶¹

3. For Pre-Trial Chambers

35. To expedite and simplify the confirmation process, Pre-Trial Chambers should consider:
 - a) having heard parties on this matter, decide which of the proposed witnesses should be called and restrict the list to those who are core to the case. This should be done only after allowing the parties to be heard.

⁵⁹ Such a document should not of course tie the Prosecution once and for all to the evidence presented therein. It might be the case, for instance, that new evidence will come to light or that a particular item of evidence will acquire relevance to a fact unforeseen at the time.

⁶⁰ For an illustration of judicial criticism in this regard, see *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Jugement rendu en application de l'article 74 du Statut, 7 March 2014, paras. 58-70.

⁶¹ Disclosure schedules have been used at the STL to try to expedite the process of disclosure and defence preparation; see, for example, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparations, 25 October 2012.

- b) making greater use of the possibility for the Chamber to call its own evidence during the confirmation process; and/or
 - c) more actively seeking to ‘police’ the scope of the confirmation process by (i) limiting the scope of the hearing to issues not already subject to written submissions; (ii) putting specific questions to the parties for that hearing that they are required to focus upon and answer; (iii) strictly limiting the possibility of subsequent and supplementary written pleadings after the hearing.
36. Pre-Trial Chambers should focus on making clear and focused findings of material facts relevant to the case. Clearer and more narrowly focused confirmation decisions would greatly contribute to rendering the trial process more focused and thus faster. Pre-Trial Chamber should consider in that context either:
- a) drafting and attaching to their decisions the equivalent of a charging document or ‘indictment’, with a short, precise and detailed description of the confirmed material factual allegations and connected legal allegations. This would effectively summarise and provide detailed notice of the material facts as confirmed in the body of the confirmation decision;
 - b) providing an edited/amended version of the text of the DCC with relevant parts struck out or amended as the case may be. This would effectively serve the same function as a), using the original DCC as a basis for the Chamber’s own rendition of the facts that have been confirmed;
 - c) in order to reduce the potential prejudicial effect of re-characterisation of charges effected pursuant to Regulation 55 and so as to enable the parties and the Trial Chamber to focus their respective efforts, confirming each/all pleaded crimes and modes of liability contained in the DCC if supported by the evidence.
37. Another way to expedite the confirmation process would be for the Court to take the view – as may be implied as a possibility from the terms of the Statute – that the right to challenge the confirmation of charges may be waived by a defendant.
38. The pre-trial phase should also be used to a greater extent as a way to make the case ready for trial and thus save time if and when the case proceeds to trial. Another way in which the pre-trial process could contribute to the preparation and expedition of proceedings would be if, during that phase, genuine pre-trial management efforts were made by the Pre-Trial Chamber to prepare the case for trial. For instance, issues of redactions could be settled once and for all during that phase (thereby avoiding the duplication of resources generated by the repetition of that process at pre-trial and trial), protective measures order could be sought and made during that phase, and disclosure requests and orders could and should be made to the greatest possible extent during that phase).

39. In order to ensure focused efforts by all parties, the Pre-Trial Chamber should ensure that, in all cases, detailed and timely notice of the charges (i.e., each and every material fact making up the charges) has been duly and clearly provided.⁶²
40. To avoid undue delays and litigations caused by late disclosure, Pre-Trial Chambers should ensure that disclosure process is completed as promptly and as effectively as possible during the pre-trial phase. The practice of issuing schedules of disclosure should be systematically applied.⁶³ Deadlines should be strictly enforced.⁶⁴ In their disclosure schedules, Chambers should therefore provide for (i) incentives; and (ii) possible sanctions, to prompt the Prosecutor to comply with those deadlines and with a view to thus ensuring that proceedings are not unnecessarily delayed. Temporary refusal of right of audience for Prosecution counsel, formal findings against Prosecution counsel for breach of a court order, orders to Prosecution counsel responsible for disclosure matters to sign an affidavit, etc, could be considered as possible ways to ensure that disclosure orders are promptly and diligently complied with.

4. For Trial Chambers

41. When a Trial Chamber identifies an issue relevant to Regulation 55 at an early enough stage of proceedings, instead of making use of that regulation, the Chamber could consider referring issues pertaining to the scope of confirmation of charges back to the Pre-Trial Chamber with a request for the Pre-Trial Chamber to specify in more detail and/or more specifically the exact nature and scope of its confirmation in relation to certain factual allegations.⁶⁵

⁶² *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-1-T, Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, 27 February 2009, para. 59: "The Trial Chamber observes that any lack of precision or specificity in an indictment interferes with judicial economy, as the Prosecutor also benefits from a clear and unambiguous indictment which enables him it to focus his case and hence to allocate his-limited resources reasonably. Therefore, the Trial Chamber stresses that a specific and unambiguous indictment is an essential prerequisite to a fair and expeditious trial."

⁶³ See, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the final system of disclosure and the establishment of a timetable, 15 May 2006; *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision establishing a calendar for the disclosure of evidence between the parties, 17 May 2013; *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012.

⁶⁴ See, for example, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Prosecution's Application for Extension of Time Limit for Disclosure, 2 May 2011; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Prosecution's Application for Extension of Time Limit for Disclosure, 2 May 2011; *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Prosecution's request to extend the time limit for disclosure, 14 December 2007; *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Prosecution's request pursuant to Regulation 35 for variation of time limit to submit a request for redactions and for the extension of time for disclosure, 12 April 2012.

⁶⁵ See, for example, in *Kenyatta*, the Trial Chamber held that Article 64(4) provides the Chamber with discretionary power to refer "preliminary issues" to the Pre-Trial Chamber or another available judge of the Pre-Trial Division where it is necessary for its 'effective and fair functioning'. (*The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, para. 84). See also Rule 71 of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon, which leaves it to the discretion of the Trial

42. Trial Chambers should carefully consider the need and effectiveness (and not just the possibility) of revising issues rather than seeking to build upon the Pre-Trial Chamber decisions. A more coherent hand-over and transition between the two phases, which should be considered as a whole, should be promoted and more actively pursued by Trial Chambers with a view to promoting greater effectiveness of the pre-trial/trial process.
43. Trial Chambers should ensure that the trial starts as soon as practical after confirmation, having ensured that the accused has had adequate time to prepare for trial.⁶⁶ Strict policing of timely and diligent compliance with disclosure should contribute to reducing that period of time.⁶⁷

5. For States Parties

44. Should the measures and recommendations listed above not succeed in resolving effectiveness-related issues with the confirmation process, States should duly consider revisiting and revising the Statute to create a more effective confirmation/pre-trial process. Various alternative models could be considered, although it is not the place here to discuss in detail the merits and limitations of each one of them:
 - a) Abolition of the current confirmation process, replacing it with an *ex parte* confirmation process similar to the one applied at the *ad hoc* tribunals. Such a course should not be adopted lightly as it would effectively deprive the ICC of a filtering mechanism weeding out ‘bad cases’ and/or greatly undermine the effectiveness of such a filtering mechanism. One way in which the Court could reduce that risk (though not with the same level of effectiveness in weeding out ‘bad cases’ and ensuring effective Defence participation) would be for Chamber to entertain Defence ‘abuse of process’ applications if there are clear indications that the Prosecution has either failed to meet its obligations under Art 54(1) and/or that the confirmation process is otherwise affected by such an abuse. Such a procedural possibility was duly acknowledged as an inherent ability of the tribunal by the ICTY in *Bobetko*.⁶⁸ To the extent that States Parties should consider that such a possibility would require an amendment of the Statute, thoughts should be given to amending the Statute accordingly.
 - b) A court-driven, rather than parties-driven, pre-trial and confirmation process and/or a system giving the PTC a greater role in the pre-trial and confirmation process.

Chamber (or the Pre-Trial Judge, as appropriate) to decide on amendment of indictment. In no cases should reliance of the Chamber upon Regulation 55 prejudice the rights of the accused.

⁶⁶ See also, above, paras. 22-26.

⁶⁷ See *Disclosure at the ICC*, paras. 82-83.

⁶⁸ *The Prosecutor v. Janko Bobetko*, Case No. IT-02-62-AR54bis & IT-02-62-AR108bis, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge, 29 November 2002, para. 15.

45. Should Chambers and States come to be satisfied that the quality of Prosecution investigation has significantly improved over time, they could consider – either through judicial reconsideration of past rulings or through an amendment of the Rules – adjusting the approach of the Pre-Trial Chamber to its evaluation of the evidence, as outlined in more detail above.

DISCLOSURE AT THE ICC

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I. General Observations

1. Under the Statute and Rules of the ICC, the parties¹ are required to disclose certain materials to each other, typically during the pre-trial phase of the case.²
2. An efficient and reliable disclosure process is essential to the effective functioning of the ICC. This is because the parties, and in particular the Defence, rely upon the materials disclosed to prepare for all aspects of the trial as well as for other events, like the confirmation hearing. The right to certain types of disclosure is one of the key rights of the accused enshrined in the Statute, and the fairness of the proceedings themselves can depend upon the adequacy and timeliness of the disclosure carried out. And because the Chambers rely to a great extent on the parties to identify relevant evidence, the adequacy of disclosure *inter partes* can have a direct impact on the Chamber's own ability to carry out its mandate to arrive at the truth in the proceedings before the Court.
3. In accordance with Article 54(1)(a) of the ICC Statute, the Prosecutor has the obligation to investigate 'all facts and evidence relevant to an assessment of whether there is criminal responsibility', seeking both inculpatory and exculpatory evidence equally. Given the breadth of this duty, the Prosecutor's disclosure obligations – including its obligations to disclose materials that are incriminatory (Articles 61 and 64 ICC Statute and Rule 76 ICC RPE), exculpatory (Article 67(2) ICC Statute), and relevant to the preparation of the Defence (Rule 77 ICC RPE) – may be sizeable, and the scope of these obligations may evolve over time with the evolution of the case itself. The Defence, meanwhile, must disclose any possible defence that may be relied upon (Rule 79 ICC RPE) as well as materials 'intended for use by the Defence as evidence for the purposes of the confirmation hearing or at trial' (Rule 78). The Chamber seized of the case has the responsibility of managing the disclosure process and ensuring both that the parties' rights to disclosure under the Statute and Rules are protected and that the requirement that the trial be fair is not prejudiced by the process of disclosure (Articles 61, 64, 67 ICC Statute and Rules 76 and 84 ICC RPE).³
4. The timely, complete and organised disclosure of materials between the parties can thus go a long way toward ensuring efficient and fair pre-trial and trial proceedings at the ICC. In practice, however, the disclosure process is often rife with delays and the subject of considerable and time-consuming litigation, which can further prolong the proceedings. Disputes as to the scope, adequacy, and timing of disclosure are frequent, and can be exacerbated by ambiguities in the law and a lack of clarity and predictability in the Court's practice. The need to balance disclosure obligations with confidentiality concerns and with the im-

¹ Communication of disclosed materials to and by victim participants is beyond the scope of this paper.

² The Prosecutor has statutory disclosure obligations prior to the confirmation hearing and prior to trial but may seek to disclose additional evidence during the trial process.

³ This is a guiding principle of Pre-Trial Chamber decisions in setting out the disclosure system and timetable for disclosure between the parties. See, for example, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05/08, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008.

plementation of adequate protective measures for witnesses, victims, and others can likewise give rise to delays in disclosure and sometimes in the proceedings themselves. Translation requirements and deficiencies in the parties' abilities to effectively manage and review their own materials to identify those materials subject to disclosure may also adversely impact the efficiency of the disclosure process. All of this can, in turn, lead to litigation which consumes the parties' and the Chambers' resources and further delays the proceedings. More fundamentally, the delays and inefficiencies just identified risk negatively impacting on the rights of the accused to a fair trial. Yet, to date, the ICC has not developed an effective sanctions regime to address lapses in the disclosure process and to encourage greater and timelier adherence to disclosure obligations.

5. Many of the issues the ICC faces in the disclosure context are issues that have been faced and continue to be faced by the *ad hoc* international criminal courts,⁴ and for which there may be no easy solutions. Other issues may not be so intractable, however, and may simply reflect that, to date, a relatively small number of cases at the ICC have completed the pre-trial phase and the ICC, as a result, continues to develop its own best practices.
6. The present section identifies a number of challenges in the context of the ICC's current disclosure practice gleaned from an examination of public filings and decisions issued by the ICC and provides recommendations with a view to addressing the issues thus identified.

II. Challenges and Recommendations

1. Broad discretion in the management of the disclosure process

7. Disclosure is conceptualised by the statutory framework as an *inter partes* process, with the parties determining what material in their possession needs to be disclosed and effecting that disclosure.⁵ Nonetheless, the Chamber seized of the case has an important role to play in managing the disclosure process and ensuring that disclosure obligations are met.⁶

⁴ *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision On Accused's Twenty-Second, Twenty Fourth and Twenty Sixth Disclosure Violation Motions, 11 November 2010, para. 47.

⁵ Rule 121(2)(c) ICC RPE. See *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on the defence's request for specific relief in respect of three witnesses of the prosecution, 16 August 2012, para. 9 ("...the Chamber wishes to remind the parties that the disclosure process is to be carried out *inter partes* and that they should not seek the Chamber's intervention unless prior efforts to resolve a particular issue on an *inter partes* basis have clearly failed to produce satisfactory results"). See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01.05-01/08, Decision on the defence application for additional disclosure relating to a challenge on admissibility, 2 December 2009, para. 22; *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision Scheduling a Hearing on Issues relation to Disclosure between the Parties, 7 February 2011.

⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01.05-01/08, Decision on the defence application for additional disclosure relating to a challenge on admissibility, 2 December 2009, paras. 12-13; *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision Scheduling a Hearing on Issues relating to Disclosure between the Parties, 30 May 2009.

8. The Chambers enjoy considerable discretion in how they manage the disclosure process, including in relation to the timing⁷ and content of disclosure,⁸ which has led to different Chambers adopting different approaches and requirements with regard to the disclosure process.
9. **Pre-confirmation disclosures by the Prosecution.** Pre-Trial Chambers have adopted varying approaches when addressing when and to what extent certain categories of materials must be disclosed by the Prosecutor in advance of the confirmation hearing. Disclosure obligations pursuant to Article 67(2) ICC Statute and Rule 77 ICC RPE have been the source of controversy.⁹ Some Pre-Trial Chambers have ordered the disclosure of the bulk of Article 67(2) ICC Statute and Rule 77 ICC RPE evidence.¹⁰ Other Pre-Trial Chambers have held that the Prosecutor must disclose all exculpatory evidence and evidence material to the preparation of the Defence in its possession prior to the confirmation hearing.¹¹
10. Applications by the Prosecutor to appeal these rulings requiring broad disclosure have consistently been denied.¹²
11. **The pre-confirmation filing of disclosed materials on the record.** As disclosure is carried out *inter partes*, the Chamber typically will not have access to all

⁷ The Chambers have fairly consistently interpreted the deadlines referred to in Rule 121 as only indicative of the minimum time limits a party can avail itself of to comply with its disclosure obligations. In this respect, Chambers have held that the time limits must be read with and subject to Article 67(1)(b) ICC Statute which provides that an accused must have adequate time for the preparation of his or her defence. See, for example, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-47, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 12 April 2013, para. 16.

⁸ See Article 61 ICC Statute. This article underscores the broad discretionary power of the Pre-Trial Chamber to make any order necessary to facilitate the disclosure process. Article 64, which governs the trial stage of the proceedings and identifies the functions and powers of the Trial Chamber, explains in provision (3)(c) that the Trial Chamber is to ‘...provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of trial to enable adequate preparation for trial’. See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01-05-01-08, Redacted Decision on Prosecution’s Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 20 July 2010, paras. 59-60.

⁹ The Prosecutor has an obligation to disclose exculpatory material under Article 67(2) ‘as soon as practicable’ and to provide for inspection of materials relevant to the preparation of the Defence pursuant to Rule 77. Rule 77 provides no guidance as to when such inspection should take place, but to ensure the trial is fair the Chambers have consistently held that it must take place within a reasonable time prior to the confirmation hearing. See, for example, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-47, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 12 April 2013, para. 16.

¹⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventative Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 25 April 2008.

¹¹ *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on ‘Prosecution’s application for leave to Appeal the ‘Decision on issues relating to disclosure’ (ICC-01/04-01/10-87)’, 21 April 2011.

¹² These arguments have been routinely rejected, and applications by the Prosecutor to appeal such rulings have been consistently denied by the Pre-Trial Single Judge. See, for example, *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on ‘Prosecution’s application for leave to Appeal the ‘Decision on issues relating to disclosure’ (ICC-01/04-01/10-87)’, 21 April 2011.

material disclosed, absent an order that the Chamber be given such access.¹³ The Prosecutor has consistently objected to the filing of all material disclosed *inter partes* prior to the confirmation hearing, arguing that the system adversely affects the rights of the parties and the impartial role of the Judge.¹⁴ In a number of cases, some Pre-Trial Chambers have accepted the objections of the Prosecutor,¹⁵ while other Pre-Trial Chambers have rejected the Prosecutor's objections, holding instead that ensuring an effective disclosure process requires that all evidence disclosed between the parties shall be communicated to the Chambers, regardless of whether the parties intend to rely on the evidence at the confirmation hearing.¹⁶ To date, all applications for leave to appeal such an order have been refused by the Pre-Trial Chambers.¹⁷

12. **The presentation of disclosed material.** In a number of cases, Pre-Trial Chambers have issued orders with respect to how the parties should organise and present their disclosed evidence for the purposes of the confirmation hearing or trial. Although the Statute and Rules provide some guidance in this regard,¹⁸ different Chambers have adopted different approaches.¹⁹

¹³ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, para. 22 (in which the Prosecutor argued, *inter alia*, that disclosure through the Registry affected the "fairness of the proceedings...since it imposes an extra-statutory limitation on the parties' ability to efficiently communicate amongst them...which can be considered to violate key governing provisions in the Statute and the Rules").

¹⁴ See, for example, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Order regarding the "Prosecution's Information on the Status of Disclosure", 15 January 2014.

¹⁵ See, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Final System of Disclosure and Establishment of a TimeTable, 15 May 2006, para. 56; *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Second Decision on issues relating to Disclosure, 15 July 2009, paras. 8-10.

¹⁶ *The Prosecutor v. Bahar Idriss Abu Garda* Case No. ICC-02/05-02/09, Decision Scheduling a Hearing on Issues relating to Disclosure between the Parties, 30 May 2009; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case Nos. ICC-01/05-01-08, ICC-01/05-01/08, Decision on the Evidence Disclosure System, and Setting a Timetable for Disclosure Between the Parties, 31 July 2008; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011.

¹⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Prosecutor's application for leave to appeal, Pre-Trial Chamber III's decision on disclosure, 25 August 2008; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the "Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (ICC-01/09-01/11-44)", 2 May 2011.

¹⁸ Thus, for example, Article 61(3) and Rule 121(3) require the Prosecution to draft a detailed description of the charges together with a list of the evidence which the Prosecution intends to present at the confirmation hearing. See, for example, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-47, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 12 April 2013 para. 29; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure Between the Parties, 31 July 2008, paras. 66-70; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11-48, Decision Setting the Regime for Evidence Disclosure and Other Related Matters 6 April 2011, para. 22; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision Setting the Regime for Evidence Disclosure and Other Related Matters 6 April 2011, para. 21; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 22 September 2011, p.

13. The Prosecutor has strongly opposed the imposition of an obligation to facilitate the Defence in the latter's understanding of Article 67(2) ICC Statute and Rule 77 ICC RPE material.²⁰ In rejecting the applications for leave to appeal, Pre-Trial Chambers have noted a misunderstanding on the part of the Prosecution and clarified that the in-depth analysis chart is restricted to incriminatory evidence only.²¹
14. **Trial Chamber rulings on disclosure.** Pre-Trial Chambers are not alone in showing great variation in their management of disclosure. Trial Chambers have also taken different approaches with respect to how material should be disclosed

11; *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 12 April 2013, paras. 29-32.

¹⁹ In some cases, the Pre-Trial Chamber has required the Prosecution to facilitate the work of the Defence in its analysis of material disclosed, and has ordered the Defence to do the same (see *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Prosecutor's application for leave to appeal, Pre-Trial Chamber III's decision on disclosure, 25 August 2008; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Defence Requests in Relation to the Submission of a Comprehensive In-Depth Analysis Chart, 13 July 2011; *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision On The Final System of Disclosure and Establishment Of A Timetable, 15 May 2006, paras. 59-60). Other Chambers have further ordered the inclusion of a concise summary of the content of each item and an explanation of the relevance of such item (see *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision establishing a disclosure system and a calendar for disclosure, 24 January 2014, paras. 24-28; *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Second Decision on issues relating to Disclosure, 15 July 2009, paras. 15-16. See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08/55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure Between the Parties, 31 July 2008, paras. 66-73; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure Between the Parties, 31 July 2008; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, paras. 68-70; *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decisions on issues relating to disclosure, 30 March 2011). Likewise, to facilitate the Defence, the Prosecution has been required to provide an explanation of the relevance of such items for the preparation of the defence (see *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decisions on issues relating to disclosure, 30 March 2011; *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Second decision on issues relating to Disclosure, 15 July 2009, paras. 13-16).

²⁰ *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the "Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (ICC-01/09-01/11-44)", 2 May 2011, para. 13; *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on "Prosecution's application for leave to Appeal the 'Decision on issues relating to disclosure' (ICC-01/04-01/10-87)", 21 April 2011.

²¹ *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the "Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (ICC-01/09-01/11-44)", 2 May 2011, para. 18; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Submission of an Updated, Consolidated Version of the In-Depth Analysis Chart of Incriminatory Evidence, and annex, 10 November 2008; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Disclosure of Evidence by the Defence, 5 December 2008.

and the timing of disclosure prior to trial.²² Only some Chambers, for instance, have required the parties to submit their evidence for trial accompanied by an explanatory analytical chart updating the chart submitted before the Pre-Trial Chambers.²³

15. There are also differences among Trial Chambers as to the details to be provided in the analytical chart. While some Chambers require the Prosecution to prepare a detailed chart linking all incriminatory evidence to the charges alleged, others also require the Prosecution to specifically indicate where evidence relates to more than one factual allegation.²⁴
16. With respect to the timing of disclosure, some Chambers have considered that full disclosure should be completed five months prior to the start of trial, while others have considered three months sufficient.²⁵ In one case, the Prosecutor was ordered to disclose one year in advance of the scheduled trial date.²⁶
17. **Defence disclosure for trial.** There is also inconsistency between the Chambers with respect to the timing, extent, and form of disclosure of the Defence. Some Chambers have held that it is sufficient for the Defence to advise the Chambers and other parties of witnesses to be called seven days in advance, and to allow relevant inspection of Defence materials pursuant to Rule 78 ICC RPE three days in advance of their use.²⁷ Others have held that the Defence should allow the Prosecution to inspect materials pursuant to Rule 78 as soon as the Defence makes a decision to use the materials at trial but in any event, no less than two weeks prior to the commencement of the Defence case.²⁸ Yet others have opted for a combination of the two approaches.²⁹ In addition, some Chambers have required the Defence to disclose seven days in advance of a witness's testimony

²² *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision of the Date of Trial, 5 November 2009, para. 5 (finding that five months, following full disclosure, provides the Defence with sufficient time for preparation).

²³ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the "Prosecution's Submission on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart", 29 January 2010; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Order Fixing the Schedule for Pre-Trial Disclosure of Incriminatory and Exculpatory Evidence and the Date of a Status Conference (rule 132 of the Rules of Procedure and Evidence), 23 January 2009.

²⁴ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009, paras. 13-14.

²⁵ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on request for additional time to disclose translations, 9 July 2013, para. 6.

²⁶ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, 6 March 2013.

²⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, paras. 64-65.

²⁸ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, paras. 50-51.

²⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on defence disclosure and related issues, 24 February 2012, paras. 17-18.

a list of documents the Defence intends to use during questioning, identifying the specific material to be submitted as evidence during questioning.³⁰ Some Trial Chambers have required the Defence to disclose summaries of its witness statements³¹ and others to disclose the formal statements, along with a summary of the key elements of the witnesses' testimony, two weeks prior to the opening of the Defence case.³²

18. **In conclusion**, the broad discretionary nature of the powers of Pre-Trial and Trial Chambers to manage disclosure have led to differing practices being adopted by differently constituted Chambers. Insofar as the existence of different approaches leads to unpredictability, it can give rise to delays in the proceedings due to ensuing litigation.

Recommendations:

19. There should be greater consistency between Chambers in their management of the disclosure process to provide clarity to the parties with respect to the discharge of their disclosure obligations. This would reduce the incidence of litigation over discretionary decisions made by the Chambers. It would allow the parties, and the Prosecution in particular, to organise the information received through investigation in a way optimal for disclosure purposes down the road, rather than having to go through investigative files later for this purpose.
20. In order to ensure a more consistent or uniform approach to disclosure management, Chambers should develop a standard Practice Direction for disclosure both during the pre-confirmation phase and prior to trial that would allow the parties to organise their cases appropriately. Such a Practice Direction could, for instance, establish a default time-line for disclosure and clear instructions as to what type of materials must be disclosed at which point, while still preserving Chambers' statutory discretion to modify that default time-line if and when needed. It could also provide guidance as to how evidence disclosed should be presented and organised consistent with the requirements of the Statute and Rules.

³⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on defence disclosure and related issues, 24 February 2012, para. 21.

³¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Second Decision on Disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, paras. 58-59.

³² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the "Prosecutor's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, p. 23, para. (b)(iii); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on defence disclosure and related issues, 24 February 2012, para. 28. See, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on disclosure by the defence, 20 March 2008, where the Chamber ordered certain Defence disclosures three weeks prior to the commencement of the trial. A Defence application for leave to appeal the decision was refused by the Chamber (*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, ICC-01/04-01/06, Decision on the defence request for leave to appeal the "Decision on disclosure by the defence", 8 May 2008).

2. Inconsistencies regarding approaches to redaction processes

21. One of the most pivotal factors hindering efficient and timely disclosure between the parties is the need to ensure that disclosure will only occur once sufficient measures have been put in place to either protect continuing investigations or to ensure the protection of victims, witnesses, and other persons at risk as a result of the activities of the Court.
22. The legal framework governing disclosure takes into account the need to ensure protections for continuing investigations and victims, witnesses, and other persons.³³ Nonetheless, striking the appropriate balance between confidentiality and disclosure is not easy, and issues related to ensuring adequate confidential protections have given rise to a variety of challenges for disclosure at the ICC.
23. **The process of implementing and revising redactions and other protective measures.** First, the process of elaborating and implementing adequate protective measures can be time-consuming and give rise to delays, whether those measures involve physical relocation of a witness or the redaction of written materials.³⁴
24. Thus, for example, relocation of at least some witnesses will frequently be requested by the Prosecutor as a pre-requisite to being able to disclose information to the Defence.³⁵ In general, however, the relocation of a single witness takes up to four months to implement, and in some cases significantly longer.³⁶

³³ See Rule 81(2) ICC RPE. Rule 76 ICC RPE likewise makes clear that while the Prosecution must disclose information about its witnesses in advance of the trial, the obligations set forth in that rule are subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and Rules 81 and 82.

³⁴ *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure’ (ICC-01/09-01/11-62)”, 11 May 2011; *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on “Prosecution’s application for authorisation to disclose a document received pursuant to article 54(3)(e) in redacted form”, 4 August 2011; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013; *The Prosecutor v. Abdallah Banda Abakaer Nourain And Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, 6 March 2013, para. 18.

³⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the disclosure of evidentiary material relating to Witness 219, 27 August 2009.

³⁶ *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, paras. 71-73; *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 (OA5), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006, paras. 21-22. In at least one case, the Prosecutor requested relocation for nearly all of the witnesses that it intended to call at the confirmation hearing and not all its requests were made in a timely manner, resulting in substantial delays to the proceedings (see *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May

25. Even where requests for relocation or other protective measures are made in a timely manner, there may still be delays. The Prosecutor's reliance on the Registry for the implementation of appropriate protective measures as a precondition to disclosure invariably impacts on the Prosecutor's ability to fully control the meeting of its disclosure obligations.³⁷ Moreover, requests for relocation rejected by the Registry will typically lead to litigation before the Chamber, which can also contribute to delays in the proceedings and in disclosure.³⁸
26. In addition, as a consequence of the political instability of the situations the Prosecutor is investigating, it is general practice for the Prosecutor in all cases to petition the Chamber to disclose most of the evidence in its possession initially in a redacted form, either for the purpose of protecting an ongoing investigation³⁹ or to protect witnesses, victims, and other persons considered at risk.⁴⁰ However, the presumption is that all evidence to be disclosed will be disclosed in full,⁴¹ and the Appeals Chamber has held that each redaction requested by the Prosecutor must be assessed on a case-by-case basis.⁴²
27. The process by which requests for redactions are addressed by the Chamber is, as a consequence, time-consuming and involves considerable resources of the

2008, paras. 71-73). In other cases, failures on the part of the Prosecutor to make timely requests for protective measures with respect to individual witnesses has caused delays to disclosure (see *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, First decision on the Prosecutor's requests for redactions and other protective measures, 27 March 2012).

³⁷*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* Case No. ICC-01/09-01/11, Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013; *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Decision on the disclosure of evidentiary material relating to Witness 219, 13 August 2009. Note that Defence reliance can also lead to delays. See, for example, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, 6 March 2013, para. 18.

³⁸*The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, 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.

³⁹ See Rule 81(2) ICC RPE.

⁴⁰*The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, paras. 43-46. The Appeals Chamber held that Rule 81(4) empowers the competent Chamber to authorise redactions whose sole purpose is to protect individuals other than Prosecution witnesses, victims, or members of their families.

⁴¹ Trial Chambers have allowed limited redactions to remain in place after trial using Article 64(6)(e) ICC Statute. See, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Redacted Decision on the Prosecution's Request for Non-Disclosure of Information in Six Documents, 25 July 2011.

⁴²*The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, paras. 71-73; *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 (OA5), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, paras. 21-22.

Prosecution, the Defence, the Registry and the Chamber.⁴³ The Prosecutor's request for redactions may be dealt with by way of an *ex parte* hearing, after which the Chamber will issue a reasoned decision on the application.⁴⁴ The decision must provide specific reasons why any given piece of information is redacted from any given statement interview or document.⁴⁵

⁴³ The Prosecutor bears the burden of establishing that redactions are warranted, and, where redactions are permitted, of periodically reviewing the continued necessity of redactions (see *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006; *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 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, paras. 36-39; *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-568, OA3, "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; *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01-04-01/06 OA5, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07 (OA5), Judgment on the appeal of Mr. Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecution Request to Redact Statements of Witnesses 4 and 9", 27 May 2008; *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04/07 (OA2), Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, paras. 59-64; *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-475, Judgment on the Appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" 13 May 2008, para. 71; *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 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, para. 37; *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the Appeal of Mr. Thomas Dyilo Lubanga against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" 14 December 2006, para. 33). Prior to ruling on applications for redactions, the Chamber is required to give the Defence the opportunity to make submissions on the issues involved, without revealing the information the Prosecutor claims warrants protection. This will require the Prosecution to file redacted versions of its applications so as to give the Defence the opportunity to make submissions (see, for example, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Prosecution's Further Observations on the "*Requête de la Défense aux fins de levée de certaines expurgations et communication de documents*", 9 January 2014). In some cases, the Pre-Trial Chamber will request observations from the Victims and Witness Unit, which may propose additional or alternative protective measures (see *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-88, Decision Ordering the Parties to Provide Risk Assessment with Respect of Witnesses and the Victims and Witnesses Unit to Submit Observations Thereupon, 21 August 2013, para. 9; *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on Prosecutor's Request for Non-disclosure of Identities of Witnesses DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWW-0307, DAR-OTP-WWWW-0312 and DAR-OTP-WWWW-0314, 31 August 2009, p. 3; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Requesting the Prosecutor, the Victims and Witness Unit and the Registry to Submit Observations on the Re-classification of Certain Documents, 17 November 2008).

⁴⁴ See, for example, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Prosecution's Further Observations on the "*Requête de la Défense aux fins de levée de certaines expurgations et communication de documents*", 9 January 2014.

⁴⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Defence Reply to the Observations of the Victims' Representatives, 28 November 2006; *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the de-

28. The lifting of redactions can be similarly time-consuming, as it may require careful assessment by the Chamber as to whether sufficient measures are in place to ensure persons at risk will not be placed in danger by the disclosure of their identities to the Defence.⁴⁶ The obligation of the Prosecutor to periodically review the continued necessity of redactions previously granted may likewise give rise to delays,⁴⁷ particularly if the Prosecutor is hindered by difficulties in contacting the affected witness.⁴⁸
29. In sum, confirmation hearings have been delayed because pending requests for redactions could not be determined prior to a decision by the Registrar on whether the relevant witnesses would be accepted into the witness protection program and on the subsequent implementation of protective measures to them. Absent decisions being made on these matters, the materials could not be disclosed to the Defence.⁴⁹

cision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006; *The Prosecutor v. Bahar Idriss Abu Garda*, ICC092/05-02/09, Decision on Prosecutor’s Request for Non-disclosure of Identities of Witnesses DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312 and DAR-OTP-WWWW-0314, 31 August 2009, para. 6. As was noted in *Katanga and Ngudjolo*, this requirement ‘has already led to the issuance of several decisions on redactions...in which more than four hundred pages have been necessary to justify the redactions authorised in the statements, interview notes, transcripts of interviews and related documents concerning... witnesses. The Single Judge required several weeks after the filing by the Prosecution of requests for redactions in order to accomplish this task’ (see *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, 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).

⁴⁶ See, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Request for Non-Disclosure of Information, a Request to Lift a Rule 81(4) Redaction and the Application of Protective Measures pursuant to Regulation 42, 14 March 2011.

⁴⁷ *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on “Prosecution’s Application for Extension of Time Limit for Disclosure”, 10 May 2011.

⁴⁸ In one case, where exculpatory material was requested to be redacted, the Chamber held that if the Prosecutor does not attempt to satisfy himself that the witness still faces a risk and still objects to the witness’s identity being disclosed to the Defence, the Prosecutor would be breaching his obligations under the statute. See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, *Décision sur la protection de 21 témoins relevant de l’article 67-2 du Statut et/ou e la règle 77 du Règlement de procédure et de prevue*, 24 July 2009, para. 36. Regulation 23bis ICC Regulations provides that the Chamber may reclassify a document upon request by any participant or on its own motion where the basis for the classification no longer exists and the Chambers will conduct *proprio motu* assessments as to whether granted redactions are still necessary: See *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision reclassifying certain documents and ordering the filing of public redacted versions, 9 October 2009; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on unsealing and re-classification of certain documents and decisions, 20 June 2008; *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Decision on the Suspension of the Time-Limits Leading to the Initiation of the Confirmation Hearing, 30 January 2008.

⁴⁹ *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Decision on the Suspension of the Time-Limits Leading to the Initiation of the Confirmation Hearing, 30 January 2008; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, *Ordonnance urgente relative à la mise en œuvre de mesures de protection concernant l’intermédiaire 143 expurgée*, 16 July 2010; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Fifth Decision on the Prosecution Request for Authorisation to Redact Statements, Investigators Notes,

30. A related challenge in this context arises from the fact that different Chambers take different approaches toward redactions, leading to inconsistent practice between the Chambers about how to deal with applications for redactions. These differences make it more difficult for the parties to accurately anticipate how redactions will be addressed in advance and thus to manage their materials and resources accordingly.⁵⁰
31. Importantly, in those cases where Redaction Protocols have been adopted by Trial Chambers, the disclosure process has proceeded more efficiently than in those cases where individual redactions require direct petitioning of the Chamber.⁵¹ This suggests that the overall efficiency of the proceedings could be improved by the adoption of Chambers-wide Redaction Protocols applicable to all cases and governed by a Practice Direction or other regulatory instrument consistent with the powers of the Court under the existing statutory regime. This would facilitate better organisation of the Prosecutor's disclosure material at the

Written Consents and documents relating to Witness 157, 161, 268, 279, 280 and 311 and Other Documents, Public Redacted Version, 21 April 2008; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, 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, Public Redacted Version, 25 April 2008.

⁵⁰ Some Chambers, for instance, require the Prosecution to petition the Chamber directly in relation to every redaction the Prosecution seeks to make. In those cases, the Prosecutor is only permitted to disclose the redacted material to the Defence once the Chamber has approved the specific redactions. See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Redaction Process, Public Document, including Annex A, 12 January 2009. Other Chambers have developed Redaction Protocols that still allow for the possibility for redactions to be dealt with individually, consistent with the holding of the Appeals Chamber in *Lubanga*. See, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 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, para. 40; *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the protocol establishing a redaction regime, with public Annex A, 27 September 2012; *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on the protocol establishing a redaction regime, Public with public Annex A, 27 September 2012. Pursuant to these Redaction Protocols, redactions to categories of documents covered by common justifications (standard justifications) are pre-approved. The Redaction Protocols also provide a procedure for addressing disputes concerning the application of redactions covered by pre-approved categories on a case-by-case basis. With respect to redactions that do not fall under the pre-approved categories, documents are to be disclosed to the Defence in redacted form at the time of the application to the Chamber to allow the Defence the opportunity to respond to the applications.

⁵¹ This is not to suggest that the use of Redactions Protocols has been without problems. For example, Trial Chambers have chastised the Prosecutor for unilaterally modifying the Redaction Protocol. See *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01-09-02/11, Decision on the prosecution application to vary the Redaction Protocol and to redact investigators' identifying information, 21 December 2012; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on second prosecution application for authorization of non-standard redactions, 3 December 2012. There have also been instances in which the Prosecution failed to follow the procedure established by the Redaction Protocol. See, for example, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Order regarding redactions, 26 November 2012.

earliest opportunity. It would also reduce litigation over requests for redactions, thus preserving the resources of both the parties and the Chambers.⁵²

32. In the alternative of such Protocol being adopted in this context, a number of steps could be taken to facilitate a more expeditious practice in relation to redactions. Thus, for example, consideration could be given to reducing the impact of the redaction process prior to the confirmation hearing by allowing the Prosecution to disclose summaries of Article 67(2) ICC Statute and Rule 77 ICC RPE material prior to the confirmation hearing rather than requiring all such material to be disclosed. The Defence could request full disclosure on an *ad hoc* basis should it wish to rely on any of the summarised exculpatory or Rule 77 material for the purpose of the confirmation hearing.
33. **The use of redactions in general.** While the process of making, seeking approval for, or lifting redactions is time-consuming, the use of redactions also impinges on the efficiency of proceedings in other ways. The same evidence may be disclosed to the Defence multiple times with different degrees of redactions. Effectively, the Defence may be required to review the same material three times before the actual identity of the witness or other key information may be disclosed to the Defence and allows for full Defence investigations to take place at a very late stage in proceedings.
34. This has led to complaints on the part of the Defence about the necessity of re-viewing the same materials multiple times and that the Court does not appreciate the distinction between confidential disclosure to Defence counsel, who are bound by a Code of Professional Conduct, and disclosure to the public.⁵³ This situation has also led to complaints by the Defence that, upon receiving materials where redactions have been lifted, ‘one is often puzzled by the reason or what the reason was for the particular redactions to have taken place’.⁵⁴

Recommendation:

35. The redaction process needs to be streamlined. The Chambers should adopt a uniform Redaction Protocol to be applied to all cases for both pre-trial and trial. Even if a uniform Redaction Protocol is not adopted at the pre-confirmation stage, consideration should be given to permitting disclosure of Article 67(2) ICC Statute and Rule 77 ICC RPE material in summary form for the purposes of the confirmation hearing. The Chambers should ensure that full disclosure takes place sufficiently in advance of the scheduled trial date to avoid delays necessitated by Defence investigations.

⁵² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Redaction Process, Public Document, including Annex A, 12 January 2009, para. 5.

⁵³ *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11-T-ENG CT WT, 12 June 2012, pp. 14, 18-21.

⁵⁴ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Transcript ICC-01/09-01/11-T-ENG ET WT, 18 April 2011, pp. 17-18.

3. Confidentiality agreements have the potential to hinder disclosure and cause delays

36. Article 54(3)(e) ICC Statute allows the Prosecutor to ‘obtain on the condition of confidentiality and solely for the purpose of generating new evidence’ documents or information relevant to its investigation. In the types of conflict situations in which the Prosecutor is carrying out Prosecution investigations, the ability to give a potential witness an undertaking that the witness’s identity and the information he or she discloses will never be disclosed to the Defence or the Court absent his or her agreement is a powerful inducement for the potential witness to provide information to the Prosecutor that he or she may have otherwise been too afraid to share.
37. Unlike the *ad hoc* Tribunals, which had the ability to issue search and seizure warrants pursuant to which their prosecutors could seize entire archives of official state documents from the affected countries, the ICC Prosecutor is primarily reliant upon voluntary cooperation for evidence collection. This said, it is noteworthy that Trial Chamber V(A), by majority, recently ruled that it can “as a question of law, issue a binding cooperation request requiring the Government of Kenya to employ compulsory measures to compel the appearance of witnesses summonsed by a Trial Chamber”.⁵⁵ This decision was later confirmed by the Appeals Chamber.⁵⁶
38. The Prosecutor’s reliance on Article 54(3)(e) ICC Statute to obtain evidence can lead to a host of challenges for the disclosure process that are exacerbated by the Prosecutor’s arguable over-reliance on Article 54(3)(e) as a means of obtaining evidence.⁵⁷
39. In cases where Article 54(3)(e) ICC Statute information is at issue and the materials in question are subject to disclosure, delays in disclosure will almost invariably result from the Prosecution’s attempts to negotiate with information providers a right to disclose the materials to the Chambers and/or the Defence.⁵⁸

⁵⁵ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, para. 180.

⁵⁶ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”, 9 October 2014.

⁵⁷ In a number of cases, the Prosecutor has obtained thousands of documents and other materials on the condition that the information obtained will not be disclosed to the Defence or to the Chamber. See *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008.

⁵⁸ *The Prosecutor v. Abdallah Banda Abakaer Nourain And Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on Article 54(3)(e) documents, 23 November 2011; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the status of documents as referred to in article 54(3)(e) of the Rome Statute, 29 October 2008, para. 9; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision Requesting Observations

This is at least in part because Article 54(3)(e) agreements are most commonly used early in an investigation, and often before the Prosecutor is able to make an informed assessment of whether the evidence contains information which is likely to be considered exculpatory once a particular person is charged.

40. Even if an information provider's consent is obtained, it will rarely consent to full disclosure and the Chamber seized of the case will invariably be petitioned with applications for disclosure with redactions in accordance with the scope of the consent given by the information provider.⁵⁹ A failure by the Chamber to approve the redactions requested will necessarily result in additional periods of negotiation with information providers and extended litigation over Article 54(3)(e) ICC Statute disclosure. If the information provider persists in opposing disclosure, the Chamber must then determine whether counterbalancing measures can be taken in order to ensure that the rights of the accused are protected and the requirements of a fair trial are met.⁶⁰
41. As stipulated by the ICC Appeals Chamber, "[a] textual interpretation of article 54(3)(e) of the Statute indicates that the Prosecutor may only rely on the provision for a specific purpose, namely in order to generate new evidence. This interpretation is confirmed by the context of article 54(3)(e) of the Statute."⁶¹ In other words, some of the issues related to delays in disclosure or inability to disclose stemming from the Prosecutor's reliance on Article 54(3)(e) could be significantly reduced if the Prosecutor used Article 54(3)(e) evidence in the way it was intended to be used – to obtain lead evidence only. Disclosure difficulties will, however, remain nevertheless given the necessity to obtain consent from an information provider should the material obtained under Article 54(3)(e) be material subject to disclosure.
42. In the *Katanga and Ngudjolo* case, the Prosecutor submitted to the Chamber that 'best practices have been put in place' to reduce the number of documents

concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing, 2 June 2008, paras. 9-14.

