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## **Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report - 30 September 2020**

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## LIST OF ABBREVIATIONS

ACN	Advisory Committee on Nominations of Judges
ASP	Assembly of States Parties
AWA	Application for a Warrant of Arrest
CAR	Central African Republic
CBF	Committee on Budget and Finance
CDR	Call Data Records
CIV	Côte d'Ivoire, Ivory Coast
CLD	Case Law Database
CoCo	Coordination Council
CSO	Civil Society Organisation
DCC	Document Containing Charges
DRC	Democratic Republic of the Congo
EBCO	Ethics and Business Conduct Office
EU	European Union
ExCom	Executive Committee
FSS	Forensic Science Section
GCU	Gender and Children Unit
GS-OL	General Service – Other Level
GTA	General Temporary Assistance
HRS	Human Resources Section
IAS	Investigative Analysis Section
IBA	International Bar Association
ICA	International Cooperation Adviser
ICC-FDP	ICC Financial Disclosure Programme
ICS	International Cooperation Section
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ID	Investigations Division
IEU	Information and Evidence Unit
IKEMS	Information and Knowledge Management Section
ILOAT	International Labour Organisation Administrative Tribunal
IO	International Organisation
IOM	Independent Oversight Mechanism
IOP	Immediate Office of the Prosecutor
IRMCT	International Residual Mechanism for Criminal Tribunals
IS	Investigations Section
JCCD	Jurisdiction, Complementarity and Cooperation Division
JWP	Judicial Workflow Platform
KPI	Key Performance Indicator
LAS	Legal Advisory Section
LSU	Language Services Unit
LTD	Legal Tools Database
ORSU	Operational Risk and Support Unit
OPCD	Office of Public Counsel for Defence
OPCV	Office of Public Counsel for Victims

OTP	Office of the Prosecutor
PD	Prosecutions Division
PE	Preliminary Examination
PES	Preliminary Examinations Section
PIU	Public Information Unit
PIOS	Public Information and Outreach Section
POS	Planning and Operations Section
PSU	Protection Strategy Unit
RFA	Request for Assistance
RPE	Rules of Procedure and Evidence
SALTT	Suspects-At-Large Tracking Team
SALWG	Suspects-At-Large Working Group
SGG	Study Group for Governance
SOP	Standard Operating Procedure
SS	Services Section
STA	Short Term Appointment
STL	Special Tribunal for Lebanon
TFV	Trust Fund for Victims
UNHCR	United Nations High Commissioner for Refugees
VAMS	Victims Application Management System
VPRS	Victims Participation and Reparations Section
VTC	Video conferencing
VWS	Victims and Witnesses Section
WFA	Warranting Further Analysis

# INTRODUCTION

## I. BACKGROUND

1. In December 2019, the Assembly of States Parties to the Rome Statute for the International Criminal Court (ASP) established the Independent Expert Review (hereafter ‘the Experts’).<sup>1</sup> The overall mandate of the Experts was to ‘identify ways to strengthen the ICC and the Rome Statute system in order to promote universal recognition of their central role in the global fight against impunity and enhance their overall functioning’.<sup>2</sup> To this end, the Experts were tasked with making ‘concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole’.<sup>3</sup>

2. The Experts are further mandated to make their recommendations to the ASP and the International Criminal Court (the Court) ‘on specific complex technical issues’ under the following clusters of issues: (i) Governance; (ii) Judiciary; and (iii) Preliminary examinations, investigations and prosecutions.<sup>4</sup>

3. The Experts were appointed in Annex II as follows:

- Cluster 1 - Governance: Mr. Nicolas Guillou (France), Ms. Mónica Pinto (Argentina) and Mr. Mike Smith (Australia);
- Cluster 2 - Judiciary: Ms. Anna Bednarek (Poland), Mr. Iain Bonomy (U.K.) and Mr. Mohamed Chande Othman (Tanzania);
- Cluster 3 - Preliminary examinations, investigations and prosecutions: Mr. Richard Goldstone (South Africa), Mr. Hassan Jallow (The Gambia); and Ms. Cristina Schwansee Romano (Brazil).

4. At their first Plenary, the Experts appointed Mr. Richard Goldstone as the chair.<sup>5</sup>

5. The Experts were assisted in their work by Ms. Maria Manolescu (Cluster 1), Ms. Kritika Sharma (Cluster 2), and Ms. Gabriele Chlevickaite (Cluster 3).

6. The ASP requested the three clusters to ‘coordinate their work and present a comprehensive Report containing a single set of recommendations’.<sup>6</sup> For this purpose, regular consultations among all nine Experts were held throughout the Review. The Experts held five plenary sessions - two of which were held in person, in The Hague (21 – 23 January, 24 February) and three by video-teleconferencing (14 – 15 June, 10-11 August, and 1 and 3 September 2020). Further, each of the three clusters held numerous meetings, both virtual and in person. Each cluster completed its report by 31 July 2020.

7. In their work, the Experts were mindful that the Review is part of a wider State Party-driven review process with the Court. They endeavoured in this regard to avoid any duplication and maximise potential synergies. They did so, for example, by consulting relevant ASP facilitators to understand the issues under their mandate. Cluster representatives also attended several meetings of ASP bodies as observers.

<sup>1</sup> Review of the ICC and the Rome Statute system, ICC-ASP/18/Res.7 (2019) - [English](#) | [French](#) | [Spanish](#).

<sup>2</sup> *Ibid.*, Annex I, A, para.1.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, Annex I, para.2.

<sup>5</sup> *Ibid.*, Annex I, C, para.11: ‘The experts shall appoint among themselves a Chair, who will act as contact point for the experts. The Chair shall act as overall coordinator for the three clusters, ensuring coherence, adherence to timelines, proper handling of cross-cutting issues, access to and cooperation from the Court, uniform reporting in terms of form, and other administrative matters’.

<sup>6</sup> *Ibid.*, Annex I, A, para.18.

8. As requested by the ASP,<sup>7</sup> an Interim Report was submitted on 29 June 2020.<sup>8</sup> The Chair and Experts representing each cluster presented the report and answered States Parties' questions in a virtual joint meeting of The Hague and New York Working Groups of the ASP that took place on 30 June 2020.<sup>9</sup>

9. The Interim Report contained details of the consultations carried out by the Experts, indicating the number of interviews and meetings held by them between January and April 2020.<sup>10</sup> They were held with current and former officials, staff and external defence and victims' representatives, Heads of Court Organs, the Staff Union Council, States Parties, ASP representatives and bodies, NGOs and academics. Details were also provided of the written submissions received by the Experts. The updated figures are included in Annex II to this Final Report (the Report).

10. The ASP requested the Court and the ASP Presidency to enable the unhindered access of the Experts to staff and documents, subject to statutory and regulatory requirements and appropriate confidentiality agreements.<sup>11</sup> Accordingly, the Experts have accessed and had regard to a wide array of information, some of which is confidential or of a sensitive nature. For the purpose of the findings and the recommendations and their underlying analysis, reference is made, as appropriate, to some of these sources, with the consent of the confidentiality holder. Mention of such information in the report does not diminish the confidentiality level of the documents, whose content remains restricted or confidential.<sup>12</sup>

11. With due regard to the terms of reference contained in the ASP Resolution and having considered the written and oral submissions received, each cluster decided on the issues that it would investigate. These issues were outlined in the Interim Report<sup>13</sup> and are the subject-matter of the findings and recommendations contained in this Report.

12. Each of the three clusters prepared reports comprising their findings and recommendations on the issues under their review. These conclusions drawn by each cluster were discussed among all the Experts, who strived to reach consensus on all matters before them. This Report, with all its findings and recommendations, carries the concurrence of all the Experts.

13. The Report is submitted pursuant to the ASP request that the Experts present their final report and recommendations to the Bureau, the ASP, the Court and other stakeholders by no later than 30 September.<sup>14</sup>

14. Respecting the working languages of the Court, the Experts would have preferred to issue the full Report in both English and French simultaneously, as was done with the Interim Report. However, to ensure full confidentiality of the Report, the Experts preferred not to share its content with any third party before its public issuance. The Report is issued together with a French translation of its Introduction, and a summary of the recommendations that the Experts advise should receive priority (Annex D). The Secretariat of the ASP has made arrangements for the translation into French of the full Report to begin on 30 September. In case of any discrepancies between the Report and any of its translated versions, the English Report should be considered authoritative.

## II. COOPERATION RECEIVED BY THE EXPERTS

15. The Experts received the fullest cooperation from the ASP Presidency, the Court and the ASP Secretariat. Many present and former officials and members of staff of the Court volunteered to speak with the Experts, and many others agreed to do so at the request of the

<sup>7</sup> *Ibid.*, Annex I, C, para.19 'The Group of Independent Experts shall submit an interim report or in the alternative, if a written report is not feasible, brief States Parties on the status of work'; E, para.25(d): 'June-July 2020: Interim report or briefing to States Parties'.

<sup>8</sup> Independent Expert Review on the International Criminal Court and the Rome Statute System, Interim Report (hereafter 'Interim Report') – [English](#) | [French](#).

<sup>9</sup> See 'Opening remarks by Mr. Richard Goldstone, Chair of the IER, on presentation of the IER Interim report on 30 June 2020' – [English](#) | [French](#).

<sup>10</sup> See [Interim Report](#), Appendix.

<sup>11</sup> [ICC-ASP/18/Res.7](#), A, para.10; C, para.16.

<sup>12</sup> Where a public online version of the document referenced was available, it has been included as hyperlink in the relevant footnote.

<sup>13</sup> [Interim Report](#), para.31.

<sup>14</sup> [ICC-ASP/18/Res.7](#), para.9; Annex I, C, para.19; E, para.25(e).

Experts. Similarly, numerous States Parties and civil society organisations shared their insights with the Experts. Many documents were furnished to the Experts, both at the initiative of officials and staff, and at the request of the Experts. Many of the documents shared with the Experts were subject to appropriate agreements and understandings on confidentiality.

16. Each Organ established a focal point for the Experts to facilitate communication between them and the Court. The focal points diligently responded to requests for information and all questions of the Experts. The focal points were the Special Assistant to the Registrar (for the Registry), the President's Chef de Cabinet (for the Judiciary) and the Prosecutor's Chef de Cabinet for the Office of the Prosecutor (OTP).

### **III. PRELIMINARY OBSERVATIONS**

17. Throughout the process, the Experts were guided by the objective of identifying actionable proposals focused on systemic issues rather than individual actors. For the most part, the proposals need neither amendments to the Rome Statute, nor budget increases.

18. In terms of approach, the Experts compared the Court with other international organisations, domestic and international courts, and other public institutions, to import good practices and innovations, as well as to understand whether the challenges facing the Court were peculiar to it or shared with other similar entities. Several proposals are inspired by other institutions, whether in terms of internal grievance procedures, human resources, internal governance or court procedures.

19. The Experts did not only focus on the Court itself, but – in line with the instructions of the ASP – on the Rome Statute 'ecosystem' and the complementary roles of the Court, the ASP and civil society organisations (the three are also referred to hereafter as 'stakeholders').

20. The Experts note that their mandate was to identify ways to strengthen the Court and the Rome Statute System. Consequently, the findings in the Report are focused on areas in need of improvement and do not present an exhaustive overview of all the positive aspects within the Court or of the Rome Statute system. While such successes do not form the subject-matter of the Report, they were taken into account by all of the Experts.

21. Throughout the process, the Experts were impressed by the commitment that was evident – especially from staff and officials of the Court, but also from representatives of States Parties and members of civil society organisations – to the purposes and mission of the Rome Statute system. The Experts welcomed the strong support received by the Court from numerous governmental and non-governmental actors, from all continents, when faced with recent political threats.

22. In today's political climate and having regard to on-going human rights violations across the globe, the mission of the Court is as crucial as ever. States Parties should demonstrate their commitment to the institution they have founded, and ensure that the Review process is successful in strengthening the Court and the Rome Statute system. It is the firm belief of the Experts that through strong and effective cooperation of all stakeholders in the implementation of the recommendations contained in this Report, and any further recommendations that will result from the wider State-driven review of the Court, substantial improvement can be achieved in the functioning of the Court and of the Rome Statute system.

### **IV. IMPLEMENTATION**

23. The Report contains 384 recommendations, both short and long-term, with varying degrees of complexity, and urgency of implementation. The Experts acknowledge that full implementation of the recommendations will require time, as well as joint effort and determination from the Court, the ASP and States Parties.

24. Having regard to the many recommendations made in this Report, the Experts considered that it would be helpful to draw special attention to those recommendations they consider should be implemented as a matter of priority. A summarised list of these recommendations is contained in Annex I to this Report.

25. The Experts advise that a standing coordination or working group be established to follow-up on the implementation of the recommendations, work on the development of concrete plans for such purpose, as well as to assign tasks and follow-up on completion of intermediary steps. The working group should report regularly and transparently to the ASP on progress achieved. Such updates should also be shared with the Court. While the Experts do not wish to be prescriptive on this matter, they suggest that there would be benefits in having all Organs of the Court, as well as the ASP (through Presidency or Bureau members, for example), represented on this group.

# REPORT

In this Report, each (sub-)section consists of two parts – the first comprises the findings of the Experts, and the second - their recommendations.

## *Court-wide matters*

### I. GOVERNANCE

#### A. Unified Governance

##### 1. Structure of the Court

### Findings

26. Inherent in the structure of any international court or tribunal is the dual nature of the institution: the ICC is both a judicial entity (ICC/Court) and an international organisation (ICC/IO).<sup>15</sup> As a judicial entity, the Court must benefit from judicial independence. As an international organisation, States Parties reasonably expect to be able to guide and shape the institution. Contradictions can arise between the two attributes of the ICC, and in practice such differences have led to tension between the ICC and the ASP. Whereas the dual nature of the ICC cannot be changed, employing this distinction can improve the clarity of reporting lines and improve cooperation.

27. The ICC/IO does not carry out judicial activity – it indirectly supports it. It encompasses administrative services customarily found in international organisations (e.g. human resources, budget and finance, procurement, facilities management, general services etc.). It is led by the Registrar as Chief Administrative Officer, similar to a secretary-general. The ICC/IO should function as a unified organisation, with a vertical hierarchical structure. States Parties play a key role in the ICC/IO, including by electing its officials, financing its expenses and overseeing its functioning.

28. The ICC/Court refers to the judicial activity of the ICC. Here, a further distinction is needed between justice and the administration of justice. Judicial and prosecutorial work (e.g. judgments, deliberations by Judges, the Prosecutor’s decisions to initiate or pursue a case, investigations) require absolute independence. Judges and prosecutors must be able to carry out such activity free from any interference. States Parties shall not use their role in the ICC/IO to influence judicial and prosecutorial activity, whether through budget decisions or appointments. Accountability for judicial and prosecutorial work is ensured through the judicial remedies foreseen by the Court’s legal framework.

29. The administration of justice, however, does not necessitate the same degree of independence. Confidentiality and independence should not be used as a way of deflecting accountability and preventing oversight. The administration of justice is audited in national systems – the same should be the case for the ICC. Efficiency in the administration of justice can also be monitored through performance indicators.<sup>16</sup>

30. Within the ICC/Court, States Parties’ involvement is limited to the legislative function and judicial cooperation.

31. The aforementioned distinctions lead to a **three-layered model of governance** of the ICC, in line with the provisions of the Rome Statute:

- Layer 1: Judicial and prosecutorial activity;

<sup>15</sup> ‘Court’ is used throughout the Report as short form for the ‘International Criminal Court’, without an intended emphasis of the judicial character of the organisation.

<sup>16</sup> See *infra* Section [VI. PERFORMANCE INDICATORS AND STRATEGIC PLANNING](#).

- Layer 2: Administration of justice;
- Layer 3: Administration of the international organisation.

32. Depending on the type or scope of an activity, it falls under one layer or the other. Every layer has a corresponding framework and requires different degrees of independence and accountability.