⁵⁹ Prior to disclosure of Article 54(3)(e) material with redactions, the Chamber must approve the redactions. See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Reasons for the Oral Decision of 3 February 2009 on the Procedure for the Redaction of Documents Obtained by the Prosecutor Under Article 54(3)(e) of the Statute and Order Instructing the Prosecutor to Submit Documents to the Chamber, 26 February 2009.

⁶⁰ See, for example, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, paras. 9-10; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Public Redacted Version of the "Third Decision on Article 54(3)(e) documents", 21 June 2013; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, para. 146 (the Prosecution was asked to consider counter-balancing measures such as "admissions").

⁶¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory material covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, para 41.

collected pursuant to Article 54(3)(e) ICC Statute.⁶² Indeed, there are some indications in recent cases of a substantial reduction in the number of documents the Prosecutor has identified as obtained pursuant to Article 54(3)(e) and subject to disclosure.⁶³ However, issues remain and in a recent ruling in *Ntaganda*, the Single Judge expressed her surprise ‘by the amount of evidence collected by the Prosecutor under article 54(3)(e) of the Statute and the time she has taken to obtain the lifting of restrictions by providers’.⁶⁴ Without information from the Prosecutor as to what the Prosecutor’s best practices are, neither the Chambers nor the Defence in that case, or other cases, are in a position to assess whether the Prosecution has been complying with its obligations and whether additional improvements to the Prosecutor’s use of Article 54(3)(e) can be made. Recent developments show, however, that the Prosecution is trying to develop policies in order to reduce its use of Article 54(3)(e) during the course of its investigations.⁶⁵

Recommendation:

43. Article 54(3)(e) ICC Statute should be used sparingly and only in exceptional circumstances.⁶⁶ Providers of information pursuant to Article 54(3)(e) should be asked to consent to full disclosure *to the Chambers* at the time of providing the information.⁶⁷ Where evidence provided is of particular probative or exculpatory

⁶² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing, 20 June 2008, para. 51.

⁶³ For example, in *Banda and Jerbo*, the Prosecutor indicated only ten documents had been collected pursuant to Article 54(3)(e) that had to be disclosed (see *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, paras. 145-149). However, it is hard to assess whether the limited number of documents at issue in that case reflects a broad-based, new approach on the part of the Prosecutor or simply the difficulties inherent to a specific investigation.

⁶⁴ *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-210, Order regarding the “Prosecution’s Information on the Status of Disclosure”, 15 January 2014.

⁶⁵ See, however, *Investigations at the ICC*, para. 28: the 2009-2012 Prosecutorial Strategy announced a policy to no longer seek confidential information from humanitarian organisations.

⁶⁶ This has been how the comparable provision, Rule 70 ICTY RPE, has been used at the ICTY. See, for example, *The Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002, paras. 19-21. This has been the clear direction given by the Appeals Chamber, which held that Article 54(3)(e) is a provision that may be relied upon for one specific purpose, namely to generate new evidence (see *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory material covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, para. 41). However, while relying on Article 54(3)(e) for lead evidence may reduce the amount of material obtained pursuant to this provision, it will not relieve the Prosecutor of the obligation to disclose that material if the material falls within a category of evidence that must be disclosed.

⁶⁷ Given that such full, *in camera* disclosure is the consistent approach taken by the Chambers following the *Lubanga* Appeals Chamber decision (*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory material covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008), the Prosecutor should obtain the consent of the information provider to disclose to the Chamber the evidence provided pursuant to Arti-

ry value, providers should be asked for their consent to disclosure of the evidence to the Defence at the earliest opportunity.

4. Broad interpretation of disclosure obligations

44. A perennial subject of time- and resource-consuming litigation in the context of disclosure is the scope of the Prosecutor's disclosure obligations and whether the Prosecutor has abided by these obligations.⁶⁸
45. The obligation of the Prosecutor to disclose Article 67(2) ICC Statute and Rule 77 ICC RPE materials is an ongoing obligation throughout the proceedings,⁶⁹ and the Prosecution's changing understanding of these materials in light of its evolving understanding of its own case and that of the Defence is a factor that may negatively impact the degree to which the Prosecutor can satisfy disclosure obligations.
46. Litigation between the parties over the scope of the Prosecutor's obligations to disclose exculpatory material and material relevant to the preparation of the Defence has provided some guidance to the Prosecutor on the proper interpretation of the Prosecutor's disclosure obligations.⁷⁰ The Appeals Chamber, for instance, has interpreted the obligation to disclose pursuant to Rule 77 very broadly.⁷¹ An item will be considered material for Rule 77 purposes if it is relevant for the preparation of the Defence, in the sense that it would undermine the Prosecution case, support a line of argument of the Defence, or significantly assist the accused in understanding the incriminatory and exculpatory evidence and issues in

cle 54(3)(e) at the time such material is provided, so as to avoid delays that may otherwise be expected to result from the Prosecutor having to obtain that consent at a later date.

⁶⁸ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Order to the Prosecution to provide copies of documents it seeks to withhold from the Defence, 14 March 2013; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on Defence Request for disclosure of eight documents, 18 April 2013; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on request for additional time to disclose translations, 5 August 2013; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the "Defence Request for Disclosure of Article 67(2) and Rule 77 Materials", 14 July 2011; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Public redacted "Decision on the 'Defence request for Termination of Proceedings'", 30 January 2014.

⁶⁹ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, 6 March 2013, para. 20.

⁷⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Public redacted version of "Decision on the Defence Request for disclosure of pre-interview assessments and the consequences of non-disclosure" (ICC-01/05-01/08-750-Conf), 9 April 2010; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on Response to Prosecution Application Regarding the Disclosure of the Identities of Certain Individuals Who Will not Appear as Trial Witnesses, Public, 28 August 2013.

⁷¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC_01/04-01/06, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber 1 of 18 January 2008, Public, 11 July 2008; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Redacted Version of Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", 29 July 2011.

the case.⁷² The assessment is to be made on the basis of a *prima facie* relevance standard.⁷³

47. The impact of protracted litigation over the scope of the Prosecutor's disclosure obligations on the expeditiousness of the proceedings could be alleviated to a degree if the Prosecutor took a different approach to disclosure.

Recommendation:

48. The Prosecution should take a presumptive approach to disclosure and make available to the Defence in electronic form all non-confidential materials (i.e. all materials for which there are no grounds to withhold or delay disclosure) obtained pursuant to an investigation. The Prosecutor should place all evidence collected pursuant to an investigation that does not require protective measures in a searchable electronic database much like the ICTY's Electronic Disclosure System. With access to an electronic database of materials collected pursuant to an investigation, the Defence can easily search the material for itself. Electronically disclosed materials must be specifically indexed, with Article 67(2) ICC Statute and Rule 77 ICC RPE materials identified and searchable by key words. The use of such a system should not, however, be used as a substitute by the Prosecution for satisfying its obligation to identify for the Defence the evidence disclosed on the electronic database that falls under Article 67(2) or Rule 77. Neither the efficiency nor fairness of the proceedings would be facilitated by disclosure to the Defence of volumes of material without specifically identifying those known by the Prosecution to be exculpatory to the Defence.⁷⁴

5. Poor management of material subject to disclosure

49. There are a number of instances evident in the case-law of situations in which the Prosecution's own internal processes and organisation have contributed to a failure to meet disclosure obligations. Thus, for instance, Chamber decisions refer to situations in which the Prosecution advises the Chamber that it has belatedly identified new materials subject to disclosure,⁷⁵ or is unable to locate materials it wishes to rely upon for the purposes of the confirmation hearing, or has

⁷² *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber 1 of 18 January 2008, 11 July 2008.

⁷³ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09 OA 4, Public, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor, 28 August 2013, para. 42.

⁷⁴ The Prosecutor would also continue to be responsible for the periodic review of any protected material in the possession of the Prosecution not placed in the electronic database so as to identify materials subject to disclosure pursuant to Article 67(2) ICC Statute and Rule 77 ICC RPE.

⁷⁵ *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the "Prosecution's notification of its intention to rely on 18 documents previously disclosed pursuant to Rule 77 or Article 67(2) for the purposes of the confirmation of charges; and request for authorization to maintain redactions previously made; and additional request to disclose one document as incriminating evidence", 16 December 2013, para. 14.

overlooked certain materials subject to disclosure⁷⁶ because the person charged with reviewing the materials was not a person with sufficient familiarity with the case⁷⁷ or as a result of mere inadvertence.⁷⁸

50. In *Katanga and Ngudjolo*, the Single Judge highlighted a number of incidents which she was ‘highly disturbed by’.⁷⁹ In other instances, the Prosecutor’s failure to disclose Rule 77 ICC RPE material relevant to one case has only come to light from the Prosecutor’s reliance on that information in a second case dealing with the same situation.⁸⁰
51. In *Kenyatta*, the Trial Chamber addressed failures of the Prosecutor to disclose materials that should have been disclosed pursuant to Article 67(2) ICC Statute prior to the confirmation hearing, noting their particular relevance to the credibility of Prosecution evidence relied upon at the confirmation hearing. The Prosecutor explained the failure as the result of an oversight by two reviewers, but its impact was important to the decision of the Prosecutor to withdraw the

⁷⁶ *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the “Prosecution’s urgent request pursuant to Regulation 53 for variation of time limit to submit a request for redactions and Notice of information regarding the coming disclosure”, 3 April 2012, para. 4; *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the “Prosecution’s request pursuant to Regulation 35 for the extension of time for disclosure and for variation of time limit to submit a request for redactions”, 2 October 2013, para. 6; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No: ICC-01/09-01/11, Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, para. 85; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No: ICC-01/09-01/11, Decision on request for additional time to disclose translations, 9 July 2013, para. 2.

⁷⁷ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the 19 June 2008 Prosecution Information and other Matters concerning Articles 54 (3)(e) and 67 (2) of the Statute and rule 77 of the Rules, 25 June 2008, para. 21.

⁷⁸ *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision Regarding the Non-Disclosure of 116 Documents Collected Pursuant to Article 54(3)(e) of the Rome Statute, 27 January 2014, para. 7; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on Prosecution’s application to disclose on additional document, 21 February 2013, para. 8.

⁷⁹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the 19 June 2008 Prosecution Information and other Matters concerning Article 54(3)(e) and 67(2) of the Statute and rule 77 of the Rules, 25 June 2008, para. 21. These include: the Prosecution’s discovery of 1172 documents relating to the investigation into the DRC situation that had been unregistered with the Office of the Prosecutor for years; the fact that the Prosecutor did not inform the Single Judge or the Defence about this problem for weeks, and only informed them after the expiration of the deadline for disclosure of Article 67(2) ICC Statute and Rule 77 ICC RPE materials; the Prosecution’s disclosure three days prior to the start of the confirmation hearing of a CD-Rom with an unknown number of Rule 77 materials; the Prosecution’s loss of an unsigned draft statement of one of the witnesses on whose evidence the Prosecution intends to rely at the confirmation hearing; and the Prosecution’s loss of a document entitled “The Political Situation in Congo” transmitted by that witness during his second interview. Addressing these occurrences, the Single Judge stressed that the Prosecution must immediately put in place the necessary measures to stop the continuous re-occurrence of these types of incidents.

⁸⁰ For example, in the *Katanga and Ngudjolo* case, the Prosecution sought redactions to witness statements it was obligated to disclose as Rule 77 ICC RPE material. The Chamber noted that the witness statements, which were primarily relevant to the *Lubanga* case, had not been disclosed in *Lubanga* (see *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Décision sur la protection de 21 témoins relevant de l’article 67-2 du Statut et/ou e la règle 77 du Règlement de procédure et de preuve, 24 July 2009, para. 64).

charges against Mr. Muthaura.⁸¹ The Chamber reprimanded the Prosecution and required it to conduct a complete review of its case file and to certify to the Chamber that it has done so.

52. In *Bemba*, the Prosecutor failed to abide by the deadlines imposed by the Chamber for applications for redactions, filed applications out of time, and made it impossible for the 30-day timeline for disclosure prior to the confirmation hearing to be met. The Chamber expressed its ‘astonishment’ at the conduct of the Prosecutor.⁸² The remedy was a postponement of the confirmation hearing.⁸³
53. In the same case, the Prosecution filed a motion requesting authorisation to add and disclose additional evidence to be relied on at trial beyond the deadline.⁸⁴ The Chamber rejected the application for three reasons: “first, the wholesale, unexplained and unjustified breach by the prosecution of the Chamber’s disclosure orders... second, the provision by the prosecution in its application of only partial and incomplete details of the history to, and the difficulties with, the additional eight sources that the prosecution sought to rely on, and the linked failure by the prosecution to provide, for each of the sources, a sufficiently compelling or explicable basis that would justify an order granting the application, and third... the critical consideration that the accused needs sufficient time to prepare for a trial which is to commence in April 2010 (just over four months from the date of the Decision)...”.⁸⁵
54. In *Ruto et al.*, the Chamber noted that, of all incriminatory evidence disclosed after the confirmation hearing, 70% was disclosed only in January 2013, or later, despite the fact that 9 January 2013 was the final deadline for full disclosure.⁸⁶ The Chamber adjourned the start of trial due to the burden placed on the Defence.⁸⁷ Three months later, the Trial Chamber noted that it was “deeply concerned by both the significant volume of late disclosure in this case and that fact that at this late date, additional evidence still remains to be disclosed to the De-

⁸¹ *The Prosecutor v. Uhuru Muigai Kenyatta and Francis Kirimi Muthaura*, Case No. ICC-01/09-02/11, Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, 11 March 2013.

⁸² *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on Postponement of the Confirmation Hearing, 17 October 2008, paras. 22-23.

⁸³ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on Postponement of the Confirmation Hearing, 17 October 2008, para. 25.

⁸⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the “Prosecution’s Request for Leave to Appeal the Trial Chamber’s Oral Ruling Denying Authorisation to Add and Disclose Additional Evidence after 30 November 2009”, 28 January 2010, paras. 2-10.

⁸⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the “Prosecution’s Request for Leave to Appeal the Trial Chamber’s Oral Ruling Denying Authorisation to Add and Disclose Additional Evidence after 30 November 2009”, 28 January 2010, para. 28.

⁸⁶ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision concerning the start date of trial, 8 March 2013, paras. 13, 18.

⁸⁷ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision concerning the start date of trial, 8 March 2013, para. 13.

fence”.⁸⁸ Again, the Chamber adjourned the trial to allow the Defence three months to prepare for trial.⁸⁹

55. Finally, in the *Mbarushimana* case, the confirmation hearing was delayed due to a failure on the part of the Prosecution to comply with its obligation to provide the appropriate translations of materials it disclosed for the purpose of the confirmation hearing.⁹⁰

Recommendation:

56. The Prosecution should conduct a comprehensive review of its own practices with regard to evidence collection, organisation or indexing, and ongoing review for purposes of disclosure, with a view to improving existing practices to meet its disclosure obligations in a timely, efficient, and accurate manner. Consultations with outside experts, including prosecutors from other international criminal courts and from national jurisdictions, may also help to identify best practices in this regard. The Prosecution and Chambers need to devise a system whereby disclosure becomes a priority for the parties. One method that appears to have had success at the ICTY is for the Prosecution to designate one person of sufficient seniority in each team working on a case who is given the responsibility for the management of the disclosure process and who will be accountable to the Chamber for the disclosure process. That person is required to file before the Chamber monthly disclosure reports throughout the proceedings certifying the constant review and disclosure of prosecution materials as the case proceeds.⁹¹

6. The impact of post-confirmation investigations

57. The Appeals Chamber stated that the Prosecution’s investigations should be ‘largely completed’ by the confirmation hearing.⁹² Despite this pronouncement,

⁸⁸ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, para. 90.

⁸⁹ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, para. 94.

⁹⁰ *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on “Defence request to deny the use of certain incriminating evidence at the confirmation hearing” and postponement of confirmation hearing, 16 August 2011.

⁹¹ Interview with Dermot Groome, Senior Trial Attorney in the *Mladić* case, 29 March 2014.

⁹² *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Judgment In 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, para. 44. See also *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 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, paras. 52-54 (The Appeals Chamber held that the Prosecutor’s “duty to establish the truth is not limited to the time before the confirmation hearing. Therefore, the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth”. However, the Appeals Chamber noted that “ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing”, but that it “accepts the argument of the Prosecutor that

it is evident from the clear variation in numerous cases between the evidence disclosed pre-confirmation and that disclosed for the purpose of trial that the Prosecution's investigations are not 'largely completed' by the confirmation hearing.⁹³

58. The Prosecution has argued that, in some cases, it can only expand its investigations after confirmation due to risks to witnesses and the security situation on the ground. In doing so, it balances its obligations to safeguard witnesses' security with the need to avoid overburdening the Court's protection system with demands for long-term protection of dozens of witnesses and their families before it is absolutely necessary to do so.⁹⁴ While this may explain the approach of the Prosecutor, it is in tension with her disclosure obligations.
59. Thus, for example, in *Kenyatta*, the Prosecution dropped seven out of the 12 witnesses relied upon for the confirmation hearing and added 26 witnesses that were first interviewed after the confirmation stage. The Trial Chamber in that case observed that 'the Prosecution is not necessarily required to rely on entirely the same evidence at trial as it did at the confirmation stage',⁹⁵ but underscored that the Prosecution should not continue investigating post-confirmation for the purposes of collecting evidence which it could reasonably have been expected to have collected prior to confirmation.⁹⁶ While the majority of the Chamber concluded that the Prosecution should have conducted a more thorough investigation prior to confirmation in accordance with its statutory obligations under Article 54(1)(a) ICC Statute,⁹⁷ the appropriate remedy fashioned by the Chamber was to invite the Defence to submit its observations as to the estimated time needed to adequately prepare for trial.⁹⁸
60. In *Ntaganda*, the Prosecutor requested postponement of the date of the confirmation hearing and the setting of a new calendar for disclosure of evidence between the parties. The Prosecutor submitted a number of concerns concerning the state of the investigation and the evidence due to the fact that the case had been dormant for several years during the period between the issuance of the first arrest warrant (7 March 2007) and the second warrant of arrest (13 July

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 conflict results in more compelling evidence becoming available for the first time after the confirmation hearing”).

⁹³ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09, Decision concerning the start date of trial, 8 March 2013, paras. 13-14.

⁹⁴ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, para. 55.

⁹⁵ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, para. 105.

⁹⁶ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, para. 121.

⁹⁷ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, para. 123.

⁹⁸ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, paras. 126-127.

2012).⁹⁹ The request was granted and the confirmation hearing postponed for five months.¹⁰⁰

61. In seeking the late addition of new witnesses six weeks prior to the start of trial in *Ruto et al.*, the Prosecution submitted that “the lateness of discovery of these three persons as potential witnesses is not to be attributed to the Prosecution, but rather resulted from the “exceptional and precarious circumstances of the case”, which included “an atmosphere of intimidation in Kenya” which has had “a chilling effect on current prosecution witnesses as well as anyone intending on cooperating with the Court”.¹⁰¹ As a result of security concerns, two of its ‘most critical witnesses’ along with another witness have been unable to commit to testifying at trial. It was these circumstances, the Prosecution claimed, that led it to continue investigating in the hope of finding new witnesses to replace existing witnesses should this become necessary.¹⁰²
62. Each of these examples is of a case where the Prosecutor faced particular difficulties. They suggest a tendency on the part of the Prosecution to seek to rely on different evidence at trial than it did for the purpose of confirmation. This might suggest either lack of – investigative – preparedness on the part of the Prosecution. This could also demonstrate that, given the particular challenges of international criminal investigations and prosecutions, general principles might sometimes have to be adjusted to accommodate those realities. However, and in line with existing case-law, the Prosecution should seek in principle to ensure that its investigations are finalised before confirmation.¹⁰³ As the confirmation hearing is the opportunity for the Prosecution to rely upon the core evidence of its case, the goal should be to complete as much of the investigation and disclosure as possible before confirmation.¹⁰⁴ This point has been recognised by the Prosecutor and she has committed in her Strategic Plan for 2012-2015 to “aim at presenting cases at the confirmation hearing that are as trial ready as possible”.¹⁰⁵
63. These issues are dealt with more comprehensively in the Chapter *Investigations at the ICC*, but for current purposes, it suffices to say that continuation of substantial investigations past the confirmation hearing can have a profound impact on the efficiency and effectiveness of the disclosure process. Because the Defence relies to a great extent on the materials disclosed by the Prosecutor to pre-

⁹⁹ *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision on the “Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing” and Setting a New Calendar for the Disclosure of Evidence Between the Parties, 17 June 2013, para. 16.

¹⁰⁰ *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision on the “Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing” and Setting a New Calendar for the Disclosure of Evidence Between the Parties, 17 June 2013, p. 19, paras. (a) and (b).

¹⁰¹ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, para. 19.

¹⁰² *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, para. 20.

¹⁰³ See *Investigations at the ICC*, paras. 56-58.

¹⁰⁴ *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, para. 25.

¹⁰⁵ ICC Office of the Prosecutor, Strategic Plan, June 2012-2015, p. 6, para. 4(a).

pare for trial, the prolongation of the Prosecutor's investigations risks having a serious impact on the overall fairness of the proceedings.

Recommendation:

64. Strict deadlines should be imposed on the disclosure of evidence following the confirmation hearing, so as to provide adequate time for the Defence to prepare for trial.

7. Delays in Defence disclosure due to difficulties in obtaining information

65. Challenges in relation to disclosure and meeting disclosure obligations are not confined to the Prosecution. Inefficiencies and delays in Defence disclosure may arise for a variety of reasons, including because of delays on the part of potential information providers to respond to requests that have been made by the Defence¹⁰⁶ which will often result in the Defence requesting the assistance of the Chamber.¹⁰⁷ For example, requests for cooperation sent to States by the Defence are often ignored by States,¹⁰⁸ and even when the Chamber assists by issuing orders, the response can take a year or more.¹⁰⁹
66. The reluctance of information providers to supply materials to the Defence is a common feature of international criminal trials and, unlike at the *ad hoc* Tribunals, the ICC's authority to compel the production of evidence through the issuance of *subpoenas* has only recently been confirmed.¹¹⁰ Where a State fails to respond to requests for assistance in a timely manner, that failure can impact profoundly on the efficiency of the proceedings. As timely and effective State cooperation is key to the efficiency and success of the Court, States Parties

¹⁰⁶ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Defence Request to Vary Time Limit for Disclosure of 132 items of documentary evidence, 5 July 2011; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Defence Request to Vary Time Limit for Addition to Defence Evidence List, 12 August 2011.

¹⁰⁷ *The Prosecutor v. Mbarushimana*, Case No. ICC-01/04-01/10, Decision on Defence's request for State cooperation from the Democratic Republic of Congo, 15 February 2011; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Public redacted Decision on the second defence's application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 21 December 2011; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on the third defence application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 12 September 2013; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on the defence request for a temporary stay of proceedings, 26 October 2012.

¹⁰⁸ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, paras. 1-11.

¹⁰⁹ See, for example, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on the second defence's application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 21 December 2011; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, paras. 1-11.

¹¹⁰ See in this respect, above, para. 37.

should consider the possibility of identifying incentives to cooperation and consequences for failures to do so.

67. In circumstances where the Defence have faced particular difficulties in accessing relevant information, the Chambers have requested the Prosecutor to provide its assistance to the Defence.¹¹¹ In so doing, the Chambers have recognised that it is not the role of the Prosecutor to carry out investigations at the direction of the Defence, but where the Prosecution can lend its assistance it may be requested to do so.¹¹² The utility of such an approach may, however, turn upon the willingness of the Defence to disclose its lines of defence to the Prosecutor. In some cases, where the Defence has faced particular difficulties due to non-cooperation of State authorities and where the Article 67(2) ICC Statute material disclosed by the Prosecution has been consistent with the Defence position disclosed to the Chamber *ex parte*, the Chambers have even suggested – without obliging – that the Defence consider doing so.¹¹³
68. In some cases, a lack of organisation on the part of Defence teams has been identified as the key issue impacting on orderly disclosure. For example, the Pre-Trial Judge in *Ruto et al.* expressed her dissatisfaction with the manner in which the Defence teams had approached the upcoming confirmation hearing with respect to Defence disclosure.¹¹⁴
69. The necessity of seeking and implementing protective measures for witnesses is also a cause of delay in Defence disclosure.¹¹⁵

¹¹¹ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Defence application for disclosure of evidence relating to Prosecution witness 4, 11 June 2013.

¹¹² *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Defence application for disclosure of evidence relating to Prosecution witness 4, 11 June 2013. See *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, para. 128.

¹¹³ In *Banda and Jerbo*, the Defence sought a temporary stay of proceedings because of the difficulties faced in carrying out any investigations in Darfur. The Government of Sudan had denied access to Defence teams – and, in fact, to all ICC-related personnel – and criminalised cooperation with the Court. In dealing with the Defence’s application for a stay, the Chamber proposed, though did not oblige, the Defence to consider revealing one line of argument to the Prosecution so as to facilitate the search for and disclosure of relevant evidence and the investigation thereof. The Defence had also requested the Prosecution to facilitate interviews with ten Prosecution witnesses. The Prosecution reported that a number of the witnesses had agreed to the interviews but others had refused, and it submitted that it could not compel its witnesses to cooperate with the Defence but ‘just put the scenario to them and let them decide’. The Chamber encouraged the Prosecution to do more than just that. See *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on the defence request for a temporary stay of proceedings, 26 October 2012.

¹¹⁴ *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the “Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List of Evidence”, 12 August 2011, para. 8; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the “Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)””, 29 August 2011.

¹¹⁵ In the case of *Banda and Jerbo*, the Registry informed the Chamber that with respect to fifteen Defence witnesses it would need a minimum of ten months to conduct interviews and, depending on the assessment made, to relocate the witnesses, should they be referred to the Victims and Witness Unit for inclusion in the ICC Protection Program (see *The Prosecutor v. Abdallah Banda Abakaer Nourain and*

70. In other cases, poor work practices have caused disruptions to the efficient progress of proceedings.¹¹⁶

Recommendation:

71. With respect to Defence investigations, the Prosecution should be required to assist the Defence whenever the Defence satisfies the Chamber that it cannot access evidence absent the assistance of the Prosecutor.

8. Delays in the translation of disclosed materials

72. The need to translate materials into the ICC's official working languages or other languages, as relevant, can lead to delays in the disclosure process and in the proceedings more generally.
73. First, and most simply, the official working languages of the ICC are French and English and the Chambers have held that all documents and materials filed with the Registry must be in English or French, as required by Article 50(2) ICC Statute and Regulation 39(1) ICC Regulations.¹¹⁷ If the original is not in one of these languages, it must be translated.¹¹⁸ If the documents filed are in English, and the accused only speaks French, he is entitled to have 'such translations as are necessary to meet the requirements of fairness'.¹¹⁹ Insofar as the evidence to be disclosed for the confirmation hearing or for trial must comply with this requirement, the need to translate the materials may lead to delays.¹²⁰ In some

Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09, Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, 6 March 2013, para. 18).

¹¹⁶ For example, in one case, evidence disclosed by the Defence has been incomplete with pages missing (see *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on Prosecution's Request to Exclude Certain Documents Submitted by the Defence, 22 September 2011, para. 26); or the Defence has failed to disclose its evidence in accordance with the Order of the Pre-Trial Chamber (see *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Disclosure of Evidence by the Defence, 5 December 2008, para. 9; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Order for Full Disclosure and Further Clarification from the Defence, 18 December 2008).

¹¹⁷ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on Prosecution's Request to Exclude Certain Documents Submitted by the Defence, 22 September 2011, para. 20.

¹¹⁸ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on Prosecution's Request to Exclude Certain Documents Submitted by the Defence, 22 September 2011, paras. 16-19.

¹¹⁹ See Article 67(1)(f) ICC Statute. This has been interpreted as entitling the right to have translations of all those documents which are necessary for him to understand the nature, cause and content of the charges, See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Defence's Request Related to Language Issues in the Proceedings, 4 December 2008, para. 14.

¹²⁰ Regulation 39(1) ICC Regulations provides that all documents and materials filed with the Registry must be in English or in French, unless otherwise provided in the Statute, the Rules, or the Regulations, or authorised by the Chamber or the Presidency. See *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the "Prosecution's Request to Exclude Certain Documents Submitted by the Defence", 22 September 2011; *The*

cases, delay in translations result from the inability of the Translation Unit of the Court to provide timely translations.¹²¹

74. Second, if an accused does not understand one of the official working languages of the Court, he is entitled to receive certain materials in his native language (Article 50(3) ICC Statute).¹²² In some cases, Chambers have wisely sought to reduce the impact of possible translation-related delays by ordering the Defence to identify from material disclosed for the confirmation hearing which is core to the preparation of the Defence case and which thus needs to be translated.¹²³ Importantly, Trial Chambers have held that evidence can only be considered to have been disclosed to the Defence from the moment the accused can fully understand the precise contents of it.¹²⁴ In this respect, deadlines imposed in a proceeding cannot start to run until the accused has the materials he is entitled to receive in a language he fully understands.¹²⁵ Delays in providing translations in a language understood by the accused have led to the postponement of a confirmation hearing in at least two cases.¹²⁶

Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on request for additional time to disclose translations, 9 July 2013, para. 7.

¹²¹ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on Prosecution's Request to Exclude Certain Documents Submitted by the Defence, 22 September 2011, para. 16; *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision Requesting Observations from the Interpretation and Translation Section, 19 September 2013.

¹²² Rule 76(3) ICC RPE provides that the Prosecutor is obliged to make available the statements of Prosecution witnesses "in original and in a language which the accused fully understand and speaks". Article 67(1)(f) ICC Statute provides for the accused's right to have 'such translations as are necessary to meet the requirements of fairness'. See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Defence's Request Related to Language Issues in the Proceedings, 4 December 2008. See also *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07 (OA3), Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2008; *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision on the Defence Request for Extension of Time for the Purpose of Requesting Translation of Witness Statements into Kinyarwanda, 13 November 2013; *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07(OA3), Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2008.

¹²³ *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties, 17 May 2013, paras. 21, 26.

¹²⁴ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRC-OTP-1042-0006 Pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009; *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on commencement date of trial, 20 June 2013, para. 36

¹²⁵ *The Prosecutor v. William Samoei Ruto And Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on request for additional time to disclose translations, 9 July 2013, para. 7; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09 OA 2, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translations", 17 February 2012.

¹²⁶ *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on "Defence request to deny the use of certain incriminating evidence at the confirmation hearing" and postponement of confirmation hearing, 16 August 2011; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, 6 March 2013.

Recommendations:

75. Chambers should continue to explore ways it can focus the burden of translation on key documents. The Prosecutor should ensure that it exercises due diligence in seeking to have relevant key materials translated into one of the official working languages of the Court. Where the Prosecutor has credible information that the accused does not sufficiently understand English or French it should proactively begin translation of relevant key materials into the native language of the accused. The Prosecutor should, at the earliest opportunity, seek translations of the materials in its possession that needed to be disclosed, particularly statements of key witnesses.
76. The Prosecutor should provide unofficial translations while it is obtaining official translations of the documents. Doing so would give the Defence the earliest possible indication of what is in the evidence and allow the Defence to request the prioritisation of particular documents.

9. No effective sanctions regime to deter violation of disclosure obligations

77. In most cases, there will invariably be some late disclosure of evidence by the Prosecution outside the time frames set by the Chambers.¹²⁷ There are certain deadlines for disclosure set in the Statute that are considered by some Pre-Trial Chambers not to be subject to variation.¹²⁸ Where that is the case and where the parties do not expect to meet those deadlines, Chambers have typically pushed off the triggering date, such as the confirmation hearing or the start of the trial to allow disclosure to be completed within the timelines specified by the statutory framework. As a result, the parties' difficulties in meeting disclosure obligations can have a direct impact on the prolongation of proceedings.¹²⁹

¹²⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the prosecution's second application for disclosure of additional evidence (ICC-01/05-01/08-767 – Conf-Exp), 7 May 2010; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on request for additional time to disclose translations, 9 July 2013, para. 12.

¹²⁸ See *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Defence Requests for Extension of Time Limit for Disclosure in Compliance with the E-Court Protocol, 16 August 2011, para. 12. See also *The Prosecutor v. Germain Katanga and Mathieu Ngudjoli Chui*, Case No. ICC/01/04-01/07, 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, para. 69. Cf. *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the "Defence Request for an extension of the time limit for the inspection and submission of its evidence for use at the confirmation hearing", 26 July 2011 (where the Single Judge treated Regulation 35 ICC Regulations as applicable).

¹²⁹ *The Prosecutor v. Francis Kirimi Muthaura Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision of the Defence Requests for Leave to Resubmit or Add Evidence and Related Requests, 15 September 2011. In this case, Defence requests for late disclosure prior to the confirmation hearing were rejected but Regulation 35(2) ICC Regulations was considered applicable.

78. Where the Statute and Rules do not set a fixed deadline, extensions of time to comply with disclosure obligations are requested almost as a matter of course.¹³⁰
79. Requests for extensions of time are governed by Regulation 35 ICC Regulations.¹³¹ In cases where the Prosecution has sought authorisation out of time for the inclusion of incriminating evidence that should have been disclosed pursuant to an earlier deadline, the Chamber will consider whether circumstances out of the control of the Prosecution justify the delay and whether the Defence would suffer prejudice from the late inclusion of the evidence.¹³² A review of a number of cases demonstrates that the Chambers take a relatively rigorous approach to the grant of extensions of time while appreciating the complexity of the disclosure process and balancing requests with the overall mandate of the Court to seek the truth.¹³³
80. It is the emphasis on this mandate, however, that arguably restricts the ability of the Chambers to take a hard-line approach to requests for extension of time to allow belated disclosures.¹³⁴ In particularly egregious cases of failures to disclose, the only remedy available to the Chamber is to refuse the admission of the evidence; while Chambers have adopted this remedy in a number of cases, they are unlikely to do so when the impugned evidence is of particular relevance to the establishment of the truth.¹³⁵ In that circumstance, the approach adopted

¹³⁰ See, for example, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Extension of Time Limit for Disclosure under Rule 121(6) of the Rules of Procedure and Evidence, 5 September 2011; *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision on the Defence Request for Extension of Time for the Purpose of Requesting Translations of Witness Statements into Kinyarwanda, 13 November 2013.

¹³¹ Regulation 35 ICC Regulations only applies to time limits prescribed in the Regulations or ordered by the Chamber and no extension or reduction of time limits can be granted in relation to time limits established by the ICC Statute or the ICC RPE, which are preclusive. See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-466, Decision on the Defence Application for Leave to Appeal 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”, 5 May 2008; *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Decision on the Suspension of the Time-Limits Leading to the Initiation of the Confirmation Hearing, 30 January 2008.

¹³² See, for example, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05/08, Decision on the prosecution’s second application for disclosure of additional evidence (ICC-01/05-01/08-767-Conf-Exp), 7 May 2010, para 26.

¹³³ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Defence Requests for Leave to Resubmit or Add Evidence and Related Requests, 15 September 2011; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Extension of Time Limit for Disclosure under Rule 121(6) of the Rules of Procedure and Evidence, 5 September 2011; *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision on the Defence Request for Extension of Time for the Purpose of Requesting Translations of Witness Statements into Kinyarwanda, 13 November 2013; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05/08, Decision on the prosecution’s second application for disclosure of additional evidence (ICC-01/05-01/08-767-Conf-Exp), 7 May 2010.

¹³⁴ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Prosecution request to add P-548 and P-66 to its witness list, 23 October 2013.

¹³⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminat-

by the Chambers has been to ensure that any prejudice caused to the Defence is remedied by measures such as the grant of an extension of time to allow the Defence to investigate the newly disclosed evidence or leaving open the possibility of the Defence petitioning the Chamber for a short adjournment in the proceedings after the evidence has been presented at trial.¹³⁶

81. Public reprimands are one form of possible sanction, and in the case-law there are examples of Chambers chastising the parties in public filings for their approach to the disclosure process and calling into question their professionalism.¹³⁷ While this method of sanction has some force, it is *ad hoc* and may or may not be applied in any given case of disclosure violations. For the possibility of sanctions to have maximum impact, they need to be identified in advance and applied consistently. Such sanctions could include the temporary refusal of right of audience for Prosecution counsel, formal findings against Prosecution counsel for breach of a court order or orders to Prosecution counsel responsible for disclosure matters to sign an affidavit certifying full disclosure has taken place.¹³⁸

ing Witnesses and the disclosure of related incriminating material to the Defence, 23 October 2009; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05/08, Order relating to the prosecution's communication of incriminatory evidence (ICC-01/05-01/08-985), 12 November 2010, paras. 12-16.

¹³⁶ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Prosecution's Application to Add P-317 to the Prosecution Witness List (ICC-01/04-01/07-1537), 3 November 2009, para. 27; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence, 23 October 2009, para. 29.

¹³⁷ In *Kenyatta*, the Trial Chamber found that the authority to issue a reprimand and warning to the Prosecutor for failure to identify and disclose materials falls within the Chamber's broad discretionary powers set out in articles 64(2) and 64(6)(f) (See *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, paras. 89-90). In the same case, the Chamber issued a caution to the Prosecutor in relation to the timeliness and thoroughness of Prosecution investigations (see *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Prosecution's application for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, para. 88). There are also examples of Chambers ordering the Prosecutor to review its investigative file and certify to the Chamber that it has done so and assessed that no further material in its possession needs to be disclosed (see *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, para. 97). While not a sanction, the most serious measure imposed by the Chambers in response to failures to disclose potentially exculpatory material, was a stay of the proceedings on the basis that all the requirements of a fair trial could not be satisfied. However, once the issue surrounding that disclosure had been rectified, the stay was lifted and the case allowed to recommence. The *Lubanga* Trial Chamber imposed a second stay of proceedings for failure by the Prosecution to follow orders of the Court. This ruling was overturned by the Appeals Chamber, which held that the Trial Chamber should first have had recourse to sanctions against the Prosecutor prior to imposing a stay (see *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory material covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, para. 55).

¹³⁸ See also *The Confirmation Process*, para. 40.

Recommendation:

82. The Chambers should develop a regime of sanctions to be applicable to disclosure violations regardless of whether or not the belatedly disclosed evidence is admitted at trial.
83. The imposition of sanctions is within the inherent discretion of a Chamber. The Chamber should impose sanctions where disclosure obligations are not met and the circumstances otherwise warrant, in order to increase the degree of compliance with disclosure obligations.

PRESENTATION AND ADMISSION OF EVIDENCE

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I. General Introduction

1. An international criminal trial typically involves the production and admission of hundreds or thousands of exhibits and dozens or hundreds of witnesses.¹ The forensic process of establishing facts in such cases is therefore costly and time-consuming.² In the *Lubanga* case, for instance, 1373 exhibits were admitted (368 from the Prosecution, 992 from the Defence and 13 from the legal representatives); 67 witnesses heard (36 Prosecution witnesses, 24 Defence witnesses and 3 witnesses called by the legal representatives). In *Katanga and Ngudjolo*, out of the admitted exhibits, 261 exhibits were tendered by the Prosecution, 371 by the Defence and 5 each by the LRVs and Chamber and 56 witnesses heard (Prosecution: 24, Defence: 28, LRVs: two, Trial Chamber: two).³ In *Bemba*, 583 exhibits were admitted.⁴ The Trial Chamber admitted 90% of the Prosecution's materials, despite Defence's objection. Record evidence includes a number of reports whose authors were not called nor otherwise authenticated.⁵ In that case (*Bemba*), the Prosecution called 42 witnesses, the Defence called 34 and the Trial Chamber called one witness.
2. The size, duration and cost of international criminal proceedings negatively affects public trust in the effectiveness of international criminal justice. The huge financial cost of individual cases in turns limits the effectiveness of international justice as a whole as it limits the number of investigations and prosecutions which may be conducted at any one time. It is therefore essential for the credibility and effectiveness of the ICC, that it should find practical responses to these challenges.
3. As discussed in more detail below, the principal evidence-related problems identified in the practice of the ICC are as follows:

¹ In *Karadžić* (single accused), a total of 10,943 exhibits were tendered, with 580 witnesses (as of 20 February 2014); in *Tolimir* (single accused), 3503 exhibits were tendered, with 187 witnesses; in *Popović et al.* (seven accused), 5526 exhibits were tendered, with 315 witnesses; in *Prlić et al.* (six accused), 8706 exhibits were tendered, with 206 witnesses. See *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Prosecution Motion for Variation of The Word Limit for Its Final Brief and Submission on Timing of Filing of Final Trial Briefs with Appendix A, 3 March 2014, Appendix A.

² The ongoing *Karadžić* trial opened on 26 October 2009. The investigation in the *Lubanga* case started on 21 June 2004, the trial opened on 29 January 2009 and the judgment was delivered on 14 March 2002. The investigation in the *Katanga* case started on 21 June 2004, the trial opened on 24 November 2009 and the judgment was delivered on 7 March 2014.

³ *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Summary of Trial Chamber II's Judgment of 7 March 2014, pursuant to article 74 of the Statute, paras. 7-9, available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/documents/986/14_0259_eng_summary_judgment.pdf (last visited on 7 August 2014).

⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Order on the Classification of Items Admitted into Evidence, 11 December 2013, para. 1; note however that at footnote 7, the Trial Chamber specifies that "[t]he totality of the items admitted into evidence to date are set out in the confidential annex to the present order."

⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 6 September 2012.