33. **Layer 1**, Judicial and Prosecutorial activity, is in the hands of the Presidency, the Judges and the Prosecutor, respectively. There can be no auditing of judicial activity by the States Parties, ASP or external actors. The same is valid for prosecutorial work, with the caveat that the OTP can – and is encouraged to – carry out ‘Lessons Learnt’ exercises to review and improve internal practices, including through the use of external experts.<sup>17</sup>

34. The Presidency and Prosecutor, respectively, are the leaders in **Layer 2**, but a form of accountability should be in place. While States Parties cannot impose on the President or Prosecutor how to manage the administration of the Chambers or of the OTP, judicial and prosecutorial auditing should be carried out – though by peers – to render the assessment objective. A Judicial Audit Committee, made up of outside judges and prosecutors, is recommended in this regard. Inter-court comparisons of performance indicators on issues of administration of justice can further contribute to assessing efficiency in Layer 2.

35. The Registry supports Layers 1 and 2, and in this regard the Registrar cooperates with the Prosecutor and acts under the guidance of the Presidency.

36. For matters related to the administration of the international organisation (**Layer 3**)<sup>18</sup> the Registrar is the leader, in line with article 43 of the Rome Statute. The Registrar is responsible for the development and implementation of administrative processes and policies, including the budget. In this regard, the Registrar shall consult other Principals, but remains the decision-maker. In performing such activities, the Registrar is accountable to the ASP. The One Court principle<sup>19</sup> should be in full effect in Layer 3, through the uniform application of administrative processes, ethical standards, staff regulations, values, disciplinary processes and so forth.

37. The Three-Layered Governance Model is consistent with the relevant provisions of the Rome Statute. Article 38(3)(a) indicates that the Presidency is responsible for ‘the proper administration of the Court’.<sup>20</sup> This is to be understood as the judicial function of the ICC (ICC/Court – Layers 1 and 2). This interpretation is also consistent with the provisions of Article 43(1), according to which the Registry is responsible for ‘the non-judicial aspects of the administration and servicing of the Court’ (ICC/IO – Layer 3), and headed by the Registrar who is the ‘principal administrative officer’. Similarly, the provisions entrusting the Prosecutor with ‘full authority over the management and administration of the OTP, including the staff, facilities and other resources thereof’,<sup>21</sup> should be construed as concerning Layer 2. The Registrar acts under the guidance of the Presidency as regards the activities or services falling under Layers 1 or 2. In Layer 3, the Registrar is accountable to States Parties.

38. The distinction between ICC/Court and ICC/IO in terms of authority and accountability is also consistent with the provisions of Article 119. There, it is clarified that

<sup>17</sup> See *infra* Section [XV.Lessons Learnt](#).

<sup>18</sup> With the exception of external relations, as the President is the ‘face’ of the Court – see *infra* paras.41-42.

<sup>19</sup> While the absence of a clear definition and interpretation of this principle has been shared with the Experts, it is understood to refer to the different entities within the Court and their leaders acting jointly, as one institution.

<sup>20</sup> The distinction between the three layers was recently noted by the ICC Pre-Trial Chamber II: ‘(...) *the Single Judge recalls that the Court’s statutory framework clearly distinguishes the role of the Court, as a judicial institution entrusted with the power to exercise its jurisdiction over persons for the most serious crimes of international concern; the position of the Assembly of States Parties, which is responsible for considering and deciding on the Court’s budget; and the duties of the judiciary and Chambers. The judiciary, indisputably, cannot play any role in the budgetary process, let alone in the negotiation of any financial agreements. There is no legal basis for the Chamber to engage in the financial matters of the Court, nor has the Single Judge authority to refer such a request to the Presidency.*’ *The Prosecutor v. Ali Kushayb*, Decision on the Defence request under article 115(b) of the Rome Statute, [ICC-02/05-01/20-101](#), 23 July 2020, para.8.

<sup>21</sup> [Rome Statute](#), Art.42(2).

the Court has authority to settle any disputes concerning its judicial functions, and that any other disputes related to the interpretation or application of the Rome Statute is referred to the ASP.

### (1) ICC/Court Governance

39. Matters related to judicial and prosecutorial activity (Layer 1) are in the hands of the Judges, the Presidency, and the Prosecutor respectively.

40. In Layer 2, the Presidency is the authority. As such, it is responsible for developing tools and introducing measures required for the efficient management of proceedings. Important instruments at their disposal are Key Performance Indicators (KPIs), both for efficiency and effectiveness measurements.<sup>22</sup>

41. The Presidency is responsible for all human resources matters that concern the Judges, such as requests for leave or participation in external activities. Further, the Presidency shall take the lead in capacity building activities for Judges and Chambers staff, including an Induction Programme for new Judges, continuous professional development for Judges and staff, and regular seminars to facilitate discussion on specific topics and agreement on common guidelines.<sup>23</sup>

42. Finally, the President represents the Court externally, as the ‘face’ of the Court in the field of external relations. In this regard, the President plays a key role in successfully promoting the universality of the Rome Statute, shaping the image of the Court, as well as more generally fostering global and political support for the Court.

43. The Prosecutor is the head of the prosecutorial function and leader of the administration of the OTP. Currently, the administration of the OTP encompasses both matters relating directly to investigations and prosecution (Layer 1), as well as issues of organisational administration (Layers 2 and 3). From reports received by the Experts from numerous staff, there are several examples of services within the OTP that duplicate or overlap with activities performed by the Registry. While the Experts noted the Court’s past efforts to identify potential inter-Organ overlaps and enhance synergies,<sup>24</sup> they believe that the OTP delegating matters related to Layer 3 to the Registry will enable a more efficient use of resources and uniform application of internal policies and regulations. Further, such delegation is also in line with the External Auditor’s recommendation.<sup>25</sup>

44. In this regard, the OTP and Registry should consult on which services/activities could be delegated to the Registry and the extent to which the latter has the capacity to support the OTP’s needs. There is nothing to prevent the incoming Prosecutor from rendering such a delegation, as has been done in other international courts/tribunals. Such an approach would also enable the OTP to make use of available resources to focus on its core business. States Parties are advised to discuss this matter with candidates for the role of Prosecutor.

### (2) ICC/IO Governance

45. The Registrar has dual roles: secretary-general of an international organisation and registrar of a court. For the former, the Registrar reports to States Parties;<sup>26</sup> for the latter, to the Presidency.

46. As secretary-general of the ICC/IO, the Registrar shall be the leader, decision-maker and responsible for the development and implementation of administrative processes and policies, including budget. Other Principals shall be consulted, but the Registrar remains the decision-maker. Activities of the ICC/IO can be audited, as with other international

<sup>22</sup> See *infra* Section [VI. PERFORMANCE INDICATORS AND STRATEGIC PLANNING](#).

<sup>23</sup> See *infra* Section [IX.A. Induction and Continuing Professional Development](#).

<sup>24</sup> Report of the Court on Inter-Organ Synergies, CBF/28/12 (2017).

<sup>25</sup> External Auditor’s Report on the budget process, [ICC-ASP/18/2/Rev.1](#) (2019), Recommendation 1, p.2.

<sup>26</sup> This is consistent with – for example – the provisions of the ICC Financial Regulations and Rules, stating that the Registrar is accountable to the ASP for the proper management and administration of the financial resources [ICC Financial Regulations and Rules](#), Regulation 4.9.

organisations, both internally through the Office of Internal Audit (OIA), and externally. Inter-IO comparison based on KPIs can facilitate assessment of efficiency.<sup>27</sup>

47. It is within the ICC/IO that the One Court principle finds its rightful application. The adoption of this approach has been beneficial to the Court and increased inter-Organ cooperation. At the same time, the Experts heard there is a need for a definition of the principle and a clear interpretation of what it implies in practice. For full effect to be given to this principle, the distinction between the ICC/Court and ICC/IO needs to be taken into account. Within the ICC/Court, it is not feasible to aim to apply the principle, as there is an inherent separation between the Chambers, OTP, Defence and Victims.

48. In line with the One Court principle, uniform, Court-wide instruments and approaches should be prioritised for all aspects of the ICC/IO. There should be no duplication or parallel working groups in different Organs (e.g. mentorship or training programs, currently existing both within the Registry and the OTP). All staff should be treated the same way, regardless of the Organ they work in, and should be united around the same Court-wide values.<sup>28</sup> A great number of staff were of the view that there is currently a different interpretation or application of Court internal administrative or human resources policies to OTP and at times Chambers staff, compared with their counterparts in other Organs.

49. The Registry should take the lead in further integrating offices or units within the Court that perform similar tasks, with the goal of strengthening capacity through pooling or reallocation of resources, and avoiding overlap. For example, the following can be reviewed: activities performed in the OTP (i.e. Operational Risk and Support Unit (ORSU), the Planning and Operations Section in the Investigation Division (ID POS), the Preliminary Examinations Sections in the Jurisdiction, Complementarity and Cooperation Division (JCCD PES), and integrated teams) and in the Registry (Country Analysis Unit in External Operations and Support Section (EOSS) and the Services Unit in Victims and Witnesses Section (VWS)); psychologists for witnesses – both in the OTP and in the Registry (VWS); suspects at large tracking teams – both within the OTP and the Registry.<sup>29</sup>

50. The uniform approach guided by the One Court principle should also be applied to independent units and offices within the Court. Functional independence of the TFV Secretariat, Independent Oversight Mechanism (IOM), ASP Secretariat, and OIA does not preclude the uniform application of administrative and human resources policies and equal opportunities for and treatment of staff. Further, the Court-wide efforts to assess efficiency through KPIs should be extended to such independent offices, as is already done for the Office of Public Counsel for Defence (OPCD) and for Victims (OPCV).<sup>30</sup> As units within the Rome Statute system, all such offices should develop and align their strategies to the Court's Strategic Plan.

## **Recommendations**

**R1.** The Three-Layered Governance Model should be used as a tool to ensure effective and efficient governance, clarify reporting lines and improve cooperation among stakeholders.

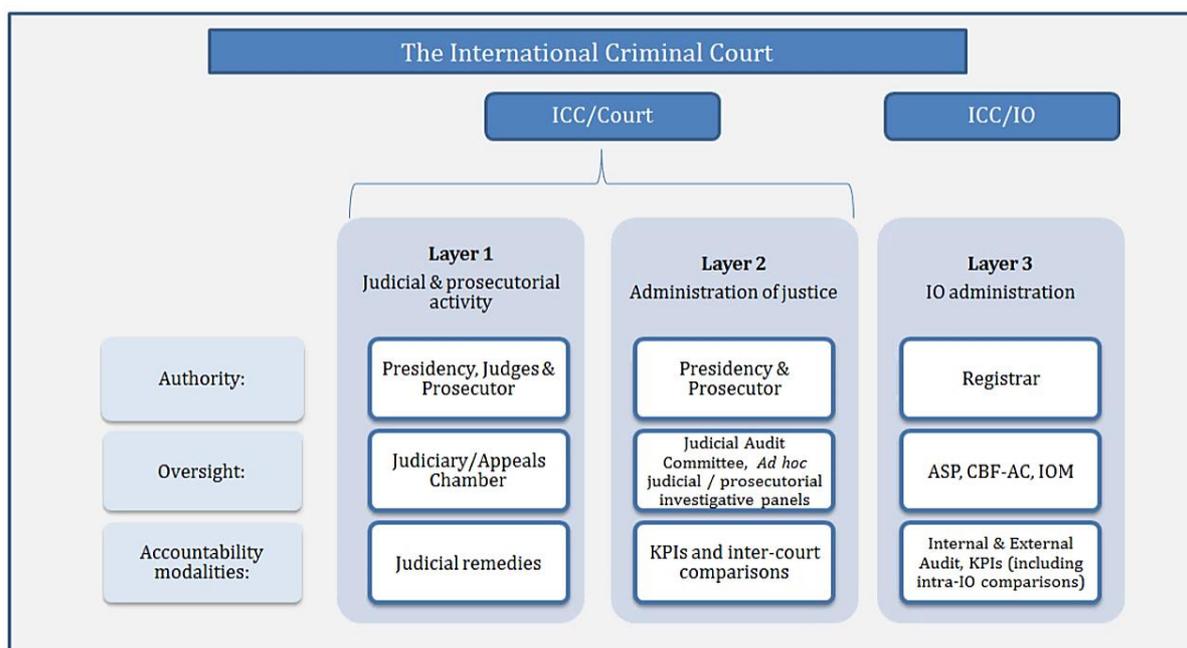
<sup>27</sup> See *infra* Section [VI. PERFORMANCE INDICATORS AND STRATEGIC PLANNING](#).

<sup>28</sup> The Court committed to developing a set of Court-wide values at the request of the Audit Committee – ‘The Court proposes to supplement the existing framework harmoniously through a high-level, organisation-wide set of core values as a complement to its current Strategic Plan (2019-2020) which does not define core values for the Court as a whole.’ - Update by the Court on a Court-wide values and ethics framework, AC/11/18 (2020), paras.2, 4, 6-7.

<sup>29</sup> See further *infra* Section [XIV.B.3.Tracking and Arrests of Fugitives](#).

<sup>30</sup> Registry Key Performance Indicators (2019-2021), p.2.

**Figure 1: The International Criminal Court – Three-layered Governance Model<sup>31</sup>**



**R2.** ICC/Court: Layer 1, Judicial and Prosecutorial activity, is in the hands of the Presidency, the Judges, and the Prosecutor respectively, and requires absolute independence. There can be no auditing by States Parties, ASP or external actors. States Parties should not use their role in the ICC/IO to influence judicial and prosecutorial activity. In Layer 2, the Presidency and the Prosecutor are the leaders. Accountability should be achieved through judicial and prosecutorial auditing, carried out by peers. Inter-court comparisons of performance indicators on issues of administration of justice can further contribute to assessing efficiency in Layer 2. The Registry supports Layers 1 and 2 and, in this regard, the Registrar cooperates with the Prosecutor and acts under the guidance of the Court President.

**R3.** A non-permanent Judicial Audit Committee should be called on to carry out audits of the administration of justice activities in Chambers and OTP. The Judicial Audit Committee should be made up of current or former, national or international judges and prosecutors with relevant experience, appointed similarly to the Committee recommended in R113 (p.92).

**R4.** The ICC/IO should function as a unified organisation, with a vertical hierarchical structure. The Registrar is the Chief Administrative Officer, responsible for the development and implementation of administrative processes and policies, including the budget. In this regard, the Registrar should consult other Principals, but – as Chief Administrative Officer – should remain the decision-maker. The One Court principle should be in full effect in Layer 3, through the uniform application and interpretation of administrative processes, ethical standards, staff regulations, values, disciplinary processes and so forth to all staff, regardless of Organ. Uniform, Court-wide instruments and approaches should be prioritised for all aspects of the ICC/IO. There should be no duplication or parallel working groups in different Organs. All staff should be treated the same way, regardless of the Organ they work in, and should be united around the same Court-wide values.

**R5.** The uniform approach guided by the One Court principle should also be applied to the independent units and offices within the Court. The Court-wide efforts to assess efficiency through Key Performance Indicators should be extended to such independent offices. As units within the Rome Statute system, all such offices should develop and align their strategies to the Court's Strategic Plan.

**R6.** The incoming Prosecutor is encouraged to delegate to the Registry, as much as possible, the services/activities within the OTP that pertain to administrative matters (Layer 3). The OTP and Registry should consult on this issue and on the extent to which the

<sup>31</sup> For further details on the judicial/prosecutorial investigative panels, see *infra* Section [IV. INTERNAL GRIEVANCE PROCEDURES](#) and specifically R108 (p.87).

Registry has the capacity to support the OTP's needs. States Parties are advised to discuss this matter with candidates for the role of the Prosecutor.

**R7.** The Registry should take the lead in further integrating offices or units within the Court that perform similar tasks, with the goal of strengthening capacity through pooling or reallocation of resources, and avoiding overlap.

## 2. Decision-Making Process and Internal Legal Framework

### Findings

51. In terms of Court-wide decision-making, the three Principals meet regularly in the Coordination Council (CoCo). A meeting of their Chiefs of Staff, taking place more often, prepares CoCo meetings. Inter-Organ coordination is needed on all levels, from the working level to Heads of Organs.

52. Without exception, all those who commented on inter-Organ coordination and decision-making shared that it was a much too slow and lengthy process. On the working level, the Experts heard there is resistance to inter-Organ coordination partly due to the Court's internal atmosphere of distrust,<sup>32</sup> the many silos in which it operates, as well as the fear that pooling resources will lead to loss of jobs. At the senior management level, the absence of clarity surrounding the roles, reporting lines and powers of the three Principals hampers the efficiency of the decision-making process. Specifically, the perceived possibility for a Principal to veto any and all Court-wide decisions, regardless of their scope/matter, affects the constructiveness and efficiency of the process. Some Organ(s)/Heads of Organ(s) are perceived as slowing down decision-making, sometimes intentionally.

53. The complex and blurred governance structure at the Court, combined with a high number of individuals being at the Court for a significant length of time and other factors, seems to have led to a situation where there is a tendency for too many people to want to be involved in too many areas that are outside of their direct area of responsibility. This complicates any decision-making process, contributes to the extended duration of any consultation process and can also result in diluting the outcome of the process. For example, having the three Organs' legal offices comment on the language of an Administrative Instruction related to minute, purely administrative matters might improve the fine details of the document, but the resources invested in it might not be worth the outcome. Each Organ should aim to focus on their core business, as prescribed by the Rome Statute and interpreted with the help of the Three-Layered Governance Model. Such approach also necessitates building or strengthening trust between the Organs and senior managers across the Court.

54. The process for developing the internal legal framework of the Court is currently too lengthy and complex to enable it to act in an agile manner. The average duration for all Administrative Instructions and Presidential Directives between 2016 – 2020 has been 150 days per instrument, excluding the time needed for a first draft to be prepared. Three Administrative Instructions on more complex topics took between 358 and 381 days each.<sup>33</sup> This is due to a lack of clarity as to ownership in the project, the equal veto power of the Organs, and the practice of consulting all Heads of Organs, who then consult their P-5s, even on matters of minor importance.

55. The application of the Three-Layered Governance Model to the Court should help clarify responsibility areas and reporting lines, leading to more efficient and effective decision-making processes. The matter at hand will dictate who the owner of the process should be. A clear distinction needs to be drawn between who the ultimate decision-maker is and who needs to be consulted. There should be no veto from Principals in matters that do not fall under their responsibility. The Experts further recommend employing clear deadlines for consultations, with tacit approval implied after the deadline has passed.<sup>34</sup>

<sup>32</sup> See further on this *infra* Section [II.B. Working Environment and Culture, Staff Engagement, Staff Welfare](#).

<sup>33</sup> Based on information provided by the Court to the Experts.

<sup>34</sup> Implementing these recommendations would require amending 'Procedures for the promulgation of administrative issuances', [ICC/PRES/D/G/2003/001](#) (2003) and 'Procedures for the elaboration and promulgation of administrative instructions', [ICC/AI/2004/001](#) (2004).

56. Matters related strictly to the administration of the ICC/IO (such as the three aforementioned AIs that were blocked for over a year at the inter-Organ consultation stage) are the Registrar's responsibility. The Registrar should be required to consult the Prosecutor and President in CoCo on the strategic objectives, but need not obtain approval of the latter on the final language and implementation details.

57. The Registrar should report regularly to the ASP on the length of the inter-Organ consultation process for all Layer 3 internal legal documents. In the absence of embracing this evolution in terms of inter-Organ decision-making and coordination, it is highly unlikely that the status quo will change.

58. Further efficiency in unified governance and administration can be achieved through regular meetings between the Principals and Heads of (functionally) independent offices (OPCD, OPCV, TFV Secretariat, ASP Secretariat). Meeting when needed and in any case regularly, as an extended CoCo (CoCo+), would ensure strategic coordination at the highest level, enabling the Court as a whole to work in harmony and with unity of purpose. A further benefit would be that CoCo+ would offer the possibility to integrate (institutional) defence and victims' issues in Court-wide approaches – currently, they are meant to be funnelled through the Registry, but the latter is necessarily constrained by its neutrality.

### **Recommendations**

**R8.** Each Organ should aim to focus on its core business, as prescribed by the Rome Statute and interpreted with the help of the Three-Layered Governance Model. This model should be employed to clarify responsibility areas and reporting lines, leading to more efficient and effective decision-making processes. The matter at hand will dictate who the owner of the process should be. A clear distinction needs to be drawn between who the ultimate decision-maker is and who needs to be consulted. There should be no veto from a Principal in matters that do not fall under their responsibility.

**R9.** The Registrar should be the sole official responsible for developing, updating, interpreting and implementing internal legislative instruments relating to internal administrative matters (ICC/IO). The Registrar should consult the Prosecutor and President in CoCo on the strategic objectives, but should not be required to obtain approval of the latter on the final language and implementation details. The approach of consulting all Organs, implying all Heads of Organs, their support staff and their legal offices, on such details should be discontinued. Where needed, clear deadlines for consultations should be employed, with tacit approval implied after the deadline has passed.

**R10.** The Registrar should report regularly to the ASP on the length of the inter-Organ consultation process for all Layer 3 internal legal documents.

**R11.** An extended Coordination Council (CoCo+) should regularly bring together the Principals and the Heads of (functionally) independent offices within the Court (OPCD, OPCV, TFV Secretariat, ASP Secretariat) to ensure strategic coordination at the highest level, enabling the Court as a whole to work in harmony and with unity of purpose.

## **3. Content of Internal Legal Framework**

### **Findings**

59. The improved process described above should be employed to review potentially outdated administrative issuances or those that are contradictory to principles set out in decisions of the International Labour Organisation – Administrative Tribunal (ILOAT) against the Court. A systemic process should further be put in place to ensure reviewing the compliance of the Court's internal legal framework with ILOAT decisions, as soon as practicable after the Tribunal decides on a matter involving the Court.

60. The Experts also recommend the Court to follow UN administrative procedures as a starting base in developing new policies. When needed, the approaches can be tweaked to the Court's needs, taking into account the differences in size of the organisation and the mission, but this should remain the exception. Otherwise, the Court will constantly have to

‘re-invent’ the wheel. Designing an internal legal instrument from scratch takes significant time. Dedicated staff are needed to research the topic, seek expertise in the matter, draft the instrument and then facilitate consultations. This is costly, creates legal uncertainty and blocks resources that could otherwise be made use of elsewhere. Using the UN administrative procedures as a starting base is in line with the Court following the UN Common System and enables the Court to prioritise its resources to focus on its core mission.

61. The use of the UN Common System should also lead the Court and ASP to review its decision to make use of ILOAT rather than the UN Appeals Tribunal. The jurisprudence of the two might differ on specific points, and the Court could find itself in an impossible situation, between applying the UN Common System, taking into account potential interpretation/implementation principles from the UN Appeals Tribunal, and ensuring compliance with the ILOAT jurisprudence.<sup>35</sup>

## **Recommendations**

**R12.** The Court’s internal legal framework should be reviewed to identify and amend as needed outdated internal legal instruments or those that are contradictory to principles set out in ILOAT decisions against the Court. A systemic process should further be put in place to enable a review of the Court’s internal legal framework’s compliance with ILOAT decisions, as soon as practicable after such a decision involving the Court is delivered, to identify and implement any necessary amendments.

**R13.** The Experts also recommend the Court to follow the UN administrative procedures as a starting base in developing new policies. When needed, the approaches can be tweaked to the Court’s needs, taking into account the differences in size of the organisation and mission. The use of UN Common System should also lead the Court and ASP to review the decision to make use of ILOAT rather than the UN Appeals Tribunals.

## **4. Working Culture at the Court**

### **Findings**

62. The Court appears to suffer internally from distrust (inter-Organ, as well as between staff and senior/higher management) and a culture of fear. Such observations were shared with the Experts by staff at all levels. Individuals have pointed to the existence of an antagonistic approach between the Organs, a mentality of ‘us vs them’ which naturally is not conducive to cooperation and coordination.<sup>36</sup>

63. It appears from the Experts’ consultations that the Court is widely perceived from within as too bureaucratic, too inflexible, and lacking in leadership and accountability. Several staff shared with the Experts instances of non-inclusive, indecisive and bureaucratic leadership styles. Constructive and meaningful dialogue between managers and the people they supervise does not always seem to be part of the working culture.<sup>37</sup> At the same time, potentially due to the culture of fear on all levels, a risk adverse environment seems to dominate, where leaders avoid or delay taking responsibility when needed, priorities change and accountability is lacking.

<sup>35</sup> See also R120 (p.103).

<sup>36</sup> This finding is consistent with the conclusion of the Independent Expert appointed by the Court to review informal conflict resolution at the ICC. She noted in her report that ‘In interviews with staff across the Court, the expert was told that trust was either completely lacking or severely eroded on all three levels. (...) Some staff expressed that trust in the institution is significantly damaged in the aftermath of actions on the part of previous top leadership. In the assessment of the expert, the present climate at the Court is not only one of a lack of trust, but indeed one of distrust (...) – impl[ying] fear of the other, tendency to attribute sinister intentions to the other and desire to protect oneself from the effects of another’s conduct’ - Independent Expert Report on establishing an Ombudsman Office (2019), paras.177-178, pp.50-51.

<sup>37</sup> *Ibid.*, p.20, para.59: ‘Some areas of the Court are characterised by a command and control style of operations, in-group – out-group mentality and loyalties, and conformist expectations. In such situations, staff members raising concerns with individuals outside the chain of supervision is not seen favourably and such actions are sometimes met with hostility, reprisals and stigmatisation’.

64. Decisive action needs to follow the ASP's and Court's commitment to ensuring gender equality and providing a welcoming environment for all individuals affiliated with the Court. The Experts make a number of findings and recommendations throughout the Report addressing gender inequality, particularly in senior positions, through measures relating to elections,<sup>38</sup> recruitment,<sup>39</sup> working environment,<sup>40</sup> training and professional development.<sup>41</sup> Targeted interventions for gender equality should be complemented by gender mainstreaming.<sup>42</sup> Attention should further be given to ensuring the dignity, wellbeing, safety and inclusion of LGBTIQ+ individuals<sup>43</sup> in the Court's working environment. The Experts welcome in this regard the ICCQ, an informal sexual and gender diversity network at the Court. In pursuing these goals, the Court should make use of dedicated focal points on gender issues, and sexual and other forms of harassment,<sup>44</sup> best practices and expertise of specialised external partners, such as UN Women and dedicated NGOs.

65. The Experts recommend recruitment processes for managers to focus more on the required managerial and leadership skills. Capacity building should also be employed as needed to support the further strengthening of Court managers' leadership skills. In this regard, the Experts commend the Court for the recently initiated Leadership Framework project. Strong support is needed for a successful implementation from all Organs, as well as adequate resources.

66. Many staff have shared with the Experts that the inadequate style of management, and absence of leadership and accountability have caused a lot of stress, with many needing to go on extended sick leave, including for burnout. A Wellbeing Survey aiming to identify 'hot zones' of secondary trauma, burnout and stress prevention within the Court is a welcome initiative.<sup>45</sup> The follow-up of the project, identifying potential causes and developing adequate response measures should receive the suitable support.

67. Though requested, no data has been presented to show how the Court's sick leave rate compares to other IOs. As the Experts suggest elsewhere,<sup>46</sup> comparison of such data with other international courts or tribunals and potentially other international organisations can offer some clarity as to whether the situation at the Court is similar to, or better or worse than at other similar institutions.

68. In contrast with the aforementioned negative views shared with the Experts on the working conditions and atmosphere at the Court, the Experts note that a high number of staff continue to work at the Court for significant lengths of time.<sup>47</sup> Further, employment conditions are the same as for UN staff, and The Hague is a comfortable expat city and a non-hardship duty station.

69. While the Experts recommend many systemic changes on different levels through this Report, they note the need for staff to have reasonable expectations as to what an international, culturally diverse, non-career bureaucracy can offer.

<sup>38</sup> See R77 (p.61).

<sup>39</sup> See para.212, R88 (p.69), R91 (p.73).

<sup>40</sup> See paras.203, 209, 214, R333 (p.269).

<sup>41</sup> See para.233, R99 (p.76), para.42, R174 (p.141).

<sup>42</sup> Mainstreaming a gender perspective is defined as: '(...) the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality' – [UN ECOSOC 1997/2 Agreed Conclusions \(1997\)](#). See further UN, Office of the Special Adviser on Gender Issues and Advancement of Women, [Gender Mainstreaming. An overview \(2002\)](#).

<sup>43</sup> 'LGBTIQ+ emphasises a diversity of sexuality, gender identity, gender expression and sexual characteristics, and is used to refer to anyone who is non-heterosexual and/or non-cisgender, including Lesbians, Gays, Bisexuals, Transgenders, Intersexed, Queers, Pansexuals, Genderqueers, Agenders and Asexuals' – ICCQ, Comments on the Staff Union Council's 'Concept paper on amendments to the Administrative Instruction on Sexual and Other Forms of Harassment (ICC/AI/2005/005)' (2019), para.1.

<sup>44</sup> See R122-123 (p.103).

<sup>45</sup> The Survey was suspended end of March due to the COVID-19 crisis. At the time of writing, the Experts were not informed as to when the survey would be relaunched.

<sup>46</sup> See *infra* Section [VI. PERFORMANCE INDICATORS AND STRATEGIC PLANNING](#).

<sup>47</sup> Over 200 staff (G and P level) have been working at the Court for over 10 years; similar number of staff has been at the Court between 5 and 10 years – based on data provided by the Court to the Experts.

70. It is clear from the input received by the Experts through consultations, as well as previous independent experts' work<sup>48</sup> that the Court, and senior management specifically, need to make efforts to rebuild and strengthen internal trust and re-shape the working culture at the Court. Specifically, the Court should aim to move away from a highly litigious, adversarial atmosphere within the Court. This can be achieved, for example, through more transparent and regular communication from leadership to staff. The Experts also recognize the important role the Staff Union Council can play in bridging the gap between staff and leadership, by advocating and implementing a collaborative and cooperative working culture. Additional measures could include CoCo decisions being communicated quickly and effectively to the concerned staff/Organs, and prioritising opportunities for staff to engage in a constructive and meaningful dialogue with the leadership, on office-, unit-, section-, Organ- and Court-wide levels.

71. Additional observations and recommendations on the Court's working environment and staff engagement are made in the Human Resources Section of this Report.

### **Recommendations**

**R14.** The Court, and senior management specifically, need to make efforts to rebuild and strengthen internal trust and re-shape the working culture at the Court. Specifically, the Court should aim to move away from a highly litigious, adversarial atmosphere in a human resources management context. This can be achieved, for example, through more transparent and regular communication from leadership to staff. In practice, this would include communicating quickly and effectively CoCo decisions to concerned staff/Organs, and prioritising opportunities for staff to engage in a constructive and meaningful dialogue with the leadership, on office-, unit-, section-, Organ- and Court-wide levels.

**R15.** Decisive action needs to follow the ASP's and Court's commitment to achieving gender equality and ensuring the dignity, wellbeing, safety and inclusion of all individuals affiliated with the Court, regardless of gender or sexual orientation. Targeted interventions for gender equality should be complemented by gender mainstreaming.

**R16.** Recruitment processes for managers should place more emphasis on the required managerial and leadership skills. Capacity building should also be employed as needed to support the further strengthening of Court managers' leadership skills.

**R17.** The Leadership Framework project, as well as the Wellbeing Survey should be effectively supported by the Court and its Principals.

**R18.** Sick leave rates should be compared with data from other international courts and international organisations to clarify whether the situation at the Court is similar to, or better or worse than at other similar institutions.

**R19.** Regularly carrying out the Staff Engagement Survey, Wellbeing Survey, and comparing sick leave rates through a consistent methodology would also enable monitoring the evolution of results. Such comparisons in time would offer an indication of progress and should guide relevant actors' decisions.

**R20.** The Staff Union Council can and should play an important role in supporting the process of strengthening trust within the Court and re-shaping its culture, by advocating for and practising a collaborative and cooperative approach.

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<sup>48</sup> E.g. Final Audit Report on Human Resources management, [ICC-ASP/17/7](#) (2018), pp.36-37 and para.245; Independent Expert Report on establishing an Ombudsman Office.