- a) Evidence presented by the parties and admitted by Chambers is often of poor quality, resulting in evidential debris clogging the record and slowing the proceedings.⁶
- b) Evidence produced at trial is often repetitious, secondary or goes to prove collateral issues which are either irrelevant to the case or so remotely relevant to core issues in dispute that it does not materially advance the case.⁷
- c) A great deal of time is spent litigating the admission of evidence.⁸ The lack of certainty and consistency between Chambers as regards the proce-

⁶ In *Lubanga*, large parts of evidence regarding a central element of the case, i.e., child soldiers, were rejected by the Chamber because of their poor quality: “A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on. The Chamber spent a considerable amount of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest. The Prosecution’s negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditures on the part of the Court.” (*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 482). In *Katanga*, the Chamber having drawn attention to a range of significant lacunae in the Prosecution investigation at paras. 59-66, concluded as follows: “Sans doute l’enquête du Procureur aurait-elle gagné à approfondir ces différentes questions ce qui aurait permis de nuancer l’interprétation à donner à certains faits, d’interpréter plus justement certains témoignages recueillis et, là encore, d’affiner les critères auxquels la Chambre a eu recours pour évaluer la crédibilité de plusieurs témoins. Nombre de ces éléments d’ordre socioculturel ont, en réalité, été abordés à l’occasion des questions qu’a posées la Chambre. Ils auraient à ses yeux mérité d’être évoqué dès les débuts de la présentation de la preuve du Procureur afin de favoriser d’emblée, en audience, des débats contradictoires plus éclairés.” (*The Prosecutor v. Germain Katanga*, Case No. ICC-01/04/01/06, Judgement rendu en l’application de l’article 74 du Statut, 7 March 2014, para. 67.) In a dissenting opinion, Judge Van den Wyngaert noted “the fact that so much evidence was missing, and there were so many serious credibility problems with crucial prosecution witnesses”. She goes on to state that “[t]he Prosecution case was extremely weak” and that “there were many deficiencies in the Prosecution’s investigations: they took place more than three years after the facts; a number of crucial sites... were never visited; essential forensic evidence was lacking; a number of potential witnesses were either not interviewed... or not called to testify.... The Prosecution also failed to follow-up on the investigations of its own key witnesses.... [M]ost of the witnesses who were called by the Prosecution to give evidence about the role of Germain Katanga and the structure of the Ngiti fighters of Walendu-Bindi during the relevant time-period were persons whose knowledge about these matters was second-hand or incomplete at best.” (*The Prosecutor v. Germain Katanga*, Case No. ICC-01/04/01/06, Judgement rendu en l’application de l’article 74 du Statut, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, paras. 133, 137-139, 148).

⁷ See, for example, the Trial Judgment in *Lubanga*, where the Chamber dismissed portions of the evidence for its lack of relevance (*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras. 779, 896, 1042, 1233). In a dissenting opinion in *Katanga*, Judge Van den Wyngaert pointed to evidence led on two issues which, aside from being of importance once the charges against Katanga were re-characterised, ‘were all but irrelevant under the original charges.’ (*The Prosecutor v. Germain Katanga*, Case No. ICC-01/04/01/06, Judgement rendu en l’application de l’article 74 du Statut, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, para. 41.) In the *Bemba* case, the Prosecution presented 40 witnesses, in a case in which command responsibility of the accused is the central question in issue; 24 of the 40 witnesses were alleged victims of crimes capable only of giving crime-based evidence; two witnesses were called about domestic prosecution of crimes in the Central African Republic, and one was an expert on the impact of sexual violence. There was thus a significant repetition of evidence concerning the crimes alleged with little focus on the main question of command responsibility.

⁸ For example, in the *Bemba* case, the majority of litigation concerned the admission of documents. Rather than ruling on admissibility issues contemporaneously in the courtroom, Trial Chamber III set up a cumbersome and complicated regime in its ‘Order on the Procedure Relating to the Submissions

dures for the admission of evidence contributes to the protracted and lengthy process.

4. ICC Judges could contribute to finding practical solutions to resolving evidential challenges and speeding up the evidential process by adopting a number of basic principles:
 - a) International criminal tribunals are, by their nature, faced with procedural and evidential problems that might rarely, if ever, trouble domestic jurisdictions. It might therefore be the case that solutions from domestic legal traditions – common law, civil law and others – are ill-suited or only partly suited to the needs of the Court. In some cases, the adoption of domestically-inspired solutions might impact negatively on the overall effectiveness or fairness of the process as they are implanted into a judicial architecture different from their place of origin. The ICC should, therefore, seek to devise solutions best suited to its own particular needs. The body of jurisprudence of other international criminal tribunals and human rights bodies should provide precious jurisprudential guidance and a useful framework within which to seek those solutions. In all cases, the Court should be wary of adopting solutions to a – procedural or evidential – problem without the necessary safeguards (in particular human rights safeguards) to ensure that the adopted solution contributed to promoting effective and expeditious proceedings whilst at the same time safeguarding the fundamental rights of the accused.
 - b) Embrace a more proactive judicial attitude towards the evidential process: Whilst the structure of the evidential process at the ICC is primarily party-driven, it leaves a great deal of room for Trial Chambers to participate in and contribute to streamlining the evidential process. This could be achieved, *inter alia*, by adopting the following principles:
 - i) Focusing the evidential process to central issues in dispute: Trial Chambers should actively urge the parties to focus their cases on

of Evidence’, 31 May 2011 (Case No. ICC-01/05-01/08-1470), which required the parties to make objections to admissibility in advance, in writing, before a document was used in court. This resulted in a significant amount of decisions on admissibility issues being rendered in writing instead of directly in court over the course of the proceedings: First Decision on the prosecution and defence request for the admission of evidence, 15 December 2011; Decision on the Prosecutions’ Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 6 September 2012; Second Decision on the admission into evidence of material used during the questioning of witnesses, 14 June 2013; Decision on the admission into evidence of items deferred in the Chamber’s “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute”, 27 June 2013; Decision on the admission into evidence of items deferred in the Chamber’s ‘First decision on the prosecution and defence requests for the admission of evidence’, 3 September 2013; Third Decision on the prosecution and defence request for the admission of evidence, 6 November 2013; Order on the classification of items admitted into evidence, 11 December 2013. This practice could raise issues of compatibility with the rights of the accused to know the case against him but it ran the risk of the accused seeking to introduce evidence to counter allegations contained in documents and materials which may not ultimately be admitted, leading to an even more voluminous evidential record further littered with extraneous materials.

core – ‘material’ – issues in the case and disallow evidence or lines of questioning on collateral issues. They could do so, *inter alia*, by:

- (a) requiring more specificity in pleadings on the part of the Prosecution (so that the Trial Chamber can evaluate the relevance of the proposed evidence from both sides);
 - (b) requiring the Prosecution to lead evidence relevant to the case as delineated in the charging documents, rather than to let the case grow and evolve as the proceedings progress;
 - (c) requiring the Defence to more clearly provide the outline of its case at the commencement of proceedings;⁹
 - (d) requiring the Prosecution in advance of trial to link each proposed piece of evidence to the fact(s) which it is intended to prove.
- ii) Preventing the eliciting of irrelevant, duplicative or only remotely relevant evidence: The first point goes hand in hand with a much more active approach in preventing the litigation of issues that are not central to the case of either party. This, in turn, will require that Trial Chambers have a clear and detailed understanding of the parties’ cases from the early stages of the proceedings. If necessary, Trial Chambers should actively question the parties in the early stages of the proceedings about particular lines of questioning and facts which they seek to prove to be able to control the direction and scope of the evidential process and rule out a line of questioning if not relevant to central issues in the case;
 - iii) Make greater use of Chamber’s evidence: As discussed further below, Trial Chambers should make greater use of court evidence. It should do so after having given the parties an opportunity to be heard. It could do so, in particular, where its calling evidence could result in an overall saving of time (for example, in relation to expert witnesses).

5. Some of the tools available to Chambers to streamline, expedite and narrow down the evidential processes are discussed further below.

⁹ At the STL, for instance, Defence teams were requested to provide relatively precise indications of the allegations with which they were taking issue. *The Prosecutor v. Hussein Hassan Oneissi and Assad Hassan Sabra*, Case No. STL-II-01/PT/PTJ, Decision on the Prosecution Motion Regarding the Defense Pre-Trial Briefs, 5 July 2013; *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the Prosecution Motion Regarding the Defense Updated Pre-Trial Briefs, 24 October 2013. At the ICTY, Defence teams were ordered to refile their pre-trial briefs with more specificity. See *The Prosecutor v. Mićo Stanišić & Stojan Župljanin*, Case No. IT-08-91-PT, Order to the Defence to Supplement the Pre-Trial Briefs pursuant to Rule 65ter(F), 9 July 2009, p. 4; *The Prosecutor v. Radoslav Brđanin & Momir Talić*, Case No. IT-99-36-PT, Decision on Prosecution Response to “Defendant Brđanin's Pre-Trial Brief”, 14 January 2002.

II. Reducing the Amount of Evidence and Time Spent on the Presentation of Evidence

1. General observations

6. The first major concern regarding the effectiveness of the evidential process, understood as a forensically-led process capable of establishing the truth, is the amount of evidence that is being produced in ICC proceedings. As described above, evidential records before the ICC, and international criminal tribunals generally, are systematically very large. This affects the overall length of proceedings as it typically involves calling many witnesses and generally implies much litigation between parties. Furthermore, when time will come for Judges to prepare their judgement, they will also need much time to go through and analyse a record that might have bulked into the thousands of pages.¹⁰
7. Another major issue affecting the effectiveness of the evidential process before the ICC (and other international criminal tribunals) is the *quality* of the evidence being produced and the fact that time is taken in court to produce such evidence and that it will require judges to spend much time evaluating and setting aside this sort of evidence. Poor quality of evidence often means that the parties will lead a lot of evidence in the hope of compensating for the quality of the material being produced. For instance, the first Prosecution witness in *Lubanga* accepted that he had lied about his claims – which were at the core of the Prosecution case.¹¹ In the same case, none of the nine witnesses alleged by the Prosecution to have been child soldiers were found to be credible, and the Chamber did not rely on the testimonies of any of them in the judgement.¹² In relation to the accused Muthaura, a former civil service chief who was accused of fuelling violence after the 2007 election in Kenya, whilst a challenge to the lack of credibility/reliability of the Prosecution evidence was initially dismissed by the Pre-Trial Chamber and charges confirmed,¹³ the Prosecution shortly thereafter formally withdrew charges against him, acknowledging that it had no case against the accused.¹⁴ One of the reasons for the withdrawal was that the Prosecutor decided to drop the key witness against Mr Muthaura after this witness recanted a crucial part of his evidence, and admitted that he had accepted bribes.¹⁵

¹⁰ See, generally, on the evidentiary scale of international trials: P. Murphy and L. Baddour, '*International Criminal Law and Common Law Rules of Evidence*', in K. A. A. Khan, C. Buisman and C. Gonnell (eds.), *Principles of Evidence in International Criminal Justice*, Oxford University Press 2010, p. 152.

¹¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras. 430-441.

¹² *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, paras. 479-480. See also, *Investigations at the ICC*, para. 67.

¹³ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein*, Case no. ICC-01/09-02/11, Decision of confirmation of charges, 23 January 2012, p. 154.

¹⁴ *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case no. ICC-01/09-02/11, Decision on the withdrawal of charges against Mr Muthaura, 18 March 2013, para. 11.

¹⁵ See Press release: Statement by ICC Prosecutor on the Notice to withdraw charges against Mr Muthaura, 11 March 2013, available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx (last visited on 16 March 2014).

8. For the Prosecutor to rely upon evidence that is ultimately rejected is not in itself exceptional. What is of greater concern is the apparent failure of the Prosecution to diligently investigate and verify the credibility of witnesses central to its cases as required under Regulation 36 of the Regulations of the Office of the Prosecutor (and, arguably, Article 54(1)(a) ICC Statute).¹⁶ In the *Katanga* judgement, Judge Van den Wyngaert thus noted that despite the difficulties of conducting investigations of crimes committed in a war zone, the Court cannot lower its evidentiary standard.¹⁷ The Prosecution case under Article 25(3)(a) ICC Statute was extremely weak and the ‘cause of this complete failure of the Prosecution case is that the incriminating evidence did not pass muster.’¹⁸ The dissenting Judge pointed out that such failure was linked to the investigations conducted by the Prosecution.¹⁹
9. One issue of particular concern in regard to the reduction of evidential debris (and the size and quality of the overall evidential record) is parties’ reliance on unverified information collected by others. In the first confirmation hearing in the *Gbagbo* case, for instance, the Prosecutor relied heavily on anonymous hearsay from NGO reports, United Nation reports and press articles. The Pre-Trial Chamber noted that it is unable to attribute much probative value to these materials and insisted that “[s]uch pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1)(a) of the Statute”.²⁰ In the Pre-Trial Chamber’s assessment, the evidence was insufficient for the purposes of the confirmation of charges hearing. However, it “did not appear to be so lacking in relevance and probative value that it [left] the Chamber no choice but to decline to confirm the charges under Article 61(7)(d) of the Statute”. Consequently, the Pre-Trial Chamber adjourned the confirmation of charges hearing and requested the Prosecutor to provide further evidence or conduct further investigations.²¹
10. In the *Ngudjolo* case, the Trial Chamber held that:

“it would have been more efficacious for the Prosecutor to engage in a more thorough analysis of their marital status and educational history. It must however be noted that, in most cases, it is the Defence teams which produced civil status documents and report cards, all of which were relevant in determining with greater certainty the ages claimed by some wit-

¹⁶ Regulations of the Office of the Prosecutor, available at <http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf> (last visited on 13 March 2014). See also, *Investigations at the ICC*, para. 27.

¹⁷ *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, para. 142.

¹⁸ *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, para. 137.

¹⁹ *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, para. 138. See also, on the quality of evidence presented in court, *Investigations at the ICC*, paras. 18-23.

²⁰ *The Prosecutor v. Laurent Gbagbo*, Case no. ICC-02/11-01-11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, para. 35.

²¹ *The Prosecutor v. Laurent Gbagbo*, Case no. ICC-02/11-01-11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, para. 15.

nesses as well as the dates, institutions and localities where they studied. Furthermore, this evidence, for some of which the Prosecution did not raise a challenge as to authenticity, was accorded significant weight in the Chamber's assessment of the status of these witnesses, their membership in a militia, their ability to testify and their reliability."²²

11. The Chamber also criticised the quality of Prosecution investigations.²³ Furthermore, the Chamber found that key Prosecution witnesses gave inaccurate and contradictory testimonies, thus rendering their evidence inadmissible when Defence witnesses accurately corroborated one another,²⁴ and the Prosecution failed to challenge the authenticity of crucial documents.²⁵
12. In *Lubanga*, the Trial Chamber highlighted several Defence witnesses who provided unreliable evidence. For example, one witness was only able to provide evidence that a number of armed individuals were under 18, but failed to provide concrete evidence that those individuals were below the age of 15.²⁶ The Chamber found another Defence witness to be evasive and contradictory on the issues that concerned Lubanga.²⁷
13. Adequate filters could help avoid and dissuade the production of evidence of poor quality.²⁸ Such filters would greatly reduce court time and associated resources and would help concentrate the process onto material of greater evidential value.
14. From the effectiveness point of view, evidence of poor quality would have a negative impact in relation to the following:
 - a) It increases the risk of a miscarriage of justice.
 - b) It undermines the quality and credibility of the record (or perception thereof).

²² *The Prosecutor v. Mathieu Ngudjolo*, Case No. ICC-01/04-02/12, Judgment pursuant to article 74 of the Statute, 18 December 2012, para. 121.

²³ *The Prosecutor v. Mathieu Ngudjolo*, Case No. ICC-01/04-02/12, Judgment pursuant to article 74 of the Statute, 18 December 2012, para. 123.

²⁴ *The Prosecutor v. Mathieu Ngudjolo*, Case No. ICC-01/04-02/12, Judgment pursuant to article 74 of the Statute, 18 December 2012, paras. 138-141, 152-153, 157-159, 171-177, 181, 189, 204-205, 217-219, 238-240, 243-244, 251, 270-271, 276, 282-283.

²⁵ *The Prosecutor v. Mathieu Ngudjolo*, Case No. ICC-01/04-02/12, Judgment pursuant to article 74 of the Statute, 18 December 2012, para. 178.

²⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 723.

²⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 730.

²⁸ In *Lubanga*, for instance, none of the witnesses called by representatives of victims were thought by the Trial Chamber to be capable of belief. See *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, paras. 499-502. See also, *Victim's Participation before the ICC*, paras. 15-22. In *Ngudjolo*, two victims appeared as witnesses but none of their evidence was referred to in the judgement. *The Prosecutor v. Mathieu Ngudjolo*, Case No. ICC-01/04-02/12, Judgment pursuant to article 74 of the Statute, 18 December 2012, para 32.

- c) It unnecessarily and unfairly prolongs the proceedings and wastes resources.

2. Recommendations

15. The first and most important way in which the quality of evidence could be improved (and to focus the evidential process on that sort of evidence) is to improve the quality of investigations. This is discussed elsewhere in this paper.²⁹ Additional recommendations are made below with a view to ensuring that the evidential process focuses on the best possible evidence, avoids as much as possible evidential debris and thus reduces the scope, time and cost of the proceedings.

a) The Pre-Trial and Trial Chambers should ensure specificity and detailed particularisation of charges

16. This would ensure a clear, common and detailed understanding of the case against the accused and, in turn, it would enable the Trial Chamber to rule promptly and effectively on the admissibility of evidence and to reject evidence that does not evidently go to prove a fact material or directly relevant to the charges.³⁰
17. In the field of international criminal law, and not just at the ICC, the one factor that might contribute most to the length of proceedings is the lack of specificity of charges. This results, typically, in the Prosecution case evolving all through the proceedings (thereby going in various evidential directions); one case will typically develop different branches. In the *Bemba* case, for instance, because of the absence of detailed pleadings and clarity about the case, the parties have litigated over dozens of alternative theories of effective control and *mens rea*. This has resulted in a case that has lacked evidential focus and which has lasted much longer than comparable cases.³¹ Instead of focusing on proving and, respectively, disproving the case as confirmed, both parties have engaged in advancing successive theories and producing vast quantities of evidence in relation to each and every one of them.

²⁹ See *Investigations at the ICC*, p. 48.

³⁰ This would also enable Chambers to set aside any attempt to lead “political” rather than legally relevant and forensically-sound defences.

³¹ See, for example, *The Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Judgment, 16 November 2005. The trial commenced on 30 January 2005 and closed on 31 August 2005 with 41 live witnesses and approximately 500 exhibits (see Press Release, Judgment in the Case the Prosecutor v. Sefer Halilovic, available at <http://www.icty.org/sid/8517> (last visited on 18 March 2014)). See also *The Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment, 10 July 2008, with a total of 114 trial days, 56 Prosecution witnesses, 20 Defence witnesses and a total of 2068 exhibits (see Case Information Sheet, available at http://www.icty.org/x/cases/boskoski_tarculovski/cis/en/cis_boskoski_tarculovski_en.pdf (last visited on 18 March 2014)).

18. Detailed and focused pleadings would help narrow the scope of the case and thus the scope of the evidence relevant to the case. Greater specificity and clarity of pleadings would also enable the Trial Chamber to arbitrate between relevant and irrelevant evidence and disallow the latter sort so as again to contribute to keeping the size and duration of the case down. Greater clarity in the legal standards being applied by the Court should also contribute to reducing this problem.
19. The Pre-Trial Chamber is tasked with rendering a decision confirming the charges, following the confirmation stage. These decisions often run to more than 100 pages, with an average of 149 pages for majority or unanimous decisions, and 166 pages including dissenting opinions.³² They do not therefore provide for the sort of detail and specificity characteristic of a charging instrument which provides specificity in relation to each material fact.
20. In addition to establishing a more demanding standard of pleadings than currently accepted, Pre-Trial Chamber should ensure that details of the case against the accused (i.e., ‘material facts’) should come in a form suitable for that purpose. As discussed elsewhere in this paper,³³ under the ICC regime, several possibilities are open to do so:
 - a) The PTC could itself clearly and explicitly summarise the charges, insofar as they have been confirmed by the PTC (if necessary, as an attachment to its confirmation decision). Lengthy confirmation decisions serve little purpose if the parties remain in doubt about the exact scope of confirmation of charges. Narrower, clearer and more focused decisions would serve a more useful function than lengthy decisions, which often bring more ambiguities than clarity.³⁴
 - b) The PTC could edit the DCC based on its confirmation (striking, adding or amending accordingly) and attach it to its confirmation decision in that form.³⁵
 - c) In the alternative, the PTC could order the Prosecution to produce an amended document containing the charges with clear instructions to stick to the scope of confirmed charges.³⁶

³² For example, the *Lubanga* confirmation decision ran to 157 pages (*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007); the *Katanga and Chui* confirmation decision ran to 226 pages (*The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008); and the *Bemba* decision ran to 186 pages (*The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 30 September 2008).

³³ See *The Confirmation Process*, p. 79.

³⁴ The confirmation decision in *Katanga*, for instance, was 226 pages long. It contained an 18-page legal discussion of one particular mode of liability (see *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, paras. 487-539). The Decision offers much less detailed discussion about the critical material facts that are core to the case against the accused.

³⁵ See also, *The Confirmation Process*, para. 36.

21. The Defence should also be encouraged to focus its own evidential effort on issues that are truly relevant to the case. This could be done, *inter alia*, by –
- a) requiring the Defence, prior to the commencement of trial, to state, at least in general terms, the nature of its case and which of the material facts making up the charges it is taking issue with.³⁷ Article 91(I) of the STL Rules of Procedure and Evidence provides a relevant illustration of what may be demanded of an accused without infringing upon his fundamental rights.³⁸ As the Trial Chamber's powers under the Statute and Regulations of the Court would allow this, no amendments are required. It is useful to note that a ruling to that effect has already been made in *Lubanga*.³⁹ By way of example, it should be noted that in *Banda & Jerbo*, Trial Chamber IV instructed the Prosecution and the Defence to provide a joint filing as to the agreed facts, if any. Thereupon, the parties informed the Chamber that they had agreed on specific issues that the Defence will contest at the trial.⁴⁰
 - b) disallowing evidence and lines of questioning that are not directly relevant to the case (for example, a political defence) or not a valid legal defence to the charges (for example, *tu quoque*).

³⁶ In the *Kenya* cases, the Trial Chamber reviewed the proposed amended DCC and the various arguments of the parties, and then ordered that a new one be produced in accordance with its line-by-line direction. It would certainly be useful if that could be done earlier in the proceedings by the PTC given that it is best placed to know what allegations it has confirmed or not. In both *Kenya* cases, the Trial Chamber ordered updated DCCs to be produced and for the counts section to specifically refer to the underlying allegations. See *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Order for the prosecution to file an updated document containing the charges, 5 July 2012, paras. 8-11; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11-439, Order for the prosecution to file an updated document containing the charges, 5 July 2012, paras. 8-9. See also *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Order regarding the content of the charges, 20 November 2012, para. 15; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Order regarding the content of the charges, 20 November 2012, para.12.

³⁷ Prior to the confirmation of the charges, the Prosecution and the Defence could agree to facts alleged in the DCC for the purposes of confirmation of the charges (see *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/0503/09, Joint Submission by the Office of the Prosecutor and the Defence as to Agreed Facts and submissions regarding modalities for the conduct of the Confirmation Hearing, 19 October 2010, paras. 4-5). This saves time and resources because the Court would not need to call any *viva voce* witnesses at confirmation and the Defence would not make any oral submissions at the confirmation hearing.

³⁸ The provision reads as follows: "After the submission by the Prosecutor of the items mentioned in paragraph (G), the Pre-Trial Judge shall order the Defence, within a set time-limit and no later than three weeks before the Pre-Trial Conference, to file a Pre-Trial Brief addressing legal and factual issues, and including: (i) in general terms, the nature of the accused's defence; (ii) the matters which the accused disputes in the Prosecutor's pre-trial brief; and (iii) in the case of each matter set out pursuant to paragraph (ii), the reason why the accused disputes it."

³⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Disclosure by the Defence, 20 March 2008, Disposition; note that a Defence request for certification to appeal this decision was denied, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Defence Request for Leave to Appeal the 'Decision on Disclosure by the Defence,' 8 May 2008.

⁴⁰ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/0503/09, Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons, 16 May 2011, para. 3, footnote 4.

22. Finally, it should be noted that efforts to focus the trial on core evidential issues would have little value in reducing the length and scope of proceedings if Trial Chambers continue to ‘re-characterise’ charges under Regulation 55. The practical effect of such a course is to oblige or invite the parties to litigate new factual allegations resulting from the ‘re-characterisation’ of charges under Regulation 55.⁴¹ This, in turn, will mean that parties (in particular the Defence) will have to bring new evidence to rebut, not the initial allegation, but the one resulting from the modification of charges pursuant to Regulation 55. This has been identified judicially as an issue of relevance to the right of the accused to receive a fair trial.⁴² This also unquestionably lengthens the proceedings by creating a second round of evidence (at least for the Defence) and effectively results in multiplying layers of evidence (one for the confirmed case, one for the Regulation 55 case).⁴³ To reduce the potential unfairness and the lengthening effect of such a course onto the proceedings, the following recommendations should be considered:

- a) In the determination of whether to make use of Regulation 55, Trial Chambers should consider whether the same evidence as has already been led in relation to the *original* charge or (partly) different evidence would be relevant to the new allegation. In the latter case, Trial Chambers should in principle refrain from re-characterising the charges so as to avoid a second evidential track from developing and prolonging the proceedings.
- b) States Parties should carefully consider the content and tenor of Regulation 55 with a view to determining (i) whether the provision finds a valid and sufficient legal basis in the Statute and the Rules, (ii) whether, as presently drafted and interpreted, it is consistent with the effective protec-

⁴¹ See, for example, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused, 21 November 2012, paras. 43-46; *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07 O A 13, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, 27 March 2013, paras. 82-85; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Prosecution’s Application for Leave to Appeal the Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, 22 June 2009, para. 25; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-2483-Red, Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines, 18 December 2012, para. 20(ii)(a)-(f); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Prosecution’s Response to “Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and Related Procedural deadlines”, 21 December 2012, para. 28; *The Prosecutor v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08, Decision on “Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines”, 16 January 2013, para. 23.

⁴² See *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, Separate Opinion of Judge Fulford, 14 March 2012, paras. 20-21; *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Jugement rendu en application de l’article 74 du Statut, Minority Opinion of Judge Christine Van den Wyngaert, paras. 118-132.

⁴³ *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Jugement rendu en application de l’article 74 du Statut, Minority Opinion of Judge Christine Van den Wyngaert, paras. 118-132.

tion of defendants' rights. If States Parties are not satisfied that this is the case, they should consider amending the Rules to prohibit, limit or qualify the use that Trial Chambers can make of that provision.

b) Chambers should verify that the Prosecutor has complied with its obligation under Article 54(1)(a)⁴⁴

23. This recommendation applies to both Pre-Trial as well as Trial Chambers. Where the Prosecution has failed to comply with its Article 54(1)(a) ICC Statute allegations, Chambers should take steps to ensure full compliance therewith.

24. Pursuant to Article 54(1)(a) of the ICC Statute, the Prosecutor shall

“In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.”

25. That provision is intended to correct risks associated with overly adversarial proceedings that have affected other international criminal tribunals and provide a useful avenue to both compensate for the Prosecution's greater resources and to ensure that the Prosecution only relies upon information as part of its case once it has taken diligent steps to verify its credibility. This provision also acknowledges the Prosecution's role, not just as a party to the proceedings, but as a 'minister of justice' endowed with a responsibility to assist the Chamber in arriving at the truth.⁴⁵ The late Judge Kaul described the Prosecutor's obligations under Article 54 ICC Statute as 'fundamental requirements which set out

⁴⁴ It is to be noted that the following recommendations are inherently linked with the recommendations found at paras. 37-38.

⁴⁵ See ICTY/ICTR Prosecutor's Regulation No. 2, at no. 2(h): 'The Prosecutor expects [Prosecution Counsel], consistent always with the letter and the spirit of the relevant Statute and Rules of Procedure and Evidence, and the independence of the Prosecutor:... (h) to assist the Tribunal to arrive at the truth and to do justice for the international community, victims and the accused.' (http://icty.org/x/file/Legal%20Library/Miscellaneous/otp_regulation_990914.pdf; http://www.unictr.org/Portals/0/English/Legal/Prosecutor/reg_05.pdf (last visited on 16 April 2014)). Similarly, Rule 55(C) of the STL RPE stipulates that "(i)n performing his functions, the Prosecutor shall assist the Tribunal in establishing the truth". In this context, in *Krstić*, Judge Shahabuddeen held as follows: "The Prosecutor is a party, but it is recognized that she represents the public interest of the international community and has to act with objectivity and fairness. Appropriate to that circumstance. She is in a real sense a minister of justice. Her mission is not to secure a conviction at all costs." (*The Prosecutor v. Krstić*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, Partial Dissenting Opinion of Judge Shahabuddeen, 30 September 2002, para. 18). Similarly, the Pre-Trial Judge at the STL held that "the Prosecutor must act, not merely as a party to the proceedings, but also as an agent of Justice, representing and safeguarding the public interest." (Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attach Against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, 29 April 2009, para. 25; see also *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01, Order Relating to Making Public the Prosecutor's Submissions Concerning the Ayyash et al. Case, 6 December 2011, para. 15).

clear, if not high standards for proper investigations carried out by the Prosecutor on behalf of the Court.’⁴⁶

26. The use of the expression ‘shall’ in Article 54(1)(a) ICC Statute underlines two important aspects of this provision: the responsibility outlined therein is mandatory in nature. Article 54 establishes a “clear and binding mandate for the Prosecutor to investigate both sides of the case equally.”⁴⁷ The use of the word ‘shall’ indicates that no discretion exists.⁴⁸ Secondly, and as a result, a failure to comply with this provision should and must be sanctioned.⁴⁹
27. Statements attributed to the Prosecutor suggest that the Office of the Prosecutor has sought to interpret Article 54(1)(a) ICC Statute in the narrowest possible way and, arguably, in violation of the terms and spirit of the Statute. For example, the Prosecution’s strict interpretation on disclosure rules in *Lubanga*⁵⁰ has resulted in a stay of proceedings as it was held that the rights of the accused were infringed.⁵¹ The Trial Chamber held that the Prosecution had incorrectly used Article 54(3)(e) ICC Statute and as such, “the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial.”⁵² Likewise, nine Prosecution Witnesses who were allegedly child soldiers in *Lubanga* were held to be unreliable, calling for careful

⁴⁶ C. Buisman, ‘*Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*’, 11 Nw. J. Int’l Hum. Rts. 30 2013, p. 62. See also, *Investigations at the ICC*, para. 27.

⁴⁷ M. Bergsmo and P. Kruger, ‘Article 54 – Duties and powers of the Prosecutor with respect to investigations’ in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, Hart Publishing, 2008, p. 1078.

⁴⁸ M. Bergsmo and P. Kruger, ‘Article 54 – Duties and powers of the Prosecutor with respect to investigations’ in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing, Oxford 2008), p. 1079.

⁴⁹ See *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on defence application pursuant to Article 64(4) and related requests, Concurring opinion of Judge Van den Wyngaert, 26 April 2013, para. 6: “the appropriate remedy for the Prosecution’s failure to fulfil its obligations under article 54(1)(a) would be to exclude all or part of the evidence obtained by way of excessive and unwarranted post-confirmation investigation. However, I agree with my colleagues that there are mitigating circumstances in this case which lessen the need to resort to such a drastic measure.”

⁵⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, para. 13; *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcript of hearing on 6 May 2008, ICC-01/04-01/06-T-86-ENG, p. 33: lines 14-18.

⁵¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, paras. 92-93. The decision was upheld on appeal. See *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 13, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, paras. 46-51.

⁵² *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, paras. 92-93.

review and assessment of investigative practices adopted in this case.⁵³ Many of the witnesses testified that they were asked by the intermediaries to lie about their age and role in the Union of Congolese Patriots.⁵⁴ The Chamber held that P-0321, an intermediary, “acted on the instructions of the Prosecution and under the latter’s supervision for more than a year.”⁵⁵ The Prosecution’s failure to verify the evidence obtained through intermediaries has caused unnecessary delay and waste of financial and human resources, reflected by the Chamber needing to spend a large amount of time to verify the credibility of these witnesses by having the Prosecutor call investigators and intermediaries to provide evidence in court.⁵⁶ The belated and post-confirmation withdrawal of charges against Muthaura and the circumstances in which this occurred again gives cause for concern in that regard. Reliance on reports prepared by others (which do not have the same ethical and investigative responsibilities as the Prosecutor) might have contributed to some of these problems.⁵⁷

28. Another factor contributing to this situation is the extent to which the Prosecution is permitted to rely on witness anonymity during the pre-confirmation phase. Anonymity means that the Defence is effectively denied the ability to contest and challenge the credibility of proposed witnesses. A case could therefore proceed to trial based on untested evidence. Once a witness has been relocated or is provided with necessary protection, his/her identity should be promptly disclosed to the Defence. This would enable the prompt and effective investigation of his/her credibility and would ensure that the PTC is able to assess witness evidence reliably and credibly.
29. The responsibility to ensure full compliance with Article 54(1) belongs to both the Prosecution and Chambers. In that regard, Pre-Trial Chambers have noted that the Prosecutor’s manner of investigation cannot in itself cause the Chamber to decline to confirm the charges,⁵⁸ and does not fall within the scope of the

⁵³ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras. 480-481.

⁵⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 375.

⁵⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 448.

⁵⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Redacted Decision on Intermediaries, 31 May 2010, paras. 150-151.

⁵⁷ C. Buisman, ‘*Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*’, 11 Nw. J. Int’l Hum. Rts. 30 2013, p. 55 (citing: *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on Bar Table Motion of Defence of Germain Katanga, 21 October 2011).

⁵⁸ See, for example, *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the confirmation of charges, 8 February 2010, para. 48; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the confirmation of charges, 23 January 2012, para. 64.

confirmation hearing.⁵⁹ Thus far, attempts by the Defence to raise issues compliance with Article 54 at trial stage have failed.⁶⁰

30. It is, therefore, essential to the integrity, effectiveness and length of the evidential process that the Court should enforce the Prosecution's duties and responsibilities under Article 54(1)(a) with a view to ensuring that only evidence that has been subjected to careful investigation of its credibility and reliability is presented to the Court.
- a) Before the confirmation of charges, the Pre-Trial Chamber should verify the Prosecution's compliance with its obligations under Article 54(1) ICC Statute.⁶¹ In particular, the PTC should take steps to obtain information regarding the following:
- i) The various lines of investigations pursued in compliance with the Prosecution's obligation to investigate Article 54(1)(a)'s 'exonerating circumstances'.
 - ii) If and when the PTC is satisfied that relevant lines of investigation of 'exonerating circumstances' have been diligently and sufficiently pursued, the PTC should be responsible for verifying the Prosecution's compliance with its responsibilities under Article 54(1)(a).
 - iii) To verify whether the Prosecution has complied with its obligation under Article 54(1)(a) in relation to proposed witnesses and exhibits, the PTC should be willing, where the circumstances so warrant, to order the Prosecution to disclose what steps were taken to verify the reliability/credibility of a (proposed) witness or exhibit. If the efforts are regarded as inadequate, the PTC should have the discretion to either refuse to admit that evidence or order further investigations regarding any issue which the Chamber believes should have been subject to such an investigation.
- b) Subject to necessary protective measures, full disclosure of all information relevant to investigating and testing the Prosecution evidence should be effected to the Defence at the earliest opportunity.⁶²

⁵⁹ See, for example, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the confirmation of charges, 23 January 2012, para. 63.

⁶⁰ For an illustration, see *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Second Corrigendum to the Defence Closing Brief, 29 June 2012, para. 451; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Second Corrigendum to the Defence Closing Brief, 29 June 2012, para. 451.

⁶¹ See, for example, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure Between the Parties, 31 July 2008, para. 28: "The Chamber is of the opinion that the Prosecutor's obligations to investigate incriminating and exonerating circumstances equally is a further reason why it must request communication of all exculpatory evidence."; whereby Pre-Trial Chamber III had already emphasised at paras. 16-19 the necessity to have access to the evidence exchanged between the Prosecutor and the Defence, in particular to exculpatory evidence.

⁶² See *Disclosure at the ICC*, p. 102.

31. These measures would contribute to (i) ensuring the greater reliability of the evidence produced at trial, (ii) reducing the amount of evidence being produced and thus the time necessary to produce it in court, and (iii) ensuring the integrity of the judicial process.

c) Trial Chambers should more proactively seek to reduce the amount of evidence proposed by the Parties

32. Trial Chambers should manage the process more restrictively to ensure expeditious proceedings.
33. As noted by Antonio Cassese, “[t]he slowness of proceedings may also stem from deficiencies in courtroom management. Proactive management is all the more important in complex cases where the judicial resources as well as party resources are limited.”⁶³ He goes on to suggest that “the Trial Chamber should ... exercise its inherent powers to ensure expeditious proceedings to control the courtroom more actively.”
34. What was true of the SCSL then is relevant today to identifying possible ways to expedite proceedings before the ICC. Various recommendations are made here to try to identify possible procedural ways to render the management of ICC cases from the Bench more proactive.
35. One of the main impediments to the ability of Trial Chambers to be more involved in policing the scope of the evidence led by the parties (and to restrict the scope thereof) is the fact that, under the approach followed so far by ICC Trial Chambers, they will only be ‘educated’ about the evidential nature of the case well into that case. Judges will therefore often be unable and reluctant to interfere with the way parties have chosen to conduct their case. This party-driven approach to the evidential process can easily be abused and result in exceedingly long trials.
36. Unlike judges in civil law jurisdictions, ICC Judges do not have in their possession a ‘dossier’ enabling them to navigate the case and understand what the evidence is about until much later into the case when the case comes together in front of them.⁶⁴ In order to be able to cut the length of time taken in court by the presentation of irrelevant or secondary evidence – and thus the overall length of proceedings – Judges need to have at least a general understanding of the evidence that will be presented to them before the commencement of trial. This

⁶³ Report on the Special Court for Sierra Leone, submitted by the Independent Expert Antonio Cassese, 12 December 2006, para. 85, available at <http://www.scs-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&> (last visited on 23 April 2014).

⁶⁴ Pursuant to Rules 129 and 130 ICC RPE, the decision on the confirmation of charges as well as the record of the proceedings of the Pre-Trial Chamber are transmitted to the Presidency and from then on to the assigned Trial Chamber. However, this will necessarily be limited to the material the Pre-Trial Chamber had access to and will therefore – unless an order has been rendered to that effect – not include *inter partes* disclosure.

should help them put some limits on what the parties are permitted to do and how long they can spend on it.

37. Several possible procedural instruments are capable of helping Trial Chambers achieving that desirable goal:

- a) **A (quasi-) ‘dossier’ approach:**⁶⁵ Before the *ad hoc* Tribunals, certain Trial Chambers have requested the Prosecution, prior to the commencement of trial, to provide copies of the evidence which they propose to offer at trial (as appear on the Prosecution’s proposed list of exhibits).⁶⁶ ICC Chambers could replicate that approach and demand of the Prosecution that it should provide prior to trial copies of witness statements, expert reports and exhibits that it proposes to use at trial. This would enable the Chamber to familiarise itself with the case and size the evidential scope and nature of that case. In light of the STL experience, the ICC could also consider inviting the Defence to share its views on the nature of the evidence provided by the Prosecution at this early stage. This course of action would enable the Judges to have a more objective view of the case at this early stage.
- b) **In-depth analytical chart:** The preparation and submission of an ‘in-depth analytical chart’ discussed in relation to the confirmation of charges phase could also be of assistance to the Trial Chamber itself so that the Judges can understand and evaluate the purported relevance of each piece of the evidential puzzle before trial and familiarise themselves with it. It should include reference to relevant documentary evidence as well as witness evidence. This would enable them to decide issues of admissibility much more promptly and to exclude from the record information which they have come to view as inadmissible for any given reason.

⁶⁵ To the extent the ‘record of the proceedings before the Pre-Trial Chamber’ is transmitted to the Trial Chamber once the charges are confirmed (see footnote 65), pursuant to Rule 121(10), this includes ‘all documents transmitted to the (Pre-Trial) Chamber pursuant to (Rule 121)’, i.e. pursuant to Rule 121(2)(c) it also includes “all evidence disclosed between the Prosecutor and the person *for the purposes of the confirmation hearing*” (emphasis added). This, in turns, means that it does *not* – unless there is an order to that effect – include *inter partes* disclosure going beyond disclosure for the purpose of the confirmation hearing. To the extent that some Pre-Trial Chambers do request the disclosure of all *inter partes* disclosure and this is thus transmitted to the Trial Chamber as part of the record of the proceedings, the issue would appear to stem from an apparent unwillingness of Trial Chambers to take into account the record of proceedings transmitted from Pre-Trial Chambers.

⁶⁶ See, for example, the ICTY *Blagojević* case, where the Trial Chamber requested to receive the same material disclosed by the Prosecution to the Defence during pre-trial discovery “in order to be prepared to make decisions that effect preparations for the trial and decisions during trial including those on admissibility of evidence.” (*Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-PT, Decision on Joint Defence Motions for Reconsideration of Trial Chamber’s Decision to Review All Discovery Materials Provided to the Accused by the Prosecution, 21 January 2003, p. 1.) Earlier already, in *Dokmanović*, Judge Cassese had requested that the Prosecution deliver to the Trial Chamber witness statements taken from witnesses whom the Prosecution intended to call for trial and other material on which the Prosecution intended to rely at trial (*Prosecutor v. Slavko Dokmanović*, Case No. IT-95-13a-PT, Order, 28 November 1997, p. 3).

- c) **Footnoted DCC:** The possibility and value of a ‘footnoted DCC’ has been discussed above in relation to the Pre-Trial Chamber.⁶⁷ Such a document could also be eminently useful for the Trial Chamber, which could readily identify what certain proposed pieces of evidence are supposed to prove and decide promptly and efficiently whether to admit that evidence.
 - d) **More proactive management of the evidential process from the Bench:** In addition to the above, Judges should more actively query with the parties the relevance of certain lines of questioning and what facts they seek to establish – at an early stage in the case. This would enable them to participate in the evidential process rather than merely witnessing it and learning the case as it passes in front of them. As Cassese noted, “Judges should not be strictly constrained by the common law style of courtroom management and should actively manage the Trial from beginning to end.”⁶⁸
 - e) **More proactive management of the procedure on admission of evidence:** A factor contributing to the length of the proceedings is the almost unrestricted ability of parties and participants to put to a witness documents/exhibits without any or little connection to the testimony of that witness. Judges should be encouraged to take a stricter approach and to require the parties to demonstrate a sufficient linkage between the witness and documents that a party proposes to introduce through a witness.⁶⁹
38. With such tools and/or a combination thereof, Judges would be in a position to significantly reduce the duration of proceedings by, *inter alia*:
- a) ruling evidence inadmissible – instead of adopting the current practice of international criminal tribunals of ‘adopt now, evaluate later’, thereby eliminating evidential debris and reducing the overall size and duration of cases;
 - b) ruling out evidence as duplicative, where it has been able to satisfy itself that evidence merely repeats evidence already on record (without providing valuable corroboration);
 - c) shortening excessively long testimonies;

⁶⁷ See also, *The Confirmation Process*, para. 30.

⁶⁸ Report on the Special Court for Sierra Leone, submitted by the Independent Expert Antonio Cassese, 12 December 2006, para. 111, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&tabid=176tabid=176> (last visited on 23 April 2014).

⁶⁹ See, for example, in *Bemba*, Trial Chamber III requested the parties to make submissions on the admissibility of documents, which had merely been ‘used during the questioning of witnesses’ and, as such, appeared ‘relevant to issues under examination’; for example, these documents included ‘photographs shown to... witnesses’ with no further connection to witnesses requested (*The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Order Seeking Observations on the Submission as Evidence of Items Used During the Questioning of Witnesses but not Submitted as Evidence by the Parties or Participants, 23 October 2013, paras. 8-9). Submissions have subsequently been filed by the parties but a decision thereon has not been rendered, from what is available on the Court’s public website.

- d) restricting the number of witnesses that are not crucial to the establishment of the guilt or innocence of the accused.⁷⁰ To the extent that the view was taken that the Trial Chamber does not have such inherent power (although such a position would not be unreasonable considering the Chamber's overall responsibility to guarantee fair and expeditious proceedings⁷¹), States Parties should consider amending the Court's Rules to add a provision similar in effect to Rule 73bis(C) ICTY RPE which enables Judges to demand a reduction in the number of witnesses from the Prosecution.⁷²
- e) refusing to hear witnesses that are not likely to cast any light on the allegations made by the Prosecution.⁷³

d) Trial Chambers should consider making greater use of the possibility for them to call evidence, in particular in regard to expert witnesses

39. Requirements of admissibility for proposed exhibits should be enforced more strictly than they are presently with a view to dissuading the parties from 'dumping' large quantities of evidence 'from the bar table' or otherwise. In the *Bemba* case, for instance, the Prosecution has now filed four distinct Bar Table Motions with approximately 90% of proposed documents being admitted in such a way. As a result, there are now more than 500 exhibits on the record of these proceedings. Most of them have not been the subject of any genuine adversarial testing in court. This will affect the Judges' ability to deliberate promptly and efficiently, having to review, consider and evaluate hundreds of exhibits. Parties will in turn need more time to rebut such evidence and pleadings will necessarily increase with the size of the evidential record. Stricter po-

⁷⁰ Report on the Special Court for Sierra Leone, submitted by the Independent Expert Antonio Cassese, 12 December 2006, para. 110, available at <http://www.scsl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&tabid=176> (last visited on 23 April 2014).

⁷¹ The view that the Court has this authority as a matter of inherent competence to regulate the proceedings would appear to be consistent with existing precedents. See, for example, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo*, Case No. ICC-01/04-01/07, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, paras. 6-10, 61-65, 68-72.

⁷² Rule 73bis(C) ICTY RPE reads as follows: 'In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 ter (L)(i), the Trial Chamber, after having heard the Prosecutor, shall determine (i) the number of witnesses the Prosecutor may call; and (ii) the time available to the Prosecutor for presenting evidence.'

⁷³ Report on the Special Court for Sierra Leone, submitted by the Independent Expert Antonio Cassese, 12 December 2006, para. 110, available at <http://www.scsl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&tabid=176> (last visited on 23 April 2014); see also, *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Pre-Trial Conference, 26 October 2000, pp. 126-135, where Presiding judge Hunt questioned at length the necessity for the Prosecution to call repetitive evidence and concluded by saying: "[Y]ou understand the nature of the Trial Chamber's concern about repetitive [...] evidence about the same issue, and you will keep that, I hope, very much in mind." (p. 135); the ICTY Rules were subsequently amended to include Rules 73bis(C)(i) and 73ter(C), which allows a Trial Chamber to determine the number of witnesses the parties may call; see also, Rules 73bis(D) and 73ter(D) of the ICTR Rules; Rules 127(C)(iii) and 129(C)(iii) of the STL Rules; Rules 73bis(D) and 73ter(D) of the SCSL Rules.

licing by Trial Chambers of this sort of evidential dumping would reduce the size of the record significantly and enable all (parties, participants and Chambers) to focus more efficiently on core evidential matters.

40. Certain categories of evidence take much court time and are often of little evidential value to the Trial Chamber. The most obvious example is the evidence of expert witnesses, who are often and generally selected and called by the parties. Typically, the Defence expert responds to the evidence of the Prosecution expert which, at best, leads to the evidence cancelling each other out, and rarely contributes to the fact-finding function of the Court. This wastes court time and has little demonstrable evidential benefit. It is costly as experts must typically be paid to prepare and produce two sets of reports and are often partisan in their approach or conclusion. Expenses and court time could be saved if the Chamber were to select and instruct experts, after having received informed submissions from the parties in that regard.
41. To reduce the amount of (unnecessary or not sufficiently credible) expert evidence (and in order to reduce the cost associated therewith – in time and expenses), Trial Chambers should consider:
 - a) taking a much narrower view of (i) what may be said to constitute ‘expertise’ for the purpose of the evidential process and (ii) what issues could/should be subject to expert evidence. This would result in a significant gain of time at trial and a reduction in the overall cost to the Court. In particular, Trial Chambers should not permit parties to call, under the guise of ‘expert’ evidence, evidence that in fact encroaches on its responsibility as fact-finder.
 - b) seeking submissions from the parties as regards fields of expertise relevant to the case and what questions should be asked of the expert and what material should be submitted to him/her.
 - c) once the Chamber has ruled that a particular area/issue warrants the introduction of expert evidence, the Chamber should:
 - i) select an expert (again, having considered the parties’ submissions regarding the choice of an expert);
 - ii) provide a set of ‘instructions’ taking into account, where relevant, the submissions of the parties; and
 - iii) provide the selected expert with all necessary material, taking into account, where relevant, the material identified by the parties for that purpose.

This is done in many domestic jurisdictions without any difficulties. This was also done in ICL cases (for instance, at the State Court in Bosnia and Herzegovina). Similarly, the *Lubanga* Trial Chamber called its own expert

witness to testify on factual backgrounds, which were already presented by a Prosecution expert witness.⁷⁴

- d) The Chamber should not allow parties in principle to call other experts in relation to the issue subject to the report of the Chamber's expert. Nor, unless exceptional circumstances are shown, should it allow other kinds of expert evidence to be led at trial unless it again follows that Chamber-based approach.
42. It is of note in this context that Regulation 44 ICC Regulations already provides for the possibility of the Trial Chamber (a) directing the joint instruction of an expert by the participants (para. 2), or (b) *proprio motu* instructing an expert (para. 4), and (c) issuing any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, the manner in which their evidence is to be presented and the time limits for the preparation and notification of their report (para. 5). Trial Chambers should consider making greater use of these procedural possibilities with a view to expediting and reducing the scope of the proceedings.

e) Trial Chambers should clarify the conditions for the admissibility of evidence

43. Clear and sufficiently demanding requirements should be adopted to ensure the overall quality of the record and to dissuade the presentation of unreliable evidence that unduly prolongs the proceedings. If necessary, this should be clarified by the Appeals Chamber.
44. One of the main problems is that the statutory instruments do not establish any precise minimum requirements of reliability, relevance, probative value and authenticity.⁷⁵ As a result, admissibility is decided on case-by-case basis with no common application by the various chambers. This has resulted in conflicting approaches by different Chambers and a huge amount of litigation triggered by legal uncertainties as regard the condition of admissibility of evidence.
45. Criticism has been directed by Court at evidence perceived to be of insufficient quality. In *Gbagbo*, for instance, Pre-Trial Chamber I noted that the Prosecutor relied heavily on NGO reports and press articles regarding key elements of the

⁷⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras. 67-70.

⁷⁵ see Article 69 ICC Statute; Rules 63-64 ICC RPE; While Article 69 refers to "relevance and admissibility", it provides only very little guidance on what these concepts mean – only that probative value/unfair prejudice may be taken into account. The Rules do nothing to assist. It is noteworthy that a standard provision concerning admissibility of evidence is contained in the Rules of a number of other international tribunals: "A Chamber may admit any relevant evidence which it deems to have probative value. A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial." (Rules 89(C), (D) of the ICTY/ICTR Rules; Rules 149(C), (D) of the STL Rules).

case.⁷⁶ These documents, according to the Chamber, “cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1)(a)” and they “do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges.”⁷⁷ In *Katanga*, the Chamber held that media reports “rarely provide detailed information about their sources. Opinion evidence is, in principle, only admissible if it is provided by an expert.”⁷⁸ Since the Prosecution failed to provide information on the background or qualifications of the journalists or their sources, the Chamber could not attach probative value to the opinions.⁷⁹ In *Bemba*, however, the Trial Chamber admitted into evidence various media reports without authentication by authors or witnesses.⁸⁰

46. An almost unrestrained policy of admission in large-scale war crimes cases results in the following problems, all of them affecting the effectiveness of proceedings and their duration/cost:
- a) longer trials (as large quantities of evidence are led, instead of only the best-quality evidence available);
 - b) the tendering of unreliable evidence, thereby negatively affecting the overall quality and credibility of the record;
 - c) an increased risk of a miscarriage of justice by exposing the accused to a conviction based on poor-quality evidence;
 - d) trial judges needing an inordinate amount of time to go through huge records of evidence to draft their judgements, thereby further increasing the length of proceedings;⁸¹
 - e) the Appeals Chamber being seized of evidence-based appeals regarding some of that poor-quality evidence (whether or not it has been relied upon) will also be affected.

⁷⁶ *The Prosecutor v. Laurent Gbagbo*, Case no. ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, para. 35.

⁷⁷ *The Prosecutor v. Laurent Gbagbo*, Case no. ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, para. 35.

⁷⁸ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case no. ICC-01/04-01/07, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, para. 31.

⁷⁹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case no. ICC-01/04-01/07, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, para. 31.

⁸⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case no. ICC-01/05-01/08, Decision on the Prosecutor’s Application for Admission of Materials into Evidence pursuant to Article 64(9) of the Rome Statute, 8 October 2012, paras. 85-111.

⁸¹ See, for example, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, 23 November 2010, paras. 7-10, 24, 27-28, whereby Judge Ozaki stated that the admission of statements would be superfluous and could lead to the parties to contest every single potentially contentious fact in the statements, thereby prolonging the proceedings. She also stated that this would also require the Chamber to analyse and evaluate thousands of additional pages without necessarily adding to the quality of the witness’s evidence (para. 27).

47. Whilst the ICC should not adopt strict technical rules of admission that might be warranted with a jury, there is a case to suggest that it should apply stricter rules of admission than is presently the case. To reduce the amount of evidential debris from the record without prejudicing the ability of either party to put their case forward, and thereby contributing to shortening the length of proceedings, the following measures are recommended:
- a) Clear, uniform and sufficiently demanding conditions of admissibility of evidence should be set out to enable Trial Chambers to exclude evidence of poor quality, questionable or unverifiable origin, or evidence that is unjustifiably duplicative in character, etc. More important than the standard itself will be the readiness and actual enforcement of those standards by Trial Chambers in a consistent and effective manner so as to create a genuine disincentive for parties to attempt to produce large quantities of evidence of poor quality or questionable origin and to focus, instead, on the core of their respective cases.
 - b) A strict burden should be placed on the tendering party to establish that the conditions of admissibility of its proposed evidence are all met in relation to each piece of evidence.
 - c) There should be stricter policing of those conditions by the Court, which should, *inter alia*, require:
 - i) parties to justify the need for duplicative evidence and exclude such evidence when no sufficient reasons exist for leading evidence to the same effect multiple times. Unless reasonably necessary in the circumstances, parties should be dissuaded from seeking to lead what is, in effect, multiple layers of corroborating evidence.
 - ii) the Chamber to strictly control the lines of questioning by the parties to ensure that:
 - (a) the Prosecution stays within the framework of the case as confirmed; and
 - (b) the Defence does not venture into lines of questioning that are not directly relevant to the case.
48. It is submitted that strict adherence to these standards would constitute a strong and useful disincentive in future proceedings; knowing that information of poor evidential quality is likely to be rejected, the parties are likely to exercise more readily their good professional judgement in setting aside evidence of poor quality rather than trying to have it produced and/or admitted.

f) Introduction of a no-case-to-answer stage

49. One way to shorten the scope of the Defence case is to introduce in the practice of the ICC a system of no-case-to-answer at the end of the Prosecution case.⁸² This could result in the dismissal of the Prosecution case at that stage. It could also result in partial dismissal of the case, so that the Defence would have to present evidence only in relation to these counts or incidents that have passed the no-case-to-answer stage, thereby shortening the proceedings. In large-scale cases that contain multiple incidents, the dismissal of evidence-intensive incidents could have a greatly beneficial effect in terms of overall length and cost of proceedings. The Trial Chamber in *Ruto* has stated that, in principle, such motions for no-case-to-answer would be allowed.⁸³ In *Kenyatta*, the Prosecutor submitted that the Chamber has the authority to entertain ‘no case to answer’ proceedings at the end of the Prosecution’s case.⁸⁴ This practice should be adopted systematically in all cases. If necessary, an amendment of the Rules could be envisaged, but as apparent from the holdings of the Kenyatta Chamber, this would not seem to be strictly speaking necessary.

⁸² See, for an illustration, Rule 98*bis* of the ICTY RPE.

⁸³ See, for example, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Conduct of Trial Proceedings (General Directions), 9 August 2013, para. 32.

⁸⁴ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Prosecution submissions on the conduct of the proceedings, 25 July 2013, paras. 6-7.

INTERLOCUTORY APPEALS

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I. Introduction

1. The Appeals Chamber of the ICC has over the years had to deal with many complicated interlocutory appeals. These have had very positive effects: firstly, it has permitted the Appeals Chamber to test the mechanisms of appeal and the procedural regime in place for that purpose. Secondly, the interlocutory process has resulted in some of the most important jurisprudence to come out of the ICC.¹ Thirdly, these decisions have brought needed jurisprudential clarity, which has in turn enabled the Trial Chambers to perform their functions more effectively and in a more consistent manner.² Lastly, interlocutory appeals have proved essential to regulating the course and the fairness of proceedings in international criminal proceedings, including before the ICC.³
2. The principal difficulty associated with interlocutory appeals pertains to the length of time needed by Pre-Trial or Trial Chamber to grant leave to file an appeal, as well as the time needed by the Appeals Chamber to resolve these issues once they are appealed. Rule 156(4) ICC RPE mandates that “[t]he appeal shall be heard as expeditiously as possible.” Parties are thus subject to tight and strict deadlines to file interlocutory appeals and to respond to any such

¹ In the *Al Bashir* case, for example, the Appeals Chamber clarified the correct standard of proof for the issuance by the Pre-Trial Chamber of a warrant of arrest under Article 58 of the Rome Statute. See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09 OA, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 3 February 2010, paras. 1, 30-33, 39. The Appeals Chamber clarified that the test of ‘reasonable grounds to believe’ that the person had committed a relevant crime did not require the Pre-Trial Chamber to be satisfied that the requisite intent (in that case, genocidal intent) was the ‘only reasonable conclusion’. Another example is the *Katanga and Ngudjolo* case, in which the Appeals Chamber addressed the important question of admissibility in cases where the state, having jurisdiction, had chosen not to conduct investigations. The Chamber confirmed that, in such cases of state inaction, the complementarity principle does not have the effect of rendering proceedings before the ICC inadmissible (see *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07 OA 8, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of Case, 25 September 2009, paras. 75-79).

² For example, in the *Al Bashir* case, the interlocutory appeal mechanism was able to advance proceedings by clarifying the law on proof by inference, particularly at the arrest warrant stage (see *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 24 June 2009, p. 8). Similarly, in the *Katanga* case, the Appeals Chamber clarified some key issues in the ICC’s admissibility regime. See, for example, B. Batros, ‘*The Judgment on the Katanga Admissibility Appeal: Judicial Restraint at the ICC*’, 23 *Leiden Journal of International Law* 343 2010, p. 345.

³ For instance, in the *Lubanga* case, the Appeals Chamber was able to resolve a sensitive matter of notice (in relation to the interpretation and application of Regulation 55), which most likely could not have been properly remedied at the end of the proceedings or with serious consequences for the parties and the process itself. At a different point in the same case, the Appeals Chamber suspended the implementation of the Trial Chamber’s decision on victim participation, pending the outcome of an appeal of that decision, so as to avoid irreversibly prejudicial evidence being heard (see *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I’s Decision on Victim’s Participation of 18 January 2008, 22 May 2008).

appeal.⁴ Whilst some interlocutory decisions have been rendered most promptly by the Appeals Chamber, many have been pending for some time. Interlocutory appeals have taken as long as seven months to be resolved, if one excludes the time period taken up by the procedure to grant leave to file an appeal.⁵ Once appellate submissions are filed, the Appeals Chamber needs an average of four months to resolve an interlocutory appeal.⁶

3. Whilst some of the time taken is eminently necessary for the Appeals Chamber to fully and properly address often-intricate legal and factual issues, some of the delays appear less justifiable. It is suggested that such delays can be remedied.

II. Overall Length of Time Spent on Interlocutory Appeals

4. Based upon a review of interlocutory appeals filed, delays occur for two principal reasons: the delay by a Pre-Trial or Trial Chamber in granting leave to file an appeal, and the delay by the Appeals Chamber in issuing its decision.⁷
5. For example, in the *Katanga and Ngudjolo* case, leave to appeal against one Trial Chamber decision was granted after approximately two and a half months, while the Appeals Chamber issued its decision on the appeal about four and a half months after the filing of appellate submissions.⁸ In the matter of the arrest

⁴ Depending on the nature of the decision being appealed, a party wishing to appeal it has five days (Rule 154(1) ICC RPE) or two days (Rule ICC 154(2) RPE) from the date of the impugned decision. Regulation 64(2) of the ICC Regulations then provides that, subject to sub-regulations 5 and 6 (which provides for shorter deadlines), the appellant shall file a document in support of the appeal, with reference to the appeal, within 21 days of notification of the relevant decision. A response thereto will also in principle have to be filed within 21 days of the notification of the documents (Regulation 64(4) ICC Regulations). When a party wishes to appeal a decision under Article 82, paragraph 1(d), or Article 82, paragraph 2 ICC Statute, which is subject to obtaining leave to appeal, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal (Rule 155 ICC RPE). Under Regulation 65(3) ICC Regulations, participants may file a response within three days of notification of the application unless the Pre-Trial or Trial Chamber concerned orders an immediate hearing of the application. In the latter case, the participants shall be afforded an opportunity to be heard orally. When leave to appeal is granted, the appellant shall file, within 10 days of notification of the decision granting leave to appeal, a document in support of the appeal (Regulation 65(4) ICC Regulations). Participants may in turn file a response within 10 days of notification of the document in support of the appeal.

⁵ See *The Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09-OA, Judgment on the Appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 3 February 2010. This appeal judgement was issued almost seven months after the Prosecution filed its appeal on 6 July 2009 (Prosecution Document in Support of Appeal against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC-02/05-01/09-25).

⁶ Based on a sample of 10 interlocutory appeals taken from the *Bemba, Katanga and Ngudjolo, Lubanga* and *Al Bashir* cases, the Appeals Chamber took an average of four months to decide on interlocutory appeals.

⁷ War Crimes Research Office, “Expediting Proceedings at the International Criminal Court”, June 2011, p. 46, available at <http://www.wcl.american.edu/warcrimes/icc/documents/1106report.pdf> (last visited on 6 April 2014).

⁸ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07 OA 10, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 20 November

warrant in *Al Bashir*, the Pre-Trial Chamber had issued its impugned decision on 4 March 2009, and the Prosecutor sought leave to appeal it on 13 March 2009. The Pre-Trial Chamber then issued its decision on the application for leave to appeal more than three months later, on 24 June 2009. The Appeals Chamber rendered its decision approximately seven months after the appeal was filed.⁹ More encouragingly, a sample of 10 decisions on leave to appeal taken from the *Lubanga* and *Bemba* cases show that Trial Chambers take an average of one month to decide on the request for leave to appeal.¹⁰

III. Effectiveness and Fairness of Current Interlocutory Appeals Procedure

6. The second issue pertains to the effectiveness and/or fairness of a system of leave to appeal that depends on the willingness and readiness of the Pre-Trial or Trial Chamber that rendered the original decision to grant leave to appeal its own decisions.¹¹ Whilst the system in place at the ICC is in line with the practice of other international criminal tribunals,¹² this practice has been criticised in the past and has by no means functioned as a guarantee for the fairness of proceedings – much to the contrary, depending on the Trial Chamber seized of a request for leave to appeal. Indeed, the ICC is facing problems linked to this practice, which regularly results in critical issues not going to the

2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, 12 July 2010, paras. 5-8. See also *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07 OA 11, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, 16 July 2010, paras. 5-8, where leave to appeal the decision was granted two and a half months after the application, and the judgment was issued two and a half months later.

⁹ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-OA, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 3 February 2010, paras. 3-5.

¹⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08: Decision on Defence Request for Leave to Appeal the Decision on the Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims, 11 September 2013; Public Redacted Version of “Decision on ‘Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines’” of 11 January 2013, 16 January 2013; Decision on the “Defence Request for Leave to Appeal the Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute”, 30 October 2012; Decision on the Prosecution and Defence Applications for Leave to Appeal the “Decision on the Admission into Evidence of Materials contained in the Prosecution’s List of Evidence”, 26 January 2011; Decision on the Prosecution’s Request for Leave to Appeal the Trial Chamber’s Decision on Directions for the Conduct of the Proceedings, 15 December 2010. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06: Decision on the Defence Request for Leave to Appeal the Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012; Decision on the Defence Request for Leave to Appeal, 3 May 2012; Decision on Two Requests for Leave to Appeal the “Decision on the Request by DRC-D01-WWWW-0019 for Special Protective Measures Relating to His Asylum Application”, 4 August 2011; Decision on the Prosecution Request for Leave to Appeal the “Decision on Intermediaries”, 2 June 2010; Decision on the Defence Application for Leave to Appeal the Trial Chamber’s “Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/07 to Express Their Views and Concerns in Person and to Present Evidence During the Trial”, 8 September 2009.

¹¹ Rule 155(1) ICC RPE.

¹² See Article 82 ICC Statute; Rules 154 and 155 ICC RPE; Article 25 ICTY Statute; Rules 65 and 72 ICTY RPE; Article 24 ICTR Statute; Rules 65 and 72 ICTR RPE.

Appeals Chamber because a Trial Chamber is unduly and unnecessarily restricting the parties' ability to have the validity of its decisions tested on appeal. For instance, in the *Bemba* case, the Trial Chamber refused to grant leave to the Defence to challenge its ruling regarding the re-qualification of charges under Regulation 55, a matter of great practical effect on the course and fairness of proceedings.¹³

7. Furthermore, there is a clear need for a set of uniform guidance from the Appeals Chamber on a broad range of issues that have resulted in different and sometimes conflicting lines of jurisprudence at Pre-Trial and Trial Chamber level (for example, on victims participation, definitions of modes of liability, etc). The Pre-Trial and Trial Chambers are able to and indeed do regulate the issues that reach the Appeals Chamber as they wish. This is much to the detriment of the establishment of uniform practice.
8. It would therefore seem to be a wise course of action to establish a mechanism whereby issues of a sensitive (procedural or substantive) nature that are arguably affecting a trial decision should be capable of interlocutory appeal where a failure to address that matter at an early stage could negatively affect the position of a party, the fairness of proceedings or their integrity.
9. Whilst the power could be given to the Appeals Chamber to grant leave to appeal (as was the case at the ICTY pre-1996), such an approach would arguably require an amendment of the Statute (Article 81(1)(d) ICC Statute; see also Rule 155 ICC RPE and Regulation 65(3) ICC Regulations). This would also further burden the Appeals Chamber and potentially make it more difficult for the Chamber to evaluate the true impact of the issue on the ongoing proceedings. An alternative is therefore to have a separate Trial Chamber, with its own composition, decide such matters. This approach is preferred and is recommended below.

IV. Recommendations

10. **The working methods of the Appeals Chamber should be made public.** The working methods of the Appeals Chamber are treated by the Court as confidential. The reason why working methods should remain confidential is not readily clear. It is suggested that the Appeals Chamber of the ICC – as the Appeals Chamber of the ICTY has done over the years – should make its working methods public so that their adequacy and efficiency may be evaluated and so that improvement can occur in that context. The Appeals Chamber could also thus head off criticism and provide transparent explanations about their efforts to perform their functions effectively. Transparency in the management

¹³ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Public Redacted Version of “Decision on ‘Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and Related Procedural Deadlines’”, 11 January 2013.

of work would also contribute to a sense of greater accountability and legitimacy.¹⁴

11. **Create a separate Trial Chamber responsible for granting leave to appeal.** Such a course would be consistent with the requirement of Article 81(1)(d) that leave be granted by a Trial Chamber (or Pre-Trial Chamber). It could be composed of the Presiding Judges of the Trial Chambers, which would have the benefit of ensuring consistency of approach between Trial Chambers. It would also ensure that one member of the Trial Chamber that rendered the impugned decision would participate so as to ensure that full consideration be given to both the effect of a possible appeal on trial proceedings and the effect of resolving the matter thereupon.
12. **Use of oral hearings to promote efficiency and expeditiousness of proceedings.** Instead of extensive written litigation, and once seized of an application for leave to appeal, the Appeals Chamber (or the Pre-Trial or Trial Chamber, should they retain the competence to decide leave to appeal) should consider ordering an oral hearing at short notice to hear the parties' arguments. This could also be done instead of or in addition to written filings by the parties so as to: (a) enable judges to ask any residual questions they might have; and (b) expedite the process of discussion and deliberations among them. The possibility of using oral hearings to expedite proceedings is already foreseen in Regulation 65(3) ICC Regulations, which provides for that possibility in relation to interlocutory appeals under Rule 155 ICC RPE. The use of that possibility could be expanded (by orders of the Court and/or an amendment of the Regulations) to all forms of interlocutory appeals. Ultimately, the presence of that possibility in the regulations is not sufficient and Judges would have to actually make use of it. It is suggested that the authority to call such a hearing should be given to the Reporting Judge and/or Presiding Judge on the matter subject to appeal with a view to expediting that process.¹⁵ Discretion should be exercised to decide if and when such a course is appropriate or not (depending on the nature of the matter being litigated).
13. **Deadlines for rendering of decisions on requests for leave to appeal.** Judges should set themselves a strict timeframe to decide the issue of leave to appeal and should avoid any unwarranted delay in doing so (whether as a matter of practice or by binding themselves in the Regulations):
 - a) The time used by Pre-Trial or Trial Chambers to issue their order on an application for leave should not exceed 15 days from the date of the application for leave to appeal.
 - b) Decisions on leave to appeal should be simplified and should address the arguments of the parties only to the extent strictly necessary.

¹⁴ See ICTY Manual on Developed Practices, at pp. 141-142, available at http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf (last visited on 8 April 2014).

¹⁵ See *Orality*, para. 6.

- c) The Pre-Trial or Trial Chamber seized of an application for leave to appeal should duly consider issuing a scheduling order reducing the time given to the parties (and/or participating victims) to respond or reply so as to expedite the timeframe relevant to full briefing of the matter.
14. **Deadlines for rendering of interlocutory decisions should be shortened.** Judges have adopted Regulations which set very tight deadlines to parties filing their submissions before the Court.¹⁶ Judges have not exercised the same stringent control over their own use of time. With a view to expediting the decision-making process, Judges should consider imposing upon themselves strict deadlines to resolve interlocutory appeals. They could decide to do so either informally or by amending their regulations. States Parties could also adopt a rule to that effect by amending the Rules of Procedure. On that basis, the Appeals Chamber should: (a) as a matter of good practice; and/or (b) by amending its regulations, set a limit of 45 days to render an interlocutory decision (calculated from the time of completion of all briefings by the Appellant and Respondent). Expeditiousness does not necessarily mean quality, however, and the Appeals Chamber should maintain some discretion in relation to particularly complex appeals, which might warrant extensive research and careful drafting.
15. **Appeals decisions should be made simpler and more focused.** The Appeals Chamber has sought, on occasions, to provide extensive reasoning for its decision. This generally provides useful indications of its position and gives authority to its ruling. In some cases, it is also plainly necessary and justified. This might be warranted, in particular, in areas of law that are subject to much dispute and in need of clear guidance.¹⁷ Excessive judicial tutoring might however impact negatively on the expeditiousness of the resolution process. It would also seem that many interlocutory decisions could have been drafted more expeditiously on more narrow grounds without prejudicing the appellant or without affecting the Court's duty to provide reasons for its decision (an element of the fair trial requirement). It is therefore recommended that the Appeals Chamber should strive to issue narrower, more focused decisions, which would also contribute to creating a more modest and incremental approach to the Court's jurisprudence. In particular, decisions should be strictly limited in principle to issues that have been fully litigated by the parties and which are necessary for the resolution of the appeal brought before the Appeals Chamber.
16. **The Appeals Chamber should resolve all contentious matters that are in issue on appeal, in particular where such matters are likely to arise in other cases and/or might otherwise impact negatively on the duration of proceedings.** The Appeals Chamber has, on occasions, side-stepped issues that

¹⁶ See Regulation 65 ICC Regulations.

¹⁷ An example is the decision on the admission of evidence rendered in *Bemba* on 3 May 2011. See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08 OA 5 OA 6, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011.

were subject to an appeal and which were affecting the course of proceedings. For example, in a decision on disclosure, the Appeals Chamber indicated that the Prosecutor could continue investigations after the confirmation proceeding if it was necessary to establish the truth.¹⁸ This effectively provided no or only a fictional limitation upon the Prosecutor's ability to continue its investigation after confirmation.¹⁹ This, in turn, has caused delays in the beginning of trials, extensive disclosure issues and a whole new body of evidence being presented at the trial stage. Clearer guidance from the Appeals Chamber should contribute greatly to making proceedings faster and more effective.

17. **The Appeals Chamber should consider rendering oral instead of written decisions, or in advance thereof, with a view to enabling the proceedings to continue.** Where interlocutory appeals raise relatively straightforward issues or where an interlocutory issue effectively prevents the continuation of trial proceedings, the Appeals Chamber should consider rendering its decision orally. Where guidance regarding the basis of its decision needs to be further expanded, the Appeals Chamber could consider rendering a written decision at a later stage. In this way, it would not delay the trial process.²⁰
18. **Victims' participation in interlocutory appeals proceedings should be restricted.** Restrictions on victims' participation in interlocutory appeals proceedings should be duly considered to expedite these proceedings and to reduce the amount of written filings.²¹ This would remove delays in resolving

¹⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 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, para. 52.

¹⁹ See, however, *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, 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, para. 44 ("the investigation should largely be completed at the stage of the confirmation of charges hearing. Most of the evidence should therefore be available ... and it is up to the Prosecutor to submit this evidence to the Pre-Trial Chamber.").

²⁰ While in some cases, the Appeals Chamber has delivered orally a summary of its interlocutory decisions (see, for example, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr862.aspx, last visited on 30 April 2014), it is noted that this did not reduce the duration of interlocutory proceedings, since the Appeals Chamber merely reads out the summary of decisions which are delivered in writing at the same time. The added value of this procedure is not readily apparent.

²¹ The delaying effect of victims' participation may be illustrated with regard to interlocutory appeals against provisional release decisions. The Statute and the rules set out strict timelines in order to ensure that decisions in matters relevant to freedom and detention are issued promptly (i.e. a document in support of appeal within seven days, then a response within five days). After this has happened, however, victims are often given time to file separate observations and parties are then given more time to respond thereto. See, for example, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08 OA 2, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", 2 December 2009, paras. 17-29; Case No. ICC-01/05-01/08 OA 7, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release", 19 August 2011, paras. 9-18. The process is thus delayed, undermining the very purpose of the regime's expedited nature. In such a case, victims could be required to submit their views and concerns on any provisional release appeal no later than two days after it is filed in a 10-page filing, and then the party

the appeal and at least one additional layer of submissions. The Appeals Chamber could, however, exercise its discretion in exceptional circumstances to allow victims to make limited submissions if the issue on appeal could have a clear and important effect on their position in the proceedings.

19. **Adequate staffing of the Appeals Chamber should be guaranteed.** Considering the number of appeals reaching the Appeals Chamber and the complexity of some of them, States Parties should carefully consider whether more resources (in the form of additional staff) should be put at the disposal of the Appeals Chamber.

appealing could submit its response to these views and concerns two days afterwards. This would mean that the victims' involvement in such matters (if allowed) would be 'time neutral', i.e. it would not extend the length of the appeal.

ORALITY

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I. Introduction / Issues

1. The expeditiousness of proceedings and the resources of all relevant parties (Chambers, Prosecution, Defence, participating victims and Registry) have been affected by what may be characterised as an unprecedented practice of extensive written litigation before the ICC. The following statistics may be provided as a matter of illustration of the scale and size of paper litigation before the ICC:¹
 - a) In the ICC's first case, *Lubanga*, the last filing/decision count is of 3,090 individual filings. At the time of the delivery of the verdict, the Trial Chamber had rendered 275 written decisions and orders.² Out of a sample of 50 decisions, the Trial Chamber took an average of 95 days to issue a decision, and most decisions concerned the admissibility of evidence and information disclosure issues. On average, a decision is 18 pages. Out of the 50 decisions, eight were based on both written and oral submissions (16%), while the others were based on written submissions only. The *Lubanga* case is currently under appeal.
 - b) Also at the appeals stage is the case of *Ngudjolo*, which was severed from the *Katanga* case on 21 November 2012.³ After that severance, the counting of documents started from scratch. From the moment of severance, the number of individual filings and decisions is currently at 173. Until severance, the number was of 3,319 filings. In total, the *Ngudjolo* case thus currently counts 3,492 individual filings on the record.
 - c) In the *Katanga* case, 3,482 individual filings are currently on the record.
 - d) In the *Bemba* main case, the number on the record is of 3,065 individual filings.
 - e) The record of the *Bemba* contempt proceedings, with five co-accused, but initiated only on 28 November 2013, already accounts for 394 individual filings.
2. It is striking to note that cases of generally comparable sizes at the ICTY have generated far fewer filings. In the *Boškoski & Tarčulovski* case, for instance, a case with two defendants, a total of 1,967 written filings were put on the record (1,469 of which were confidential); i.e. these were less filings than for both single accused cases named above, namely *Lubanga* and *Bemba*, one of which has not yet been completed. Quite tellingly, ICTY cases which involved more accused have, proportionally, generated even less written filings: the *Kunarac et*

¹ The following statistics are recorded as of 15 May 2014. Further, in considering these statistics, it should be noted that the same decision, order or party's filing might be filed several times with the Court in public, public-redacted, confidential or *ex parte* versions.

² *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 11.

³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, 21 November 2012.

al. trial proceedings (with 3 co-accused) generated a mere 562 filings (239 of which were confidential); in contrast, the *Lubanga* case – a single accused case – generated almost six times this amount of filings; the *Gotovina et al.* trial proceedings (with, again, 3 co-accused) generated 2,427 filings (including 1,203 confidential filings). The same conclusion proves true for very large-scale multi-accused ICTY cases which proportionally generated far fewer written filings: in the case of *Milutinović et al.*, one of the largest case (in terms of scope and factual allegations) with six co-accused, a mere 4,402 filings (including 1,302 confidential filings) were placed on the record.⁴

3. A superficial review of filings in the *Lubanga* and *Bemba* cases reveals that many are routine and redundant in nature, often expressed in language which is unhelpfully pugnacious. The record also reflects a culture of sometimes unrestrained litigiousness, in which parties expend much time and vast resources in an effort to have the ‘last word’ and judicial time is being wasted sorting through unnecessary rhetoric to identify and resolve routine evidential and procedural matters.⁵
4. This excessive written litigation is therefore negatively affecting the resources of all (parties, participants and Chambers). An inordinate amount of time is spent by all actors preparing lengthy and sometimes overly complicated filings. Written applications almost invariably trigger several layers of written filings from other parties and participants. The effectiveness of proceedings – here understood as adequate control over the length and cost of proceedings as well as the effective management of proceedings by the Court – is very negatively affected as time and resources are wasted on secondary matters rather than on making the case ready for trial and actually trying it promptly and professionally.
5. The promotion of a culture of orality could help the Court deal more effectively and in a much prompter way with many of the routine issues that do not, and should not, require extensive written briefings and written decisions. It should be noted, however, that more ‘orality’ in the proceedings will not and cannot resolve all problems of effectiveness. First, practical constraints (availability of courtrooms, availability of court interpreters, schedule of counsel, etc) will place limitations upon the extent to which the Court will be able to use hearings and orality as a way to expedite proceedings. Secondly, certain (legal and factual) issues are so complex that they could hardly be litigated, at least exclusively, orally so that written submissions are unavoidable in these sorts of situations. In such cases, more orality could actually result in longer rather than shorter proceedings.

⁴ These statistics have kindly been provided by the ICTY Registry.

⁵ See, for example, in *Mbarushimana*, where the Pre-Trial Chamber expressed its dissatisfaction with both parties’ oversights and mistakes regarding vital aspects of the case (for example, the Defence requested to re-admit evidence that it had previously successfully sought to exclude on grounds of violation of the suspect’s rights). The Pre-Trial Chamber stated that in most cases, these problems had triggered additional petitioning and litigation. See *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the confirmation of charges, 16 December 2011, paras. 35-36.

6. Instead of a one-solution-solve-all approach, the use of greater orality in the proceedings should be subject to the discretion and good judgement of ICC Chambers. It is of note that several ICC Chambers have already started making good use of court time to resolve pending legal, evidential or practical matters that might have otherwise delayed or prolonged the proceedings.

II. Recommendations

7. **The Court, in particular Chambers, should seek to rely less on written proceedings and more on orality to try to expedite proceedings.** Judges should consider actively seeking to promote a culture of orality among the parties (understood here as Defence counsel, Prosecutors and victims' representatives). For example:
 - a) Judges could expressly invite the parties during hearings (and, if necessary, schedule hearings) to address the court orally rather than in writing. For routine matters or matters that are not factually or legally complex, the Court might expect parties to address the Court orally (motions, responses and replies) either in the courtroom, or through recorded conference calls or on-the-record meetings held with the Chamber's legal officers (as is the practice in other international criminal tribunals). Judges can of course require written briefing for complex matters, or novel legal issues, but only where deemed helpful to their understanding and resolution of the issues. Use of short hearings to ventilate outstanding issues with the parties and to ask any questions the Court might have, could facilitate narrowing the issues to those which actually require written support.
 - b) During the pre-trial phase, in particular, the Pre-Trial Chamber might benefit from regularly scheduled informal working meetings for the parties to air issues and debate them in front of the Court. Such meetings need not occur in court, but may instead be organised (as is the case for instance at the STL) in a more informal setting with less resources.⁶ These meetings can also quite effectively be used to narrow down the scope of issues that will need to be discussed during more formal hearings or status conferences, and thus expedite these. For matters that arise with some urgency between regularly scheduled hearings, judges may consider using a simple

⁶ An accurate record of such meetings should be made in all cases and should in principle be made public. It is worth recalling in this respect, that Rule 126(B) of the STL Rules stipulates, *inter alia*, that any "motion shall be oral unless decided otherwise by the Trial Chamber." This is in line with a growing awareness of the relevance of the orality of proceedings in international criminal institutions and represents significant progress from the ICTY and ICTR Rules, which did not include any such provision. In addition, Rule 126(B) was recently picked up upon by the STL Trial Chamber and its scope was expanded to support "the contention that meetings with the Trial Chamber may be an appropriate forum to discuss trial preparations. Out of court meetings with counsel are a normal function of judicial case management. The Trial Chamber [...] has convened meetings with counsel for different Accused in the presence of counsel for the Prosecution, or vice-versa." The benefits of out-of-court meetings - as opposed to court hearings - were further emphasised, namely that "[a]n informal meeting can be arranged at short notice and, where necessary, in chambers. Court sessions require pre-planning and consume resources including expenditure on contract interpreters." (*The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, Decision on 'Merhi Defence Request Relating to Holding Confidential Meetings and the Public Nature of the Proceedings', 1 April 2014, paras. 6-7, 9.)

process, whereby a party could request a hearing or conference by providing to the Court and parties a short description of the matter that it wishes to raise and the reason why it needs to be heard outside the regular schedule. Communication through emails, rather than filings, should be promoted for routine and non-contentious matters.

- c) To expedite and simplify the decision-making process, judges should consider and be encouraged to render oral decisions on the record instead of (often lengthy) written decisions, in particular for routine or secondary ‘house-keeping’ matters, reserving written decisions for disputes that involve matters of greater legal significance.

8. **Judges should create incentives for greater collegiality among parties and prompt them to seek to cooperate between themselves with a view to eliminating or narrowing issues in dispute.** The culture between parties appearing before the ICC has been in some instances contentious and adversarial.⁷ Information obtained from participants in ICC proceedings suggests that there is comparatively very limited interaction between the parties, and even less effort being made by parties to come to certain agreements on matters of procedure or evidence which could easily be resolved without the need to involve the Court and without the need for litigation.⁸ Certain Chambers have therefore taken steps to invite parties to resolve their dispute among themselves. Promoting a collegial culture in other international criminal tribunals (or, at least, in certain trials before other international tribunals) has resulted in significant savings of time and a lowering of litigation fever comparable to the one that is currently affecting the ICC.⁹ As the ICTY Trial Chamber noted in *Karadžić*, although ICTY Rule 65ter(H) (which provides for agreements between the parties) deals with the pre-trial phase of the case, the Chamber may also choose to note on the record any matters of fact or law which are agreed between the parties during the trial.¹⁰ The Court (and parties) should consider using the following tools to seek to promote greater collegiality among parties in all ICC cases:

⁷ There are, of course, exceptions where parties have constructively tried to find agreeable solutions between them. See, for instance, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Second Joint Submission by the Prosecution and the Defence as to Agreed Facts and the Authenticity of Evidence, 15 March 2013, where parties were able to agree on certain issues such as a redaction protocol.

⁸ In contrast, such contacts and efforts are routine in other international criminal tribunals.

⁹ Agreement on uncontested facts, agreement on non-cross-examination, agreement on admissibility of evidence, agreement on scheduling matters, etc, have been common features of the practice of other tribunals. See, for example, *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, Defence and Prosecution Joint Motion for Admission of Agreed Document, 7 May 2012, whereby the Defence and Prosecution notified the Chamber that they had reached an agreement on the admission into evidence of certain evidentiary material. See also *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, Prosecution and Defence Joint Notice of Compliance with the Oral Order of 9 September 2011 Regarding the Change in Status of Certain Exhibits Admitted under Seal, with Confidential Annexes A and B, 11 November 2011, whereby the parties also came to an agreement on the status of exhibits.

¹⁰ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Agreed Facts, 14 February 2013, para. 3.

- a) As noted above, working meetings ordered by the Court where parties would try to resolve or reduce the scope of outstanding issues between themselves (if necessary with the assistance of the Court) could become a regular feature in all cases to try to narrow down the scope of what remains in dispute between parties and what must be formally decided by Chambers.
 - b) An expectation that the parties have attempted to resolve outstanding issues *before* bringing them to the attention of the Court could be encouraged by the Chamber and the Registry. This expectation could be reinforced when an issue between the parties is raised, by judges routinely inquiring about the steps actually taken by the parties to resolve the matter and taking appropriate action depending on the response. Chambers should be encouraged to effectively press parties to genuinely and diligently seek to reach agreements with the other side in a timely fashion as a condition precedent to involving the Court in their pre-trial and evidentiary disputes.¹¹
9. **In the selection and designation of counsel for all parties, the competent organs of the Court (the Registry for Defence counsel and representatives for victims, the Office of the Prosecutor for Prosecution counsel) should ensure that counsel selected to play a part in the proceedings are professionally and institutionally able as a matter of principle to litigate matters orally and effectively in court.** For a culture of greater procedural orality to emerge, and for such an approach to bear fruit in terms of saving court time and resources, advocates and judges must be fully capable of making arguments and resolving issues *live* in the courtroom. In the process of designating counsel (for the accused and victims), the Registry should therefore carefully assess the experience of candidates in oral advocacy and in handling complex criminal cases. From the point of view of counsel appearing for the Prosecution, it should be expected that, where an issue comes up in court that pertains to a case-specific issue (as opposed to a matter of policy of the Office), counsel should in principle be capable of taking a position without the need to report and obtain instructions from his/her hierarchical superior.
10. **An essential criterion for judges to be assigned to ICC Pre-Trial and Trial Chambers should be *significant* experience in managing complex criminal cases.** In their selection of candidates and election of Judges at the ICC, States Parties are therefore invited to consider this factor as central to their decision. States Parties are also invited to consider abolishing the system of List A and B (Article 36(3) and (5) of the Statute) and to amend the Statute to focus, instead, on candidates' expertise and competences – as judges, practitioners or in other capacities – in handling and managing complex criminal litigation.