## **B. Chambers Governance (Working Environment and Culture, Structure, Management and Organisation)**

### **Findings**

#### **1. Working Environment and Culture**

72. Both elected officials and staff informed the Experts of the low morale in Chambers. The scores of the Staff Engagement Survey reinforce this conclusion. This seems to be due to three main factors. First, there is an absence of opportunities for promotion for Chambers staff due to the structure of staffing in Chambers, which creates frustration and discontent among staff.<sup>49</sup> Second, staff perceive a degree of arbitrariness or lack of consistency in management decisions, such as assigning individuals specific roles or cases, rather than basing it on merit. Third, the working environment in Chambers has been affected by instances of harassment and bullying by some Judges, which have not been sufficiently tackled, partly due to the perceived unaccountability of Judges.

73. In spite of the above factors however, the majority of staff members opt to continue working in Chambers due to the nature and uniqueness of the role: Chambers staff enjoy the substance of their work and feel committed to the cause of international justice; further, they might also consider it difficult to find similar positions in a domestic system. Many staff members have been in Chambers for a very long time, some since 2003.

74. The Experts heard numerous accounts from staff and officials of difficult working relations between a few Judges and some Chambers staff. On the one hand, there appears to be an approach of self-perceived aristocracy from some Judges, treating staff as ‘commoners’. On the other hand, there appears to be a tendency of lack of consideration of Judges from some legal staff. This is especially the case when Judges are perceived as not ideally suited for the position they were elected to or where a judge is perceived as not being involved or fully engaged in the Chamber’s work. Even when that is not the case, in the current working environment, some legal staff, having been at the Court for more than 10 years, might consider themselves as being more competent than an incoming Judge.

75. Such viewpoints can lead to a certain level of detachment by Judges, relying on staff for all the drafting and only reviewing documents, without being continuously involved throughout the legal process. This can result in a situation in which legal staff conduct the preparation of decisions, almost independently from Judges, in some cases with the Judges’ consent, in others without the latter realising it.

76. While Chambers staff fall administratively under the Registry, in practice there is little to no management oversight from the Registry, which often results in different treatment of staff at the same level in different Organs, and a lack of uniform application and interpretation of administrative policies.

#### **2. Chambers Structure and Organisation**

77. Chambers legal staff are central to the efficient and effective performance of the Chambers’ primary judicial mandate and the provision of high-quality legal services to Judges.

78. Originally, the guiding objective of the Chambers legal staff structure adopted in 2004 was to establish a cabinet of legal advisers for each judge, consisting of two legal officers at P-3 and P-2 levels, and each of the three Divisions (Pre-Trial, Trial and Appeals) were to have three legal advisers at P-4 level. Moreover, the Pre-Trial Chamber was to have a senior

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<sup>49</sup> In the latest Staff Engagement Survey (2018), 72% of respondents from the Judiciary responded overall negative to the affirmation ‘The ICC provides me with good prospects/opportunities for internal mobility’ and 82% responded overall negative to ‘I am satisfied with the opportunities for advancement within the ICC’. In comparison, the scores for the Registry and OTP were as follows: prospects for internal mobility – 57% of Registry respondents and 57% of OTP responded overall negative to the affirmation; to the question on prospects for advancement – 56% of respondents in Registry responded overall negative and 59% in the case of the OTP. The different size of the three Organs, as well as the more uniform positions in Chambers compared to OTP and Registry should also be kept in mind.

legal adviser at P-5 level, a position intended to attract an individual having judge d' instruction experience. None of these positions were conceived to have specific leadership and managerial responsibilities. Of this structure, only 15 P-2 posts and three legal adviser posts (one per Division) were included in the initial budgets of the Court.

79. This organisational structure was only partially implemented. In 2007, a reclassification of P-2 legal officers' positions to P-3 took place. However, a few years ago, a reverse decision was taken by the Presidency not to fill P-3 legal positions that become vacant and instead to either recruit P-2 or P-1 staff against those posts (i.e. a process of 'natural attrition' of P-3 posts). Over time, P-2 legal positions amassed in Chambers.

80. All these measures were attempts to put 'a band aid' on the organisation of Chambers legal staff support. The organisation, teams and working arrangements in the three Divisions operated differently. No overarching managerial strategy ensued. From a pyramid legal support staff structure, envisaged at the Court's establishment, to date the organisational configuration is a flat arrangement. The current staff foundation of Chambers comprises 21 P-3 and 12 P-2 legal officers.<sup>50</sup>

81. The latest organisational and structural changes occurred in 2016, with the establishment, on the Judiciary's initiative and following approval by the ASP, of the post of Head of Chambers Staff. Prior to that, the management of Chambers was under the President of each Division.

82. Despite industrious and genuine efforts by the Judiciary to develop an effective and functioning organisational structure for Chambers legal support, there was unanimity among persons interviewed by the Experts on the continuing existence of a collection of challenges and weaknesses arising out of the original working premises and the developments recited earlier. In particular, these include:

- *Management:* Judges were engaged in managerial, human resource and staffing decisions, including micro-management of Chambers. They also became its main managerial decision-maker.
- *Teams:* The assignment of legal officers to individual Judges led to the development of mini-teams in Chambers, with some legal officers becoming the personal fiefdoms of Judges. That rendered it difficult to form coherent teams. Information available to the Experts also indicates that between one-third to half of the Judges assign legal officers to their external and non-Chambers related commitments (e.g. speeches, lectures, articles, etc.), rendering it distracting to Chambers productivity. The judge-legal officer proximity also leaves room for abuse, as a legal officer with privileged access to an assigned Judge can easily exploit that relationship by pushing their own personal interests and projects through the Judge, instead of putting them forward for debate and resolution with colleague legal officers. Furthermore, an inequality arises between legal officers individually assigned to Judges and those generally assigned to a Chamber.
- *Performance:* There was neither incentive, nor reward for excellent performance by legal staff, nor accountability for under-performance. No consequences followed for performance or non-performance.
- *Organisation:* (i) The general organisational set-up leans heavily on the assignment of legal officers to individual Judges rather than to a Chamber as a whole; (ii) some Judges migrated with their legal officers when they were reassigned to other Divisions by the Presidency; (iii) given the flat structure that finally persisted in Chambers, P-2 and P-3 legal officers supervise other legal staff at the same level; (iii) A tendency is claimed to have developed for some Judges to prefer to work with or confer responsibilities on P-2 over P-3 legal officers.

<sup>50</sup> Resolution of the Assembly of States Parties on the proposed programme budget for 2020, the Working Capital Fund for 2020, the scale of assessment for the appointment of expenses of the International Criminal Court, financing appropriations for 2020 and the Contingency Fund [ICC-ASP/18/Res.1](#) (2019), p.2.

- *Staff development:* Chambers legal staff have remained in the same positions for a long time. The average length of service of P-3 legal officers has been over 11 years and that of P-2 legal officers over five years. The human resource conditions are those in which there is limited internal or external staff mobility, remote chance of promotion and scarce opportunity for professional growth.<sup>51</sup> All this seriously affects staff motivation.
- *Contracts:* A highly unsatisfactory contract status pervades the Chambers legal staff. They are engaged under three categories of contracts, regular fixed-term appointments, General Temporary Assistant (GTA) and Short-Term Appointment (STA).<sup>52</sup> Some of the contractual arrangements expose some legal staff to serious vulnerabilities, including contract renewal anxiety, and place the Judiciary under an organisational risk, should a group separation arise. The Experts were informed that a substantial number of P-2 posts are not in the budget structure of Chambers, yet they form part of its essential mainstay. It would appear that there is a mismatch between the realistic establishment of qualified legal staff required on the basis of the workload and the budget provided. While STA contracts are meant to cover urgent or temporary staffing needs, in actual fact they have been continuously occupied by legal officers, workload compelling, for countless years. The judicial workload in Chambers has been consistently demanding. As a result, it was claimed, there was a tendency towards mediocrity in performance.

83. Despite these limitations and drawbacks, the Judiciary have applied commitment, industry and resilience in moulding suitable working methods in Chambers. The Experts were informed that the allocation of legal officers to the three Divisions is workload-based and highly satisfactory. Noteworthy achievements have also been recorded in the execution of many aspects of the judicial mandate.

84. Having regard to the importance and the workload of the Chambers, however, the Experts are of the view that there is a serious need for a substantial increase in the number of P-4 posts to assist with the judicial work of the Court.

85. In order to strengthen the management, organisation and capacity of Chambers, a pressing need arises for a rejuvenated organisational structure for legal staff support services, including real opportunities for promotion. Effective leadership, change management and proper organisational set-up are essential. So too are sound human resource policies, including staff professional development.

## **(1) Static and Dynamic Case Teams Led by *Référendaires***

86. In the Experts' estimation, an integrated case team organisation, with in-built flexibility, for all the Chambers in the three Divisions, represents the most appropriate operational and responsive arrangement for efficient, effective and quality legal staff support for the Chambers and Judges.

87. In 2019, at the Judiciary's insistence and following the Judges Annual Retreat on 3-4 October 2019, broad consensus was reached for the establishment of trial teams for the Trial Division. This led to the issuance on 1 October 2019, by the President of the Trial Division, of the General Principles for Court Trial Teams.

88. The Principles represent an excellent initiative by the Judiciary to improve the working methods of trial teams, and ultimately the delivery of timely and quality judicial decisions. The Experts were also informed that since 2009, over a decade ago, a team-based approach has been productively functioning in the Appeals Division.

89. The Judiciary recognises that a more efficient and effective organisation and management of Chambers and improved performance of its judicial mandate is warranted. This would require a departure from the original individual judge-centred legal support staff arrangement to a case team-focused organisation, which should now prevail. This represents

<sup>51</sup> See *supra* n 49.

<sup>52</sup> Concerning different contracts see e.g., Report of the Court on Human Resources Management, [ICC-ASP/18/4](#) (2019).

not only a modification of the working methods in Chambers, but also, significantly, a change in the mindset and approach.

90. Further to the team-based approach, the Experts recommend a Chamber based organisation model for Chambers staff, with a combination of static and dynamic teams. Static teams would work in (i) the Pre-Trial Chamber, as a core team for procedural decisions, and (ii) the Appeals Chamber. This would contribute to uniform approaches to procedural matters at the pre-trial stage and coherent jurisprudence at the appeals phase. Additionally, dynamic teams, following the case team model, would follow a case from pre-trial to trial, taking into account the factors highlighted further.

91. A key refinement of the case team approach is the designation for each case team of a team coordinator or '*référéndaire*' (see the following para.), with leadership, managerial and organisational responsibilities, and at a more senior professional level (P-4) than the other members of the team. Apart from coordination, the team coordinators would be required to provide direction to the team. It should also be plain in their job description that they bear the overall and ultimate responsibility for the management, organisation and performance of the team. Additionally, it is proposed that the case team approach be formally adopted by the Presidency for all the Divisions.

92. Coordinators for the dynamic and static teams should be recruited specifically for the role. Currently, the position of case team coordinator has at times been filled in an ad hoc manner, resulting in P-3 and P-2 legal officers, respectively reviewing the work of other legal staff at the same level, which has led to additional friction. In line with the higher responsibilities and key roles fulfilled by team coordinators, the post should be renamed '*référéndaire*', similar to the approach employed by the Court of Justice of the European Union (EU).<sup>53</sup> The *référéndaires* would be attached to a Chamber or a case, not a judge. The position would be subject to a nine-year tenure policy (maximum duration of employment in the position), i.e. the same length as the Judges' mandate.

93. On the organisational structure, the proposed case teams would each be composed of between six to eight legal officers, and headed by a *référéndaire*. Once at trial, the dynamic teams would be further divided into two sub-teams, one responsible for judgment drafting and the other for day-to-day procedural matters. All of these tasks would have as a common objective and interest the efficient and effective realisation of the Chambers' primary responsibilities. The team as a whole should be agile, fully integrated, functional and synergised. The teams would have as members P-1, P-2 and P-3 legal officers.

## (2) Specialised Pre-Trial Team

94. Taking into account the specificity of the subjects, the highly litigious nature of some of the matters, and the complexity of legal and other issues at the Pre-Trial phase, the Experts invite the Presidency in its re-assessment of the working methods of the Judiciary and the efficient management of the Pre-Trial Division's workload, to consider the necessity and viability of the establishment of a specialised static team. Such a team would be assigned to all Pre-Trial Chambers in the Division. To be headed by a (senior) legal advisor, it would exclusively focus on all issues before those Chambers prior to the commencement of phase 1 of the confirmation proceedings, in particular: (i) requests by the Prosecutor for authorisation to open an investigation;<sup>54</sup> (ii) requests for the issuance of a Warrant of Arrest/summons to appear;<sup>55</sup> (iii) challenges on admissibility and jurisdiction;<sup>56</sup> (iv) review of the Prosecutor's decision not to commence an investigation;<sup>57</sup> (v) measures in respect of unique investigative opportunity;<sup>58</sup> (vi) cooperation issues;<sup>59</sup> and (vii) notification by the TFV regarding the implementation of assistance programmes in situation countries.<sup>60</sup>

<sup>53</sup> For an explanation of the role of *référéndaires* in the Court of Justice of the European Union (CJEU), see [Performance review of case management at the CJEU](#) (2017), paras. 23-26.

<sup>54</sup> [Rome Statute](#), Art. 15.

<sup>55</sup> *Ibid.*, Art. 58.

<sup>56</sup> *Ibid.*, Art. 15, 18-19.

<sup>57</sup> *Ibid.*, Art. 53(3).

<sup>58</sup> *Ibid.*, Art. 56.

<sup>59</sup> *Ibid.*, Art. 57, 87.

<sup>60</sup> [Regulations of the Trust Fund for Victims](#), Regulation 50 (a)(ii).

Depending on the workload and other exigencies, the team and its members could also support the Pre-Trial Chambers in the event of a surge in the demand for legal support. The Experts recommend similar consideration of specialised static teams for appeals, to ensure consistent and coherent jurisprudence at the appeals level.

### **(3) Transferability of Case Teams**

95. Legal officers involved in pre-trial proceedings gain tremendous knowledge on a situation or case, and of the legal and procedural issues. Consideration should be given by the Presidency to whether or not there is merit in the transfer of the same Pre-Trial case team (referred to as dynamic team above) to the Trial Chamber to continue to deal with the same case at the trial stage. On one side, by a transfer of knowledge, this would augment a Trial Chamber's insight of the case, and enrich legal staff mobility, which is acutely wanting. On the other side, a sustained continuous five-six years assignment of a legal officer to the same case at pre-trial and trial stages might also turn out to be demotivating. Moreover, at the pre-trial phase, legal officers are assigned more than one case, each of which has different timelines for completion. The size of case teams and their respective workloads, at pre-trial and at trial phases of proceedings, are also not identical. All this may inhibit a seamless transition and complicate the overall optimal use of legal staff in Chambers.

96. Another issue to be factored in while deciding on the transferability of case teams from pre-trial to trial is the possibility of a conflict of interest in the same pre-trial case team, having been involved in the sifting of potential evidence and having participated in the drafting of the confirmation decision, continuing to be on the same case at trial. Article 39(3)(a) mandatorily requires Judges assigned to the Pre-Trial Division to serve in that Division for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in that Division. However, this does not radiate upon legal staff, who do not make judicial decisions, a domain exclusively reserved for Judges. An alleged appearance of potential prejudice to the rights of the accused may be raised by such case team transfer.

97. To summarise, the recommended structure is the following:

Pre-Trial stage:

- Specialised static pre-trial team (one team for all cases in pre-trial);
- Dynamic case team (that follows the case to the trial stage);

Trial stage:

- Dynamic case team (moving with the case from pre-trial), to be further sub-divided in:
  - Day-to-day procedural matters;
  - Judgment drafting;

Appeals stage:

- Static appeals teams.

### **(4) Role of Presiding Judges**

98. A Presiding judge of a Chamber should be consulted by the Head of Chambers Staff prior to the assignment of staff to a case-team and the assignment of the team to a case. Their views must bear significant weight in any assignment. The Presiding Judges should be fully responsible for and exercise control over the substantive work of case teams. The Presidents of the Divisions should also be consulted whenever a member of the legal staff is to be transferred from one Division to another.

## (5) Legal Staff Support to Judges

99. The need for support for Judges, to assist them in order to meet their individual official and other professional duties, is understandable. The guiding principle should remain a team-based approach, rather than one legal officer per judge. Adequate, timely and proper legal support to individual Judges can be ensured through the assignment of one of the team members to a judge, depending on the work required to be done, for a specific project/task and limited duration. This approach is functioning satisfactorily in the Appeals Chamber and appears to be equally suitable for adoption by the other Chambers.