¹¹ In this respect, parties should be pressed to try and resolve matters *inter partes* with Chambers being petitioned only where parties have failed to reach a workable solution. In some cases, this is already the case with respect to disclosure issues (see *Disclosure at the ICC*, para. 7). This practice should be endorsed and applied to recurring procedural issues as a matter of course.

11. **It is recommended that the President, with input from the Chambers, develop targets for desirable timeframes (in days) between the date of the submission of the parties' first filing and the date of the issuance of the decision, and that the Registrar assemble monthly data by judge, shared among all the judges, as to actual time taken for each decision rendered by that judge (either individually or as part of a panel) relevant to the targets.** This would permit realistic adjustments to be made to the targets, inform the judges as to areas where time might be saved, and encourage discussion within the Chambers as to best practice. It would also allow the Chambers to detect problem areas and work towards solutions internally before becoming subject to outside criticism.

12. **In order to encourage and facilitate a culture of orality, it is also recommended that the Registry and Chambers work together to develop tools to assist judges to distinguish and prioritise filings, save time on routine matters and relieve them of duties that could be performed by legal officers under their supervision.** For example:
 - a) The creation of a form cover page by which the litigant is required to disclose in brief the reason for the filing, certifying that s/he has discussed the substance of the filing with opposing counsel and stating whether or not opposing counsel wishes to contest.
 - b) The creation of a form order by which the judge or panel expresses whether, based on the cover page, the matter should be heard without further filings, heard after further filings (with deadlines and limitations on length), diverted for further settlement discussions during the next status/pre-trial conference, including the date thereof, or decided on the papers (with deadlines and limitations on length).
 - c) For routine and simple procedural matter (for example, setting deadlines or fixing hearing dates), Chambers should consider issuing decisions by and in email form.

13. **With a view to ensuring transparency of decision-making and to safeguard the jurisprudential heritage of the Court, oral decisions should be duly and properly recorded and made accessible in principle to all.** The Registry should be made responsible for recording and properly indexing these and making them available to the public.

VICTIM'S PARTICIPATION BEFORE THE ICC¹

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¹ This paper was drafted before any information was available regarding the current restructuring project of the Registry, which also involves OPCV and VPRS. It should be read as such.

I. General Observations

1. The procedural rights and entitlements given to victims in the context of ICC proceedings is a major advance and a momentous step in the building of a functioning, credible and participatory sort of international criminal justice. Victims' participation gives victims a voice of their own and has effectively created a solid and precious constituency for the Court.
2. Over the past 10 years, the ICC has started to implement the promise of participatory justice for victims. It has crafted a place for them, given them a voice in the proceedings and endeavoured to strike a difficult balance between the place given to victims' representatives and to other actors in the process. Direct participation by victims – albeit through counsel – is unquestionably a great statutory advance. That process has also enabled the Court to reach out to affected communities and to communicate more directly with one of its most important constituencies.
3. However, whilst the statutory principle that victims should be permitted to participate in relevant aspects of ICC proceedings is unquestioned (Article 68(3) ICC Statute), the implementation of that regime has raised a number of effectiveness-related problems associated with their participation, which will be detailed below. None, however, should result in questioning the value and importance of having victims participate at relevant stages of ICC proceedings.²
4. In its 2013 report, REDRESS noted that “despite significant efforts and investment, the ICC’s participation system is currently failing to achieve [the potential for the ICC to develop a system which greatly benefits victims] and there are concerns regarding its sustainability, effectiveness and efficiency, as well as its meaningfulness for victims”.³ The report also noted that “regrettably, the ICC’s participation system is currently failing to achieve [its potential contribution to the proceedings]. Despite significant efforts and investment, the ASP and others have questioned the sustainability, effectiveness and efficiency of the system, as well as its meaningfulness for victims”.⁴

² REDRESS Report, “The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future, October 2012, p. 7, available at http://www.redress.org/downloads/publications/121030participation_report.pdf (last visited on 15 April 2014):

‘[I]nvolving victims of horrific crimes in processes that concern them is not only appropriate in moral terms, it is consistent with emerging principles which recognise victims’ rights to be informed about processes that concern them and to engage in the judicial process.’

³ REDRESS Report, “Independent Panel of experts report on victim participation at the International Criminal Court,” July 2013, para. 5, available at <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf> (last visited on 15 April 2014).

⁴ REDRESS Report, “Independent Panel of experts report on victim participation at the International Criminal Court,” July 2013, para. 36, available at <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf> (last visited on 15 April 2014).

5. The effect of victims' participation – understood as their demonstrable effect on the proceedings and the extent of fulfilment of their statutory rights – should be measured against what victims have been permitted to do by the Court. If and where they have been given extensive rights to (cross-) examine witnesses and to elicit and tender evidence, for instance, the effect (positive and/or negative) of that involvement should be fully considered so as to evaluate whether such involvement has on balance been beneficial to the process. The present paper does not deal specifically with the issue of reparation. The reason for this is the absence of sufficient ICC practice at this point to evaluate the effectiveness of the system of reparation in place before the Court. An expert evaluation of that process should, however, be conducted if and when issues of effectiveness affect that part of ICC proceedings.

II. Challenges, Shortcomings and Recommendations

6. The issues that have been identified in this context may be said to fall into the following categories:

1. **Clarifying the role of victims with a view to ensuring more expeditious proceedings**

7. The case-law of the ICC has made a most useful contribution to creating precious international jurisprudence regarding the role of victims in international proceedings. Less fortunate is the fact that this case-law is sometimes contradictory.⁵ As noted by REDRESS, “[t]he system is also significantly affected by divergent visions of the participation system within the ICC. The Panel is concerned that different efforts aimed at addressing the current challenges are disjointed and risk further undermining the system of participation”.⁶

⁵ See, generally, S. Mounthan, ‘*Victim Participation at the ICC for Victims of Gender-based Crimes: A Conflict of Interest?*’, 21 *Cardozo J. Int'l & Comp. L.* 619 2012-2013, p. 628. For example, the judge in the *Katanga and Ngudjolo* case decided that all victims who met the requirements of Rule 85 ICC RPE had a right to participate as a victim. The Trial Chamber in *Lubanga*, however, took a different approach and required every victim to show how his or her personal interests were affected by the case.

⁶ REDRESS Report, “Independent Panel of experts report on victim participation at the International Criminal Court,” July 2013, para. 5, available at <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf> (last visited on 15 April 2014). See also, para. 46:

“However, the underlying problem of diverse visions of victims' participation within the ICC also needs to be addressed. The Panel believes this is an issue primarily for the judges who ultimately decide the way victims participate in proceedings. While the practice and the jurisprudence of the ICC are evolving, the ICC should be in a position to inform victims with some certainty about what participation entails so that they can decide whether they want to engage with the Court. Recognising that judges remain independent in their decisions and that the number and situation of victims in different situations may require case-specific approaches, the Panel suggests that the judiciary should review the participation systems with a view to developing consistent Court policies and guidelines in relation to victim participation. In the absence of such policies and guidelines, the Panel recommends that these issues be discussed as early as possible in the proceedings and decisions communicated to victims promptly.”

8. Some Chambers of the ICC have given victims a role so broad in scope and nature that it might raise difficult issues of the proper delineation of their and the Prosecution's roles and responsibilities and effectively create a second, *de facto* prosecuting body in the proceedings.⁷ Unrestricted victims' participation may in turn threaten the overall balance of proceedings (to the prejudice of the rights and position of the accused and overall fairness of proceedings) and increases the financial cost of victims' participation and the duration of proceedings.⁸

Recommendations:

9. **Chambers should set and enforce a clearer separation between the role and competence of victims and the Prosecutor and limit victims' involvement to issues that are not within the mandate of the Prosecution.** The Court should enforce a strict division of tasks, rights and responsibilities between the Prosecutor and victims' representatives. Under the Statute, the duty and responsibility of presenting evidence regarding the accused's guilt and innocence falls exclusively on the Prosecutor.⁹ The Statute does not provide a basis for victims to seek to do so or to contribute in any way to the actual prosecution of the ac-

⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on victim's participation, dissenting opinion of Judge Rene Blattmann, 18 January 2008, para. 10. See also, A. de Brouwer and M. Heikkilä, 'Victim Issues: Participation, Protection, Reparation, and Assistance', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev and S. Zappalà, *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1325. The authors cited the Policy Paper on Victims' Participation, Office of the Prosecutor, ICC, (April 2010, p. 18), and mentioned that the Prosecutor had objected to the decision held in the *Lubanga* case (*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on victim's participation, 18 January 2008, para. 108-109) to allow victims to submit and challenge evidence relating to the guilt or innocence of the accused at the trial stage, as this is a duplication of the role of the Prosecutor. On 22 September 2006, Pre-Trial Chamber I (the *Lubanga* case) held that the confirmation hearing is an essential stage of the proceedings and therefore, "the victims may participate in the confirmation hearing by presenting their views and concerns in order to help contribute to the prosecution of the crimes from which they allegedly have suffered and to, where relevant, subsequently be able to obtain reparations for the harm suffered" (*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006, p. 5). The Pre-Trial Chamber did not provide any references to any legal provisions in the Statute or the Rules of Procedure and Evidence. Then, the Pre-Trial Chamber went on to hold that in principle, participation should be limited to access to public documents only and the victims can only be present during public hearings. However, it was then stated, again without references, that 'the Chamber retains the option to make an exception to this principle in the event of exceptional circumstances' without providing any examples of "exceptional circumstances" (*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006, p. 6).

⁸ The tendency of victims to act as a second prosecutor is also apparent from the nature and content of their opening and closing statements; see, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 - Closing Statements: August 25, 2011, pp 68-69, 72; *The Prosecutor v. Germain Katanga*, Case, Case No. ICC-01/04-01/07 - Closing Statements: May 16, 2012, pp. 58-59; 62-70, 73; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08 - Opening Statements: November 22, 2011, pp. 38-42. See also G. de Beco, 'Victim Participation in Proceedings before the International Criminal Court: Resolving Contentious Issues', 3 Hum. Rts. & Int'l Legal Discourse 95 (2009), p. 111. The Trial Chamber in the *Lubanga* case decided, 'Rule 85 of the Rules does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I.' (*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on victim's participation, 18 January 2008, para. 93.)

⁹ See, in particular, Articles 42, 54(1) ICC Statute. See also Chapter 5 ICC RPE.

cused. There should, therefore, be no duplication in principle between the Prosecutor and victims.¹⁰ Duplication – in questioning of witnesses, for instance – unavoidably results in longer (and, thus, more costly) proceedings.

10. The scope of permissible involvement of victims in the proceedings is clearly laid out in the ICC Statute. Article 68(3) provides that victims' views and concerns should 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." Chambers are responsible to enforce that provision in which particular case to ensure consistency with the fundamental rights of the accused. Nor are Chambers permitted under the Statute to grant victims the ability to perform a prosecutorial function.
11. Some jurisprudence suggests, however, that the standard regulating victims' entitlement to participate has been placed extremely low.¹¹ More significantly, some decisions and court practice have effectively granted victims the ability to question witnesses and elicit evidence in relation to the very same issues as the Prosecutor, i.e., to take part in the Prosecution's effort to establish the responsibility of the accused.¹² Under the Statute, however, victims are not 'parties' to the proceedings.
12. Whilst the participation of victims should and must be effective, it should remain within the bounds of what the Statute provides and should not come at the expense of the overall effectiveness of the process. On that basis, ICC Chambers should ensure that victims' participation in the proceedings is at all times consistent with the following principles:
 - a) Victims are not permitted to act as second prosecutors;¹³
 - b) Victims are not permitted to question witnesses and/or elicit evidence pertaining to the (alleged) responsibility of the accused or to his sentence;

¹⁰ Article 65(4)(a) ICC Statute provides that if the Trial Chamber opines that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may request the Prosecutor to present additional evidence, including the testimony of witnesses.

¹¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on victim's participation, 18 January 2008, para. 93; *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the appeals of The Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, paras. 54, 58.

¹² For example, in *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Witness D04-64 explained in detail the payments made to the MLC troops during their stay in the CAR during his questioning by Defence Counsel, and described how these payments were made (Transcript ICC-01/05-01/08-T-259-Red, 22 October 2012, pp. 19-21). Regardless, Maitre Zarambaud then asked: "Were the MLC troops paid, and if so how?", to which the witness' reply was prefaced with: "Counsel, as I said yesterday..." (Transcript ICC-01/05-01/08-T-260-Red, 23 October 2012, p. 64).

¹³ See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, para. 82 ("The victims are not parties to the trial and certainly have no role to support the case of the Prosecution.").

- c) The victims' questioning of witnesses should never duplicate the Prosecution's questioning and may be objected to on that basis; and
 - d) Victims can only make submissions on an issue of law or fact and/or ask questions of a witness with leave of the Trial Chamber having established to the Court's satisfaction that a 'personal interest' of victims is at stake, which the Prosecution is not able or mandated to cover. For that purpose, victims' representatives should establish that the issue in relation to which they wish to be heard is one that falls within the scope of their mandate (see below) and one that has not already been explored by the Prosecution in its submissions or questioning of a witness.
13. The same principles would regulate the scope of permissible victims' submissions (see below). Where victims are authorised to make an opening and/or closing statement, the above principles should form part of any order issued to that effect by the Court so as to restrict the scope of such a statement to what is permissible.¹⁴
14. It is recommended that the Court should adopt these principles (either as part of its regular practice and/or through an amendment of its Regulations). Should the Court fail to do so, States Parties should consider amending the Court's Rules and/or Statute to more clearly circumscribe the scope of permissible victims' involvement in the proceedings.
15. **The Court should more clearly set out the areas in relation to which victims may legitimately elicit and call evidence.** By enabling and allowing victims to participate in earnest in the proceedings, the Court has given life to a new important actor of international justice. Victims' participation holds the promise of a richer and less adversarial sort of judicial process. The involvement of victims in the process cannot, however, be interpreted as a blank check allowing victims to replace the Prosecutor or duplicate their efforts (see above). Instead, victims' participation is intended *to add* to what is already the responsibility of the Prosecutor and offer a way to achieve procedurally and inside the criminal process what might otherwise have to be done in a civil lawsuit.
16. As noted above, Article 68(3) ICC Statute makes victims' participation conditional upon the establishment of 'personal interests' in relation to a particular matter. It is, therefore, the duty and responsibility of each Trial Chamber to make that determination. The view that victims have 'personal interests', and therefore participatory rights, at all stages of the proceedings finds no basis in the Statute. Instead, the Statute specifically refers to stages of the proceedings 'determined appropriate by the Court'. Each Chamber is therefore required to determine both the existence, in a particular situation, of 'personal interests', and the most appropriate stage of proceedings for their expression.

¹⁴ Regarding the prosecutorial tenor of victims' opening/closing statements, see references above.

17. The Chamber would then have to determine in what form victims' participation may best be achieved.¹⁵ In the short term, this might help reduce the quantity of victims' filings by reducing the number of issues in relation to which victims are permitted to make submissions on the merits. In addition, and in the longer term, knowledge of the necessary threshold may dissuade victims' representatives from getting involved in all aspects of the proceedings. They may instead choose their 'battles'.¹⁶
18. Victims' participation should start where the Prosecution's own responsibilities end and be limited in substance to those areas where they can legitimately claim to have a personal interest, namely:
 - a) establishing the harm or injury done to them; and
 - b) establishing what relief would be appropriate to remedy the harm done to them.
19. Such an approach would be consistent with the terms of the Statute¹⁷ and would avoid unnecessary duplication of resources. It is also one that is consistent with both the rights of the accused¹⁸ and the practice of domestic jurisdictions.¹⁹
20. This approach could also help reduce the overall amount of time spent producing evidence of limited evidential value. In the *Lubanga* case, for instance, none of the evidence elicited by victims was accepted by the Court.²⁰ In the *Bemba*

¹⁵ See also Rule 91(2) ICC Statute.

¹⁶ See, as an illustration of that 'economical' approach the guarded position of Mr Haynes, lead representative for victims at the STL (unopposed by any Defence counsel and, thus, not subject to any litigation).

¹⁷ The Statute does not provide an express legal basis permitting victims to lead evidence related to the guilt or innocence of the accused, nor for an obligation to disclose similar in kind to the parties. To allow victims who have no disclosure obligations to present evidence relating to the guilt or innocence of the accused could negatively affect the trial management and the rights of the accused (*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the appeals of The Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, para. 71). The absence of any disclosure obligations on the victims can be interpreted as supporting the notion that they may not be allowed to lead evidence relating to the responsibility of the accused (*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the appeals of The Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, partly dissenting opinion of Judge P. Kirsch, Annex, para. 15). The Appeals Chamber in *Lubanga*, however, rejected these arguments and held that although the Prosecutor bears the onus of proving the guilt of the accused, the Court has the power to request the submission of all evidence that it considers necessary for the determination of truth (*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the appeals of The Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, para. 95).

¹⁸ S. Zappalà, 'The Rights of Victims v. The Rights of the Accused', 8 JICJ 137 2010, p. 164.

¹⁹ See, in particular, Articles 68(3) and 75 ICC Statute. In domestic criminal justice systems, victim participation takes different forms, but where such participation is allowed, it is mostly limited to establishing the harm suffered by the victim and pursuing a remedy. See, for example, Section 722(1) of the Criminal Code of Canada 1985; Section 7A(1) of the South Australian Sentencing Act 1988; Section 3771 of Title 18 (Crimes and Criminal Procedure) of the United States.

²⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 502.

case, the indications are that questioning by victims' representatives has done little more than duplicate the evidence already elicited by the Prosecution.²¹ There are therefore few empirical indications of victims' contribution to the evidential and forensic search for the truth.

21. Particularly important to save time and resources is the Court's readiness and ability to police and regulate: (i) filings by victims, and (ii) the scope of questioning by their representatives:
 - a) Victims should only be permitted to make written (and/or oral) submissions in relation to issues falling within either or both issues (a) – b), above). Where this is not the case, the Court should deny victims the right of audience and/or reject their filing. Where filings or submissions relate, in part, to these issues, the Court should consider their submissions to that extent only.
 - b) Pursuant to Rule 91(3), questions may only be asked by victims' representatives if they are expressly authorised to do so by the Chamber.²² Before leave is granted to ask questions, the Chamber should satisfy itself that the requesting victim has demonstrated with a sufficient degree of likelihood that the witness is capable of giving evidence of either or both issues (a)-b)) mentioned above. Where leave is granted, the Chamber could require victims' representatives to submit their lists of questions for prior approval by the Chamber.²³
22. It is recommended that the Court should adopt these principles (either as part of its regular practice and/or as a result of an amendment of its Regulations). Should the Court fail to do so, States Parties should be invited to consider amending the Court's Rules of Procedure to that effect.
23. **The Court should adopt a realistic and economical view of the manner and scope of victims' participation.** One of the main challenges associated with victims' participation is the cost associated with the presence of their representatives all through the proceedings.²⁴ The proposed budget for the VPRS in

²¹ See references above. See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims, 19 July 2013, paras. 22-30 (see, p. 3: 'The blanket right afforded by the Chamber to ask "follow-up" questions means in practice that no demonstrable link is required between the majority of the LRVs questions, and the interests of the victims they represent, in violation of the constitutive documents of the ICC.'). See, for example, in *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, the Trial Chamber warned the LRVs against putting questions to witnesses that amount to an assistance to the Prosecution team (Transcript ICC-01/04-01/07-T-160-Red-ENG, pp. 19-20).

²² Article 91(3)(a) ICC Statute: 'When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.'

²³ This was done, for instance, in the *Bemba* trial.

²⁴ In *Lubanga*, for instance, the Court initially appointed nine teams of lawyers to represent victims. These were later reduced to five. In *Bemba*, two teams of representatives have taken part in the entirety

2013 is almost 2 million Euros, an increase of almost 20% since 2012.²⁵ As for the OPCV, the total proposed budget is about 1.1 million Euros, almost similar to the previous year.²⁶

24. *If* States Parties take the view that costs associated with victims' participation are justified (considering the nature and scope of their contribution), the current broad approach to participatory rights of victims should remain untouched.
25. *If*, however, costs associated with victims' participation are regarded as too high, steps could be taken (in addition to the above) to curtail these costs insofar as they might be unjustified and would not otherwise affect the effective participation of victims in the proceedings.
26. The Statute does not mandate victims' presence or participation at all stages of the trial. *Instead*, Article 68(3) specifically provides that they shall be heard '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'. Victims do not have a statutory right to be present at all times, let alone to participate at all times. Instead, the statutory allowance requires a judicial determination in every case that a 'personal interest' is at stake and that the issue they wish to address is appropriately raised at that stage of the proceedings. It should be noted in that regard that the Statute is clear that their sole entitlement is 'to present' their views and concerns (as distinct from presenting 'evidence').
27. Rules 89 and 91(2) ICC RPE regulate the way in which victims are permitted to 'present' their views and concerns under Article 68(3). The existing Rule 91(2) ICC RPE already provides for the possibility that participation of victims be limited to *written* submissions.
28. Furthermore, as is clear from the text of Article 68(3) and Rules 89/91, victims do not have an automatic right to participate but have to be so authorised by the Chamber in accordance with Rule 89. Instead of the current and expensive practice of having counsel present at all times in the courtroom, including for long stretches of proceedings where victims do not play an active role, orders from the Court should be phrased in such a way that victims' involvement will be allowed only through a convincing demonstration that their 'personal interests'

of the proceedings and been present all through the trial. Costs associated with the representation of victims in proceedings are difficult to establish. They include the cost of counsel and their team. They also include the cost of two victims' offices (the LRV and the OPCV) (see below). They also include the costs and expenses of resources incurred by others (Prosecution, Defence, Chambers, Registry) by reason of victims' participation. This is the case, for instance, whenever victims are allowed to make (written or oral) submissions to which the parties might choose to respond and in relation to which the Court would have to make a ruling.

²⁵ Proposed Programme Budget for 2013 of the International Criminal Court, 16 August 2012, p. 127, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-10-ENG.pdf (last visited on 8 April 2014).

²⁶ Proposed Programme Budget for 2013 of the International Criminal Court, 16 August 2012, p. 139, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-10-ENG.pdf (last visited on 8 April 2014).

are at stake and that they need to be heard (if necessary, orally). Outside these occasions, counsel for victims should not need to be present during hearings in Court at the expense of the Court. For instance, whenever a victim applies to examine a witness in accordance with Rule 91(3)(a):

- a) The Court should insist that victims demonstrate that the proposed areas of questioning:
 - i) are within the scope of their “personal interests” (see above);
 - ii) cannot reasonably be thought to fall within the scope of questioning by the Prosecution. If necessary, the Chamber could seek information from the Prosecution as to whether or not it intends to ask questions of the witness in relation to these areas.
- b) Victims’ representatives should explain why, in every case, written submissions would be inadequate to outline their views and concerns.
- c) The Chamber should also consider, in every case, whether it could and should ask questions of witnesses that are thought to be of relevance to victims so as to obviate the need for their presence if the issue in question is a narrow and circumscribed one. This would obviate the need for counsel’s presence in court and cost associated therewith.
- d) Where leave to ask questions has been granted, the Court could also require victims’ representatives to submit general outlines of questioning to the Chamber in advance of their examination to enable the Chamber to ensure compliance with the tenor of its order.²⁷

²⁷ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08: Decision on Common Legal Representation of Victims for the Purpose of Trial, 10 November 2010, para. 39; *Corrigendum* to Decision on the Participation of Victims in the Trial and on Applications by Victims to Participate in the Proceedings, 12 July 2010, para. 102 (h). See also *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Conduct of Trial Proceedings (General Directions), 9 August 2013, paras. 19-21 (footnote omitted):

“19. When the Legal Representative wishes to examine a witness, he is directed, as a general practice, to apply to the Chamber, by means of a filing, notified to the parties, seven days in advance. In the event of unexpected changes to the witness schedule or unanticipated issues raised during testimony, the seven-day period can be altered as necessary. The application of the Legal Representative should provide reasons for separate questioning apart from the questioning by the Prosecution and include an outline of areas for examination. Documents proposed to be used during the examination, or references thereto, where appropriate, should also be provided at this time, in accordance with the regular procedure for parties discussed below. After the examination-in-chief the parties will be given an opportunity to make oral submissions, without the witness being present, and the Chamber will issue an oral ruling on the application.

20. The Chamber recalls its general guidance on the scope and mode of questioning by the Legal Representative provided in its ‘Decision on victims’ representation and participation’.

21. If the Legal Representative seeks to present evidence, he shall provide reasons for a separate presentation of evidence apart from the case presentation by the Prosecution. If leave is granted for presentation, such evidence shall be presented at the end of the Prosecution case. Further guidance on the modalities of such presentation will be issued in due course as appropriate.”

29. The regime could be relaxed at the reparation phase of the proceedings where the ‘personal interests’ of victims (as distinct from those of the Prosecution) are clearer and might justify broader participatory rights for victims.
30. The ability of victims to call witnesses should likewise be subject to the same test. It should further be scrutinised by the Court in order to avoid any fraudulent applications, as seen in the *Lubanga* case where three victims’ participatory rights were withdrawn because of identity thefts.²⁸ Thus, when seeking leave to call victim witnesses, the LRVs should be expected to have investigated their proposed witnesses’ account and, if requested, be ready to provide information regarding their diligent efforts in that regard.
31. Subject to the Chamber’s prior and reasoned approval, victims should only be permitted to call evidence that pertains to issues a) – b) identified above, and could only instruct relevant experts for either or both of those purposes. In the alternative or in addition to this, the Chamber should consider calling its own witnesses (including expert witnesses) in relation to issues of relevance to establishing the harm done to victims and ways to address it.²⁹
32. Finally, the need for victims’ participation at trial (and associated costs) could be further obviated should the Trial Chamber have in its possession a reliable record of the ‘views and concerns’ of victims to start with. Before the commencement of trial, the Office for Victims³⁰ should be ordered to prepare (if necessary under the supervision of a judicial officer from the Chamber) a report summarising the views and concerns of victims as appear in their individual applications. In addition, where necessary and justified, the Trial Chamber could call a number of victims to give evidence or it could make an order authorising a court official to take an affidavit on the Chamber’s behalf (as was done in Nuremberg in relation to information/evidence pertaining to the case against ‘criminal organisations’³¹). The Office for Victims would then be tasked to prepare a detailed report outlining victims’ views and concerns. A well-crafted report would provide a more effective and cost-efficient way to air those views and concerns and in a manner compatible with the accused’s rights. Rule 95 of the Rules of Procedure and Evidence of the STL provides helpful guidance in that regard.³²

²⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 502.

²⁹ See also, *Presentation and Admission of Evidence*, paras. 39-42.

³⁰ See below, para. 50.

³¹ See Article 17(e) of the Charter of the International Military Tribunal, which granted the Tribunal the power to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission. The Tribunal appointed Commissioners to hear evidence relating to the organisations. 38,000 affidavits, signed by 155,000 people, were submitted on behalf of the Political Leaders; 136,213 on behalf of the SS; 10,000 on behalf of the SA; 7,000 on behalf of the SD; 3,000 on behalf of the General Staff and OKW; and 2,000 on behalf of the Gestapo. The Tribunal itself heard 22 witnesses for the organisations (Nuremberg Trial Proceedings Volume 22, 30 September 1946, available at <http://avalon.law.yale.edu/imt/09-30-46.asp> (last visited on 8 April 2014)).

³² Rule 95 of the STL RPE provides that the Pre-Trial Judge shall submit to the Trial Chamber a complete file consisting of, among other things, a detailed report setting out the arguments of the parties and the victims participating in the proceedings on the facts and the applicable law, the points of

33. **States Parties should request the Registrar to provide full and transparent information regarding the overall cost of victims' participation.** This should inform any discussion regarding the need to adopt measures to reduce this cost and, if so, how to go about it.
34. **Participation by victims' representatives in the trial should not be automatic.** Instead, they should only be permitted to participate in particular procedural or evidential litigation by leave of the Chamber, if and where the four conditions outlined above (at paragraph 28. a) – d)) have been met.
35. **Victims' participatory rights should be limited to the two issues outlined above, namely:**
- a) establishing the harm or injury done to them; and
 - b) establishing what relief would be appropriate to remedy the harm done to them.

Chambers should take a more active role in exploring the issues of relevance to victims (a) - b)) regardless of victims' requests to that effect.

36. **In order to ensure in the future the effective participation of victims in the proceedings, the Court (through the Registrar) should enforce strict requirements of competence and knowledge of international (criminal) law and procedure to be eligible to represent victims before the ICC.** The quality of the legal representation victims receive is essential to their meaningful and effective participation.³³ The selection of counsel should be based on competence and experience so as to ensure the highest level of expertise and effectiveness in the representation of victims; the process of selection and appointment should be fair and transparent. It should be subject to judicial review, if necessary. The appointment in the *Kenyatta* case of an experienced international prosecutor to represent victims is a most encouraging sign that efforts are being made to even the playing field insofar as representation is concerned. To ensure quality of representation relevant to the effectiveness of victims' participation, the comments and recommendations made in the Chapter *Defence before the ICC and Issues of Effectiveness* should apply with equal force to the selection, assignment and monitoring of counsel for victims.³⁴
37. **In relation to their involvement in the reparation phase, the Registry should ensure that victims' representatives have been given resources**

agreement and disagreement, the probative material produced by each party and by the victims participating in the proceedings, a summary of his decisions and orders, suggestions as to the number and relevance of both the witnesses to be called by the Prosecutor and the witnesses the victims intend to request to call, and the issues of fact and law that, in his view, are in contention.

³³ REDRESS Report, "Independent Panel of experts report on victim participation at the International Criminal Court," July 2013, paras. 12, 95, available at <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf> (last visited on 15 April 2014).

³⁴ See *Defence before the ICC and Issues of Effectiveness*, paras. 12-27.

- commensurate to their responsibilities in the context of that phase.** To contribute meaningfully to the proceedings, victims will have to be able to identify and obtain evidence of facts relevant to establishing their claim. For that purpose, they should be able to conduct investigation in relation to these facts relevant to establishing their claim. In particular, victims' representatives should receive adequate investigative resources to establish and demonstrate the harm/prejudice caused to them by the acts of the accused.
38. **Before the commencement of trial, the Office for Victims should be ordered to prepare (if necessary under the supervision of a judicial officer from Chambers) a report summarising the views and concerns of victims as appear in their individual applications.** In addition, where necessary and justified, the Trial Chamber could call a number of victims to give evidence or it could make an order authorising a court official to take an affidavit on the Chamber's behalf.
39. **States Parties should consider giving victims greater access to the Trust Fund.** This would permit a broader range and number of victims to participate and air their legitimate grievances, without the risk of clogging or slowing down the judicial process. It would also relieve somewhat the need to provide overly broad definitions of 'victims' for the purpose of participating in the proceedings. This would provide a more open and less aggressive venue than a criminal trial for victims of the entire situation to air their views and seek compensation.
40. **States Parties should consider amending the Statute to remove the requirement that reparation for victims is conditioned upon the conviction of the accused.** The Statute conditions reparation on the accused having been convicted of a crime.³⁵ This, in turn, creates an incentive for victims to seek the accused's conviction and places them in the position of a second prosecutor. If reparation of the harm or prejudice caused to them was not dependent on any material connection with the act of the accused, that pressure to convict would be greatly relieved and victims could focus more effectively on establishing the harm done to them and establishing the consequences thereof on their lives and that of their community. The ability of victims to obtain relief independent from the conviction of the accused would also *correct* the statutory requirement that makes reparation dependent on a conviction. In that sense, an acquittal could not be regarded as or result in a denial of justice for victims.
41. Dissociating the possibility of reparation from the necessity of conviction of the accused would have an added benefit as far as effectiveness is concerned. REDRESS has suggested simplifying and expediting the process of evaluation of individual applications through a process of 'sampling' of applications.³⁶ Whilst such an approach might be suited to civil law suits, it is hardly adequate for a

³⁵ See Article 75(2) ICC Statute; Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts – Incompatible Values?', 8 JICJ 79 2010, p. 88.

³⁶ REDRESS Report, Independent Panel of experts report on victim participation at the International Criminal Court, July 2013, paras. 89-92, available at <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf> (last visited on 15 April 2014).

criminal case insofar as, under the current regime, each of the application will impact the accused's interests if he is convicted at the end of the proceedings. If, however, the possibility for victims to participate and seek reparations was unconnected to the necessity of a conviction, the Defence is unlikely to have much (valid) objection to the practice of sampling of applications. Under such a revised regime, sampling could indeed provide a practical way to expedite and ease the current process.

42. **Statutory re-foundation of the architecture of victims' participation before the ICC:** Should the above recommendations prove insufficient to ensure and guarantee that victims' participation is truly effective and that such participation does not unduly impair the effectiveness of trial proceedings, States Parties should consider whether a re-foundation of the architecture of victims' participation before the ICC should be considered. This could include, *for instance*:

- a) abolishing victims' participation altogether (a course of action *not* recommended here as this would impact on the credibility and overall legitimacy of the Court);
- b) setting up a specialised Chamber responsible for dealing with all issues pertaining to victims' participation and reparation;
- c) amendment of the Statute and/or the Rules to specify that victims' participation should only occur after trial, i.e., during the reparation phase, if and when the accused has been convicted (or without the need for conviction if the recommendation to abolish that condition is heeded³⁷). Such a system would at once eliminate many of the problems discussed above. Such a solution would, however, reduce the value and contribution that victims could otherwise contribute to the proceedings. A careful balancing of interests should be made before deciding to adopt such an approach.

2. Issues related to the institutional management of victims' participation

43. **Duplication of costs and resources among victims-related offices.** Unlike other international(ised) tribunals, the ICC has two rather than one office devoted to the protection and representation of the interests of victims. Neither the ICC Statute nor its RPE provide for this possibility. These two offices, and their respective mandates, are the creation of the Regulations.

44. Regulation 81(4)(a) ICC Regulations provides that OPCV is responsible for providing general support and assistance (including legal research and advice) to the LRVs. VPRS's mandate is, under the direction of the Registrar, to inform victims of their rights relating to participation and reparations in the ICC, and to enable them to submit applications to the Court if they wish to do so. It also as-

³⁷ See above, paras. 40-41.

sists victims to obtain legal advice and to organise their legal representation.³⁸ OPCV was established in order to effectively assist victims in exercising their rights, or to represent them before the Chambers as provided for in the ICC Regulations.

45. A question of the legal validity of the creation of these offices by way of the Regulations of the Court and the compatibility of their mandate with the Statute should be raised here. Article 43(6) of the Statute provides that “[t]he Registrar shall set up a Victims and Witnesses Unit within the Registry”. It contains no mention of either OPCV or VPRS. Nor does it provide for any right of representation of victims by the Registrar or one of the Registry’s sub-organs. At first sight, OPCV’s mandate and existence therefore appears to be *ultra vires* of the Statute.
46. Whilst on paper distinct, the mandates of these two offices in fact overlap a great deal insofar as they are intended to care for, protect and defend the rights and entitlements of victims in proceedings.³⁹ It also results in a great deal of confusion as regards their respective functions. In addition, as noted above, victims may and are assigned counsel (and/or OPCV) for the purpose of their representation in the proceedings, so there may be a duplication of function at that level too.⁴⁰
47. The existence of two, rather than one, offices for victims therefore creates a risk of overlap between them and confusion as to their respective roles. From the financial and staffing point of view, the duplication of offices also means that resources allocated to victims’ involvement in the proceedings are allocated to two different offices instead of one.
48. The main argument in support of having two offices is that OPCV is and must be an office independent of the rest of the Registry because it represents victims in the proceedings. That suggestion is based on the fact that OPCV is at times

³⁸ Booklet, “Victims Before the International Criminal Court, A Guide for Participation of Victims in the Proceedings of the Court”, p. 13, available at http://www.vrwg.org/downloads/publications/05/VPRS_Booklet_En.pdf (last visited on 8 April 2014).

³⁹ See VPRS information booklet, “A guide for the participation of victims in the proceedings of the Court”, available at <http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf> (last visited on 8 April 2014); and Women’s Initiatives for Gender Justice report prepared for the Review Committee on the Future Role of the OPCV, available at <http://www.icc-cpi.int/iccdocs/LT/OPCV/WomensInititivesForGenderJusticeOPCV.pdf> (last visited on 8 April 2014), where VPRS and OPCV activities to date indicate that these two offices overlap in their outreach to victims in generating applications for participation in proceedings as well. For example, OPCV provides assistance to victims, assistance and legal support to victims’ legal representatives and may in certain circumstances act directly as legal representative for victims. VPRS acts as first reference point between victims and the Court and deals with the applications by victims to become a victim participant in the proceedings. In their own description of their functions, VPRS states that it ‘also assists victims to obtain legal advice and to organise their legal representation.’ In this regard, VPRS is clearly duplicating the duties of OPCV who is tasked with providing legal assistance to victims.

⁴⁰ The Chamber may request the Registrar to choose a representative or it may appoint the representative on its own motion, ‘when the interest of justice so require,’ including appointing counsel from OPCV. This is provided under Rule 90(2) and 90(3) of the ICC RPE.

given the responsibility of representing the interests of victims in the course of proceedings.⁴¹ As discussed further below, the Expert Group takes that view that this role is undesirable. There is no basis in the Statute that would permit the Registry or one of its sub-organs to act as legal representatives of victims.

49. The involvement of OPCV in the representation of victims is a cause for concern: it raises serious issues of conflicts of interest (or the perception thereof); stretches the resources of the office; and might affect the quality and effectiveness of representation. As such, with that justification gone, there is little merit to the argument that two victims-related offices are necessary at the ICC.

Recommendations:

50. **VPRS and OPCV should be merged into a unified ‘Office for Victims’. Should an amendment of the ICC Regulations be deemed necessary to that effect, the Judges should adopt it accordingly.**⁴² VPRS reviews all applications to ensure that they are complete.⁴³ In this process, VPRS would have obtained important information from potential victims. OPCV is tasked to provide support to external legal representatives of victims, by supplying factual background documents, advice and draft submissions.⁴⁴ This is an unnecessary task for OPCV, because VPRS would have been able to provide such support to the legal representatives, since VPRS gathers all information from potential victims and is the body that is responsible to ensure that all applications are completed.
51. The Statute (and Rules) only provide for the creation of a Victims and Witnesses Unit with a mandate similar in kind and nature to the victims and witnesses units known to other international criminal tribunals.⁴⁵ It makes no provision for a representative-like office within the Registry.

⁴¹ See, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the OPCV’s request to participate in the reparations proceedings, 5 April 2012, para. 8: the OPCV represented victims who had applied to participate in the proceedings, as well as acting on their behalf until the Registrar arranged a legal representative.

⁴² OPCV is created on the basis of Regulation 81(1) of the ICC Regulations; VPRS is created on the basis of Regulation 86(9) of the ICC Regulations.

⁴³ Washington College of Law, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project December 2011, ‘*Ensuring Effective and Efficient Representation of Victims at the International Criminal Court*’, p. 14, available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReport15-VictimRepresentation.pdf> (last visited on 8 April 2014). Regulation 86(4) of the ICC Regulations (Regulations of the Court ICC-BD/01-01-04) provides that the Registrar may request further information from applicants to ensure that all applications are completed before transmitting them to the Chamber.

⁴⁴ Washington College of Law, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project December 2011, ‘*Ensuring Effective and Efficient Representation of Victims at the International Criminal Court*’, p. 21, available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReport15-VictimRepresentation.pdf> (last visited on 8 April 2014). The mandate of OPCV is provided in the ICC’s Report of the Court on legal aid: Legal and financial aspects of funding victims’ legal representation before the Court (ICC-ASP/8/25, 5 October 2009), para. 42, available at <http://www.icc-cpi.int/NR/rdonlyres/B57B2475-5B57-49DD-8037-791E20A7D127/0/ICCASP825ENG.pdf> (last visited on 9 April 2014).

⁴⁵ Rule 34(A) RPE of the ICTY and ICTR both state that the Registrar shall set up a Victims and Witnesses Section to recommend protective measures for victims and witnesses, and to provide counseling and support for them.

52. One of the arguments against merging the two bodies is that OPCV is crucial as a body to represent victim applicants who would otherwise be unrepresented, pending the decision of their application to participate in the proceedings.⁴⁶ This issue can be resolved if a common legal representative for the victims is appointed whenever the need arises. There are several advantages for this. Firstly, OPCV will no longer be representing the victims during the application process. Secondly, the legal representative would have knowledge of the victims' views and interests from an early stage in the proceedings. Once VPRS has determined if all victims are likely to be able to be represented by counsel, one or more representative(s) may be selected. There seems to be no justifiable reason to maintain OPCV as an independent body.
53. Instead, victim-related resources at the Court should be centralised into a single office to avoid duplication of resources and expenses. Other than a useful downsizing of resources, this would also ensure a single line of responsibility in relation to matters pertaining to victims' participation. At the STL, for instance, the Victims' Participation Unit has the responsibility of informing victims of their rights, receiving and verifying applications before transmitting them to the Pre-Trial Judge, and providing administrative and logistical assistance to participating victims. Furthermore, the Unit shall also maintain a list of qualified counsel who could represent victims, provide legal assistance to the LRVs and when necessary, provide training to the LRVs.⁴⁷
54. **The nature, focus and priorities of the proposed 'Office for Victims' should be tailored so as to ensure effective participation of victims in the proceedings.** It is proposed that the mandate of the proposed 'Office for Victims' should adopt and integrate the following principles.
- a) **The mandate of the unified Office for Victims should replicate the responsibilities (currently given to the two different offices) to the new, unified office subject to the qualifications outlined below**
55. The unified Office for Victims should perform the functions now attributed to OPCV and VPRS. This would result in a centralisation of competence and economies of scale regarding institutional expenses associated with the participation of victims.

⁴⁶ Washington College of Law, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project December 2011, '*Ensuring Effective and Efficient Representation of Victims at the International Criminal Court*', p. 5, available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReport15-VictimRepresentation.pdf> (last visited on 8 April 2014).

⁴⁷ Rule 51 STL RPE.

b) The unified Office for Victims should provide effective support for victims and victims' representatives.

56. As per Art 43(6) of the Statute, it should have two major (and primary) functions:

- a) Provide logistical and administrative support to enable victims to claim and establish their entitlement to participate (see below);
- b) Provide support (legal and technical) to victims' representatives in the exercise of their mandate once they have been appointed.

57. Similar to the Office of Public Counsel for the Defence, which seeks to constitute an institutional memory for the Defence, the Office for Victims should provide specialist legal research and other support to the legal representatives for the victims. Regarding that function,⁴⁸ the Office for Victims should effectively act in a way that is not dissimilar in nature to the way in which the Defence Office and the Victims Participation Unit of the STL are operating, providing effective and administrative support to counsel appearing, respectively, for the defendants and victims, while also performing, upon request, discrete legal research and support.⁴⁹

c) The Office for Victims should not be involved in the representations of victims before the Court⁵⁰ – Staff of the Office should not be appointed as legal representatives of victims granted participation status

58. The resources of OPCV are limited and the Office is composed of just four jurists and three counsel.⁵¹ The capacity of OPCV is also a concern, as staff work

⁴⁸ Washington College of Law, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project December 2011, '*Ensuring Effective and Efficient Representation of Victims at the International Criminal Court*', p. 56, available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReport15-VictimRepresentation.pdf> (last visited on 8 April 2014) (citing: International Criminal Court Website, Office of Public Counsel for the Defence, <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/defence/office%20of%20public%20counsel%20for%20the%20defence/the%20office%20of%20public%20counsel%20for%20the%20defence?lan=en-GB>).

⁴⁹ For the functions of the VPU, see Rule 51 STL RPE. For the functions of the Defence Office, see Article 13 STL Statute.

⁵⁰ See REDRESS Report, "Independent Panel of experts report on victim participation at the International Criminal Court," July 2013, para. 98, available at <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf> (last visited on 15 April 2014).

⁵¹ Washington College of Law, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project December 2011, '*Ensuring Effective and Efficient Representation of Victims at the International Criminal Court*', p. 56, available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReport15-VictimRepresentation.pdf> (last visited on 8 April 2014). (Citing: Office of Public Counsel for Victims, *Helping Victims Make Their Voices Heard*, ICC-OPCV-B-001/10_Eng (September 2010), p. 9, available at <http://www.icc-cpi.int/NR/rdonlyres/01A26724-F32B-4BE4-8B02-A65D6151E4AD/282846/LRBookletEng.pdf> (last visited on 9 April 2014)).

on more than one case at a time.⁵² Also, representation by an office of the Registry raises serious concerns regarding the independence of OPCV representatives from the Court itself and/or appearance thereof – as might affect the perception of the overall fairness of proceedings.

59. If OPCV was assigned as legal representative of participating victims, it could also face a dilemma when conflicts arise among the groups of victims and OPCV would be prevented from providing support to the victims that it is not representing in the proceedings.⁵³
60. OPCV should not, therefore, be allowed to represent victims who have been granted participation status.
61. The role of the Office for Victims should be restricted to intervening on issues pertaining to the interests of the participating victims as applicants.⁵⁴ The Office for Victims should only be allowed to represent victim applicants on matters such as protection, redactions of application forms, and issues on dual status of victim/witness.⁵⁵

d) The Office for Victims should play a much greater *outreach* function, in coordination with other organs of the Court.

62. Outreach is essential to managing expectations and ensuring that the victims' communities can experience justice despite geographical and cultural distance.⁵⁶ However, "[v]ictims will only participate if they are informed of and understand

⁵² REDRESS Report, "Independent Panel of experts report on victim participation at the International Criminal Court," July 2013, para. 98, available at <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf> (last visited on 15 April 2014).

⁵³ Washington College of Law, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project December 2011, '*Ensuring Effective and Efficient Representation of Victims at the International Criminal Court*', p. 8, available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReport15-VictimRepresentation.pdf> (last visited on 8 April 2014).

⁵⁴ Washington College of Law, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project December 2011, '*Ensuring Effective and Efficient Representation of Victims at the International Criminal Court*', p. 6, available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReport15-VictimRepresentation.pdf> (last visited on 8 April 2014).

⁵⁵ Washington College of Law, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project December 2011, '*Ensuring Effective and Efficient Representation of Victims at the International Criminal Court*', p. 50, available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReport15-VictimRepresentation.pdf> (last visited on 8 April 2014). (Citing: *The Prosecutor v. Jean-Pierre Bemba Gombo*, Observations on Legal Representation of Unrepresented Applicants, ICC-01/05-01/08-547, (Office of Public Counsel for Victims, 9 October 2009), para. 10.)

⁵⁶ FIDH, "Enhancing Victims' Rights Before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court," p. 9, available at http://fidh.org/IMG/pdf/fidh_victimrights_621a_nov2013_ld.pdf (last visited on 15 April 2014).

their rights to participate and seek reparation before the ICC.”⁵⁷ As pointed out in the Report of the Court on the strategy in relation to victims, “if the rights of victims are to be effective, victims must first be aware of their right to participate so that they can take informed decisions about whether and how to exercise it, and must be assisted to apply to participate throughout if they wish to do so.”⁵⁸ Out of 2,875 participants of a survey conducted in 2007, only 2% of those who knew about the ICC (60%) knew how to access the ICC.⁵⁹ This shows that the outreach program at the ICC might not be achieving all of its potential.

63. In December 2010, another survey was published. Out of 2,498 participants, only 59% had heard of the ICC and of these, only 6% ranked their knowledge of the ICC as ‘very good’.⁶⁰ Of 16% who stated that they knew where the ICC was located, only 56% answered correctly. This shows that the awareness level was still, in 2010, very low. Furthermore, there is little evidence (and no known statistical support for the suggestion) that ICC proceedings have had a demonstrable positive effect on those communities.⁶¹

⁵⁷ REDRESS Report, “Independent Panel of experts report on victim participation at the International Criminal Court,” July 2013, para. 8, available at <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf> (last visited on 15 April 2014).

⁵⁸ ICC ASP, Report of the Court on the strategy in relation to victims, ICC-ASP/8/45, 10 November 2009, para. 46, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf (last visited on 15 April 2014). See also, ICC ASP, Court’s Revised strategy in relation to victims, ICC-ASP/11/38, 5 November 2012, para. 18, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf (last visited on 15 April 2014).

⁵⁹ P. Pham, P. Vinck, E. Stover, A. Moss, M. Wierde and R. Bailey, ‘*When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda*’, December 2007, p. 47, available at <http://hhi.harvard.edu/sites/default/files/publications/publications%20-%20vulnerable%20-%20when%20the%20war%20ends.pdf> (last visited on 8 April 2014).

⁶⁰ P. Pham, P. Vinck, ‘*Transition to Peace: A Population-Based Survey on Attitudes About Social Reconstruction and Justice in Northern Uganda*’, December 2010, p. 42, available at http://www.law.berkeley.edu/HRCweb/pdfs/HRC_Uga2010final_web.pdf (last visited on 8 April 2014).

⁶¹ Anecdotal indications suggest that even in locations where the ICC has been active, there is little knowledge and understanding of its activities. Furthermore, there is very little evidential indication that, besides a limited awareness of the functioning of the Court in those places, the Court has otherwise positively impacted upon these places. For example, a survey conducted in Northern Uganda in 2007 shows that, out of 2,875 participants, only 28.7% chose the ICC as the most appropriate mechanism to deal with abuses in Northern Uganda, and of those who knew about the ICC (60%), a total of 44% preferred the ICC to stop its arrest warrants (P. Pham, P. Vinck, E. Stover and A. Moss, M. Wierde and R. Bailey, ‘*When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda*’, December 2007, pp. 36, 41, available at <http://hhi.harvard.edu/sites/default/files/publications/publications%20-%20vulnerable%20-%20when%20the%20war%20ends.pdf> (last visited on 8 April 2014)). A survey was conducted in 2008 and the report shows that out of 2,620 interviews that were conducted in 200 villages, only 12.1% knew how to access the ICC. Of those who knew about the ICC (27%), only 15% knew about the Trust Fund for Victims (P. Vinck, P. Pham, S. Baldo and R. Shigekane, ‘*Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo*’, August 2008, p. 47, available at <http://hhi.harvard.edu/sites/default/files/publications/publications%20-%20vulnerable%20-%20living%20with%20fear.pdf> (last visited on 8 April 2014)).

64. In that context, the Office for Victims should coordinate its outreach efforts with the other sections and organs of the Court that are engaged in outreach efforts on behalf of the Court.⁶²
65. **The Office for Victims should be active in providing information to affected communities and applicants as regards the rights of victims to participate in the proceedings.**⁶³ Victims should not be denied the ability to participate in proceedings merely because they are unfamiliar with the Court or because the requirements of form that they must meet to be granted that right are too demanding. In that context, the Office for Victims should play an important role in connecting with relevant victims communities so as to: (a) provide them with relevant information about the Court and the scope of victims' right to participate, and (b) provide them with the requisite information and assistance in filling in application forms.
66. If necessary, the Office for Victims should re-draft and simplify the model application forms and make them more accessible to applicants.⁶⁴
67. As noted by REDRESS, the relevant organs should coordinate with each other to overcome time constraints.⁶⁵ **It is therefore recommended that Chambers coordinate with the Office for Victims regarding deadlines for submissions of applications by victims.** Furthermore, as timeframes would only work efficiently if outreach were conducted in advance of the deadlines, **outreach in relation to proceedings should commence at the earliest stage possible to ensure that victims are well informed and are ready to participate when the Chamber sets a deadline.**⁶⁶

⁶² For example, ICTY's Outreach organised a visit to the ICTY for seven Bosnian journalists (12-16 December 2011), where they learned about the roles of the Prosecution and Defence at the ICTY. The group then met with the Prosecutor and attended hearings. On 25 November 2011, Outreach at the ICTY hosted a group of mid-level diplomats who heard presentations from both the Defence and the Prosecution, and attended a trial hearing (ICTY Outreach Activities - 2011, available at <http://www.icty.org/sid/11213> (last visited on 8 April 2014)). See also, on ways to strengthen outreach to victims, REDRESS Report, "The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future, October 2012, pp. 24-26, available at http://www.redress.org/downloads/publications/121030participation_report.pdf (last visited on 15 April 2014).

⁶³ See REDRESS Report, "Independent Panel of experts report on victim participation at the International Criminal Court," July 2013, para. 8, available at <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf> (last visited on 15 April 2014).

⁶⁴ M. Pena, 'Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead', 16 ILSA J. Int'l & Comp. L. 497 2009-2010, p. 512.

⁶⁵ REDRESS Report, "The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future, October 2012, p. 28, available at http://www.redress.org/downloads/publications/121030participation_report.pdf (last visited on 15 April 2014).

⁶⁶ REDRESS Report, "The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future, October 2012, p. 28, available at http://www.redress.org/downloads/publications/121030participation_report.pdf (last visited on 15 April 2014).

68. **The Office for Victims should be tasked to conduct satisfaction surveys in affected communities.** Whilst the Court itself, in the exercise of its judicial responsibilities, cannot seek to satisfy the demands of victims, it should ensure that its decisions are fully understood by affected communities and that the judicial exercise remains connected to the communities that it affects most directly.
69. In that context, the Office for Victims should conduct satisfaction surveys to verify and ensure that affected communities are provided with relevant information regarding the Court and its proceedings and that they are given an opportunity to give an informed view of the performance of the Court in relation to these communities.
70. **The process of individualised victims' application should be reformed so as to avoid wasting of time and resources by all involved. The Office for Victims should play a much greater role in reviewing and analysing victims' applications to participate in the proceedings.** Under the current regime, a great deal of resources is expended by the Prosecution, the Defence and Chambers to decide on the merit or otherwise of victims' individual applications to participate.⁶⁷ Each individual application must be prepared, translated, redacted, disclosed and then individually reviewed by each party and ultimately subjected to adjudication by the relevant Trial Chamber (and, ultimately, by the Appeals Chamber itself at a later stage). Resources expended by the Court in that regard are, therefore, quite extraordinary and wasteful. It should also be noted that the current system is burdensome for victim applicants, as they are requested to provide "an array of personal information, including information to prove their identity, information on their experience of crimes under the jurisdiction of the Court and how they suffered harm, even though they will invariably be heard through a legal representative which represents their interests collectively with the interests of other victims also being represented."⁶⁸
71. Two major changes could save resources for all and cut the cost of victims' participation dramatically:
- a) Reform the current system of victims' application;
 - b) Give greater responsibility to the Office for Victims to deal with the application process.

⁶⁷ See, for example, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Fourth Decision on Victims' Participation, 12 December 2008, paras. 29, 73, 78, whereby the single Judge had to review each and every application.

⁶⁸ REDRESS Report, "The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future, October 2012, p. 16, available at http://www.redress.org/downloads/publications/121030participation_report.pdf (last visited on 15 April 2014); see also, on p. 18: 'As a result of these challenges, and the inability of the Registry to swiftly process the applications, years have sometimes gone by before applications have been fully considered and approved.'

3. Reforming the current system of victims applications

72. The system of individual applications as currently enforced is extraordinarily wasteful and “would only be sustainable if the Registry, Chambers, parties and participants are provided with sufficient resources to review and process the applications” as the number of applications increases over time.⁶⁹ With the increasing number of applications, the current application system places a strain on the Registry which eventually affects the ability of victims to participate.⁷⁰ In the Bemba case, for instance, the Prosecution, the Defence, the victims’ representatives and Chambers have had to review, evaluate and make submissions in relation to more than 5,000 individual applications.⁷¹ This represents hundreds and maybe thousands of hours of work for all those involved (Chambers, Prosecution, Defence, Registry, victims’ representatives).⁷²

⁶⁹ ICC ASP, “Report of the Court on the review of the system for victims to apply to participate in proceedings,” ICC-ASP/11/22, 5 November 2012, para. 28, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-22-ENG.pdf (last visited on 15 April 2014).

⁷⁰ See REDRESS Report, “The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future, October 2012, pp. 18-22, available at http://www.redress.org/downloads/publications/121030participation_report.pdf (last visited on 16 April 2014).

⁷¹ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08: Decision on 799 applications by victims to participate in the proceedings, 5 November 2012; Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings, 19 July 2012; Decision on 1400 applications by victims to participate in the proceedings, 21 May 2012; Decision on 471 applications by victims to participate in the proceedings, 9 March 2012; Decision on 401 applications by victims to participate in the proceedings and setting a final deadline for the submission of new victims’ applications to the Registry, 8 July 2011; Decision on 270 applications by victims to participate in the proceedings, 25 October 2011; Decision on 418 applications by victims to participate in the proceedings, 15 December 2011; Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 30 June 2010; Decision on 772 applications by victims to participate in the proceedings, 18 November 2010; Decision on 653 applications by victims to participate in the proceedings, 23 December 2010.

⁷² For example, in June 2010, the LRVs of victims VPRS 3 and VPRS 6 submitted a request to the Chamber to review the Prosecutor’s decision not to proceed against Jean-Pierre Bemba with respect to crimes allegedly committed in the province of Ituri, the Democratic Republic of the Congo (*Demande du représentant légal de VPRS 3 et 6 aux fins de mise en cause de Monsieur Jean-Pierre Bemba en sa qualité de chef militaire au sens de l’article 28-a du Statut pour les crimes dont ses troupes sont présumées coupables en Ituri*, ICC-01/04-564, 28 June 2010). The Office of Public Counsel for the Defence filed its response on 15 July 2010 (Response of the Office of Public Counsel for the Defence to the “*Demande du représentant légal de VPRS 3 et 6 aux fins de mise en cause de Monsieur Jean-Pierre Bemba en sa qualité de chef militaire au sens de l’article 28-a du Statut pour les crimes dont ses troupes sont présumées coupables en Ituri*”, ICC-01/04-566), and the Prosecution filed its observations on 29 September 2010 (Prosecution’s Observations to the “*Demande du représentant légal de VPRS 3 et 6 aux fins de mise en cause de Monsieur Jean-Pierre Bemba en sa qualité de chef militaire au sens de l’article 28-a du Statut pour les crimes dont ses troupes sont présumées coupables en Ituri*”, ICC-01/04-581). The Pre-Trial Chamber decided on the request on 25 October 2010 (Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed, ICC-01/04-582). The entire process took almost four months. See also, on the strain placed on the parties and the Chambers, REDRESS Report, “The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future, October 2012, pp. 22-23, available at http://www.redress.org/downloads/publications/121030participation_report.pdf (last visited on 15 April 2014).

73. The majority of the submissions to the ICC have been related to victim participation, as opposed to the merits of the case.⁷³ From 2005 until the end of August 2012, the ICC received a total of 12,641 applications from persons who wanted to participate in proceedings.⁷⁴ As of August 2012, less than half of the total amount of applications was allowed to participate.⁷⁵
74. Delays and resource-intensive efforts associated with this process begin even before the application reaches the Chamber, because the processing of the application prior to submission to the Chamber could take up to two years.⁷⁶ This raises the concern that too many financial resources and too much time are being consumed to review and approve or reject these applications.

Recommendation:

75. The most effective way in which saving of time and resources could be achieved would be to abolish individualised victims applications during proceedings before the reparation stage. This could be replaced by a much simpler system of collective registration,⁷⁷ which would be handled by the Office for Victims (see below) and which would not require individualised handling of every claim by parties and Chambers. Before reparation, there is little value in having victims' claims individualised and there are many practical reasons (see above) for trying to reduce the time/resources involved in a process of individualisation.⁷⁸
76. Such a system would also save resources at the appellate level, where the appeal process is being delayed and made overly cumbersome by the fact that the Appeals Chamber must rule on each individual victim's application (although it may decide to do so in one decision pursuant to Rule 89(4)).

⁷³ S. T. Johnson, 'Neither Victims nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to Fair Trial at the International Criminal Court', 6 ILSA J. Int'l & Comp. L. 489 2009-2010, p. 495.

⁷⁴ Women's Initiatives for Gender Justice, "Gender Report Card on the International Criminal Court 2012", p. 262, available at <http://www.iccwomen.org/documents/Gender-Report-Card-on-the-International-Criminal-Court-2012.pdf> (last visited on 8 April 2014).

⁷⁵ Women's Initiatives for Gender Justice, "Gender Report Card on the International Criminal Court 2012", p. 262, available at <http://www.iccwomen.org/documents/Gender-Report-Card-on-the-International-Criminal-Court-2012.pdf> (last visited on 8 April 2014).

⁷⁶ B. McAsey, 'Victim Participation at the International Criminal Court and its Impact on Procedural Fairness', 18 Austl. Int'l L.J. 105 2011, p.122. (Citing: C. H. Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' 6 Nw.J. Int'l Hum. Rts. 459 2008, p. 460.

⁷⁷ See ICC ASP, "Report of the Court on the review of the system for victims to apply to participate in proceedings," ICC-ASP/11/22, 5 November 2012, para. 35, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-22-ENG.pdf (last visited on 15 April 2014) ('As this option involves somewhat less paperwork, some time may be saved in processing and considering applications by the Registry, parties and Chambers').

⁷⁸ See *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on victims' representation and participation, 3 October 2012, paras. 25, 49, 50; see also paras. 56-58, where only applications by victims wishing to present their views and concerns individually would be observed by the parties and determined by the Chamber.

77. As suggested below, the process of registration could be handled by the Office for Victims.
78. The practical way suggested above to simplify the process of application and review may however have to be qualified where a victim wishes to exercise substantive rights (for example, adduce evidence or testify). In such a case, he or she would have to provide an individual application at that stage with a view to verifying in detail that all individual requirements are met.

III. Greater responsibility for the Office for Victims in relation to the application process

79. The ICC's existing victims' offices play little or no role in streamlining victims' applications before they go to the parties and Chambers. The Office for Victims should play a much greater part in making the process less resource-intensive for parties in the proceedings and for Chambers. This would result in a significant saving of resources.
80. The Office for Victims should therefore be made competent to record, maintain and register applications (see above).
81. As a preliminary condition, effectiveness of participation by victims must mean that the forms filed by victims must have been competently and reliably recorded. This is often not the case, which results in applications being rejected or in a wasteful 'back and forth' with victims. Improperly filed forms thus cause delays and duplications. Errors and discrepancies in the forms may also cause the credit of victim-witnesses to be severely challenged. To ensure competency and consistency in this process, it is recommended that the responsibility to assist victims filing these forms should not be delegated to others but that, instead, the new joint Office for Victims should be responsible for that process with a view to ensuring that all forms meet all the necessary formal and substantive prerequisites.
82. For the process not to be rendered unworkable by the sheer volume of victims' applications, the proposed Office for Victims should ensure that only applications that meet all requirements of form and substance are transmitted. It should strictly and objectively police the requirement that applications indeed relate to the underlying facts of that case. For example, as noted above, in *Bemba*, 5229 victims were allowed to participate in the proceedings.⁷⁹ Applications that were communicated to the parties that claimed participatory status on the basis of crimes allegedly committed in areas of the Central African Republic could fall outside the scope of the charges. If these applications were processed by OPCV despite their being irrelevant to the case, the Defence would then be required to expend valuable pre-trial resources on reviewing and providing submissions

⁷⁹ See Press Release, "Central African Republic: VPRS training session for local intermediaries assisting victims", 21 November 2012, available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr855-1.aspx (last visited on 31 March 2014).

thereon. Information pertaining to such issues should be made publically available by the Registry.

83. In relation to each registration, the Office for Victims would then be responsible for conducting an individual review of each application and for:
- a) producing a detailed account of steps taken to evaluate the validity of each application. In particular, it should carefully police the requirement that applications indeed pertain to the case in question, i.e., that they relate to the underlying facts of that case. In *Bemba*, for instance, applications were communicated that pertained to crimes allegedly committed in an area of the Central African Republic that was not relevant to the charges;
 - b) producing an individual recommendation regarding the merit of each application and whether it passes the requisite threshold;
 - c) identifying any residual issue (of law or fact) raised by individual applications;
 - d) on that basis, preparing a summary report of its findings. This shall fulfill the requirements of Rule 89(1).

Both the Prosecutor and Defence would then be invited to identify any error and/or shortcomings in the evaluation conducted by the Office for Victims. Any such challenge, and only in such cases, would be subject to a strict and narrow review by the Court on grounds of: (a) unreasonableness; or (b) clear error of law. The parties would not be required to review individual applications, but would only be reviewing (and, as the case may be, challenging) the summary report. The issue of and potential challenge to individual applications would only arise if and when the accused is convicted and the matter proceeds to the reparation stage.

84. The process time would be significantly reduced and the parties and Chambers would save a great amount of resources. The Office for Victims would thus contribute to the overall saving of time and resources involved in this matter rather than being a mere conduit for victims' applications.

Recommendations:

85. A system of registration should replace the current system of individual applications. The issue of individualisation of applications should only be dealt with at the reparation stage, if that stage is reached.
86. The Office for Victims should be tasked with the practical and logistical responsibility for recording individual applications, conducting an **individual *prima facie* evaluation of these and preparing a summary report for Chambers and the parties.** The primary responsibility for assisting applicants to file their applications should be with the Office for Victims. It would be its responsibility to provide advice and reasonable assistance to applicants to register. As noted above, it would also be its primary responsibility to conduct a summary review

of each application. If necessary, the Office for Victims should interview applicants and/or conduct any follow-up evaluation of the validity of the application.

87. It should be made clear, however, that the ‘evidential’ responsibility or the burden of establishing entitlement to participate is and remains with applicants. In such a way, the Office for Victims should be expected only to aid or help applicants, without having the responsibility of making a case on their behalf. That responsibility, and the responsibility to provide all necessary information must at all times remain with the applicants themselves. Where this has not occurred, requests for registration should be rejected.
88. Furthermore, the Office for Victims could be directed to adopt a meaningful standard (of proof) when it comes to these applications, so as to eliminate up-front applications that are unlikely to warrant participation and reparation. The following standard should be considered:

“Applicants bear the onus of establishing their entitlement to participate. They must establish, on the balance of probabilities, that their claim of harm or injury and entitlement to relief is demonstrated by the information provided to the Office for Victims. Victims have no right or entitlement to appeal against or challenge the determination made by the Office for Victims regarding their entitlement to participate in the proceedings.”

89. The above suggestions could be achieved through an amendment of the ICC Regulations. Specific requests that a particular Chamber might have in relation to the content of the summary report could be provided by order of that Chamber. The Registry should be asked by States Parties to take all necessary steps to put in place the necessary re-structuring of this Office for Victims.

DEFENCE BEFORE THE ICC AND ISSUES OF EFFECTIVENESS

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I. General Considerations

1. Defence teams before the ICC have had to labour under difficult circumstances. They have also, at times, had to travel unchartered territory. In fulfilling their duty, they have done much to contribute to the appearance of fairness of ICC proceedings. Ultimately, the legitimacy (in the affected countries and beyond those) and the quality of the judicial process depend to a considerable extent on the quality and effectiveness of the Defence. The quality of representation before the Court is also vital to ensuring that the ICC Chambers receive all relevant assistance that they are entitled to expect from the parties. A competent Defence would also greatly contribute to bolstering the quality and effectiveness of the process. Better representation is also likely to yield positive returns insofar as competent and experienced counsel will only seek to litigate those issues that are core to their case – thereby narrowing the scope of necessary litigation, shortening proceedings and reducing the overall cost of the trial or appeal process. In other words, quality representation of the accused can make a significant contribution not just to the effectiveness, but also to the legitimacy of the Court and the overall quality of its proceedings.
2. Institutionally, however, the place of the Defence before the ICC has been relatively secondary, thereby contributing to a sense of alienation from the Court and affecting the appearance of fairness of proceedings. This might be explained by the absence of Defence representation during the process of creating the ICC and by the fact that key decision-making mechanisms within the Court have been set up without much apparent consideration having been given to the need to represent Defence interests.¹
3. The absence of Defence representation within the ICC has in turn meant that key ICC policies and administrative decisions were taken by persons without any experience in Defence matters, and without taking into consideration the particularities of Defence work.² Greater efforts should be made to give a place to the Defence and Defence concerns in the way the ICC functions. Lack of

¹ For example, the Coordination Council is composed of representatives from the Presidency, Prosecution, and the Registry, but not the Defence (Regulation 3 of the ICC Regulations). The Advisory Committee on Legal Texts includes a representative of counsel, who is tasked with representing the interests of all counsel on the list, but no representative for the interests of the Defence or those of the victims (Regulation 4(1) of the ICC Regulations).

² For example, the disclosure system was designed with the premise that those using it would be physically based at the Court. Key functionalities (such as the upload of evidence) can only be used from computers within the premises of the ICC, which means that Defence teams who are not based in The Hague during pre-trial phases cannot perform this function. Moreover, although the Defence has remote access to the disclosure system, it was decided by the Registry and the Prosecution during the early years of the ICC that the Defence should not have access to the ICC server. Again, a practical consequence of this decision is that evidence cannot be disclosed ‘online’, as is the case at the ICTY, but must be disclosed physically. This means that someone from a given Defence team has to be present in The Hague in order to meet the Prosecution, and physically upload the evidence onto the Defence server. Both of these practical issues have significant consequences for the legal aid scheme (as the Registry must cover the costs of a Defence team member flying to The Hague for the sole purpose of uploading disclosure), and efficiencies, due to the duplicative effort involved in uploading the same documents into different servers.

effective representation as well as a perception of the marginalisation of the Defence from the ICC process could negatively impact on the appearance of legitimacy and impartiality of the Court. It could also result in the best professionals opting not to practice before such a Court.

II. The current structure of the OPCD / CSS should be re-organised to ensure greater effectiveness and quality of representation and to reduce costs associated with legal aid practices

4. The Defence structure at the ICC is divided between a Legal Aid Office (CSS) and a Legal Advisory Unit (OPCD). This results in duplication of 'Defence' staff within the Court. It also means, as pointed out above, that those responsible for administrating resources of Defence teams, i.e. CSS, might have no or limited experience working with or for Defence teams. Consequently, resources are not treated as an element of an 'effective representation' strategy of OPCD, but administrated as an *ex post* and separate administrative matter by CSS. Resources need to be closely linked and associated with effective preparations by Defence teams.
5. These shortcomings could be resolved by setting up an independent Defence Office along the lines of the model at the Special Tribunal for Lebanon. Such an office would centralise and include both the Legal Aid Unit (CSS) and the Legal Advisory Unit (OPCD) within its ambit. The new structure should ideally be placed under the authority of an independent Head of the Defence Office (as is the case before the STL). Pending any necessary regulatory or statutory amendment to achieve that desirable model, a combined (CSS-OPCD) office should be integrated under the authority of the Registrar but functions independently of him in regard to the performance of its functions (subject, of course, to the necessary administrative and fiscal oversight).
6. The work of the Legal Advisory Unit would have to be performed independently of the Legal Aid Unit. The Legal Advisory Unit should, however, advise the Legal Aid Unit in connection with the practical and legal requirements of devising a legal aid policy that aims to achieve effective representation. Close coordination and meetings between the two units would also ensure that the persons tasked with administering legal aid are familiar with the issues faced by the Defence in a particular case and the volume and complexity of litigation.³
7. Since the Legal Aid Unit would be based within the Defence Office, legal aid and assignment issues for the Defence should be addressed separately from those concerning the victims, and in accordance with different criteria. It would therefore be appropriate and advisable to administer separate lists for victims and Defence counsel, although it would be possible for counsel to be included on both if they meet the criteria for doing so.

³ This was indeed how the legal aid policy at the Special Tribunal for Lebanon was conceived.

8. Legal aid issues pertaining to the Defence should be dealt with separately from those affecting and pertaining to victims' representation. The tendency exhibited by the Court to address victims' and Defence issues under the same umbrella⁴ fails to address the different roles played by the two in the proceedings. In particular, the Defence are an obligatory party to the proceedings whereas victims are participants who elect to participate. Furthermore, only the accused is on trial and risks long term imprisonment so that the quality and effectiveness of his representation is critical to the overall fairness of the proceedings. In that context, the fact that the legal aid scheme establishes the same criteria and payment rates for victims' teams as for the Defence, even though they have widely different rights and responsibilities appears to be at odds with the role and function of the Defence in a criminal trial. This automatic conflation of victim and Defence interests appears to have in fact proved detrimental to the Defence since it has resulted in much higher overall costs for legal aid,⁵ which in turn, has attracted greater scrutiny and requests by the ASP for the ICC to reduce legal aid. Such requests have been made, even though the amount allocated to the Defence might not in itself be unreasonable or disproportionate, particularly when assessed in connection with the need for the Defence to exercise its procedural rights before the Court. Issues of effectiveness and cost affecting Defence or victims representation should thus be dealt with separately and independently in light of the specificity pertaining to each of them. The needs and resources necessary and justified for each should be dealt with individually and in light of their respective role so as to ensure that they each play a meaningful part in the proceedings commensurate with their role and responsibilities.

9. In setting up a new, joint Defence Office, the Registrar (or States Parties, if the Statute is amended to create an independent Defence Office) should ensure that it is given a place commensurate with the importance of its mandate and one which will ensure that it will make a genuine contribution to the effective Defence and representation of Defence interests. The chances of this happening would be greatly increased if, as part of its mandate, the Defence Office had:
 - a) the ability to participate in the Coordination Council, which is responsible for discussing and deciding on administrative issues (particularly as many of these administrative decisions can have a direct impact on the substantive rights of the Defence);

⁴ For example, the creation of one Legal Aid Unit for both Defence and victims and the submission of one legal aid budget for both, the establishment of one list for both Legal Representatives for Victims and Defence Counsel, the holding of joint training for victims and Defence, and the initiative to finalise a strategic plan for Counsel rather than one for the Defence, even though there is a Strategic Plan for Victims.

⁵ For several years, the Registry submitted one budget for legal aid which failed to break down the amounts allocated to victims and compared to the Defence. For the Defence budget, the Registry also does not distinguish between costs which might be generated by the Prosecution and which do not benefit the Defence. For example, the Registry funds duty counsel, who are required to represent Prosecution witnesses, who may be suspects.

- b) the right to be a member of the Advisory Committee on Legal Texts and to possess the equivalent participatory powers of the Prosecutor in this body;
 - c) the power to negotiate and conclude memoranda of understanding or cooperation agreements with external entities, on issues of concern to the Defence;⁶
 - d) the right of audience before the ASP and the right to engage in a discussion with States directly as regards issues affecting the work of the Defence. In the alternative, a representative of the Defence Office could appear alongside the Registrar with a view to addressing any Defence-related issues or questions.
10. The quality and experience of the staff hired would also be essential to the effectiveness and usefulness of the work of the Defence Office. Staff should only be employed in principle if they have relevant experience in managing complex criminal cases.

Recommendations:

11. Based on the issues identified above, the following recommendations should be taken into consideration:
- a) With a view to centralising and saving resources allocated to Defence issues, the CSS and the OPCD should be joined into a single “Defence Office”. The mandate and powers of such an office should be tailored in such a way that it ensures that such an office is empowered to make a genuine contribution to the quality and effectiveness of the Defence before the ICC.
 - b) Staff hired and assigned to work in the Defence Office should have demonstrated experience as Defence counsel or as members of Defence teams or other practice-based experience enabling them to have a clear professional understanding of the needs and functioning of a Defence team.
 - c) Legal aid and assignment issues for the Defence should be addressed separately from those concerning victims and their representatives.
 - d) Separate lists for victims and Defence counsel should be administered.
 - e) States should consider creating an independent Defence Office as a separate organ of the Court with its own Head and with a mandate similar in kind and nature to the mandate of the Defence Office before the Special

⁶ Again, the approach of the Defence Office at the STL provides an illustration. The DO – which, at the STL, is an organ of the Tribunal – has entered into a number of Memoranda of Understanding with, *inter alia*, the Lebanese Government in matters of cooperation and assistance and with the Netherlands Forensic Institute.

Tribunal for Lebanon. This would involve adopting a provision similar to Rule 57(G) and (I) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon,⁷ which enables the Head of the Defence Office to play an active role in monitoring effective representation, and to take measures such as withholding fees or initiating disciplinary action. Whilst guaranteeing the confidentiality of Defence preparation, the Defence Office should actively monitor the performance of Defence teams and have at its disposal regulatory and administrative powers to ensure that it is complying with its work plan and the general demands of trial preparation.

III. The Court should ensure that defendants are represented by competent counsel and that effective representation is guaranteed

12. To improve upon the effectiveness of the Defence before the ICC, two sets of measures should be taken: the first pertains to the selection and appointment of counsel; the second has to do with the necessary oversight and supervision of Defence performance. These will be discussed in turn.
13. It should be noted at this juncture that similar demands upon the quality and qualification of Defence representatives as apply to the Defence should also apply to counsel assigned to represent victims in the proceedings.⁸

⁷ Rule 57 STL Rules: “[...]”

(G) The Head of Defence Office shall, in the interests of justice, ensure that the representation of suspects and accused meets internationally recognised standards of practice and is consistent with the provisions of the Statute, the Rules, the Code of Professional Conduct for Counsel, the Directive on the Appointment and Assignment of Defence Counsel and other relevant provisions. To this end, subject to lawyer-client privilege and confidentiality, where valid reasons exist to do so, he may: [amended 20 February 2013]

(i) monitor the performance and work of counsel and the persons assisting them;

(ii) request all necessary information in order to exercise the function referred to in (i);

(iii) ensure that the appropriate advice is given to the lead counsel as would contribute to an effective defence of the suspect or accused; and

(iv) in exceptional circumstances and after considering the opinion of the lead counsel, invite the suspect or accused to provide his views on the adequacy and effectiveness of his legal representation and the performance of the Defence counsel. Any statement made by the suspect or the accused in this regard shall be recorded in writing and kept by the Head of Defence Office. A copy of the record shall be provided to the suspect or accused and his counsel. [amended 8 February 2012]

(H) If the Head of Defence Office is not satisfied that the representation of a suspect or accused meets the standards set forth in Rule 58(B), he may, in the interests of justice and after giving counsel an opportunity to be heard:

(i) if Defence counsel has been assigned, withhold the payment of the fees of the assigned counsel or part thereof until there is a satisfactory resolution of the matter. Such decision may be reviewed by the President; [amended 8 February 2012]

(ii) make representations to a Judge or Chamber for the removal of counsel or for other measures intended to ensure the effective representation of the suspect or accused; and (amended 20 February 2013)

(iii) where appropriate, initiate disciplinary proceedings against the counsel concerned.”

⁸ See *Victim’s Participation before the ICC*, para. 36.

14. There is a direct nexus between the existence of mechanisms for ensuring quality representation and vetting effective representation, and the efficiency and integrity of the proceedings. At the ICTY, the early proceedings were rife with incidents of misconduct and allegations of misconduct, in particular due to the absence of an operational disciplinary regime for counsel, and the poor quality of representation.⁹ Inexperienced or inept counsel are more likely to ‘cut corners’ in order to advance their case or to be vulnerable to pressure from their client to pursue improper objectives. There was a marked decrease in such allegations when the Registry operationalised the disciplinary regime, set up the Association for Defence Counsel (which has a vested interest in ensuring the integrity of the profession) and made a more concerted effort to vet the appointment of counsel to defendants.
15. The quality of representation is in turn conditioned on a mechanism being in place that ensures that entrants on the list for counsel have been adequately and competently vetted. For that purpose, the ICC Registry should adopt a proactive attitude towards vetting the quality and effectiveness of counsel. In particular, and in addition to the criteria already provided in the Rules and Regulations,¹⁰ it should look at the following criteria when deciding whether to grant a candidate admission to counsel’s list:
 - a) demonstrated competence and professional proficiency in complex criminal litigations;
 - b) demonstrated familiarity with the international practice of law;
 - c) prior practice in international criminal tribunals;
 - d) adequate training (see below).
16. The Defence Office should take active steps to verify the record and experience of the candidate, including, where necessary, by making formal requests for information from relevant peers.
17. The next link in a chain of effective representation is to ensure that the accused makes an informed choice about his counsel. Before the ICC, defendants are simply provided with a list containing hundreds of names, with brief biographical details of counsel available for selection. In those circumstances and considering that the accused will be unfamiliar with ICC proceedings, it is

⁹ See, for example, Defence counsel Deyan Brashich in *Krajišnik*, who was suspended by the New York State Supreme Court for professional misconduct and charging an illegal or excessive fee (Institute for War and Peace Reporting, “Krajišnik Trial Fiasco Spotlights Questionable Defense Practices”, 14 March 2003, available at <http://iwpr.net/sr/report-news/krajisnik-trial-fiasco-spotlights-questionable-defense-practices> (last visited on 5 April 2014)). See also, in *Žigić*, where the Registrar of the ICTY decided to withdraw the counsel, co-counsel, and legal assistants previously assigned to the defence of the accused Zoran Žigić (Press Release, International Criminal Tribunal for the Former Yugoslavia, “Legal Aid to Accused Zoran Zigic withdrawn following the completion of a financial investigation by the Registry”, 8 July 2002, available at <http://www.icty.org/sid/8086> (last visited on 5 April 2014)).

¹⁰ Rule 22 ICC RPE; Regulation 67 ICC Regulations.

effectively impossible for a defendant to make an expeditious and informed choice on the basis of such a list. Fellow defendants might become the sole or primary source of advice for a newly-arrived defendant. As a result, defendants are more likely to choose counsel based on entirely arbitrary factors, or through uninformed word of mouth in the detention unit. This can result in defendants electing to choose the same counsel (which triggers issues concerning conflict of interest and the availability of the counsel in question to provide effective representation),¹¹ or making uneducated decisions about their choice. In any case, failing to provide defendants with adequate support to make an informed decision regarding their choice of counsel is not a practical way to ensure the selection of a competent/effective counsel and increases the risk that defendants might later wish to replace their counsel once it becomes apparent that the counsel does not possess the skills, dedication or availability to properly defend the particular case. It will also contribute most negatively to the overall quality and effectiveness of proceedings. In particular, the defendant should have a clear understanding of the choices relevant to guaranteeing him an effective defence, in particular:

- a) necessity for him/her to make an informed choice as regard his/her selection of counsel;
 - b) his or her ability to understand the nature of proceedings and associated necessary preparations involved (for example, issues of language, familiarity with particular legal concepts/domain, ability and experience in relation to investigative work, prior practice in hybrid legal systems, ability to manage and coordinate the work of Defence teams, etc);
 - c) his or her instructions to counsel regarding the composition of the team;
 - d) the extent to which he or she may rely on existing resources at his disposal through the Defence Office (or otherwise through the Registry office).
18. Concretely, it is recommended that a manual for defendants should be prepared in clear, non-legalistic and simple language, which should be translated into the language of the defendants. This manual could be prepared by independent Defence experts, and could set out objective advice concerning, *inter alia*:
- a) the particular requirements of international criminal proceedings, and how these requirements impact on the qualities that a defendant might be looking for in counsel;
 - b) considerations which are relevant to the composition of a Defence team, in particular, the need to cover the bases in terms of the skills required for the case (as concerns experience and linguistic skills);

¹¹ For example, one counsel is appearing in two ICC cases. After the non-confirmation of charges against his (then) client, counsel was hired by another defendant in the same case.

- c) concretely, what each phase of the proceedings means for the Defence, and the type of activities which are generally performed during these phases;
 - d) a template check list of questions for the defendant to put to his Defence team at the different phases of the proceedings, so that the defendant is empowered to participate in his or her Defence.
19. In addition to providing the defendant with such a manual, an effective way to facilitate the ability of suspects to make an informed decision as to their choice of counsel would be to direct the Defence Office to meet with suspects in order to provide them with competent and impartial advice as to the particular nature of international criminal proceedings, and any specific factual or legal issues in their case which could be relevant to their choice of counsel. The Defence Office could also assist them in identifying counsel on the list who might meet certain criteria that are important to the suspect. At the same time, there should be an absolute prohibition as concerns the suspect electing to choose representation by the Defence Office or any counsel from the Defence Office.¹² As is presently the case, the Defence Office should also facilitate an accused's contacts with potential counsel before he makes his choice of counsel.
20. Effectiveness of representation might be affected, not just by the lack of competence or skill of counsel, but by other factors. Although there is a presumption that persons included in the list of counsel are qualified to represent a suspect, there may be impediments as concerns their ability to provide effective representation, for example, due to their lack of availability or conflicts of interest.¹³ The Registry should have the discretion to refuse to assign counsel (or, presumably, revoke the assignment of counsel) in such a case where there is a reasonable and credible basis that the effective representation of the accused could be affected.¹⁴
21. To secure effective representation, it is therefore essential that the Registry should take a proactive part in ensuring that fully competent counsel are assigned.

¹² It would be appropriate for the OPCD/Defence Office to implement a policy governing this process, which defines conflicts of interest as concerns the advice it provides suspects.

¹³ As an example, this could be done by verifying that the caseload of counsel or commitments to cases in other jurisdictions do not impact or impede counsel's ability to participate effectively in the ICC proceedings. The fact that counsel is involved in other cases does not necessarily act as a bar to their appointment, but the caseload of counsel would necessarily affect their availability for any one client. Delegation of counsel's responsibilities to junior staff should be disapproved of and formally prohibited. Rather, the appointment of counsel who are involved in several cases should be contingent on the submissions of a work plan/proposed team composition, which ensures that the defendant can benefit from experienced legal representation at all relevant times.

¹⁴ This issue has arisen thus far within the context of linguistic qualifications and conflicts of interest: i.e. the Registrar has informed the Chambers that counsel is responsible for the accuracy of the information submitted to the Court and for assessing the existence of conflicts of interest.