## 3. Management in Chambers

### (1) Head of Chambers Staff

100. Prior to the establishment in 2016 of the Head of Chambers Staff position, the management of Chambers was under the President of each Division. The effective functioning of the post of Head of Chambers staff is essential to sound Chambers legal support staff management and organisation, proper delivery of legal input to Judges and enhanced judicial performance. The position has leadership, managerial and organisational responsibilities. It has both coordination and facilitation functions in respect of Chambers and Divisions. One of the key responsibilities of the Head of Chambers Staff is the flexible assignment of legal officers to the case teams, in close consultation with the Presidents of Chambers and Divisions, and under the ultimate responsibility of the Presidency.

101. The Experts heard a chorus of opinion calling for the Head of Chambers Staff position to benefit from the advice and direction of the Registrar, and to be properly enabled and empowered. There was also some caution expressed about the possible risk of the position accumulating too much authority. This is sufficiently mitigated, as the post is under the direction and supervision of the Registrar for Layer 3 matters, and subject to the ultimate authority of the President for Layers 1 and 2.

102. In the Experts' opinion, the effectiveness of the Head of Chambers Staff position would be significantly enhanced by having two direct reporting lines, namely (i) on administration matters or 'non-judicial aspects of administration' (matters falling under Layer 3,<sup>61</sup> such as e.g. recruitment, staff training, legal database development) to the Registrar, and (ii) on judicial matters (matters falling under Layers 1 or 2, e.g. assignment of legal officers to case teams, organisation of internal working groups, legal reinforcement of legal advisers to the Divisions) to the Presidency, through the Chef de Cabinet to the President. By reporting to the Presidency through the Chef de Cabinet, an expedient resolution of Chambers' judicial matters would be effectively enabled.

103. The Head of Chambers Staff position would also gain from a further delegation by the Presidency of responsibilities for regular and standard administrative and human resource matters.

104. Management of Chambers staff (e.g. recruitment, leave, performance appraisals), whether G or P level, would fall under Layer 3 in the Three-Layered Governance Model.<sup>62</sup> Conversely, such management decisions ought not to fall on the Judges. Otherwise, it would imply that the Judges are accountable to the Registrar (who is the Chief Administrative Officer and authority in Layer 3), which would be contradictory to their judicial independence.

105. While not decision-makers on the matter, Judges should be consulted on matters involving recruitment in Chambers, assigning individuals to teams and performance appraisals. However, the decisions on such management matters ought not to fall on the Judges.

106. Much as the Head of Chambers Staff is to provide, if needed, reinforcement to the senior legal advisory capacity of the Divisions, the working relationship between the position

<sup>61</sup> See *supra* Section [I.A. Unified Governance](#).

<sup>62</sup> *Ibid.*

and Divisional legal adviser is currently missing from the Head of Chambers Staff job description and requires explicit mention.

## (2) Legal Advisers to Divisions

107. Currently, the Judiciary's three Divisions each have a Legal Adviser, but at different professional levels. While the Pre-Trial Division's Legal Adviser is at P-5 level, the Legal Advisers of the Trial and Appeals Divisions are at P-4 Level. This and other work arrangements warrant an overdue reclassification of the position of Legal Advisers to the Divisions. The job description also needs to be updated and their management responsibilities reviewed, considering the Experts' recommendations including the strengthened managerial role of the Head of Chambers. Having regard to the above proposal that *référéndaires* should be recruited at a P-4 level, it would be appropriate to classify the two P-4 Legal Advisers to Divisions as P-5s.

## (3) Quality of Legal Support Staff and Professional Development

108. It is of importance that the Court attracts, recruits, motivates and retains the best legal expertise. In Chambers, there is currently a lack of cultural diversity, including geographical representation from regions other than Western Europe. There is also a practice of the continued engagement of legal interns immediately upon the end of their internships.

109. Honest, objective, independent, well-researched and reasoned legal advice should be expected of legal officers. The Judiciary is well placed to offer mentoring, instil more confidence and bring out the best in legal officers. Access to Judges is a resource.

110. Counsel was also offered to the Experts that legal officers should resist the temptation of advocating practices from their own legal systems as the preferred solution to a legal problem. A better appreciation of the boundaries of the roles and responsibilities of Judges and those of legal officers is important. Regarding judicial work (Layer 1), there is overall a need for more interaction between legal staff and Judges. Judges should directly and fully manage their cases and not wait for the legal team to take the lead.

111. Moreover, it bears underlining that a legal officer should be able to work closely with all Judges. It should be appreciated that legal officers are part of a team, and must communicate, coordinate and fully integrate with the team. Working as part of a case-based team should in no way be a bar to working closely with a judge on a case.

112. Legal officers have professional competencies and have gained experience, particularly in International Humanitarian Law and Human Rights Law. Many have extensive knowledge of the Court's legal texts, jurisprudence, procedural law and practices. However, they have lesser socio-political and contextual knowledge of situation countries. To assist the Chambers in the proper execution of their judicial mandate and for their growth, legal officers would highly benefit from continuing professional development opportunities. Sessions should include some of the subjects proposed by the Experts for Judges,<sup>63</sup> as well as other specialised legal topics of direct interest to the Court. The provision of a platform for skills enhancement is not incompatible with the Court being a 'non-career' organisation.<sup>64</sup> These capacity development courses are meant to be of short duration, tailor-made and highly-focused on satisfying the acute needs of both the Chambers and their legal staff.

## (4) Administrative Assistants

113. Eight administrative assistants are engaged in Chambers. Each is principally assigned to two or three Judges. Approximately 60% of their interactions on a daily basis are with Judges. An issue of their performance appraisal needs effective resolution. On one occasion a legal officer of Chambers was asked to appraise administrative assistants, even though they rarely perform any duties for the legal officers of Chambers. Moreover, while their position

<sup>63</sup> See *infra* Section IX.A. [Induction and Continuing Professional Development](#).

<sup>64</sup> Final audit report on Human Resources management, [ICC-ASP/17/7](#) (2018), stating that '[t]he ICC is an organisation in which there are no career prospects', p.29; 'The Court does not organise any career advancement. In other words, it does not arrange any options for its employees to advance professionally (...)', p.23, para. 135.

is that of an administrative assistant, at times they are assigned personal jobs or errands by some Judges as if they were personal assistants.

114. The treatment of administrative assistants as Judges' personal assistants for private errands is improper. An updating of the job description of administrative assistants is required and, once finalised, should be shared with all Judges and staff in Chambers.

115. A position of Coordinator of Chambers administrative assistants exists, but has been vacant for a while. It needs to be filled.

116. The Presidency and the Registrar should also resolve the reporting line of administrative assistants of Judges. There appears to be confusion as to who should be the first and second reporting officer for the purposes of the performance appraisal. As Judges should not be involved in the performance appraisal of Chambers legal staff, the Head of Chambers Staff is best positioned to do so. The second reporting line should be someone in the Registry, such as the Chief of Judicial Services or of the Management Services Divisions.

### **Recommendations**

**R21.** The Presidency should consider formally adopting an integrated case team organisation, with in-built flexibility, for all Chambers and Divisions.

**R22.** To enhance the efficiency and effectiveness of the Court and management of the judicial workload, the Presidency should consider the establishment of a specialised Pre-Trial legal support team, headed by a senior legal officer, and available to assist and service the Pre-Trial Division exclusively. Similar static teams should be employed in the Appeals Division to ensure consistent and coherent jurisprudence.

**R23.** The Presidency should rename the position of team coordinator as '*référéndaire*', in line with the key roles and responsibilities assigned to this position. *Référéndaires* should be recruited specifically for the role, at a P-4 level. They should be attached to a Chamber or a case, not a judge, and have a limited maximum duration of nine years in the role (tenure).

**R24.** The Presidency should give consideration to the propriety and sustainability of the continuous assignment of a case team from the Pre-Trial stage of proceedings to the end of the Trial.

**R25.** The Presidency should consider developing and issuing guidelines on the assignment of legal officers to individual Judges in accordance with the demands of their official responsibilities.

**R26.** The Presidency should consider an organised scheme on the inter-divisional transferability of legal officers.

**R27.** The Presidency and the Registrar should consider updating the job description and commissioning a job reclassification of the position of legal adviser to the Divisions (Pre-Trial, Trial and Appeal).

**R28.** The Presidency and the Registrar should consider reviewing and harmonising the job descriptions of the Chef de Cabinet, Head of Chambers Staff, and divisional legal advisers, and developing a job description for *Référéndaires*.

**R29.** The Presidency and the Registrar should ensure proper cultural diversity, including proper geographical representation from regions other than Western Europe, of legal officers in Chambers.

**R30.** The Presidency and the Registrar should consider updating the job description of the Head of Chambers Staff, by prescribing the relevant reporting lines on administration matters to the Registrar and on judicial matters to the Presidency, through the Chef de Cabinet. The Head of Chambers should report to the Presidency on all matters relating to Layers 1 and 2, and to the Registrar on issues related to Layer 3.

**R31.** The Presidency should consider measures aimed at enabling and empowering the Head of Chambers Staff, including through further delegation of some of their administrative, human resource and other responsibilities.

**R32.** The Court should consider adopting a policy or an appropriate directive specifying that Judges should neither be involved with the recruitment of Chambers legal support staff, nor with their performance appraisal. The Judges should be appropriately consulted, by the Head of Chambers on managerial matters, matters concerning recruitment in Chambers, assigning individuals to teams and for performance appraisals.

**R33.** The ASP, the Presidency and the Registrar should improve the contractual arrangements of Chambers legal staff, in particular those at P-2 level and on STA; align realistic staff levels with Chambers staff needs and with the budget programme; and award contracts based on Chambers workload requirements.

**R34.** The Presidency should consider developing and implementing a tailor-made professional development programme for legal staff.

**R35.** The Presidency and the Registrar should immediately fill the position of Administrative Coordinator of Chambers.

**R36.** The Registrar should update the job description of administrative assistants to Judges. It should be clearly specified that they are administrative and not personal assistants. Consideration should also be given to the designation of appropriate reporting officers for administrative assistants for the purposes of supervision and performance appraisals.

**R37.** As mentioned above, decisions on recruitment should not fall on Judges. The recruitment process must be an open and competitive process that allows for equal opportunities for former Court interns and non-interns alike.<sup>65</sup>

## C. OTP Governance

### 1. The OTP Structure

#### **Findings**

117. The Office of the Prosecutor (OTP) has a staff of approximately 422 people<sup>66</sup> situated at the seat of the Court. It has three Divisions: the Jurisdiction, Complementarity, and Cooperation Division (JCCD), the Investigations Division (ID) and the Prosecution Division (PD). Each Division is headed by a Director. All three Divisions are supported by the Services Section (SS), Legal Advisory Section (LAS), and Information and Knowledge Management Section (IKEMS). The Heads of these Sections report directly to the Prosecutor. The Prosecutor has a secretariat called the Immediate Office of the Prosecutor (IOP), headed by a Chef de Cabinet. The Deputy Prosecutor is structurally situated in the Prosecutions Division and has one special assistant.

118. The JCCD is a structure unique to the ICC. It conducts preliminary examinations and fosters international cooperation and judicial assistance for the investigations. It is composed of two Sections: the Preliminary Examination Section (PES), and the International Cooperation Section (ICS). Each Section is led by a Section Coordinator.

119. The ID is headed by a Division Director, supported by an Investigations Coordinator. The ID is divided into four Sections: the Investigations Section, the Investigative Analysis Section, the Forensic Science Section, and the Planning and Operations Section.

120. The PD is led by a Division Director, supported by a Senior Appeals Counsel. The Division is divided into the Prosecution Section, which contains all the trial lawyers, case managers, legal officers, and trial support assistants, and the Appeals and Prosecution Legal Coordination Section, consisting of legal officers and appeals counsel.

121. The SS provides the operational Divisions with the necessary support services to fulfil their mandates. The Section's main areas of work are (i) the management of financial resources, and (ii) the management of linguistic support. Accordingly, it consists of the Financial Planning and Control Unit, and the Language Services Unit.

<sup>65</sup> See *infra* para.224.

<sup>66</sup> Proposed programme budget for 2020 of the International Criminal Court, [ICC-ASP/18/10](#) (2019), para. 204.

122. The LAS provides legal services and assistance to the OTP. For the most part, their work does not directly relate to situations and cases. The LAS leads in the development and implementation of the OTP Strategic Plans and Policy Papers, and facilitates the development and maintenance of the OTP's professional and ethical standards.

123. The IKEMS is the newest addition to the OTP structure, established in January 2019. It assists the OTP in centralising all the information management and evidence processing tasks in one place. IKEMS, headed by an Information Management Coordinator, consists of an Information and Evidence Unit, and a Business Service Development Unit.

124. In terms of operational structures, the core tasks of the OTP are performed by integrated teams. Since 2011, integrated teams have become the basic structure for performing the core activities of the OTP relating to investigations and prosecutions. They are composed of members of the PD, ID, and JCCD. Integrated teams are led by a Senior Trial Lawyer (PD, P-5), an Investigations Team Leader (ID, P-4), and an International Cooperation Adviser (JCCD, P-3). The ultimate control and responsibility for the activities and performance of the integrated teams are exercised by the Senior Trial Lawyer, under the direction of the Executive Committee (ExCom). ExCom was established in 2009<sup>67</sup> as a group of senior leadership tasked to advise the Prosecutor on strategic and policy matters. It is a body currently composed of the Prosecutor, the Deputy Prosecutor, the Directors and coordinators of the Divisions, and the Heads of certain Sections.<sup>68</sup>

125. The specific recommendations in the following sections should not be understood as being contradictory to the objective of delegation by the OTP to the Registry of as much responsibility for administrative services as possible (e.g. R6 (p.19), R89-90 (p.70)), nor of the recommendation for a review of structures across different Organs that perform similar or identical tasks, to ensure improved cooperation and pooling of resources (e.g. R7 (p.19)). As it is understood that such reform would be gradual and that details would need to be resolved in consultations between the Prosecutor and Registrar, the following recommendations in this section reflect the current structure and operation of the OTP.

## 2. The OTP Regulatory Framework

### Findings

#### (1) Current OTP Regulatory Framework

126. In order for the OTP to realise its strategic goals, policy aims, and priorities successfully, it requires a comprehensive and coherent governance framework. It should enable the senior management, as well as those at the operational level, to have a clear understanding and oversight of their respective expectations, objectives, performance, and reporting requirements. Having a clear and transparent framework is important not only for effective and efficient performance internally, but also for the enhancement of public confidence in the decisions taken by the OTP.

127. The foundation of the OTP regulatory framework is the Rome Statute and the Court's Rules of Procedure and Evidence (RPE), which define the independence of the OTP, its responsibilities, duties and powers. The OTP has also adopted the Regulations of the OTP, developed an Operations Manual, a number of Policy Papers,<sup>69</sup> Standard Operating Procedures (SOPs), and Internal Guidelines, which govern the OTP's operations. The OTP is also bound by the Regulations of the Court.

128. While a substantial volume of the regulatory documents referred to above reflect significant efforts undertaken by the OTP to structure its operations, it also highlights the potential for fragmentation, incoherence and lack of clarity.

129. The Experts were informed by many members of staff that the current regulatory framework is unclear to them. It would appear that, in practice, the use of the OTP Regulations and the Manual have been abandoned. This is hardly surprising as the

<sup>67</sup> Regulations of the Prosecutor, [ICC-BD/05-01-09](#) (2009), Regulation 4(2).

<sup>68</sup> See *supra* Section [I.C.3\(2\)](#) [Executive Committee \(ExCom\)](#).

<sup>69</sup> See [OTP Policies and Strategies](#).

instruments are significantly outdated (issued in 2009 and 2013, respectively). The OTP Regulations and Manual are also inconsistent with a number of Policy Papers, SOPs and Internal Guidelines. They do not reflect the current structure of the OTP and, in particular, the formation of integrated teams.