Recommendations:

22. With a view to ensuring effective representation, the Registry should consider taking the following steps:
- a) The Defence Office and the Registrar should put in place a mechanism that ensures that candidates to be admitted to the list of counsel have been adequately and competently vetted. They should take active steps to verify the professional record and experience of the candidate.
 - b) Before assigning counsel, the Registrar should verify that there are no (practical or other) impediments affecting the ability of the candidate to provide effective assistance to the accused (for example, his/her caseload). Where this is the case, the Registry should have the discretion to refuse to assign counsel (or, presumably, to revoke the assignment of counsel).
 - c) Before appointing the requested counsel, all counsel should participate in and pass a training course, which would be equivalent in character to a bar qualification. The course (which should be conducted only in the working languages of the Court), should verify counsel's knowledge of (international) criminal law and procedure, and would include practical examples to test the ability of counsel to adapt to an international legal environment. The Defence Office/OPCD would be ideally placed to conduct such training.
 - d) The Registrar should commission a Manual for Defendants, which advises and empowers defendants to make informed choices regarding their legal representation, and ongoing Defence strategy.
 - e) The Defence Office/OPCD should be mandated, or an independent counsel should be hired, to provide impartial and objective advice to suspects concerning the appointment of counsel.
 - f) Where the successfully qualified candidate has been found to meet the requirements imposed by the Strategic Plan,¹⁵ the Registry should condition appointment on counsel's immediate provision of a working plan for preparation and a list of personnel that he or she would seek to have assigned to his or her team (or the criteria for support staff that counsel would wish to appoint). On that basis, the Registry could verify that not only counsel, but the team itself, would function in such a way as to ensure effective representation. It should be noted here that the effectiveness of representation in large-scale criminal cases such as those that occur at the ICC depends as much and perhaps more about the overall capability of the Defence team than about counsel taken individually.
 - g) Where the Registry is not satisfied of the likelihood of effective representation, it should refuse appointment in clearly defined

¹⁵ See below, at para. 26 a).

circumstances, in accordance with the grounds which are set out in the Regulations and Code of Conduct (and as elaborated in the Strategic Plan for the Defence¹⁶), subject to the possibility of judicial review. The accused – though not necessarily the proposed counsel – should be able to challenge the matter before Chambers, which should exercise its responsibilities in ensuring that the rights of the accused are guaranteed and protected in an effective manner.

- h) The Registry should take active steps to ensure that counsel are not soliciting accused persons or suspects, which might result in a defendant opting for less than adequate counsel. Such practice should be strictly discouraged and any case of improper soliciting adequately sanctioned.

IV. Oversight and monitoring of effective representation of the accused

23. Effective representation is not guaranteed by the selection of a good counsel. It must endure and be guaranteed throughout the proceedings. The Registry/Defence Office should therefore take steps to ensure that each and all critical aspects of the preparation are being carried out (without unduly interfering with the responsibilities of counsel). In particular, it should scrutinise the work plans submitted by Defence teams and could compare those to the work actually performed by the Defence. In doing so, the Registry should be in a position to ascertain whether some Defence teams or individual team members are truly performing the tasks for which they have requested legal aid, or which a reasonably diligent counsel would perform at a given stage of the proceedings. The ability of the Defence Office/Registry to provide an active role in this regard is impeded by a number of factors:

- a) The Registry has not adopted a strategic plan or policy as concerns what constitutes effective representation, nor does the legal aid policy set out any criteria which would allow the Registry to withhold funds where justified;
- b) The legal aid staff have little or no experience in working on Defence teams and are therefore not adequately qualified generally to make assessments of this nature;
- c) Unlike the ICTY, the legal aid staff do not receive confidential filings and might, therefore, be unaware of the extent to which the Defence is actually implementing its work plan;
- d) The grouping of Defence and victims' legal aid in one section and the absence of a strict policy on the protection of Defence confidentiality would make Defence teams reluctant to confide sensitive information concerning Defence activities and strategy to the legal aid staff.

¹⁶ See below, at para. 26 a).

24. Timeliness in such matters is essential to both preserve the effectiveness of the accused's representation and to avoid unnecessary delays and costs. The removal of an ineffective counsel in the middle of proceedings, for instance, would require long delays to enable a new counsel to familiarise him or herself with the case. This would also incur great expense. Strict oversight of Defence performance should therefore be exercised at the very earliest stages of the proceedings. The removal of an ineffective counsel at a later stage in the proceedings could have prejudicial consequences for the accused and unnecessarily delay the proceedings.
25. Finally, it should be noted that, in all cases, the responsibility to protect and preserve the rights of the accused is with the Judges themselves. Therefore, counsel's and the Registry's responsibility to see that the accused is effectively represented must remain at all times subject to the Court's powers of review.

Recommendations:

26. In light of the above, the following is recommended:
 - a) Having consulted with relevant stakeholders (in particular, Defence Office/OPCD; associations of counsel), the Registry should adopt a Strategic Plan for the Defence, which would set out a definition of and transparent/objective benchmarks for what would qualify as "effective representation" for the purpose of ICC proceedings.¹⁷ Such a policy should guide the Registry's decision on appointment of counsel and support staff.
 - b) The Registry (under the authority and control of Chambers) should play a more active role in overseeing the performance of Defence teams with a view to ensuring the effective representation of defendants and, in turn, the overall efficiency and fairness of proceedings.¹⁸
 - c) The Registry should tie the legal aid scheme of the Court to the Strategic Plan for the Defence. Unlike the present legal aid policy, which is a vague document without reference to issues of effective representation, such a Plan should provide guidance and benchmarks regarding "effective representation" and how the responsibility to ensure effective representation will be monitored and enforced by the Registry and/or a new Defence Office.¹⁹

¹⁷ Such benchmarks should include clear criteria concerning conflicts of interest, the extent of counsel's availability and commitment to the case, and guidelines for composing a team which is capable of adapting to the legal and linguistic requirements of the ICC. Such a policy should guide the Registry's decision on appointment of counsel and support staff.

¹⁸ This is without prejudice to the Chamber's responsibility to ensure a fair trial for the accused.

¹⁹ One of the consequences of this lack of specificity and concern for effective representation is that whenever the ASP calls on the Registry to make cuts in legal aid, these cuts are often decided upon and are implemented without any consideration as to whether and how it is possible to make savings without sacrificing equality of arms or the principle of effective representation. For example, one way by which the Court could have made significant savings in legal aid without sacrificing the ability of the Defence to assist their client would have been to negotiate with States to accord a tax free status to Defence team members (as is the case with ICC Staff), and to adjust payment rates accordingly.

- d) This plan should and must in turn be administered by persons who possess actual experience working as Defence counsel or in a Defence team or have equivalent experience.
- e) The Registry/Defence Office should closely scrutinise the work plans submitted by Defence teams and follow up on any inquiry that it might have made about that plan and its implementation.
- f) With a view to reducing the costs associated with the Defence, the Registry should take a longer view of preparation needs – rather than a practice of last-minute decisions that have affected Defence preparation and increased cost.²⁰
- g) As noted above, ultimately, the responsibility to ensure that the accused is not deprived of an effective defence is with the Chamber itself, as guardian of the fair trial rights of the accused.²¹ Where there are indications that steps taken by the Registry are insufficient to ensure effective representation of the accused, Chambers (in particular, the Pre-Trial Chamber) should step in. The Chamber should do so, in particular:
 - i) as has already been carried out in some instances, by making regular inquiries (in particular, during the pre-trial process and early into the trial process) regarding the level of preparedness of the Defence and verifying (if necessary by seeking and obtaining information from both the Defence and Registry) that basic preparatory steps have been taken (for example, adequate investigation; adequate reviewing of disclosure; translation of relevant material);
 - ii) as is being done in some cases, by regularly ‘checking in’ on Defence preparation and preparedness for trial (for example, requesting the parties to report on the status of disclosure and, if necessary, setting clear guidelines for the parties to meet their obligations in that regard; or whether the Defence has been able to organise any investigative missions);

²⁰ For example, the Legal Aid Unit often makes decisions concerning Defence requests at the very last minute, which entails greater travel costs for Defence missions. Since there is a lump sum travel budget, the impact of such decisions is not immediately apparent. It is, however, self-evident that if the travel costs are greater, the Defence will be able to conduct fewer missions within that budget, which will mean that they will have to request additional resources in the future.

²¹ On the responsibility of the Chamber to ensure fair trial rights of the accused, see Article 64(2) ICC Statute. See also, for example, *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on defence application pursuant to Article 64(4) and related requests, Annex 1, Separate Opinion of Judge Ozaki, 26 April 2013, para. 3:

“...if the Chamber finds that the continuation of the trial on the basis of such charges violates the fundamental rights of the accused so that a fair trial becomes impossible, it will rely on its general power and obligation as set out in Article 64(2) of the Statute, and terminate or stay the proceedings”.

- iii) as is being done in some cases, by verifying that the Defence is provided with adequate resources (of all necessary and relevant sorts) for the effective performance of its duties;
 - iv) where there are indications that counsel's representation or the functioning of a Defence team might negatively affect the right of the accused to effective representation, by requesting the Registry to look into this matter and to take steps to address this issue (including, if necessary, by removing counsel).
27. Whilst the present paper is not dealing *in extenso* with the practice of individual Defence teams, counsel for the accused as well as members of Defence teams should ensure at all times that:
- a) they are – individually and as a team – capable of providing effective assistance to the accused;
 - b) that they focus all relevant resources onto preparing the case for trial and presenting it in the most effective of ways;
 - c) that they refrain from delaying tactics;
 - d) that they refrain from mounting political or other legally-irrelevant defences;
 - e) that they commit all the necessary time to the defence of their client;
 - f) that they carefully investigate all possible avenues of defence;
 - g) that they comply at all times with their professional and ethical obligations towards their clients and the Court;
 - h) that they conduct all necessary investigation of relevant factual issues relevant to their case;
 - i) that counsel should not delegate to others his or her core responsibilities.

INSTITUTION BUILDING AND ADMINISTRATION

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1. At the outset, it is to be noted that all of the following highlighted issues as well as any recommendations in accordance therewith are made as a matter of principle and in order to protect the institution and its staff from unfair accusations. They are further made in order to ensure that the Court is in a position to measure the conduct of its organs and staff members by an institution-wide standard, which will further strengthen the integrity of the institution and help assessing the necessity for action and reaction by the Court and its organs.

I. Institution Building

1. Independence of the Court and Appearance Thereof

2. As emphasised in the preamble of the Rome Statute, the ICC is created as an ‘*independent* permanent International Criminal Court’.¹ The independence of the various organs of the Court is essential to the good and effective functioning of the Court and is guaranteed through explicit statutory provisions to that effect.²
3. Judicial independence does not exist to serve the judiciary, but to guarantee a fair and impartial hearing and unswerving obedience to the rule of law.³ It has been described as both a state of mind and a set of institutional and operational arrangements.⁴ The guarantee of independence of judicial institutions is essential to any judicial system and must be understood as particularly crucial in the context of a criminal institution vested with the mandate of delivering the highest standard of justice at the international level and, as such, exposed to the - real or apparent - influence of daily Realpolitik.
4. As a matter of perception and reality, the ability of the ICC to exercise its prosecutorial and adjudicative mandate independently of other stakeholders, and to be perceived as doing so, is essential to its credibility and effectiveness as a judicial enterprise, lest its legitimacy as a court of law is undermined. The perception of lack of independence would limit greatly its outreach, restrict the precedential value of its case-law, and discourage recruitment of the best judges and staff. As a new court, the ICC is still building its culture and reputation. It is

¹ Emphasis added.

² Independence of the Judges, guaranteed under Article 40 (‘The judges shall be independent in the performance of their functions.’); Independence of the Prosecutor, guaranteed under Article 42(1) (‘The Office of the Prosecutor shall act independently as a separate organ of the Court.’); Independence of the Registry, guaranteed by extension of the guarantee of the independence of the President, under Article 43(2) (‘The Registrar shall exercise his or her functions under the authority of the President of the Court.’).

³ Kenneth Keith, *The Independence of the International Judge*, 10 October 2011, Inner Temple Lecture Series “The Independence of the Profession and the Judiciary”, (available at <http://www.innertemple.org.uk/education/lecture-series-2014/previous-lecture-series-speakers>, last visited on 9 April 2014).

⁴ Commentary on Bangalore Principles of Judicial Conduct, para. 23 (available at http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf, last visited on 9 April 2014).

therefore essential to build at the ICC a demonstrated culture of judicial independence, which both the Court and States Parties can defend and protect.

5. This issue is particularly salient at the ICC, where the legal framework establishes an unprecedented degree of interaction between the individual States Parties and the Representatives of the ASP on the one hand, and the various organs of the ICC on the other.⁵ Such intense interaction bears the natural and inherent risk of exposing any organ of the Court to accusations of improper influence. And although all judiciaries must exist within a political framework, the extent to which this is the case at the ICC requires additional vigilance and demands greater transparency to protect the Court against unfair allegations of political interference.
6. It is worth noting here that the following recommendations are for the most part prospective in nature and that there exists little or no publicly recorded indication of any improper attempts to interfere with the decision-making process of the Court. At the same time, the issue of independence from political or other undue influence is not a new one and it has been expressly recognised as an issue of concern in the past.⁶ It is of utmost necessity to stress that the following recommendations are made not because Judges should not be trusted (*because they should*) but in order to prevent others from making inappropriate requests of the judges and/or for them to know how to regulate their own conduct vis-à-vis the Judges and other senior officials of the Court.
7. There is no question that the Court and its staff understand and protect the independence of the ICC. However, to ensure the appearance of independence as well as its reality, transparent and express boundaries are necessary regarding the nature, timing and content of communications between officials and staff members of the Court and representatives of States Parties or of the ASP. Clear guidelines as to official and incidental and social contacts would be useful to

⁵ See, for example Articles 51(2), 52(3), 112(2)(b), 112(5); this also includes the collaboration between different organs and working groups of the ICC as well as the ASP and its various groups, particularly the Study Group on Governance (established in December 2010 by the ASP; see http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.2-ENG.pdf); the Working Group on Lessons Learnt (established in October 2012, in accordance with the Roadmap on Reviewing the Criminal Procedures of the ICC; see http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-Add1-ENG.pdf, para. 1; http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-31-ENG.pdf, Annex I, paras. 5 ff.); the Advisory Committee on Legal Text (established pursuant to Regulation 4 of the ICC Regulations); the Working Group on Amendments (established in November 2009 by the ASP; see http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.6-ENG.pdf, para. 4); the Hague Working Group and the New York Working Group (established in December 2004 by the ASP; see http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP3-Res-08-ENG.pdf); the Committee on Budget and Finance (established in September 2002 by the ASP; see http://legal.un.org/icc/asp/1stsession/report/english/part_iv_res_4_e.pdf) (last visited on 30 April 2014).

⁶ See Commentary on Bangalore Principles of Judicial Conduct, para. 29: “All attempts to influence a court must be made publicly in a court room, and only by litigants or their advocates. ... Any ... extraneous attempt, direct or indirect, to influence the judge, must be rejected. In some cases, particularly if the attempts are repeated in the face of rejection, the judge should report the attempts to the proper authorities.” Further examples of inappropriate connections and influence are found at para. 38 (available at http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf, last visited on 9 April 2014).

both the States Parties and the Court to shield both from any suggestion of impropriety. The ‘good practices’ of other sensitive international bodies may provide guidance here.⁷

8. It is recommended, that the Presidency, the Prosecutor, and the ASP, with a view to signify their commitment to promoting and protecting the independence of the Court, adopt and publicise a set of rules of conduct establishing transparency in the communications and relationships between the Court, its officials, staff and practitioners who appear before it, and the States Parties/ASP. This should include, in particular:
 - a) Explanations as to the reasons for, and existence of, boundaries between case-related subject matter and administrative information;
 - b) Rules ensuring transparency of lobbying or interventions by representatives of States Parties and/or the ASP, either in their personal or official capacities regarding the hiring of ICC staff and other ICC human resources issues.
9. It is recommended that States Parties, in order to foster the necessary understanding of the independence of the Court amongst State representatives, diplomats and public officials involved in regular interactions with Court staff and officials, and so as to avoid any suggestions of impropriety, ensure that representatives of States are adequately briefed on the above Rules and Guidelines and that their conduct is in line therewith.

2. Judicial Culture

10. The ICC, constantly exposed as it is to political and diplomatic scrutiny and potential criticism, needs a strong judicial culture of independence and cohesiveness in order to maintain its position as a convincing international judicial institution of a permanent nature.
11. Experience from various international criminal tribunals shows that collegiality in this sort of legally multi-cultural environment, with very different approaches to many legal and jurisprudential issues, does not occur automatically but that it sometimes needs to be encouraged, resourced and recognised as a priority.⁸ Col-

⁷ Protection from any appearance of impropriety as to social contact has been addressed by the adjudicators of the WTO Dispute Settlement Body, who regularly file brief reports on social or incidental contacts with diplomats (Conversation between Justice Shireen Avis Fisher and Ricardo Ramírez-Hernández, WTO, Dispute Settlement Body, Appellate Body, July 2013).

⁸ *cp.* Reflections of a former ICTY Judge: “(C)ollegiality ... is harder on an international court. It is obviously more difficult for judges who do not speak each other’s language or come from each other’s legal culture to engage in the kind of thoughtful discourse and exchange of views that breeds collegiality. ... (M)ost of these short-term judges typically have less time to grow into their roles than (domestic judges) or to develop over time and by trial and error a full-blown judicial personality or philosophy; they must draw immediately and throughout their term on the intellectual and temperamental capital gleaned from their former lives and jobs. ... Many, if not most, multinational courts will combine civil law and common law judges, and the rules of procedure as well will feature a mix of both systems,

legality enhances the quality of its work by improving communication, minimizing misunderstandings and facilitating consensus on law and practice. It enhances the judicial experience, and therefore the productivity of the Judges, by mitigating to some degree the isolation demanded of Judges, as well as the burnout and secondary trauma that occurs when Judges are confronted unrelentingly with atrocity crimes. It also builds strength and confidence into the institution, which is in turn necessary to confront unfair criticism and take on board the fair and constructive sort of critique.⁹

12. The Court having been operational for over ten years, it is strongly recommended that the Presidency now turn its attention to enhancing the collegial framework within which the judges meet together as a group so that problems may be anticipated and creatively resolved. Although this will require scheduled opportunities for interaction among Judges and between Judges and outside experts, it is an investment in time that is justified by the need to build a strong culture of collegiality within the Court.
13. It is recommended that the President and the Presidency, with a view to enhancing a distinctive and collegial ICC judicial culture of excellence essential to the effectiveness of the Court:
 - a) Make it understood that cooperation and information sharing between and among judges and panels is a priority;
 - b) Encourage Judges to promote collegiality among their staff;

which themselves often reflect basic differences in the concept of what a judges should do and what kind of role in the trial she should play. These variations in turn affect the ability of judges to appreciate opposing points of view and to interact constructively. ... I have held for last what is probably the most critical difference between judging here and abroad – the simple but profound effect of language differences. It does affect the process of judging at every stage ... In Chambers deliberations, it was perceptibly more difficult to debate and argue; there was first the problem of finding the counterpart words in the other language for what you wanted to say, but, perhaps more basically, there was the problem of finding the contextual analog in a different legal system for the procedure or the concept that you want to discuss – which in the end might not even exist outside your own system.” (Wald, *Reflections on Judging: At Home and Abroad*, 7(2004) *Journal of Constitutional Law* 219, 239-244).

⁹ On a domestic level, the crucial significance of collegiality among judges has been stressed and because of the reasons stipulated in this paragraph, such reflections are even more important in the context of international judicial institutions (“... On a collegial court, if there is to be a dissent in a case, judges will help one another to make dissenting opinions as effective as possible. Dissents become more precise, focused, and useful to the development of the law. ...The freedom to disagree with one’s colleagues, which is fostered by collegiality, enables judges accurately and honestly, and without hesitation, to identify what is common ground and what is not, all the while remaining open to revising their views. ... (I)nformation and decision-making theories posit that variance in group composition can make for better decisions because of an increase in the skills, abilities, information, and knowledge that diversity brings. Diversity is thus valuable when it brings a rich range of information and perspectives ... This suggests that the ideal group performance could be expected from groups composed of diverse yet familiar member. In other words, without familiarity, it is difficult for the group to take advantage of the unique knowledge and perspectives that each diverse member may have to share. ... The existence of collegiality on a court, then, greatly affects whether the judges on that court will be able to capitalize on their diversity.” (Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 (2003) *University of Pennsylvania Law Review* 1639, 1650-1652, 11667-1669).

- c) Establish annual retreats off-site in which Judges from all three divisions can engage together in problem solving sessions;
- d) Assign mentoring Judges to new Judges for the first year of appointment, to integrate the new judges into the emerging judicial culture;
- e) Regularly schedule formal opportunities for Judges to share their respective expertise with one another;
- f) Regularly schedule formal opportunities to bring in experts in technical areas relevant to the management of the cases in order to keep the Judges up-to date with the latest research and innovations;
- g) Seek and promote discussion of common structural and institutional problems with colleagues from other International Courts and Tribunals.

3. Jurisprudential Stability and Consistency

14. Jurisprudential stability and consistency is crucial to a credible and sustainable evolution of any judicial institution, and this is particularly necessary for the ICC. The courts of States which have incorporated the Rome Statute into domestic law rely on the interpretation of the Statute by the ICC and require predictability in that interpretation, as do those appearing before the ICC. At the same time, the ICC is a new and developing institution, and there must be some room for exploration by the judges of alternative approaches and interpretations of the Statute. Early decisions may be shaped by the particular views of the judges or the context of the case at issue. There must be some room for adjustment as the institution develops, while at the same time developing some consistency and coherence.
15. Different and conflicting legal opinions and practices have emerged within various Pre-Trial and Trial Chambers over the course of the past 10 years.¹⁰ While these conflicts are inevitable and to some degree healthy, the Court should also look for opportunities to develop consensus or consistent practice where possible.
16. To the extent that conflicts in interpretation and practice can be resolved internally by harmonisation through judicial consensus, without doing damage to judicial independence of opinion, the better it is for the performance and the reputation of the Court. The Judges have the authority to regulate practice through consensus and memorialise that consensus through regulation.¹¹
17. Where consensus cannot be reached without doing damage to individual independent judgement, then mechanisms for fast-tracking final decisions on disputed recurring issues need to be explored. For example, consideration could be

¹⁰ See generally, *Investigations at the ICC*, p. 48; *The Confirmation Process*, p. 79; *Disclosure at the ICC*, p. 102.

¹¹ Article 52 ICC Statute.

given to a specialised panel with authority to adjudicate applications for victim participation, or victim reparations. Such panels could, if practical in the given situation, operate simultaneously with the Trial Chamber or Pre-trial Chamber otherwise seized of the case, thereby increasing efficiency and potentially shortening the time-lines for the conclusion of the entire case.¹² Critically, there would be only one Chamber creating the jurisprudence in that specialised area of law, subject to speedy appellate review. Likewise consideration could be given to fast tracking interlocutory appeals¹³ on issues ancillary to the merits which are likely to arise in multiple cases. Fast tracking could involve giving priority to the case on the Appeals Chamber schedule, and imposing rigorous timeframes for filing and deciding the appeal. To that end, the Presidency should consider using its authority under Article 38(3)(a), as part of its responsibility for the proper administration of the Court.

18. It is recommended, that the Presidency, with a view to promoting jurisprudential consistency and reducing the risk of repeated litigation and conflicting outcomes in relation to the same issue, should:
 - a) Make positive efforts to encourage consensus on harmonising conflicting practice through regulation, where appropriate;
 - b) Fast track adjudicatory resolution of conflicting interpretation and practice on which consensus and regulation are not appropriate or achievable, so that the Appeals Chamber can definitively rule on issues that have given rise to differing lines of jurisprudence between Trial Chambers;
 - c) Consider the feasibility of specialised chambers to create a single line of jurisprudence on matters ancillary to the merits of the cases, or, alternatively, Judges from different chambers could sit “*en banc*” in relation to these issues to make a unified ruling in relation to them.

4. Amendment of Rules

19. The ICC is unique among international criminal tribunals in that its Rules are adopted and amended by the ASP and not by the Judges themselves.¹⁴ The Judges are only vested with the authority to propose amendments to the Rules, in the same manner as the Prosecutor or any State Party. Amendments to the Rules can only enter into force upon adoption by a two-third majority of the ASP.¹⁵ In order to streamline the judicial proposals, the Judges have created the Advisory Committee on Legal Text (‘ACLT’), which is composed of one Judge

¹² A Specialised Victims Chamber could be composed of the same three judges for all cases, who might wish to become specialists in the particular area, or of judges on a rotating basis, who also perform other non-conflicting judicial duties. See Article 39(4) ICC Statute.

¹³ See *Interlocutory Appeals*, p. 159.

¹⁴ Article 51(2) ICC Statute. See, on the contrary, Article 15 ICTY Statute; Article 14 ICTR Statute; Article 14(2) SCSL Statute (giving rule-making authority exclusively to the Judiciary).

¹⁵ Article 51(2) ICC Statute.

from each division, as well as representatives from OTP, the Registry and Defence Counsel.¹⁶

20. Two central problems are inherent to the current process of adoption of amendments and both impact directly on the efficiency of the Court: the number and composition of bodies currently involved in the drafting of proposals for amendments and the time taken to subject proposals to their multiple review; and the fact that rule amendments can effectively only happen once a year, at the annual ASP meeting. Both points will be addressed in turn.
21. Since the creation of the SGG, a roadmap has been put into place regarding the drafting of amendments, which is updated during each ASP session. It includes the involvement of a range of working groups within the Court and the ASP. Currently, the procedure is such that the Judges' WGLL recommends rule amendments to the ACLT for consideration. Thereafter, the WGLL transmits the proposals to the SGG for consideration. The SGG subsequently submits its views back to the WGLL. If the SGG decides to endorse proposals, it will then submit the latter to the WGA.¹⁷ From then on, it appears the proposals will be submitted to the ASP for voting, where they can be further amended and subject to political negotiation.
22. The process of rules amendment is cumbersome. Reform of the system is necessary to speed up and render more efficient that process of amendment and to enhance the role of interested actors into that process. The main responsibility for rule amendments should be placed with the Judges, while enabling interested actors to play a role in the process.
23. Regardless of whether the Rule is recommended by the Judges, the Prosecutor or a State Party, each should have an outside drafting expert assist them in preparing their proposed amendment.¹⁸
24. The second problem noted above is the length of time between ASP meetings. Since the ASP only meets once a year, proposals for amendments only come forward once per year at the annual meeting, where they are then potentially subject to political negotiation and bargaining.¹⁹ Indeed, there is a lack of mechanism for ASP approval between regular meetings.²⁰ However, it must be noted that Rules 8-9 of the ASP Rules provide for the convening of special sessions. This terminology is not further defined and could be interpreted to include the

¹⁶ Regulation 4 of the ICC Regulations.

¹⁷ See most recent 'Roadmap on reviewing the criminal procedures of the International Criminal Court', Annex I to the Report of the Bureau on SGG, 15 October 2013 (at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-ENG.pdf, last visited on 2 April 2014); for further specifics on the involved working groups, see footnote 5 above.

¹⁸ It is to be noted in this respect that diplomats rarely have the practitioner or legislative experience required in order to adequately perform this sort of exercise.

¹⁹ Rule 4 RPE of the ASP.

²⁰ Article 51(3) ICC Statute provides for the possibility of emergency rule-making by the Judges, subject to subsequent approval by the ASP. However this process raises the question of consequences of judicial decisions made under emergency rules later rejected by the ASP, thereby undermining the efficacy of the rule making, the authority of the decision, and the general efficiency.

calling of ‘electronic’ sessions, with the option of electronic voting on amendments, thus significantly increasing the speediness of rule adoption.

25. It is recommended, that States Parties and the ASP, with a view to enhancing the effectiveness and speediness of the Rule amendments process, should consider the following:
 - a) For those amendments recommended by the Judges or the Prosecutor, a simplified procedure should be enacted whereby one single body representing the interests of the ASP and possessing the necessary technical skills, works with the ACLT (and, if necessary, outside experts) to reach a consensus as to the form and substance of the proposed Rule or amendment; at the same time, the ASP should consider the cancellation of the ASP working groups currently involved in the amendment process (i.e., SGG, WGA);
 - b) Shorter timeframes for completion of (a) above should be set and respected. If no consensus is reached within that timeframe, the Rule change would go no further. If consensus is reached, voting by the ASP would either accept (by the statutory two-third majority) the proposed Rule as written or reject it;
 - c) Consideration should be given to convening “electronic” sessions of the ASP between annual meetings to ensure necessary amendments can be dealt with promptly;
 - d) Drafting assistance from outside experts should be available to Judges, the Prosecutor and States Parties in preparing their recommended amendments;
 - e) With a view to enabling the Court to expeditiously adapt its regulatory regime to its needs, consideration should be given to the possibility, *in the future*, of amending Article 51(2) of the Statute to provide that Rules proposed by the Judges or the Prosecutor are adopted by the ASP unless rejected by a two-thirds majority.
26. Finally, all of the above being noted, it needs to be clear that most of the difficulties presently facing the Court are eminently practical rather than regulatory in nature. In that sense, the amendment of the Statute or the Rules at this point will provide only limited resolution to the problems currently affecting the Court. States should not, therefore, too readily take the view that problems at the ICC will be resolved by tackling issues related to rules amendments.

5. Nomination and Selection of Judges

27. Criticism of the selection process of ICC Judges has affected the reputation of the ICC. This is not only unfair to the Judges and injurious to the reputation of the Court, but it also may discourage excellent judicial candidates from coming forward. Thus, the process of nomination and selection of candidates for judicial

appointments directly impacts the efficiency of the Court, as well as its credibility.

28. This criticism is not new to international criminal institutions, nor exclusive to the ICC.²¹ In general, such criticism has focused on the lack of transparency of that process and varied national processes by which States select their candidates.²² The ICC has come under particular censure for what has been considered unjustified reliance by the ASP on States to vet their candidates in the absence of clear information as to the candidate's qualifications;²³ the political lobbying in which both the nominating State and the candidate must engage in order to secure the necessary number of ASP votes;²⁴ and the complicated nature of the voting process, resembling political horse-trading more than an intelligent process for appointing the best Judges.²⁵
29. Encouragingly, steps have already been taken to provide useful merit-based information about the candidates to assist States' representatives in making educated voting choices. Since 2011, the Advisory Committee on Nominations has added legitimacy to the election process and published reports on the relevant merits of the candidates to the ASP prior to the last elections.²⁶ In addition, the

²¹ cp. Bohlander, *The International Criminal Judiciary – Problems of Judicial Selection, Independence and Ethics*, in: *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Bohlander (ed.), 2007, p. 325 (326).

²² International Bar Association's Human Rights Institute, "Background Paper to the Institute's Resolution on the Values Pertaining to Judicial Appointments to International Courts and Tribunals", adopted on 31 October 2011, available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a428d839-07c9-4933-bbec-755d72eba6c4> (last visited on 27 March 2014); it has been noted that "(f)or many countries, issues of merit are secondary to issues of representation and the primary interest is in selecting 'ambassadors' for the state. ... For many states, representation on the ... ICC is regarded as an opportunity to protect state interests, gain prestige and influence the jurisprudence of the international courts. ... (W)hether or not individual states are successful in obtaining a seat depends to a considerable extent upon prevailing political and economic power relations and on bilateral agreements between states and regional blocks." (Selecting International Judges: Principle, Process and Politics, Mackenzie, Malleson, Martin and Sands, 2010, pp. 60, 173).

²³ R. Goldstone, "The ICC Judicial elections", published by the International Judicial Academy, Washington, D.C., Spring 2012, available at: http://www.judicialmonitor.org/archive_spring2012/globaljudicialperspective.html (last visited on 27 March 2014).

²⁴ Discussion Paper, Centre for International Courts and Tribunals, University College London, "Selecting International Judges: Principle, Process and Politics", undated, available at http://www.ucl.ac.uk/laws/cict/docs/Selecting_Int_Judges.pdf (last visited on 27 March 2014); Theodor Meron, Editorial Comment – Judicial Independence and Impartiality in International Criminal Tribunals, 99 (2005) AJIL 359 (362).

²⁵ Id.; A. Hirsch, "System for appointing Judges 'undermining international court'", in *The Guardian*, 8 September 2010, available at <http://www.theguardian.com/law/2010/sep/08/law-international-court-justice-legal> (last visited on 27 March 2014). In the December 2011 elections, there were 15 rounds of voting results.

²⁶ Report of the Advisory Committee on Nominations of Judges on the work of its first meeting, ICC-ASP/12/23, 31 May 2013, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-23-ENG.pdf (last visited on 27 March 2014); Report of the Advisory Committee on Nominations of Judges on the work of its second meeting, ICC-ASP/12/47, 29 October 2013, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-47-ENG.pdf (last visited on 27 March 2014). The impact of said reports are visible. Indeed, Uruguay withdrew its candidate after he was deemed unsuitable by the Advisory Committee (cp. http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-45-Add.1-ENG.pdf, last visited on 4 April 2014).

CICC has put together a committee of distinguished jurists who rate the candidates as qualified or unqualified based on the public information about the candidate.²⁷ Both of these measures are highly commendable and demonstrate a welcomed focus on merit over politics.

30. To further the same purpose of transparently securing quality nominees, the recruitment and selection process needs further improvement in two crucial areas: national recruitment and specialised criteria. Improvements in these areas would positively contribute to the perception of the ICC as a place of judicial excellence, attract candidates whose skills are most needed on the Court at any given time, and ensure that the ASP can make an informed choice about candidates best qualified to perform these important judicial functions.
31. First, little has been done to address the shortcomings in the national recruitment and nomination stages, which produces the candidates that are then subject to ICC review. This is unfortunate, since it is at this – national – stage that States have the opportunity to both elevate the profile of the Judges and at the same time ensure that the specific needs of the Court are met. An open and publicised outreach and recruitment effort at the national level provides an opportunity to demonstrate the importance that States Parties attach to promoting to the Court its most outstanding legal minds, engenders national interest in the work of the Court, and encourages the Court to be seen in a positive light. States should also make sure that information about that process reaches their own national judiciary.
32. Second, the national outreach and recruitment process should be done bearing in mind the particular needs of the ICC that the person filling the judicial vacancy must meet. The ICC is a criminal court that applies public international law, criminal law as well as international criminal law to complex factual circumstances. The nature of this work should guide States in the selection of suitable candidates. It is also an opportunity to refine the criteria set out in the Statute and to seek candidates with the capacities relevant to the Court at the time, thus consciously constructing a Bench with Judges who possess complimentary skill sets which can improve institutional efficiency and expertise.
33. The statutory requirements for selection of Judges to the ICC are of two types: requirements ensuring diversity,²⁸ and basic competency.²⁹ These qualifications

²⁷ The CICC “Independent Panel on ICC Judicial Elections” is composed of Justice Richard Goldstone, former Chief Prosecutor of the ICTR and ICTY; Patricia Wald, former Chief Judge of the United States Court of Appeals for the District of Columbia and former Judge of the ICTY; Hans Corell, former Judge of Appeal and former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations; Judge O-Gon Kwon, Judge and Vice President of the ICTY and former Presiding Judge at the Daegu High Court. (cp. http://www.iccnw.org/documents/Independent_Panel_on_ICC_Judicial_Elections_-_Terms_of_Reference_12_May_2011_-_final.pdf, last visited on 2 April 2014).

²⁸ Article 36(8) ICC Statute. See also, Procedure for the nomination and election of judges of the International Criminal Court, ICC-ASP/3/Res.6, adopted on 10 September 2004, paras. 20-23, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP3-Res-06-ENG.pdf (last visited on 27 March 2014).

²⁹ Article 36(3)(b) ICC Statute.

represent a floor, not a ceiling. Within those competencies, there are additional skills, talents, and temperaments which are also needed, and others of which the Bench may have more than enough. The Statute recognises that a variety of expertise is useful and that a focus needs to be on attributes which are of “relevance to the judicial work of the Court”.³⁰

34. Within this framework, there is room to and need for refinement of criteria for selection so that the needs of the Court and the particular skills required for the performance of ICC judicial functions at the time of the judicial opening can be considered. It is the Judges who are serving on the Court who best understand the skills and temperament which new Judges need and which skills might be redundant. They are thus a valuable resource for the recruitment process and there is a need for a mechanism whereby the Presidency, on behalf of the Judges, can advise the Secretariat of the ASP prior to the start of the recruitment process of the particular skill sets needed, in addition to the competencies required by the Statute. This will encourage the sitting Judges to realistically inventory the expertise that exists within their ranks, and assures that the recruitment process results in adding Judges who can supplement that expertise, rather than duplicate it. Additional specific criteria would provide guidance in support of the recruitment and nomination process at the State level, and it would also assure that new Judges meet the needs of the Court with experience in the areas which would be most useful to its functioning and to the building of its institutional capacity.
35. Lastly, as a matter of principle, and irrespective of the particular skill sets requested from the Judges, when nominating a candidate, States individually (and later the ASP during the process of selection) should give great weight and consideration to the question of whether proposed candidates have trial-management experience (as Judges, Prosecutors, Defence Counsel or other relevant functions) that will enable them to perform their functions most effectively.³¹ The absence of trial skills and experience in managing large-scale cases successfully and expeditiously should be regarded as a major incentive not to propose such a candidate.³²

³⁰ Article 36(3)(b)(ii) ICC Statute.

³¹ See *Orality*, p. 168.

³² Strikingly, this type of recommendation was flagged as early as in 2001 with respect to the ICTR (International Crisis Group, International Criminal Tribunal for Rwanda: Justice Delayed, 7 June 2001, p. 11, available at <http://www.crisisgroup.org/~media/Files/africa/central-africa/rwanda/International%20Criminal%20Tribunal%20for%20Rwanda%20Justice%20Delayed.pdf>, last visited on 9 April 2014); see further, Bohlander, *Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and Other International Criminal Courts*, 12 (2009) *New Criminal Law Review*, 529, who advocates for a range of criteria for the selection of ICC judges, including *inter alia* a minimum experience in criminal trials; see also, *Commentary on Bangalore Principles of Judicial Conduct*, para. 192: “... (I)ncompetence may be a product of inadequate experience ... or the appointment to judicial office of a person who is unsuitable to exercise it and demonstrates that unsuitability in the performance of the judicial office.” (available at http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf, last visited on 9 April 2014).

36. It is recommended, that the Presidency, in cooperation with the Judges,
- a) inventory the expertise and talents existing on the current bench and identify those factors, beyond the basic statutory competencies, that the Court requires of its new Judges, based on the loss of those skills created by the vacancies and the need for those skills relative to the nature of the tasks presently before the Court;
 - b) based on this input, submit a list of additional required skills to the Secretariat of the ASP, so that they may be transmitted to the States Parties in the form of criteria accompanying the invitations for nominations.³³
37. It is recommended, that States Parties, on the basis of the skill sets requested in the invitations for nominations and when seeking to identify suitable candidates for judicial appointment, should
- a) actively seek to identify, approach and encourage suitable candidates fulfilling all necessary and relevant requirements;
 - b) incorporate the requested skills, as well as general trial management skills,³⁴ into a transparent and publicised recruitment process at the national level;
 - c) demonstrate the fulfilment by the candidate of the statutory and additional competencies and skills when referring the candidate to the ASP and to the Advisory Committee on Nominations;³⁵
 - d) instruct the Advisory Committee on Nominations to consider both the statutory competencies and the additional skills in evaluating candidates and referencing those competencies and skills in its recommendations to the ASP.
38. It is recommended, in the longer-term, that States Parties should consider amending Articles 36(3) and (5) of the Statute with a view to abolishing the List A-B system and providing a more nuanced criteria based on the practical experience of the Court.

³³ Procedure for the nomination and election of judges of the International Criminal Court, ICC-ASP/3/Res.6, adopted on 10 September 2004, par. 1, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP3-Res-06-ENG.pdf (last visited on 27 March 2014).

³⁴ See *Orality*, p. 168.

³⁵ Procedure for the nomination and election of judges of the International Criminal Court, ICC-ASP/3/Res.6, adopted on 10 September 2004, para. 6, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP3-Res-06-ENG.pdf (last visited on 27 March 2014).

6. Outreach

39. The work of the Court must be visible and understandable, since misinformation creates threats to its integrity and increases the personal risks to the safety of its judges and staff in areas where the work of the Court may be little known or the target of misinformation. One way to combat this is with accurate information delivered in a timely manner that can be understood by relevant audiences.
40. The ICC has at least three audiences which need to understand its decisions and the process by which they are reached: the international audience; the national audiences within the States Parties; and the national audiences in the States in which the cases arise, whether or not they are States Parties. A well-informed audience at the international level is critical to reaching the goal of universality of the Rome Statute, and to general deterrence. A well-informed national audience within the States Parties is critical to recruiting the best people from the State to work in the ICC, to encouraging adoption of ICC jurisprudence in furtherance of complementarity, and for continued support of the institution by the State. A well-informed national audience in the State or region where the cases arise is critical to encouraging witnesses to cooperate and to assuring those on all sides of the conflict that both the defendants and the victims are being treated fairly.³⁶
41. No one model for outreach is sufficient to reach all three audiences, but the Court has the advantage of learning from different models of other tribunals which have been successful at achieving different outreach goals.³⁷ Importantly, the ICC has the added resource of the States Parties to engage in national outreach and information sharing within their States and to suggest the most effective means to increase popular understanding of the work of the Court within their jurisdictions.³⁸
42. To reach the international audience as well as the legal audiences of the States Parties, the ICC must increase the profile and accessibility of its jurisprudence. Because of the large quantity of judicial decisions produced by the ICC, many of its most significant jurisprudential advances have received little publicity. Furthermore, the number of judicial orders and decisions makes it difficult even for the most interested observers to follow closely the evolution of the Court's

³⁶ Equal outreach to all social groups has not been consistently achieved and it has been suggested in the past that there is room for improvement in this respect, P. Vinck and P.N. Pham, *Outreach Evaluation: The International Criminal Court in the Central African Republic*, *The International Journal of Transitional Justice*, 2010, p. 421 (439-440).

³⁷ For example, the ICTY has been very successful at raising international interest in its jurisprudence and the defendants whom it prosecutes at the level of governments and legal institutions by its use of media, print and internet. The SCSL, on the other hand, has been very successful in its outreach within the effected national areas, by using video and live appearances of the principals of the Court, engaging local civil society, and by bringing videos of court proceedings to remote towns and villages.

³⁸ At the same time, past and ongoing efforts of the Court must also be acknowledged and welcomed; see for example, Report of the Court on the public information strategy 2011-2013, 22 November 2010 (available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-29-ENG.pdf); Strategic Plan for Outreach of the International Criminal Court, 29 September 2006 (available at http://www.icc-cpi.int/NR/rdonlyres/FB4C75CF-FD15-4B06-B1E3-E22618FB404C/185051/ICCASP512_English1.pdf).

case-law. Search facilities available on the ICC website do not provide easy access to that important body of decisions, judgements and orders. This not only detracts from international understanding of the work being done by the Court but also limits the ability of any interested third party, in particular domestic judges, to study and apply the Court's case-law in their own jurisdictions.