130. Instead of relying on the Operations Manual, the individual Divisions or Sections of the OTP have developed a series of SOPs and Internal Guidelines to govern daily operations. This has reportedly given rise to inconsistent practices with regard to many tasks that are essentially similar (e.g. analytical products produced by the analysts in the ID, on the one hand, and those of the JCCD on the other). This incoherence is exacerbated by the limited oversight functions exercised by the LAS.

131. It appears further that some OTP operations are governed by the Policy Papers. However, these are neither comprehensive nor clear as to how their provisions are to be implemented. It is further unclear whether these Policy Papers are binding or only intended for guidance.

132. One consequence of the foregoing is that there is no uniform regulatory framework and as a result there is an absence of standard practices. Members of staff informed the Experts that the absence of standard working procedures leaves it to the teams to ‘invent’ their own ways of working. It has resulted in personality-driven working methods (teams have applied different approaches to matters such as disclosure, redactions, division of tasks, use of SOPs). This makes it difficult for individual members of staff to integrate efficiently and smoothly into new teams.

133. The absence of a clear regulatory system also impacts negatively on the induction of new members of staff and on continuing training in all Sections of the OTP.

## (2) Areas Not Addressed Under the Current Framework

134. Apart from the fragmented nature of the regulatory framework, there are also aspects of the governance of the OTP that are not addressed. There is no reference to or definition of the roles and responsibilities of those in senior levels of management. The consequence is the prevalence of multiple, and at times, contradictory regimes within the OTP. Lack of clarity on the decision-making process, combined with a complex and somewhat confusing system of reporting,<sup>70</sup> tends to result in inefficiencies and unnecessary delays.

135. The absence of a clear definition of roles and responsibilities of staff also causes a lack of accountability for their decisions and actions. The Experts were informed of the general perception that the lack of accountability is widespread, especially at the higher professional levels. This has also been reflected in staff surveys.<sup>71</sup> This tends to demotivate staff, diminishes their level of performance and the feeling of well-being.

136. Another omission relates to the lessons learnt. While the OTP purports to be ‘a learning institution,’<sup>72</sup> ‘lessons learnt’ is mentioned in the regulatory documents only once. No lessons learnt compliance mechanism has been established.<sup>73</sup>

137. Regarding internal quality control, some responsibility is assigned to the Prosecution Coordinator (currently the PD Director), as well as team leadership. However, none of the regulatory documents makes provision for overall responsibility for the quality management of the OTP.<sup>74</sup>

<sup>70</sup> See *infra* Section I.C.3(4), paras. [162-166](#).

<sup>71</sup> Experts reviewed internal staff surveys of 2016-2018.

<sup>72</sup> [OTP Report on the Implementation of Strategic Plan 2016-2018](#) (2019), p.15, para.20.

<sup>73</sup> See *infra* Section [XV.Lessons Learnt](#).

<sup>74</sup> This issue was raised by the External Auditors in 2013 and brought to the attention of the Experts by members of the OTP staff.

## **Recommendations**

**R38.** The Prosecutor should consider constituting an OTP-wide working group on the Regulatory Framework tasked with considering the most efficient way to implement the recommendations that follow.

**R39.** The Operations Manual should be updated and consolidated, and incorporate the Policy Papers, Standard Operating Procedures, and Internal Guidelines of the OTP. Inconsistent regulations in different Divisions should be avoided.

**R40.** There should be explicit clarity with regard to which of the OTP regulatory documents are mandatory and which are optional. Provision should be made for a mechanism to monitor the compliance with regulatory requirements.

**R41.** The Operations Manual should clearly specify the roles and responsibilities of staff and management structures. It should provide for clarity with regard to the roles, functions, and decision-making responsibilities at each management level (P-4 and above). It should also provide for clear reporting lines from staff to the management and vice versa.

**R42.** A consistent induction package for new staff, should be developed, in line with Court-wide efforts on the matter.<sup>75</sup> It should contain both OTP-wide documents (Operations Manual, Regulations, legal texts), and section-specific guidelines. The induction package should explain the relevant management structures and reporting mechanisms that apply to the staff member concerned. It should also contain details of the internal grievance procedures.

**R43.** Consideration should be given to the Head of LAS being made responsible for the overall quality of the management of the OTP and compliance with its regulatory framework. Training in, and compliance with, the regulatory framework of the OTP should be included in the Key Performance Indicators.

**R44.** As provided in the programme budget for 2020, the LAS should be tasked with monitoring the development of new SOPs and Internal Guidelines, and their incorporation in an updated Operations Manual and OTP Regulations.<sup>76</sup>

**R45.** LAS should be tasked with quarterly communications to staff regarding the development of new or amended regulatory provisions.

### **3. OTP Management and Leadership Structures**

#### **Findings**

138. As pointed out above, the Court suffers within from distrust and a culture of fear. The Experts heard many accounts of bullying behaviour amounting to harassment in all Organs of the Court, though particularly in the OTP. The OTP working culture appears to be rather hierarchical, with clear divisions between the senior management and the other staff members. The OTP also suffers from a certain lack of gender balance. The gender distribution in the OTP appears to be close to 50/50.<sup>77</sup> However, there is almost a complete absence of women in senior positions – which is a general issue across the Court. Further, the Experts noted the frustration arising at the lower levels for the lack of empowerment, especially with the bureaucratic processes, some of which are perceived as unnecessarily slowing down the operations of the OTP. Furthermore, senior management appears to lack the ability to address the staff complaints and concerns regarding the working conditions and certain instances of bullying or harassment.<sup>78</sup> Some staff have also shared their frustration at how several initiatives related to staff wellbeing and engagement, whether documents or working groups,

<sup>75</sup> See further *infra* para 231, see also R99 (p.76).

<sup>76</sup> [ICC-ASP/18/10](#), para.171: LAS is responsible for coordinating the revision of the OTP's regulations and operations manual.

<sup>77</sup> Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court, [ICC-ASP/18/26](#), para.12; n 6.

<sup>78</sup> For further analysis of the working culture and conditions, see *infra* Section [II. HUMAN RESOURCES](#), para.212 and Section [II.B. Working Environment and Culture, Staff Engagement, Staff Welfare](#).

were at times more of a formality rather than actively implemented. All the management and leadership structures are analysed in detail below.

## (1) Prosecutor and Deputy Prosecutor

### *Roles of Prosecutor and Deputy Prosecutor*

139. The Prosecutor and the Deputy Prosecutor are responsible for the overall leadership, management, and administration of the OTP. However, whether justified or not, there is a perception among many members of the staff that the Prosecutor and the Deputy Prosecutor absent themselves from the core work of the OTP. The perception is also that the Prosecutor, and to an extent, the Deputy Prosecutor, are frequently travelling outside the Office on official business. Some members of staff informed the Experts that they see the Prosecutor only once a year at the Town Hall meeting.

140. The Experts also heard concerns that the Prosecutor and Deputy Prosecutor have little direct contact with the integrated teams handling the situations and cases. While the PD Director convenes weekly PD senior management meetings (P-4 grade and above), there is no equivalent forum for the Prosecutor or Deputy Prosecutor to meet with the leadership of integrated teams. These concerns are accompanied by a perception that the real power of the OTP rests with the Directors.

### *Issue of two Deputy Prosecutors*

141. Proposals have been made for the Prosecutor to consider appointing a second Deputy Prosecutor. This was the model of the initial years of the OTP. There was one Deputy Prosecutor for investigations and one for prosecutions. An alternative model suggested was to have one Deputy Prosecutor for operational matters (investigations and prosecutions) and a second one for the administration of the OTP.

142. Some members of staff expressed support for the appointment of a second Deputy Prosecutor. This is motivated by a number of areas of discontent expressed by them. There appears to be a general feeling in the ID that it is under-represented in senior management. Some are concerned that there is a lack of significant investigative experience among senior management of the ID. Some stakeholders, both within and outside the OTP, consider that a second Deputy Prosecutor would reduce delays in making management decisions and make the investigative process more efficient.

143. In the opinion of the Experts, the problems that give rise to the suggested appointment of a second deputy prosecutor can be resolved in other ways. They do not therefore justify the additional expense of having two Deputy Prosecutors. This is especially so having regard to the scarcity of resources of the Court. The resources problem is likely to be aggravated in the post-COVID-19 pandemic period.

144. Currently, the role of a Deputy Prosecutor is poorly defined, which leaves responsibilities of that office unclear. That role should be clarified and its responsibilities more precisely prescribed. The Deputy Prosecutor should be formally placed in charge of the three Divisions of the OTP. In terms of the current OTP regulatory framework, the Deputy Prosecutor heads the Prosecutions Division. No other supervisory or management powers are prescribed in the regulatory framework, even though it appears that in practice the Deputy Prosecutor does oversee and coordinate the three Divisions of the OTP.<sup>79</sup>

## **Recommendations**

**R46.** A weekly meeting should be held for the leadership of integrated teams with the Prosecutor and/or Deputy Prosecutor and thereby reduce the distance between the Prosecutor,

<sup>79</sup> [ICC-ASP/18/10](#), p.81, para.331.

Deputy Prosecutor, and staff. Such meetings should also reduce the appearance, if not the fact, of over-reliance by them on the Directors.

**R47.** The Public Information Unit should devise an internal communications strategy for the OTP, beyond email communications and an annual Town Hall meeting, to ensure that staff who are not members of team leadership (lower level staff, as well as staff from support Sections who are not part of integrated teams) can have regular and meaningful contact with the Prosecutor and Deputy Prosecutor.

**R48.** The Prosecutor should not reinstate the structure of two Deputy Prosecutors. A more efficient and effective use of the single Deputy Prosecutor can be achieved by defining clear roles and responsibilities. In particular, the Deputy Prosecutor could be assigned the following functions:

- (i) Ultimate responsibility for the three Divisions and their work;
- (ii) Overseeing and coordinating the work of the Directors;
- (iii) Reviewing and approving internal team work products, such as investigation and cooperation plans. They should not be the concern of the Executive Committee (ExCom) save in exceptional circumstances;
- (iv) Responsibility for issues related to human resources and administrative matters;
- (v) Responsibility for regularly updating the Prosecutor on the work, progress, and problems of the Divisions.

## (2) Executive Committee (ExCom)

145. ExCom was originally designed as a small group of the OTP's most senior leadership to advise the Prosecutor on strategic or policy matters. When established in 2009, ExCom was composed of the Prosecutor and the Heads of the Divisions of the OTP.<sup>80</sup> At present, ExCom has 11 members: the Prosecutor, Deputy Prosecutor, Directors of Divisions, Investigations Coordinator, Heads of Services Section, Legal Advisory Section, International Cooperation Section, Appeals and Prosecution Legal Coordination Section, and the Chef de Cabinet of the Prosecutor. With this composition, ExCom endeavours to meet on a weekly basis, subject to the availability of the Prosecutor. In fact, ExCom meets about twice every three weeks. At times, ExCom meets with the aforementioned participants, and at other times, on an ad hoc basis, with a number of invitees from integrated teams or other sections of the OTP.

146. ExCom is established under the Regulations of the OTP, and tasked to provide 'advice to the Prosecutor, be responsible for the development and adoption of the strategies, policies and budget of the Office, provide strategic guidance on all activities of the Office and coordinate them.'<sup>81</sup> However, in a number of OTP reports and documents ExCom is referred to as a decision-making body rather than as an advisory body. This confusion persists in the minds of many members of the OTP.

147. A number of senior members of staff informed the Experts that when ExCom meets with invitees from integrated teams, the discussions are lengthy and frequently without any real outcome. On some occasions, the discussions are continued by email exchanges. The result is frequent delays in decision-making and the consequent frustration on the part of the members of integrated teams.

148. There are also complaints from senior members of staff that ExCom is dilatory in communicating decisions on the matters brought to them. In some cases, there has been a complete failure to communicate decisions taken by the Prosecutor. It is not clear to the Experts whether these communication failures are the fault of the respective Directors or of ExCom itself.

149. The Experts were also informed that ExCom routinely considers operational matters, such as investigation or cooperation plans. This is time-consuming and delays the day-to-day

<sup>80</sup> [Regulations of the Prosecutor](#), Regulation 4(1).

<sup>81</sup> *Ibid.*, Regulation 4(2).

work of the integrated teams. It also wastes valuable time of some ExCom members who do not have expertise on these issues.

150. More recently, the OTP has taken steps to increase the delegation of operational decisions to the leadership of integrated teams.<sup>82</sup> However, it appears to the Experts that the level of micro-management by ExCom remains too high. The mandate of ExCom remains insufficiently defined with regard to the matters that could and should be decided by team leadership or one of the Directors, and those matters that require decision by the Prosecutor acting on the advice of ExCom.

151. Apart from the time delays caused by the micro-management of ExCom, the leadership and initiative of competent team leaders have been discouraged. Importantly, this relates to areas in which such leaders have both the relevant expertise and detailed knowledge.

152. It appears to the Experts that a desire to control the work of the teams rather than professionalism has motivated the over-concentration of decision-making at the level of ExCom. Apart from delays and other inefficiencies, this has had the inevitable consequence of demotivating senior members of the teams. That resentment filters down to the lower ranks.

### **Recommendations**

**R49.** ExCom should be regarded solely as an advisory body with the responsibility of advising the Prosecutor. Decision-making within the OTP rests with the Prosecutor. The regulatory framework should be consistent in recognising the advisory role of ExCom, and references to ExCom as a decision-making body should be avoided.

**R50.** In order to improve the speed of its advisory functions, membership of ExCom should be restricted to the Prosecutor, Deputy Prosecutor and Division Directors. The Chef de Cabinet or a Special Assistant to the Prosecutor may attend the meetings for record-keeping. When the members of ExCom wish to consult with other managers or team members, such a consultation should not be regarded as a meeting of ExCom itself.

**R51.** The issues that are required to be brought for ExCom's advice should be clearly defined. Likewise, the authority of Directors and team leaders should be clearly defined. In general, operational issues such as mission plans, investigation plans or filings should be the responsibility of the Directors, subject to the overall supervision of the Deputy Prosecutor.

**R52.** There should be more efficient communication of the decisions taken by the Prosecutor. There should be weekly communication of decisions taken by the Prosecutor to relevant members of the OTP staff. The Chef de Cabinet should be responsible for keeping a detailed record of decisions made on the issues considered by ExCom.<sup>83</sup>

## **(3) Immediate Office of the Prosecutor (IOP)**

### **Findings**

153. The IOP is a secretariat set up to provide the Prosecutor with assistance and advice regarding the day-to-day fulfilment of their functions, and the overall management and quality control of the OTP. Currently, the IOP consists of the Public Information Unit (PIU), Special Assistants to the Prosecutor, a Personal Assistant to the Prosecutor, the OTP Human Resources Section, and the Administrative Assistant of the IOP. In total, the IOP has 11 members of staff, and is headed by the Chef de Cabinet.

154. The Experts are concerned about the implementation of the mandate and function of the IOP. It does not appear to have the resources required to fulfil all of its functions efficiently. The extensive responsibilities assumed by the IOP, according to many reports

<sup>82</sup> More delegation to the Director of PD on certain legal filings has been recently introduced: the Office is working on optimising integrated team functioning to increase their autonomy. See [OTP Strategic Plan 2019-2021](#) (2019), p.26, para.41.

<sup>83</sup> In line with the efforts recommended under R14 (p.26).

received by the Experts, create a bottleneck resulting in serious time delays in processing requests from staff. Furthermore, the functions assumed by the Chef de Cabinet appear to be too numerous, multifaceted and demanding in respect to hours worked, to be carried out effectively by one person.<sup>84</sup>

### *Chef de Cabinet*

155. The Chef de Cabinet is the senior executive secretary of the Prosecutor who oversees the IOP. In that role, the incumbent is responsible for managing relations with other Organs and staff, managing the Prosecutor's calendar, facilitating interactions with internal and external stakeholders, and other communication, coordination and administrative assistance.

156. Current responsibilities of the Chef de Cabinet also include assisting with strategic and policy related tasks, amongst others: planning of the OTP strategies and goals, and their implementation; assisting in the implementation of legal, policy and strategic matters in the OTP; conducting the final review and oversight of a large category of documents before they are submitted to the Prosecutor; providing input into all strategic documents, policy papers, reports, budget documents.

157. In addition to the foregoing, the Chef de Cabinet is responsible for the overall public information responsibilities of the Office, related strategies and products; drafting correspondence, speeches and presentations for the Prosecutor; supervising relevant staff in the preparation of background information, and briefing/speaking notes. These responsibilities appear to be more appropriate for the PIU in direct liaison with the Prosecutor. The Experts refer again to this issue in the recommendations below.

### *Public Information Unit (PIU)*

158. The OTP acknowledges that communication is a 'key cross-cutting challenge' for the Office, listed as a priority under Strategic Goal 5 of the current OTP Strategic Plan.<sup>85</sup> It commits to increasing communication with States Parties and other stakeholders. However, there is no mention of increasing in-house capacity to direct the media narrative, increasing involvement with civil society and local media organisations, or the general management of communications.

159. The PIU, responsible for all public communications from the Prosecutor, is understaffed. It is also responsible for the outreach activities of the OTP (in coordination with the Registry).<sup>86</sup> Currently, it is comprised of two Public Information Officers (P-3 grade, one is under recruitment) and a Public Information Assistant (GS-OL). It is responsible for all public communications of the Prosecutor. Two officers are thus responsible for internal and external communications covering more than 20 situation countries, and for supporting the outreach activities of the Court.

160. The OTP has no spokesperson or senior media adviser. Hence, there is no senior staff member in the OTP fully dedicated to external communications. Employing an experienced media expert could reduce current micro-management of the PIU and facilitate the prompt preparation and approval of communications materials. The Experts were informed that at present, public statements made by the Prosecutor are drafted by the PIU under the direction of Chef de Cabinet. They are then circulated among all the members of ExCom and Heads of Sections for their input. Only after those members have signed off on the statement is it issued. This appears to be a cumbersome and time-consuming process.

161. A dedicated spokesperson could also reduce the amount of media engagements of the Prosecutor and Deputy Prosecutor. A spokesperson could relieve the Prosecutor and Deputy, as well as other OTP staff, from dealing with daily media inquiries.<sup>87</sup>

<sup>84</sup> See proposal for the tenure regime applicable to chefs de cabinet of the Principals, *infra* Section [II HUMAN RESOURCES, Tenure](#), para.261.

<sup>85</sup> [OTP Strategic Plan 2019-2021](#), p.24, Strategic Goal 5.

<sup>86</sup> See *infra* Section [VII.F Outreach Strategy](#).

<sup>87</sup> Also recommended in the [ICTY Manual on Established Practices](#) (2009), p.190, para.67.

## **Recommendations**

**R53.** The functions and responsibilities of the Chef de Cabinet should be considerably reduced. They should correspond to those of the senior executive secretary of the Organ, responsible for administrative matters. Strategic and policy related advice should rest with ExCom, the Legal Advisory Section, and the Senior Appeals Counsel. All communications related responsibilities should rest with the PIU and the Special Assistants to the Prosecutor.

**R54.** The appropriate functions and responsibilities of the Chef de Cabinet should align with the current professional grade attached to this position.

**R55.** The capacity of the PIU should be enlarged. A senior media officer (P-4) should be recruited by the OTP to head the PIU and, as requested, act as the OTP spokesperson.

**R56.** The PIU should fall outside the IOP and function directly under the Prosecutor.

### **(4) Integrated Teams**

#### **Findings**

162. The OTP has taken significant steps to improve the functioning of teams. It is generally accepted that the move from a joint team structure to an integrated team structure is a positive development.<sup>88</sup> Under the leadership of a Senior Trial Lawyer, the OTP has intended to move away from consensus decision-making. This is calculated to reduce significant time delays and conflicts within team leadership.

163. Another positive development reported to the Experts is the early constitution of core or ‘advance’ teams during Preliminary Examinations (PEs), starting at Phase 2.<sup>89</sup> This will have clear advantages: earlier identification of investigative opportunities; more efficient and timely preservation of materials during the PE stage, and ensuring a smooth transition if, at the end of a PE, an investigation is opened.

164. To further improve the efficient functioning of the teams, the OTP is reportedly taking steps to clarify the separation of the functions of integrated team members, and thereby reduce micro-management of their work.

165. However, the Experts suggest that yet further steps are necessary to ensure that the integrated teams work efficiently and cohesively regardless of the managerial and personality differences of their leaders. Many team members interviewed by the Experts appear to agree that some teams function substantially better than others and that this follows from the approach of their leaders. More efficient regulatory framework that identifies the respective roles of integrated team members would help avoid these inconsistencies between the teams.

166. The Experts also heard related concerns from integrated team members about the constraints on their decision-making, as well as having unclear lines of reporting. The matrix management structure appears to be cumbersome and not clear to all staff: instead of linear lines of reporting, members of integrated teams report to the Senior Trial Lawyer as well as their respective Head of Section. For instance, analysts are tasked by the Investigations Team Leader, but their performance is managed by the Head of the Investigative Analysis Section. Analogous structures apply to the International Cooperation Advisors and Investigators. This structure is calculated to hinder the ability of the team leadership to have sufficient oversight of their team members and thereby ensure accountability for their performance.

<sup>88</sup> Joint teams, as defined in the Operations Manual (internal document), were replaced by integrated teams at around 2015. The main difference between the two models concerns the team leadership: joint team leadership was shared between the PD representative, ID team leader and JCCD representative. In integrated teams the ultimate leadership and responsibility for the case lies with the Senior Trial Lawyer; see [OTP Strategic Plan 2016-2018](#) (2015), para.33.

<sup>89</sup> See *infra* Section [XIII. PRELIMINARY EXAMINATIONS](#).

## **Recommendations**

**R57.** The division of functions and responsibilities of the members of integrated teams should be clarified and circulated to all staff. These should be incorporated in an updated Operations Manual.

**R58.** The separation of strategic leadership (PD, Senior Trial Lawyers) from operational/functional leadership (ID, Team leaders) of an investigation should be clarified and implemented.

**R59.** The working methods across teams should be harmonised. The best practices for routine activities and processes of integrated teams should be defined, including the use of databases and tasking tools, meetings and communications. At the suggested weekly meetings with the Deputy Prosecutor, inter-team sharing of practices should be encouraged.

**R60.** The recent establishment of core integrated teams at Phase 2 of PEs should be institutionalised. The size of the integrated team at this stage should depend on the situation and its complexity, but should, at a minimum include a member from each of the ID, PD, and JCCD. Each team should be headed by a Senior Trial Lawyer (PD P-5), supported by appropriate core staff from the relevant Divisions and Sections.

**R61.** If possible, at the time of opening an investigation, a PES analyst should be assigned to the IAS (exchange of staff) for a limited duration.

**R62.** The role of ICS in the integrated teams should be standardised and fully explained to and discussed with the whole integrated team.

**R63.** The relationship between integrated teams and support units (Gender and Children Unit (GCU), Language Services Unit (LSU), Operational Risk and Support Unit (ORSU), Protection Strategy Unit (PSU)) needs to be clarified and standardised. They should be consulted early in the operation planning cycles, in order to avoid delays and additional expenses.

## **4. OTP Staffing**

### **(1) Staff Qualifications**

#### **Findings**

167. In terms of staff qualifications, the most common concerns reported to the Experts were twofold: the necessity for professionals, experienced in investigating and prosecuting complex crimes, and the necessity for staff with expert knowledge of the context of situation countries.

168. Regarding the ID Investigations Section, the work of investigations requires to be largely performed by people with a law enforcement background and experience in large scale criminal investigations. There is also a need for staff with a cultural awareness and knowledge of the domestic politics and context, and who do not necessarily come with law enforcement experience. There is an additional need for the ID to employ staff having more varied and specific skills, such as those relating to cyber, financial and military investigations, as well as analysis.

169. Regarding prosecutions, the Experts heard concerns about the recruitment of PD lawyers who do not have the required domestic qualifications and/or courtroom experience. Clearly, there is a need for experienced trial lawyers to assist the Senior Trial Lawyers in the conduct of trials. However, in the view of the Experts, there is a broad spectrum of tasks within the PD, not all of which require courtroom experience or advocacy. This reality is not currently reflected in the job titles and descriptions of PD staff.

170. The Experts also recognise that there is a substantial problem with regard to the absence in the OTP (and the Court as a whole) of sufficient expertise relating to situation countries. This relates to matters such as proficiency in (a) local language(s), and knowledge

of the relevant historical, political, social and cultural background. This is especially required with regard to the evaluation of PEs and investigations. Without such expertise, it is difficult, if not impossible, for the OTP accurately and meaningfully to assess the information placed before and collected by it.

171. However, with new and constantly evolving situations, it is not practically possible for the OTP to have on its permanent staff people with all of those skills. Other possible staffing models are discussed below.<sup>90</sup>

172. Another important area regarding staff qualifications is their training and the continuous development of their skills. Currently, the OTP provides some training opportunities for staff members. For example, new ID Investigations Section staff are trained in the PEACE interview model; PD carries out advocacy trainings; there are many other specific development opportunities to which the Experts were referred.

173. Notwithstanding the above, there appears to be a widespread agreement within the OTP that there is an absence of consistent training and development plans relating to the foundational principles and regulations of the OTP and the Court generally. Some interviewees referred to a lack of legal knowledge of the fundamentals of criminal evidence collection. Attention might be given to training in more basic skills relating to the foundations of criminal investigations in the OTP. This would enable new staff from different backgrounds to gain a common understanding of the legal practice of the OTP.

174. Apart from the types of development opportunities available, the training needs of the OTP staff are continuous. However, the Experts were informed that additional training suffers from insufficient time and budget constraints. Currently, the OTP does not have an officer responsible for training and development needs. The leadership of each Section or Division is required, within their budget, to identify training needs and propose solutions. This situation is less than satisfactory for staff, as well as for the managers who require staff members of high quality and with up-to-date skills.

175. The Experts were also informed that the opportunities for staff to take development leave or special leave without pay are at times decided without sufficient transparency. This leads some members of staff to believe that access to development opportunities is unequal.

## **Recommendations**

**R64.** To ensure that all newly recruited staff have sufficient expertise, consideration should be given to a review of the requirements for future recruitments that include the skills that the OTP is lacking.<sup>91</sup>

**R65.** A compulsory, Court-wide induction training on the core documents and principles of the Court should be considered.<sup>92</sup>

**R66.** The roles of trial lawyers and legal officers within the Prosecution Division should be separated and reflected in recruitment.

**R67.** A regular assessment of whether staff members require follow-up training should be introduced.<sup>93</sup>

**R68.** Professional development should be consistently included in the performance appraisal, and given appropriate attention.

**R69.** In cooperation with Registry's Human Resources Section, transparency should be increased regarding developmental leave and special leave without pay by defining the rules and regulations surrounding such requests. Leave-related human resources functions are an example of responsibilities that could be delegated to the Registry's Human Resources Section (HRS).

<sup>90</sup> See *infra* Section [II.F. Short-Term Appointments, Local Recruitment](#).

<sup>91</sup> See *infra* Section [II.E. Adequacy of Human Resources - Recruitment](#).

<sup>92</sup> Related to having a strong and clear regulatory framework, see *supra* Section [I.C.2. The OTP Regulatory Framework](#). See also *infra* Section [II.H. Staff Training and Development](#).

<sup>93</sup> See *infra* Section [II.G. Performance Appraisal](#).

**R70.** In order to address the training needs within the available budget of the OTP, consideration should be given to delegating certain training-related responsibilities to the Registry.

## (2) Quantity of Staff

### Findings

176. In order to meet the high standards of international criminal investigations and prosecutions, the OTP must have access to adequate resources. The OTP has repeatedly referred to the lack of resources, especially in terms of staff,<sup>94</sup> as one of the reasons for its inability to perform at the levels expected of it by the States Parties and other stakeholders.<sup>95</sup> The reported ‘mismatch between resources and actual work’<sup>96</sup> has wide-reaching consequences for the operations of the OTP, delaying or prolonging PEs, investigations and prosecutions, and limiting the number of situations that the OTP can effectively investigate.<sup>97</sup>

177. In response to a request from the States Parties and the Committee on Budget and Finance (CBF) to provide more clarity relating to the OTP’s growth, in 2015 the OTP conducted an internal Basic Size assessment. It assessed the needs of the teams and support services at each stage of a PE, investigation, and court proceedings. It defined what is meant by the ‘basic size’ of an integrated team. This assessment can effectively be used to compare the current workload against resources.<sup>98</sup>

178. Based on the 2020 budget proposal, two of the three OTP Divisions are under-staffed as measured by the Basic Size estimates.<sup>99</sup> The ID is the most severely under-resourced Division, having 87 less full time staff than estimated to provide the basic needs of the Division.<sup>100</sup> The Experts were informed that understaffing has already resulted in ‘more time required for the completion of planned activities, inability to react appropriately to important unforeseen events (...); diminished capacity to conduct lessons learned exercises; (...) limited tracking capacity; and highly diminished capacity to deal with cases in ‘hibernation’.<sup>101</sup> Under-staffing is also an issue in the PD, requiring 30 additional full time staff to achieve basic size.

179. Investigations by the OTP are the core function for the Court’s success. The understaffing and the imbalance of resources between PD and ID is acknowledged at many levels of the OTP.<sup>102</sup> Currently, the ratio of investigative staff (comprised of the Investigations

<sup>94</sup> See e.g. [ICC-ASP/18/10](#), p.81, p.37

<sup>95</sup> [OTP Report on the Implementation of Strategic Plan 2016-2018](#), p.4, para.iii(b), [OTP Strategic Plan 2019-2021](#), p.12, para.9.

<sup>96</sup> [OTP Report on the Implementation of Strategic Plan 2016-2018](#), p.8, para.21.

<sup>97</sup> In 2019, faced with limited resources, the Office prioritised eight investigations out of eleven that were opened. In [ICC-ASP/18/10](#), p.11, paras.21-22, the OTP reported ‘On account of the limited resources approved for 2019 <...> the pace of some investigative activities has been negatively affected.’

<sup>98</sup> See Report of the Court on the Basic Size of the Office of the Prosecutor, [ICC-ASP/14/21](#) (2015).

<sup>99</sup> *Ibid.*, p.4, para.7. It is important to note that the OTP Basic Size estimation was conducted on the basis of 6 active investigations, 9 preliminary examinations, 9 hibernated examinations, 5 cases in pre-trial, 5 cases in trial, 2 cases in appeal, and 1 new situation. Currently, there are 9 PEs, 11 open investigations (not all active – DRC, Kenya, Uganda largely hibernated). The OTP states that it will prioritise nine active investigations, and conducts 8 simultaneously; [ICC-ASP/18/10](#), paras.20-23.

<sup>100</sup> Basic Size estimate: 255 FTE, 2020 budget assumption: 177 FTE; [ICC-ASP/14/21](#), p.5.

<sup>101</sup> In the 2020 budget proposal, the OTP states: ‘with the current resources, ID has not been able to maintain regular contact with witnesses from past cases, as provided for in its quality standards. The number of investigations pending an arrest warrant has increased, but efforts are restricted to reacting to incidents and opportunities owing to limited resources. (...) there is a clear indication of overstretch across the Division as a result of the team being considerably smaller than the optimal team size: high levels of untaken leave; increased sick leave; increased requests for more analytical support from the Prosecution division and a growing backlog in workload in FSS.’ [ICC-ASP/18/10](#), p.70, para.281. ‘In the Investigation Section, current capacity in terms of investigators still falls short of identified needs. The persistent consequences of understaffing are as follows: more time required for the completion of planned activities; inability to react appropriately to important unforeseen events without removing or significantly reducing resources allocated to other priority activities; diminished capacity to conduct lessons learnt exercises, develop standards and ensure adequate training, limited tracking capacity; and highly diminished capacity to deal with cases in “hibernation”’, [ICC-ASP/18/10](#), para.283.

<sup>102</sup> *Ibid.*, p.70, para.281: as reported in 2019 ‘While a flexible approach to resource allocation has been taken, there is a clear indication of overstretch across the Division as a result of the team being considerably smaller than the

Section (IS) and Investigative Analysis Section (IAS)) to the PD's Prosecutions Section is about 1:1. A more appropriate ratio, taking into account the wide range of activities during active investigations, should be closer to 3:2. In terms of the size of integrated teams, currently they range from 4.5 to 11 investigative staff, compared to the Basic Size estimate of twenty.<sup>103</sup> The sizes of the teams within the OTP also fluctuate significantly, depending on the stage of the investigation/prosecution, and competing demands for resources.