43. Ensuring that the case-law is more accessible and easily searchable would increase its jurisprudential outreach while at the same time assisting domestic jurisdictions to prosecute international crimes. This could be achieved by putting in place tools and instruments that would enable interested parties to find their way through the maze of ICC jurisprudence, so as to determine the state of ICC law on particular issues and give the ICC greater jurisprudential visibility in other national and international jurisdictions.
44. It is recommended, that the Presidency, in cooperation with Chambers, the Office of the Prosecutor, the Registry, the Trust Fund for Victims as well as interested NGOs, work on an ongoing basis to assure that programs tailored to the needs of its diverse constituent audiences are in place and operating in a manner that is understandable and effective.
45. It is recommended that each State Party,
 - a) Design and implement an outreach plan for their State to provide their population with accurate information on the work of the Court;
 - b) Support the allocation of funding sufficient for the Registry to create the system of jurisprudential dissemination recommended below.
46. It is recommended, on a general note, that the Presidency, actively support the Prosecution and Registrar's outreach efforts. More particularly, it is recommended that the Presidency, in cooperation with Chambers and with the Registry and with a view to bridging the knowledge gap regarding the ICC's case-law and making its jurisprudence more accessible:
 - a) Provide on the Court's website an easy and effective search engine enabling users to search its case-law;³⁹
 - b) Regularly publicise on the Court's website important jurisprudential advances, such as publication on the website of a weekly or monthly newsletter reporting upon its case-law;⁴⁰

³⁹ Inspiration could be sought from the following: the ECHR's HUDOC system (<http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#>), or the court record search tools of the ICTY (<http://icr.icty.org/>), the STL (<http://www.stl-tsl.org/en/court-records-search>) as well as the ICTY/ICTR Case Law Database (<http://unmict.org/cld.html>).

⁴⁰ Inspiration could be sought from the following: the ECHR's 'Information Notes' (http://www.echr.coe.int/Pages/home.aspx?p=echrpublications/other&c=#n1347528850996_pointer); or the ICTY's 'Weekly Update' (<http://www.icty.org/sid/3980>).

- c) Provide regular analytical reports pertaining to the most important developments of its jurisprudence. This would enable interested parties to identify, discuss and, as the case may be, apply ICC law as it exists at the relevant time.⁴¹

II. Administration

1. Role of the Presidency - Internal audits

47. Pursuant to Article 38(3)(a) ICC Statute, the Presidency – constituted of the President, together with the First and Second Vice-Presidents – is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor, and for the other functions conferred upon it in accordance with the Statute.⁴² The Registrar, who is the principle administrative officer of the Court, exercises his or her functions under the authority of the President of the Court.⁴³ The Registrar is elected by the Judges of the Court, taking into account recommendations from the ASP.⁴⁴

⁴¹ Inspiration could be sought from the following: the ECHR's 'Case-law Guides' and 'Case-law research reports' (http://echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=#n1347459030234_pointer) or ICTY's defunct 'Judicial Supplement' (at <http://www.icty.org/sid/9992>).

⁴² Articles 2, 3 (representation of the Court in agreements with UN and host state); 35(3), 36(2)(a),(c), 39(1), (4) (organisation and administration of Chambers; in particular, assignment of Judges to Chambers and benches); 41(1) (excusal of Judges from exercise of a function under the Statute); 42(6) (excusal of Prosecutor from acting in a particular case); 43(2) (functions of the Registrar exercised under the authority of the President); 44(3) (agreement to the Staff Regulations proposed by the Registrar); 48(5)(b) (waiver of privileges and immunities of Registrar); 50(1) (determination of decisions to be translated into all official languages of the Court); 61(11) (constitution of Trial Chamber upon confirmation of charges); 74(1) (designation of alternate judge for trial proceedings); 112(5) (participation in meeting of the ASP or the Bureau); Note also the functions attributed to the Presidency in the ICC RPE: Rules 4(2), (4) (convening of special sessions of plenary of Judges; casting vote in event of equality of vote in plenary session); 4bis(2) (assignment of Judges to divisions); 8(1) (drawing up of Code of Professional Conduct of Counsel); 12(1), (4) (establishing of list of candidates for Registrar and Deputy Registrar to submit to ASP for recommendation); 13(2) (consultation by Registry regarding the internal security of the Court); 14(1) (approval of Regulations of the Registry); 21(3) (review of Registry decisions on refusal to assign Counsel); 26(2) (receipt of complaints pertaining to professional misconduct for further transmission); 29(2) (advising of ASP Bureau regarding any recommendation adopted plenary reading the removal of a judge, and any decision adopted regarding the removal of the Registrar or Deputy Registrar); 30(1) (decision on disciplinary measure for Judges, the Registrar or Deputy Registrar); 33(1) (receipt of request for excusal by Judge, Prosecutor or Deputy Prosecutor); 37(1) (receipt of decisions to resign from Judge, Prosecutor or Registrar and transmission to the ASP Bureau); 40(2), (3) (determination of decisions to be translated into all official languages of the Court); 41 (determination of use of official language as working language for particular case); 100 (determination of place of the proceedings); 129, 130 (receipt of decision on confirmation of charges and record of the proceedings of Pre-Trial Chamber and transmission to assigned Trial Chamber); 146(5) (determination of a term of imprisonment for offences under article 77); 171(3) (determination of period of interdiction from proceedings in case of refusal to comply with court order); 173(1) (designation of Trial Chamber for adjudication of compensation requests); Rules 199-200, 203-205, 209-212, 214-217, 219-222, 225 (Presidency as organ responsible for enforcement of sentences and responsibilities connected thereto).

⁴³ Article 43(2) ICC Statute.

⁴⁴ Article 43(4) ICC Statute.

48. The Presidency of the ICC has authority and therefore responsibility for the administration of the Court, and the Registrar. Support for the Presidency in the exercise of its responsibilities is essential, as is the need to imbed into the structure of the Court a clear understanding of the role of the Presidency and the President.

a) Specific Auditing: Sexual Harassment Audit

49. Support of the Presidency and acknowledgement of its role is of particular importance in regard to internal disciplinary measures. The Statute and the Rules provide for a well-defined ethical code,⁴⁵ which, though expressly applicable to the Judges, Registrar, and Prosecutor and their respective deputies, establishes a solid ethical foundation for the Court as an institution. This construct when robustly and transparently applied encourages internal and external respect for the Judiciary and for the Court as a whole. The Presidency is the organ to which complaints of misconduct are directed and can initiate complaints on its own motion.⁴⁶
50. In this context, an independent review team was tasked with the investigation of sexual misconduct toward witnesses by a Registry staff member working for the Registry's Victim and Witness Unit. The investigation team, led by distinguished Prosecutor Brenda Hollis, found that "relevant and credible information suggests that the chronic and pervasive structural and functional shortcomings of the VWU contributed significantly to the alleged perpetrator's ability to carry out the alleged criminal conduct over a prolonged period of time."⁴⁷ Although initiating the investigation is commendable, it is yet unclear whether further inquiries will be conducted to ensure such issues have not been repeated in other locations and by other staff members.⁴⁸
51. Of equal concern, there has apparently – as far as public record is available – been no action taken in response to the report's conclusion that there existed "the lack of a safe and effective complaints system which is understood and accessible by staff and 'clients' alike" and that this and other shortcomings "are institutional and chronic and require considered and timely corrective action".⁴⁹

⁴⁵ Articles 46, 47 ICC Statute; ICC RPE, Section IV (Situations that may affect the functioning of the Court), Subsection 1 (Removal from office and disciplinary measures).

⁴⁶ Rule 26(2) ICC RPE.

⁴⁷ Independent Review Team Public Report, Post Incident Review of Allegations of Sexual Assault of Four Victims Under the Protection of the International Criminal Court in the Democratic Republic of Congo by a Staff Member of the Court, p. 3 (available at <http://icc-cpi.int/iccdocs/registry/Independent-review-team-ReportEng.pdf>, last visited on 27 March 2014).

⁴⁸ See Gender Report Card on the ICC 2013, Women's Initiative for Gender Justice, pp. 235 ff. (available at <http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>, last visited on 4 April 2014).

⁴⁹ Independent Review Team Public Report, Post Incident Review of Allegations of Sexual Assault of Four Victims Under the Protection of the International Criminal Court in the Democratic Republic of Congo by a Staff Member of the Court, p. 6 (available at <http://icc-cpi.int/iccdocs/registry/Independent-review-team-ReportEng.pdf>, last visited on 27 March 2014).

52. Continued inaction in the face of these findings can do incalculable damage not only to the reputation of the Court, but also to the Court's ability to encourage cooperation from female witnesses and to the recruitment and retention of female staff. The Presidency, as the organ which is responsible for administration of the Court and as the focal point for ethical complaints of misconduct, has been given the opportunity to exercise its moral leadership in a decisive and constructive way, by partnering with the Prosecutor to initiate Court-wide concrete responses to the issues raised regarding sexual harassment, misconduct and gender bias in the Court.
53. It is recommended, as a matter of urgency, that the Presidency:
- a) in partnership with the Prosecutor, initiate an institution-wide Independent Sexual Harassment Audit at all levels of the Court and share the results of the audit with the Study Group on Governance and the Bureau of the ASP;⁵⁰
 - b) Institute an on-going Gender Bias Task Force;⁵¹
 - c) Invite the heads of departments and statutory officials to provide public information on steps being taken in relation to this important matter.
54. It is recommended that the ASP fund the necessary expertise to assist the President in instituting these measures.

b) General Auditing: Internal Judicial Performance Audit

55. Diverse responsibilities have been assigned to the Presidency of the ICC, as reflected in the ICC Statute and Rules.⁵² Indeed, the Presidency and the President in particular are vested with the responsibility of the proper management and administration of the Court. This is uniquely broad and must be given the appropriate broad interpretation in order to ensure the role of the President and of the Presidency is well understood and embedded into the structure of the Court.
56. Given that responsibility, it is ultimately the Presidency that is answerable for the effective use of courtroom capacity, delays in the progress of cases, and the impairment of the rights of the accused in prolonged detention due to judicial action or inaction, when these issues might have been avoided by pro-active

⁵⁰ In accordance with recommendations of the Gender Report Card on the ICC 2013, Women's Initiative for Gender Justice, pp. 243 ff. (available at <http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>, last visited on 4 April 2014).

⁵¹ A model for instituting Gender Bias Task Forces can be found in the following: *Operating a Task Force on Gender Bias in the Courts – A Manual for Action*, The Foundation for Women Judges (available at <http://womenlaw.stanford.edu/pdf/gender-bias.pdf>, last visited on 25 April 2014); see also Gender Bias in the Courts Task Force, *Gender Bias in the Courts of the Commonwealth Final Report*, 7 Wm. & Mary J. Women & L. 705 (2001) (available at <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1204&context=wmjowl>, last visited on 25 April 2014).

⁵² See above, paras. 47-48.

presidential management. In addition, it is ultimately the Presidency that must explain that the work done by judges of the ICC cannot be evaluated solely on the basis of the number of trial judgements and appellate judgements delivered by the Chambers.⁵³

57. The President is required to exercise his or her authority to manage the work of Chambers with a view to ensuring that Judges and staff perform their respective functions in an expeditious and efficient manner. To successfully do so, the President and the Presidency must have the support of the ASP, the Chambers and the Registry.
58. The Presidency and the President must also be provided with the necessary tools and expertise to proactively establish with the Registry and the Judiciary a framework for judicial performance, so that the Presidency can effectively carry out its managerial role, and accurately assess and report the progress of the Court.
59. Although the ICC is unique in many ways, it shares many of the same managerial issues and problems faced by other national and international courts charged with resolving complex cases at trial and appellate levels. Judicial administration of cases, caseloads, and judicial resources is the subject of extensive academic and practical research, and methods for assuring the prompt, effective and fair performance of judicial duties and distribution of judicial tasks are constantly evolving and improving. The Presidency, Registrar and Chambers should have the benefit of that research and outside expertise to construct a judge-led framework for the highest judicial performance.
60. The construction of a framework for judicial performance, facilitated by outside expertise, needs to establish common administrative principles within the Judiciary. Administrative principles include for example, identification of the elements of judicial excellence and agreement on the Court's administrative priorities.
61. With these principles in mind, the construction of the framework for judicial performance must provide the President with the tools to address the existing problems in judicial management, including:
 - a) Promptness in performance of judicial duties, including addressing motions and applications and rendering decisions;
 - b) Efficiency in scheduling courtroom events, avoiding unnecessary delays in trials and minimising the time Accused are in detention;

⁵³ For critical voices: *Ten years, \$900m, one verdict: Does the ICC cost too much?*, BBC, 14 March 2012 (available at: <http://www.bbc.com/news/magazine-17351946>, last visited on 25 April 2014); *International Criminal Court: 12 Years, \$1 Billion, 2 Conviction*, Forbes, 12 March 2014 (available at <http://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/>, last visited on 25 April 2014).

- c) Equal distribution of judicial workloads between case specific and other court matters;
 - d) Agreed expectations for working hours and Court presence of staff and Judges;
 - e) Other management issues as they arise.
62. With these principles in mind, and in light of existing issues, the Presidency can address with the Judiciary guidelines for practical implementation. Implementation needs to address concrete performance goals; measurements for assessing progress toward those goals; and a management structure for eliminating internal obstacles toward achievement of the goals.
63. Based on a framework thus developed, the Presidency will be in a position to demonstrate to the ASP the composite progress of the Court. In doing so, the ICC should accordingly develop its own criteria as to how its performance can best be evaluated. Particularly relevant to evaluating the Court's performance are the following benchmarks:
- a) Quality and efficiency of judicial management of cases and work of Chambers and ability to reduce overall duration of proceedings and to eliminate delays;
 - b) Effective use of resources (financial and personnel) and willingness to subject its management thereof to professional auditing;
 - c) Transparency of proceedings and transparency of the Court's activities;
 - d) Increased awareness in affected countries of the nature of the Court's work and mandate, improved reputation and greater jurisprudential relevance;
 - e) Transparency and fairness of hiring process of staff and ability of the Court to attract leading practitioners and professionals;
 - f) Active engagement of the Court, its organs and staff with relevant experts in the field;
 - g) Use by the Court, its organs and the parties of evidential, procedural, administrative and professional practices best suited to ensure fair and expeditious proceedings;
 - h) Elimination of gender bias and sexual harassment.⁵⁴

⁵⁴ See *Benchmarking*, p. 44 for further references.

64. The construction of a framework for judicial performance can serve as a tool to identify and resolve problems, encourage commitment to common judicial administrative principles, ensure effective use of resources, highlight the Judges' legal and administrative contributions, and support the need for continued or increased funding.
65. It is recommended, that the Presidency, working together with the Chambers and Registry, and with the assistance of outside expertise, construct and oversee a judge-led framework for the highest judicial performance, addressing:
 - a) Agreed administrative principles of the sort outlined above;
 - b) Practical performance goals for Chambers, Benches, and individual Judges, (for example, goals regarding scheduling, timeframes for decision making, objective criteria for achieving skill balance in panel appointments, ratio of time spent on cases to time spent on other court related work, etc.);
 - c) Measurement tools to assess progress of Chambers, Benches, and individual Judges toward reaching these goals;
 - d) A performance management structure whereby the Presidency monitors performance of Chambers, Benches and individual Judges, based on the data generated by the measurement tools, shares that data internally with the judges, and identifies and eliminates personal and institutional barriers to progress;
 - e) Periodic progress reports to the ASP reflecting the composite progress of the Court as a whole in reaching each identified goal, based on the data generated by the measurement tools, and addressing the benchmarks identified above.
66. It is recommended that the ASP,
 - a) Designate within the ASP individuals responsible for conducting a yearly review of the performance of the Court vis-à-vis the above Progress Reports and Benchmarks. States Parties and the relevant organs of the Court should also consider seeking the advice of experienced Judges, Prosecutors and Court Officials for the purpose of assisting that process of review;
 - b) Fund the necessary expertise to assist the Presidency in instituting these measures, and support the President and the Presidency in exercising their roles in effectively managing the work of Chambers, Judges and staff.

2. External Audits

67. In the event that internal audits recommended above are not performed by the conclusion of 2015, the ASP, in order to meet its oversight obligations, will

need to ensure that a mechanism of accountability is put in place. It is preferable that the Judges themselves engage with an independent sexual harassment audit and construct a framework for judicial performance, and report to the ASP as recommended above. However, in the absence of a judge-led process, the ASP will need to authorise an independent auditing body to verify that the Court is performing its tasks and managing its resources in an effective, competent and professional manner, and achieving the benchmarks outlined above.

68. It is recommended, in the absence of an internally generated independent audit, that States Parties initiate an independent sexual harassment audit at all levels and in all branches of the Court.
69. It is recommended, in the absence of a judge-led framework for establishing, evaluating and reporting judicial performance, that States Parties:
 - a) identify individuals with the necessary skills and competence to audit and evaluate the performance of an international criminal court;
 - b) set up an auditing body either within the ASP or within the Court itself and vest it with the competence to set benchmarks for performance, conduct an evaluation of the Court's performance in accordance with those benchmarks, and to report to the ASP on a yearly basis. That body should be independent of the Court and the ASP;
 - c) provide sufficient resources to this auditing body;
 - d) vest this auditing body with the authority to seek and obtain any information from the Court's organs necessary to the accomplishment of its task and that is not covered by the confidentiality of the judicial proceedings;
 - e) vest this auditing body with the authority to report and notify the ASP in case of refusal by an organ of the Court to provide sought information;
 - f) task this auditing body to adhere to the highest standards of transparency, to ensure that, in the event a confidential publishing of the report is necessary, a public redacted version be simultaneously issued.
70. It is recommended that the ASP consider putting in place a list (or hiring a pool) of high-level experts from which it can tap, if and when the need is felt, to conduct an evaluation of particular aspects of the work of the Court. Such a group could advise the Court and/or the ASP/States Parties with a view to ensure better performance.

3. Staffing Policy Review

71. The ICC faces some particular human resource challenges that have had and will continue to have consequences for the overall effectiveness of the institution. Because it is a permanent court and because there is a flood of potential

staff seeking further employment following the winding down of the *ad hoc* tribunals, the ICC is often seen as a place to have a long-term career.

72. It is essential for the Court to have some staff stay on for longer periods of time to maintain expertise, specialised knowledge of cases and jurisprudence, and institutional memory. However, it is not necessarily desirable to have a majority of the staff seeking to make careers at the ICC. There is great value in regularly bringing in new personnel with fresh ideas, energy and enthusiasm. This, however, should not in any way be perceived as criticism of the hard work and commitment shown by many and most ICC staff.
73. The central difficulty with the ICC is that since it is a small institution, there are few opportunities for staff (particularly in OTP and Chambers) to gain the necessary experience to make significant moves forward and upward in their careers. For example, if someone comes in as a very junior investigator or prosecutor, it will be difficult for them to get enough opportunities to conduct interviews or to do work in court to gain enough experience and expertise to advance to a senior investigator or prosecutor position. Therefore, for many, the model should be to come for a confined period of time and then leave to gain further experience elsewhere, with the possibility of returning at a later time.
74. The present human resources policy of the Court is not fully adapted to such an approach and efforts should be made in order to orient it in this direction. First, policies should be put in place in order to guarantee a transparent, merit- and need-based recruitment process for all positions. Second, policies should be implemented in order to make it abundantly clear to prospective and new staff members - as early as during the recruitment process, i.e., in job offers and initial invitations for interviews or written tests - that they should not plan to make their career at the Court. Instead, a clear policy should be implemented in order to encourage staff to come for a fixed period of time and then move on. Benefits for staff members should be adjusted accordingly (possibility to keep renting packages, etc...).
75. In order to foster this policy, it should be made clear that staff members will only be given the opportunity to be promoted once. A second promotion would then be made subject to the fulfilment of exceptional circumstances, in conjunction with an external assessment regarding the staff member's qualifications.
76. It is recommended, that the Presidency, with a view to ensuring that the Court is staffed with the best and most suitable candidates only and that stagnation of staff does not come at the expense of the effectiveness of the Court, instruct the Registry to
 - a) put in place a transparent, merit- and need-based recruitment process for all positions within the Court; for mid- and high-ranking positions, the Registry should also be expected to seek suitable external advice about candidates;
 - b) adopt a policy clarifying to prospective staff that they should not plan to make their career at the Court, while adopting a policy which would allow

for one promotion of current staff members and for a second promotion under exceptional circumstances and subject to external assessment. If need be, staff regulations should be amended accordingly.

COOPERATION AND WITNESS PROTECTION

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I. Introduction

1. Two issues of great concern to the effective prosecuting of international crime are the need for cooperation of information providers (in particular, States) and the ability of the Court and its organs to guarantee the safety and well-being of potential witnesses. Unless the parties – Prosecution and Defence – are able to seek, obtain and produce relevant evidence (whether by calling the relevant witnesses or in the form of exhibits), no trial – and certainly, no fair trial – will be possible. This, in turn, will only be the case if and where the parties are able to guarantee the safety and security of potential witnesses. Failure to cooperate on the part of States (and other potential information providers) will not only affect the very possibility of trial, and/or its fairness, but also potentially its overall length. In many cases, failure to cooperate on the part of a State will result in undue delays and postponement.¹

II. Cooperation

2. Under Part 9 of the ICC Statute, States Parties are required to cooperate with requests from the Court. Article 86 ICC Statute mandates that States Parties ‘cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court’. Article 89 ICC Statute specifically requires the surrender of persons charged, and Article 93 ICC Statute lists specific forms of investigative cooperation that States Parties must provide. There is no ambiguity regarding the legal obligation to cooperate imposed on States Parties by the Statute.²
3. The difficulty is in enforcement. If a State Party fails to cooperate with requests from the Court, Article 87(7) ICC Statute stipulates that the Court may refer the matter to the ASP or to the UNSC in the case of referral from that body. At that point, it is up to the ASP or the UNSC to take steps to enforce the legal

¹ *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, paras. 51, 91, 99, 103; Trial Chamber V(A) recently endorsed jurisprudence in the case of *Blaškić*, when the ICTY Appeals Chamber held: “[T]he International Tribunal may discharge its functions *only* if it can count on the *bona fide* assistance and cooperation of sovereign states”. (*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, paras. 130-131, with further references).

² See W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, pp. 973-1061; O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, pp. 1045-1050; *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, para. 27; most recently, Trial Chamber V(A) specified this obligation further and concluded that “it *can*, as a question of law, issue a binding cooperation request requiring the Government of Kenya to employ compulsory measures to compel the appearance of witnesses summonsed by a Trial Chamber”. (*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, para. 180).

obligations of the treaty. Ultimately the decision to enforce the law will plainly be a political one.

4. To date, cooperation has been uneven. In 2012, a report from the Court stated that compliance with its requests stood at 72%.³ This statistic fails to capture, however, three specific challenges with respect to cooperation. First, there are certain critical areas where cooperation has failed completely. For example, the Court has repeatedly reported to the UNSC about Sudan's failure to cooperate with requests from the Court, but no action has been taken.⁴ In the area of witness security, only 12 states have reached witness relocation agreements with the Court.⁵ Second, while many States have adjusted and act promptly on Court requests for assistance, in other cases, there have been delays in acting on such requests that then slow the work of the Court. Third, in some instances, States may give the appearance of cooperation while not fully providing genuine cooperation.⁶
5. The success of the *ad hoc* Tribunals (in particular, as regards their ability to obtain cooperation from States and others) has been both an inspiration to the work of the ICC and a benchmark by which to measure its work. However, it must be recognised that to the extent the *ad hoc* Tribunals succeeded in their missions, it was ultimately because of sustained and active support from the international community. For example, starting in 2001, the United States and the European Union conditioned aid and accession to the EU on demonstrated support to the ICTY, which led to the surrender of high-level accused and cooperation in further investigations in both Serbia and Croatia.⁷ States of the former Yugoslavia were also reported a number of times to the United Nations Security Council for non-compliance with their duty to cooperate with the Tribunal.⁸

³ UN General Assembly, A/67/308, 'Report of the International Criminal Court', 14 August 2012, para. 99, available at http://www.icc-cpi.int/en_menus/icc/reports%20on%20activities/court%20reports%20and%20statements/Documents/A67308EN.pdf (last visited on 17 April 2014).

⁴ See Fatou Bensouda's Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005), 13 December 2012, para. 7, available at <http://www.icc-cpi.int/iccdocs/PIDS/statements/UNSC1212/UNSCDarfurSpeechEng.pdf> (last visited on 17 April 2014) (describing Sudan government's lack of cooperation in the ICC's investigation).

⁵ IBA ICC Perspectives, *Witnesses before the International Criminal Court*, July 2013, p. 35. More recent data is not publicly available.

⁶ See *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Prosecution response to the "Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence", 10 May 2013, para. 4.

⁷ See A. Whiting, 'Justice Delayed can be Justice Delivered', 50 Harv. Int'l L. J. 323 2009, pp. 343-345 (reviewing history of conditionality and its effect on cooperation).

⁸ See ICTY Press Release, "ICTY President McDonald Addresses the Security Council", 2 October 1998, available at <http://www.icty.org/sid/7633> (last visited on 17 April 2014) (requesting that the Security Council adopt effective measures to ensure the immediate compliance of Serbia and Montenegro with the ICTY); ICTY Press Release, "Letter from President McDonald to the President of the Security Council Concerning Outstanding Issues of State Non-Compliance", 2 November 1999, available at <http://www.icty.org/sid/7726> (last visited on 17 April 2014) (detailing continued state non-compliance with the ICTY in spite of Security Council resolutions 940 and 1207).

6. The challenging cases at the ICC will require similar commitments of support and cooperation to succeed. Put otherwise, all of the reform efforts within the Court will fail if sustained cooperation from States (and others, such as the United Nations) is not forthcoming.⁹ Steps could be taken, within the ICC's architecture and beyond, to create strong incentives and disincentives to secure better cooperation from States with the ICC and the parties in the proceedings.

Recommendations:

7. States Parties should consider how they manage requests for cooperation from the Court and whether there are ways to act more efficiently and expeditiously with respect to those requests. In particular, States Parties should consider adopting the following measures:
 - a) Each State Party should designate a contact person/office within its competent offices specifically tasked with and competent to deal with requests for assistance from the Court or a party in the proceedings.
 - b) Necessary legislations should be adopted by each State Party to ensure that this office is permitted to respond to such requests without undue delay and/or procedural impediments.
 - c) The Prosecutor should have the inherent authority to report a non-cooperating State Party to the ASP.¹⁰ To the extent that the view is taken that an explicit legal basis should be provided to enable the Prosecutor to do so, States Parties should consider amending the Rules and/or Statute accordingly.
8. States Parties should consider further how to enhance their support for the Court. In particular, they should devise mechanisms to ensure that situation countries and other countries with significant evidence cooperate fully with the Court. In many instances, this will require prioritising the work of the Court above other imperatives. Those States Parties with influence over situation countries should be prepared to organise themselves to exert this influence in a sustained and credible manner. In particular, States Parties should consider the following as incentives and/or disincentives to secure compliance from a State Party with its obligation to cooperate with the Court:

⁹ A significant test will be the actual cooperation of the Republic of Kenya with the ICC in light of the following recent decision: *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, Disposition.

¹⁰ Article 87(7) ICC Statute provides that if a State Party fails to cooperate, 'the Court' may make a finding to that effect and refer the matter to the ASP or UNSC. In other parts of Part 9, the Court is the whole Court, including the Prosecution (see, *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, paras. 24-30, 46, 52). Thus, on one reading of the Statute, the Prosecutor should be able to make the complaint to the ASP. In the alternative, the Prosecutor would petition the Court for such a finding.

- a) The ASP could vote to suspend the rights of that State to participate in the ASP. To the extent that this would require an amendment of the Statute, States should consider it.¹¹
 - b) The ASP could be given the authority to vote sanctions against a non-cooperating State, which could either be binding upon States Parties and/or implementable at their discretion. Such powers would require an amendment of the Statute as well as of the Rules of Procedure and Evidence of the ASP.
 - c) As was the case before the *ad hoc* Tribunals, the Prosecutor should actively lobby and press States Parties to adopt political and economical sanctions and other measures against non-cooperating States Parties with a view to securing full cooperation from that State.
9. Where a situation has been referred to the Court by the United Nations Security Council, the Prosecutor is mandated by the referral resolutions to regularly report to the Council.¹² In this context, the Prosecutor has the inherent ability to ask the Council to report the State in violation of a Council resolution.¹³ The Prosecutor should also be understood as having the inherent ability to seek from the Council to adopt necessary measures and sanctions to secure that State's compliance with its obligations.¹⁴ In order for the Security Council to *commit* itself to a situation that it refers to the Court, it could provide explicitly in its resolutions referring a matter to the Court for the possibility of sanctions and the nature thereof (and/or any other mechanism that would render sanctions less discretionary in nature and more realistic in practice). For its part, the Prosecutor should duly test the readiness of the Council to cooperate in the context of its (referred) investigations as it proceeds. Where the Council fails to do so, the Prosecutor should not hesitate to suspend its investigation of that case and to give public notice of that fact to the Security Council together with its reasons for doing so.

¹¹ The introduction of a provision similar to that of Article 112(8) ICC Statute could be considered.

¹² This is the case, for instance, with the Sudan and Libya referrals. See UN Security Council Resolution 1593, S/RES/1593, 31 March 2005, para. 8, available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1593\(2005\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1593(2005)) (last visited on 17 April 2014); UN Security Council Resolution 1970, S/RES/1970, 26 February 2011, para. 7, available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1970\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1970(2011)) (last visited on 17 April 2014).

¹³ Thus far, the Prosecutor of the ICC has repeatedly reported upon the non-cooperation of Sudan without the Security Council taking any measure to enforce Sudan's duty under the relevant Security Council resolutions to cooperate with the Court.

¹⁴ Under Article 25 of the United Nations Charter, members of the UN have a duty to comply with Security Council resolutions.

III. Witness Protection

10. Witness protection has emerged as a key issue at the Court and is critical to its efficiency and effectiveness.¹⁵ As noted above, without witnesses, there cannot be a trial.¹⁶ Without adequate means of protecting witnesses, many potential witnesses are unlikely to testify and/or could be induced to change their evidence. It is therefore essential to the overall effectiveness of the Court that it should have the means – if necessary with the assistance of States Parties – to protect potential and actual witnesses.
11. Article 68 ICC Statute provides that ‘[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’. The Court will seek to provide security to all those who are at risk of danger as a result of their interactions with the Court.¹⁷
12. Because the ICC, as a permanent institution, is designed to act quickly when atrocities occur, it will often be engaged in situations of ongoing conflict where risks to witnesses and victims will be pressing. As the International Bar Association (IBA) has noted in a report on witnesses,

‘the ICC’s credibility rests on ensuring that persons who testify or who may be at risk because of their connection with those who testify, are safe and secure’.¹⁸
13. The ability of the Court to protect witnesses is critical to effective investigations since the Prosecution cannot even interview witnesses if it cannot ensure their security. It is also key to efficiency since delays in relocating witnesses will result in delays in disclosure, which will in turn delay proceedings. Finally, it is essential to effective proceedings because if witnesses are intimidated or otherwise discouraged from testifying, valuable evidence can be lost and prosecutions could flounder.
14. The ICC has a range of potential measures to protect witnesses including measures to shield the identity of the witness from the public, delayed disclosure, and temporary and permanent relocation. It is the responsibility of the Victims and Witnesses Unit of the Registry to assess the protection needs of each witness. Because of the confidentiality that necessarily attends to witness security, the functioning in this area can often be opaque. For this reason it is

¹⁵ See, for example, *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, paras. 93-95.

¹⁶ Trial Chamber V(A) went even further in a recent decision and held that “the power to compel the attendance of witnesses is an incidental power that is critical for the performance of the essential functions of the Court”. (*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, para. 86).

¹⁷ *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, paras. 1, 44.

¹⁸ IBA ICC Perspectives, *Witnesses before the International Criminal Court*, July 2013, p. 27.

recommended that the States Parties undertake a comprehensive review to further identify the needs of the Court.

15. Witness protection issues have arisen in nearly every case before the Court. In the Kenya cases in particular, the Prosecutor has complained that witnesses have stopped cooperating after being intimidated or bribed. The Prosecutor has brought Article 70 cases in the Kenya and CAR cases, alleging that the integrity of witnesses has been compromised. Proceedings have been delayed, in particular in the Kenya cases, as a result of difficulties in securing protection for witnesses.
16. The Court faces three specific challenges with respect to witness protection. Firstly, does it have the necessary technical expertise within the Victims and Witnesses Unit? In July 2013, the IBA noted that VWU was facing numerous internal challenges, including the departure of qualified staff and management difficulties.¹⁹ The new Registrar has committed to taking steps to address these concerns and should be fully supported in these efforts. Secondly, does the Court have sufficient resources to provide adequate protection to witnesses? Witness protection is expensive, and it is tempting to take steps to hold down costs in this area. But the first decade of the Court has shown that if inadequate funds are provided in certain areas – for example, investigations and witness protection – it can have severe consequences for the functioning of the Court (which can end up costing even more money in the long run).²⁰ Otherwise put, investments in investigations and witness protection are essential to the effective and efficient functioning of the Court. Thirdly, are States Parties providing adequate support for witness protection, in particular for witness relocation? As of July 2013, only 12 States Parties had signed witness relocation agreements with the Court.²¹ As a result, there can be significant delays in relocating witnesses which can affect the well-being of the witnesses themselves and the efficiency of proceedings.²²

Recommendations:

17. It is recommended that, in cooperation with all organs of the Court, States Parties should undertake a comprehensive review of the witness protection process in order to assess the needs of the Court with respect to personnel, resources, and cooperation.
18. It is further recommended that this review should consider the centrality of witness protection to the entire scheme and provide specific recommendations on how to achieve a robust, effective and efficient witness protection system.
19. States Parties should duly consider entering into bilateral agreements with the Court to take sensitive witnesses into their domestic witness protection regimes.

¹⁹ IBA ICC Perspectives, *Witnesses before the International Criminal Court*, July 2013, p. 28.

²⁰ IBA ICC Perspectives, *Witnesses before the International Criminal Court*, July 2013, p. 27 (“it is questionable whether the required resources are being provided to match these protection needs”).

²¹ IBA ICC Perspectives, *Witnesses before the International Criminal Court*, July 2013, p. 35.

²² IBA ICC Perspectives, *Witnesses before the International Criminal Court*, July 2013, pp. 35-36.

Necessary legislation should be adopted at the domestic level for that purpose. The Registrar should be competent to negotiate such agreements (in consultation with the other organs of the Court).

20. In the alternative, the ASP should discuss and consider adopting an ICC-wide witness protection scheme in which States Parties could voluntarily join. This would have the practical benefit of one uniform system being adopted in relation to all States Parties with necessary mechanisms being built into the ICC architecture.

LIST OF ABBREVIATIONS

ACLT	Advisory Committee on Legal Texts
ASP	Assembly of States Parties
CAR	Central African Republic
CSS	Counsel Support Section
DCC	Document Containing the Charges
DO	Defence Office
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
EU	European Union
IBA	International Bar Association
ICC or Court	International Criminal Court
ICC Regulations	International Criminal Court, Regulations of the Court
ICC RPE or ICC Rules	International Criminal Court, Rules of Procedure and Evidence
ICC Statute	International Criminal Court, Statute
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ID	Investigation Division (Office of the Prosecutor)
IDAC	In-Depth Analytical Charts
JCCD	Jurisdiction, Complementarity and Cooperation Division (Office of the Prosecutor)

JRR	Justice Rapid Response
LRA	Lord's Resistance Army
LRV	Legal Representative of Victim(s)
MICT	International Residual Mechanism for International Criminal Tribunals
NGO	Non-Governmental Organisation
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for the Victims
PD	Prosecution Division (Office of the Prosecutor)
PTC	Pre-Trial Chamber
SCSL	Special Court for Sierra Leone
SGG	Study Group on Governance
STL	Special Tribunal for Lebanon
STL RPE or STL Rules	Special Tribunal for Lebanon, Rules of Procedure and Evidence
UN	United Nations
UNSC	United Nations Security Council
VPRS	Victims Participation and Reparations Section
VWU	Victims and Witnesses Unit
WGA	Working Group on Amendments
WGLL	Working Group on Lessons Learnt

BIOGRAPHIES

INDEPENDENT EXPERTS

Professor Dr. Guénaël Mettraux

Guénaël Mettraux (Swiss national) is a practising international lawyer who has acted as counsel for, *inter alia*, General Sefer Halilović, former Minister Ljube Boškoski, General Ante Gotovina (appeal), General Milivoj Petković (appeal), former Minister Augustin Ndirabatware (appeal) and Hassan Assad Sabra and as consultant at various international criminal tribunals (ICTY; ICTR; MICT; ECCC; STL; ICC). He is advising a number of States, NGOs and international organisations on issues of international (criminal) law, transitional justice and judicial cooperation. He is a Professor of Law at the University of Amsterdam, a Guest Lecturer at the University of Fribourg (Switzerland) and a Panel Member of EULEX's *Human Rights Review Panel*. He has published widely in the field of international criminal law and procedure – including *Lieber Prize* winner “The Law of Command Responsibility” (Oxford University Press, 2009).

Justice Shireen Avis Fisher

Justice Shireen Avis Fisher (US-American national) served as an Appeals Judge at the Special Court for Sierra Leone from 2009 through 2013, and as its President in 2012 and 2013. Prior to her appointment to the Special Court, she was appointed as an International Judge of the War Crimes Chamber of the Court of Bosnia and Herzegovina. Between 2008 and 2009 she served as a Commissioner on the Kosovo Independent Judicial and Prosecutorial Commission. She was appointed to the Bench of the US State of Vermont in 1986. Justice Fisher represented the International Association of Women Judges from 2002 through 2012 as an independent expert to the Hague Conference on Private International Law. She was appointed by Secretary General Ban Ki-moon to the Residual Special Court for Sierra Leone in October 2013. She was recently awarded the *2014 Global Jurist of the Year Award* by the Center for International Human Rights at Northwestern University School of Law.

Dermot Groome

Dermot Groome (US-American national) is a Senior Prosecuting Trial Attorney at the ICTY on the prosecutions of, *inter alia*, Slobodan Milošević, Mitar Vasiljević and Ratko Mladić. Prior to the ICTY, he was a consultant on projects that involved the development of legal systems, investigation and documentation of human rights abuses, as well as training of law enforcement and human rights personnel, including the International Human Rights Law Group, the Cambodian Defenders Project, the Legal Aid of Cambodia and the United Nations Centre For Human Rights Phnom Penh. He is the author of *The Handbook of Human Rights Investigation, 2nd Edition: A Comprehensive Guide to the Investigation and Documentation of Violent Human Rights Abuses* and numerous articles in the field of international criminal law. Since 2008, he is a Distinguished Fellow in International Criminal Justice law at Pennsylvania State University, Dickinson School of Law and worked at the Manhattan District Attorney's Office from 1985 to 1993.

Professor Alex Whiting

Alex Whiting (US-American national) is a Professor of Practice at Harvard Law School where he teaches, writes and consults on domestic and international criminal prosecution issues. Previously, he worked as a US and international prosecutor. From 2010 until 2013, he was working at the Office of the Prosecutor of the ICC where he served first as the Investigations Coordinator, overseeing all investigations in the Office, and later as Prosecutions Coordinator, overseeing all of the Office's ongoing prosecutions. Before working at the ICC, he taught for more than three years as an Assistant Clinical Professor of Law at Harvard Law School. From 2002-2007, he was a Trial Attorney and then a Senior Trial Attorney with the ICTY, in the cases against *Fatmir Limaj et al.*, *Milan Martić* and *Dragomir Milošević*. Before working at the ICTY, he was a US federal prosecutor for ten years. Alex Whiting attended Yale College and Yale Law School. He has published widely in the area of International Criminal Law.

Gabrielle McIntyre

Gabrielle McIntyre (Australian national) is the double-hatted Chef de Cabinet to the President of the ICTY and of the MICT. She has been the principal legal and policy advisor to four successive Presidents of the ICTY and has worked closely and collaboratively with the Judges of the ICTY and ICTR Appeals Chambers for over a decade. During her tenure as Chef de Cabinet, she has drafted or directly impacted the drafting of almost all major judgements and decisions of the ICTY and ICTR Appeals Chambers. Ms. McIntyre has been instrumental in preparations for the launch of the MICT, the successor institution to the ICTY and ICTR. She has previously served as an Associate in the Supreme Court of South Australia, an advisor in the South Australian Attorney-General's Office, and teacher of the law of evidence at the University of Adelaide.

Jérôme de Hemptinne

After graduating in Law from the University of Louvain (1992) and obtaining two masters degrees in Public International Law from the University of Cambridge (1994) and from New York University (NYU) (1995), Jérôme de Hemptinne (Belgian national) worked for nine years at the ICTY where he was, among other things, Chef de Cabinet for the President. In 2006, he joined the Office of the Legal Counsel of the United Nations in New York. Since 2008, he has been the Senior Legal Officer at the STL and is teaching International Humanitarian Law at the Universities of Louvain, Amsterdam, Geneva and Strasbourg. He is also a member of the board of *Avocats sans Frontières*.

Professor Göran Sluiter

Göran Sluiter (Dutch national) is Professor of International Criminal Law, in particular the Law of International Criminal Procedure at the University of Amsterdam and lawyer at *Prakken d'Oliveira Advocaten* (Amsterdam). As an *ad litem* judge, Professor Sluiter sat on the *Van Anraat* case, the first genocide case in the Netherlands. Previously, he worked as a Senior Lecturer in Criminal Law at the University of Amsterdam and a Lecturer in International Law at Utrecht University. He is the co-editor of *International Criminal Procedure – Principles and Rules* (OUP 2013), the co-editor (with C. Stahn) of *The Emerging Practice of the International Criminal Court* (Brill, 2008) and the co-editor (with S. Vasiliev) of *International*

Criminal Procedure: Towards a Coherent Body of Law (CMP, 2009). He has published an extensive number of articles and book chapters.

RESEARCH AND DRAFTING CONSULTANTS

Bettina Spilker

Since she qualified to the Berlin Bar in 2012, Bettina Spilker (German and Swiss national) has been working as an Associate Legal Officer at the STL (*Prosecutor v. Ayyash et al.*, Defence for Assad Hassan Sabra) and as a Legal Assistant at the ICTY (*Prosecutor v. Prlić et al.*, Defence for Milivoj Petković). She has lectured at the University of Leiden (Summer School on International Criminal Law) and is assisting in advising governments on issues of international criminal law, transitional justice and judicial cooperation. Prior to that, she worked at the ICTY (Appeals and Trial Chambers), the ICTR (Trial Chambers, Defence) and the ICC (Defence). She also assisted Defence Counsel in the first Genocide case tried in Germany under universal jurisdiction. Ms. Spilker studied law in Bonn and Berlin and holds an LL.M. (Distinction) in Public International Law from the University of Aberdeen (UK).

Kiat Wei Ng

Kiat Wei Ng (Malaysian national) is currently a Legal Assistant at the ICTY (*The Prosecutor v. Prlić et al.*, Defence for Milivoj Petković) and a Legal Consultant in other major international cases. He previously worked at the Office of the Prosecutor at the ICTY (*The Prosecutor v. Ratko Mladić*) for more than two years. He graduated with a First Class Honours LL.B. degree at Multimedia University, Malaysia in 2009 and obtained his LL.M. (Distinction) from University College London (UCL) in 2010, specialising in Public International Law. Since he graduated from UCL, he has worked as a writer and researcher at various non-governmental organisations, including *Think Africa Press* and *Femin Ijtihad*, in the fields of international criminal law, women's rights and refugees' rights.