180. Lack of sufficient staff also appears to be an issue for the JCCD. The International Cooperation Section (ICS) currently has 15 staff members, which has remained largely unchanged over the past five-six years, while the volume of work has increased significantly.<sup>104</sup> The number of relevant members of staff was not commensurately increased. This hampers the speed of cooperation activities, and reduces the ability of the ICS to respond promptly to the needs of teams or changing circumstances on the ground. The Preliminary Examinations Section (PES), carrying out all the analytical and legal tasks related to preliminary examinations is carried out by 12 staff members in total.<sup>105</sup> The small number of staff available to PES is reported as one of the reasons for the length of PEs.

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

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

183. The shortcomings in the OTP's ability to keep up with the teams' requests for translations and interpretations are serious. The teams frequently wait months for the LSU to provide a response to their requests. Those working on non-prioritised situations report even longer delays. Since a large number of translations and transcriptions are outsourced, the ability of the LSU to respond to the teams' demands is also linked to the budget allocated to the Unit. At the end of 2019, this led to an effective halt on outsourcing translations and transcriptions. Based on the proposed programme budget, in 2020 the LSU anticipates that it will be short of resources amounting to the equivalent of 3,415 pages of materials to be translated.<sup>106</sup>

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

## **Recommendations**

**R71.** The current situation prioritisation practices should be reconsidered in order to adapt to the dwindling capacity of the Office to take on new situations/cases.<sup>107</sup>

**R72.** In the absence of an increase of staff in the ID, the OTP should consider assigning staff from other Divisions and Sections to ID, to improve the balance between the ID/PD numbers of staff.<sup>108</sup>

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optimal team size; high levels of untaken leave; increased sick leave; increased requests for more analytical support from the Prosecution Division and a growing backlog in workload in FSS.'

<sup>103</sup> [ICC-ASP/14/21](#), p.16.

<sup>104</sup> The number of RFAs increased by 68.68% between 2013 and 2018, and by 21.29% between 2017 and 2018 (based on internal JCCD – International Cooperation Section overview, February 2020).

<sup>105</sup> Three Situation Analysts (P-3), six Associate Situation Analysts (P-2), two Assistant Situation Analysts (P-1), and one Head of Section (P-5). No additional resources have been allocated to it since an increase in 2014. [ICC-ASP/18/10](#), pp.64-65, paras.262-265.

<sup>106</sup> *Ibid.*, p.52: OTP LSU Translation capacity: 11,935 pages; anticipated translation volume: 16,950 pages.; para.214: As an example, the *Al-Hassan* case evidence requiring translation from Arabic exceeded 5,000 source pages, and the Document Containing Charges reached 500 pages (as compared to standard 30 pages).

<sup>107</sup> See *infra* Section [XII. OTP SITUATIONS AND CASES: PROSECUTORIAL STRATEGIES OF SELECTION, PRIORITISATION, HIBERNATION AND CLOSURE](#).

<sup>108</sup> See *infra* Section [II.J. Flexibility, Scalability and Mobility in Staffing](#).

**R73.** The OTP should consider the possibility of delegating certain translation/interpretation responsibilities to Registry’s LSS, where confidentiality requirements allow for it.

**R74.** The compatibility of current human resources requirements with the LSU’s requirement to recruit specific-language staff in a timely manner should be assessed.

**R75.** A review of the number of posts for administrative support the OTP requires should be prepared for the ASP, together with the specification of the required skills.

## **D. Registry Governance**

### **1. Election of the Registrar and Deputy Registrar**

#### **Findings**

185. According to the Rome Statute, the Registrar is elected by an absolute majority of the Judges, taking into account any recommendation by the ASP.<sup>109</sup> The Presidency establishes a list of candidates who satisfy the criteria laid down in the Statute and transmits it to the ASP with a request for any recommendations. The President then transmits the list, together with any recommendations from the ASP, to the Judges for a decision to be taken in the Plenary.<sup>110</sup>

186. Notwithstanding the success of the most recent election, both Court officials and civil society representatives have pointed out the current system of selection of the Registrar is inadequate considering the high level responsibilities placed on the incumbent. The Experts consider the process ought to be more thorough and that States Parties should play a stronger role in the process, in line with the provisions of the Rome Statute.

187. While the Statute foresees a role for both the ASP and the Judges, in practice, the ASP’s recommendations have mostly consisted of guidelines and principles that should guide Judges in their selection.<sup>111</sup> The Experts recommend that the ASP, in accordance with its responsibilities under the Three-Layered Governance Model, carry out a selection process with the assistance of an expert committee that vets candidates, performs background checks, carries out interviews, and proposes a short list to States Parties.<sup>112</sup> The ASP would then confirm the shortlist and transmit it to the Judges for their decision.

188. An additional concern refers to the re-election of Registrars, and the potential politicisation of campaigns for re-election, where Registrars might be placed in a difficult position of having to prioritise between accountability towards the Judges and accountability towards the ASP. The Experts suggest that in the long-term, the provisions should be changed to foresee a 7 – 9 year mandate for the Registrar, non-renewable. This would remove the incentive to favour anyone in hopes of re-election. If in place, the Deputy Registrar should serve until the end of the Registrar’s mandate.<sup>113</sup>

189. The Experts make similar recommendations elsewhere to the effect of extending mandates of elected officials, while making the terms non-renewable.<sup>114</sup> This approach is not only indicated for increased independence of the role, but also reduces the procedural burden on the ASP, as they would have to deal with such elections less often.

190. While foreseen as a possibility under the Statute,<sup>115</sup> in practice, it did not initially appear as necessary to recruit a Deputy Registrar. The addition of such a position would

<sup>109</sup> [Rome Statute](#), Art. 43(4).

<sup>110</sup> [Rules of Procedure and Evidence](#) (hereafter ‘RPE’), Rule 12 (1)-(3).

<sup>111</sup> See for example Recommendation [ICC-ASP/16/Rec.1](#) (2017).

<sup>112</sup> This process would complement the interviews carried out by the Judges at a later stage.

<sup>113</sup> Article 43(5) of the Rome Statute foresees that the Deputy Registrar ‘shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.’ (emph. added).

<sup>114</sup> See for example R366 (p.315).

<sup>115</sup> ‘If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner [as the Registrar], a Deputy Registrar. (...) The Deputy Registrar shall hold office for a term of five years or such shorter

enable the Registrar to focus on the administration of the ICC/IO (Layer 3). The Experts suggest that the role of Deputy Registrar could be foreseen as Chief of Judicial Services (at D-2 level), accountable to the President/Prosecutor (for matters falling under Layer 2). This would make the decision practically cost-neutral. The Deputy Registrar should be elected in the same manner recommended for the Registrar, and if possible simultaneously.

191. The ASP could consider having candidates apply jointly for the positions of Registrar and Deputy Registrar and electing them not individually, but as a pair.<sup>116</sup> This would offer a great opportunity to ensure gender balance and diverse geographical representation in the senior management of the Registry. So far, all four Registrars of the Court have been from the group of Western European and other States Parties.<sup>117</sup> Selecting the two positions jointly would further permit States Parties and Judges to ensure complementary profiles and expertise, rather than aiming to find candidates for the role of Registrar who are both skilled managers of complex organisations and highly knowledgeable in judicial matters. Joint candidacies would also signal good working relations and cooperation among the two. A similar approach should be considered by the ASP for the joint election of the Prosecutor and Deputy Prosecutor.

## **Recommendations**

**R76.** The process of electing the Registrar should be more thorough. The ASP, in accordance with its responsibilities under the Three-Layered Governance Model, should carry out a selection process with the assistance of an expert committee that would vet candidates, perform background checks, carry out interviews, and present a shortlist to the States Parties. The ASP would then vote to confirm a shortlist of candidates before it is transmitted to the Judges for their decision. The same procedure would be followed in the case of a Deputy Registrar, if one is to be elected.

**R77.** The Experts recommend making use of the possibility of instating a Deputy Registrar, to enable the Registrar to focus on administration of the ICC/IO (Layer 3). The role would coincide with the Chief of Judicial Services (D-2) position, which would make the decision practically cost-neutral. The Deputy Registrar should be elected in the same manner recommended for the Registrar, and if possible simultaneously. The ASP could consider having candidates apply jointly, as a pair, for the positions of Registrar and Deputy Registrar, and electing them as such, to promote gender and geographic diversity. A similar approach should be considered by the ASP for the joint election of the Prosecutor and Deputy Prosecutor.

**R78.** In the long-term, States Parties are recommended to consider amending the provisions referring to the Registrar's term to limit it to a 7 – 9 years non-renewable mandate.

## **2. Various Sections of the Registry**

### **Findings**

192. The wide scope of the Experts' review invited submissions from staff on numerous and diverse issues. The majority of staff who volunteered to share insights with the Experts commented on areas of improvement on a Court-wide level, governance and management challenges within the OTP and – in fewer numbers – in Chambers. As far as the Registry is concerned, submissions were received mostly relating to field offices, resource management and leadership within two specific Sections. Only few comments were made on the senior management in the Registry.

193. Many of the proposals put forward by the Experts in other sections (such as Unified Governance, Human Resources, Internal Grievances Procedures, Ethics and prevention of

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term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.' - [Rome Statute](#), Art.43(4)-(5).

<sup>116</sup> As is the case in some countries, such as Argentina, where candidates for the position of president and vice-president are both on the voting ballot.

<sup>117</sup> Mr Cathala (FR) 2003 – 2008, Ms Arbia (IT) 2008 – 2013, Mr Van Hebel (NL) 2013 – 2018. The current Registrar, Mr Lewis, is from the UK.

Conflicts of Interests, for example) will impact and extend to staff and units in the Registry. In the following paragraphs, the Experts make comments on additional specific issues within the scope of Registry governance.

194. Some staff have pointed out that certain Sections of the Registry were understaffed or overstuffed. The need for a closer look at the organisation and allocation of human resources has been particularly flagged for the Victims and Witness Section (VWS). The Experts also heard concerns related to the working culture, use of resources and need for further auditing in this Section.

### **Recommendation**

**R79.** It is recommended that the Registrar evaluates the needs of the VWS and its staffing structures, especially compared to other international tribunals, to see whether and which improvements could be brought.

## **3. Field offices**

### **Findings**

195. The Court currently has seven field offices in six countries. The Experts commend the Registry for beginning work on a draft Framework for Field Engagement.<sup>118</sup> The findings and proposals that follow should inform the final or updated version of the Framework.

196. Field offices need to be adapted to the reality of prosecutorial and judicial activity, modulated based on capacity and workload. For increased flexibility in the opening and closing of field offices, more local staff could be recruited. Similarly, more flexibility is desirable for Heads of offices in terms of recruitment and procurement.

197. The Registry is recommended, in consultation with Heads of field offices, to develop additional means of coordination between field offices and The Hague. While staff in the field should continue to report to the Head of the field office, they ought to also regularly coordinate with the relevant Section in the headquarters on their activity. For example, the Experts recommend elsewhere that the Public Information and Outreach Section (PIOS) in the Registry retain coordination over outreach officers in field offices, working in cooperation with the chiefs of said offices.<sup>119</sup>

198. To enhance the impact of the Court's presence in the field and maximise use of resources, regional field offices, that would act as hubs for several countries in the region, could be considered. Further, the OTP is encouraged to make increased use of field offices. An essential pre-condition in this regard is enhanced coordination and communication between the OTP and the Heads of field offices.<sup>120</sup> Finally, field offices are also in an ideal position to strengthen cooperation with local civil society in the field.<sup>121</sup>

199. The Experts heard concerns related to staff in field offices who do not speak the local language. This significantly reduces their ability to engage with local actors and risks negatively affecting the credibility of the Court on the ground. As recommended elsewhere,<sup>122</sup> recruitment of staff for field offices should ensure the individuals speak the language of the respective country, even more so when it is one of the two working languages of the Court. Ideally, field staff should also be familiar with the culture of the country. Recruitment of local staff could guarantee both knowledge of the local language and culture, and reduce costs otherwise needed for language or training.

200. Heads of field offices with whom the Experts met indicated the operational nature of their mandates, the high-intensity and difficult working conditions under which staff in field offices operate. Further, the Experts heard numerous accounts of disconnect between staff in the field and in The Hague, a perceived lack of understanding by those in the headquarters

<sup>118</sup> At the time the Experts consulted the draft, internal discussions on the paper had not yet been finalised.

<sup>119</sup> See R167 (p.128).

<sup>120</sup> See *infra* Section [XIV.ID Field Presence in Situation Countries](#).

<sup>121</sup> See *infra* Section [VII.D. Relations with Civil Society and Media Organisations](#).

<sup>122</sup> See R100 (p.77).

of the difficulties facing those working from the field, and reduced professional opportunities for the latter, compared to their peers in The Hague.

## **Recommendations**

**R80.** Field offices need to be adapted to the reality of judicial activity, modulated based on capacity and workload. More local staff could be recruited, for increased flexibility in the opening and closing of field offices.<sup>123</sup> Similarly, more flexibility is desirable for Heads of offices in terms of recruitment and procurement.

**R81.** The Registry is recommended to develop additional means of coordination between field offices and headquarters, in consultation with Heads of field offices. Staff in the field should continue to report to the Head of the field office, as well as regularly coordinate on their activity with the relevant Section in the headquarters.

**R82.** To enhance the impact of the Court's presence in the field and maximise use of resources:

- (i) regional field offices, acting as hubs for several countries in a region, should be considered;
- (ii) the OTP should make increased use of field offices, through enhanced coordination and communication with the Heads of field offices;<sup>124</sup>
- (iii) field offices should also be further made use of to strengthen cooperation with local civil society in the field.

**R83.** In the interest of ensuring field staff's ability to engage with local stakeholders, they should be familiar with the language and culture of the respective country. Recruitment of local staff would guarantee both knowledge of the local language and culture, and reduce costs otherwise needed for language or training.

**R84.** The Registry is recommended to consider tenure for field office positions, following the example of embassies and UN offices in the field. The conditions of such tenure would depend on whether the duty station is a non-family or hardship one, and whether the staff is international or nationally recruited. The Heads of field offices and Occupational Health Unit (OHU) surveys on field office welfare should be consulted on the matter.

**R85.** Increased internal mobility between field office staff and the headquarters, as recommended by the Experts in the Human Resources Section,<sup>125</sup> would also contribute to increased awareness by staff in The Hague of the challenges faced in the field, and – vice versa – enable field staff to establish a network at the Court's permanent premises that would enhance the connectivity between Court staff, regardless where they are based.

**R86.** Staff from field offices should have access to similar institutionally-offered opportunities in terms of professional and personal development as those in The Hague.<sup>126</sup> This refers, for example, to trainings, possibility to be considered for positions at headquarters, and option to benefit from psychological support (welfare officers). The Human Resources Section (HRS) and OHU should aim to ensure that such services and opportunities are made available to field office staff, preferably via video teleconferencing (VTC).

<sup>123</sup> See *infra* Section [II.F. Short-Term Appointments, Local Recruitment](#).

<sup>124</sup> See R297 (p.253).

<sup>125</sup> See *infra* Section [II.J.1. Internal Mobility](#).

<sup>126</sup> See *infra* Section [II.H. Staff Training and Development](#).

## II. HUMAN RESOURCES

### A. General

#### Findings

201. The staff at the Court are, generally speaking, engaged in a stimulating and worthy international endeavour, the envy of professional colleagues around the world. Moreover, those based in The Hague (i.e. the vast majority), live and work in close to idyllic conditions, notably in a highly organised and well-ordered city and in a soaring and inspirational purpose-built court complex that provides superb working conditions by any standards.

202. Yet repeated internal surveys over the years, anecdotal evidence, observations from professional counsellors at the Court and interviews conducted by the Experts indicate that many members of staff are unhappy and dissatisfied. At the same time, it seems that relatively few staff choose to leave the Court and move their careers elsewhere. Indeed, a surprisingly high percentage of staff have been with the Court for over a decade, some since it was created. The combination of a relatively high level of dissatisfaction in the workplace and a workforce that is not being sufficiently rejuvenated through a process of staff turnover (particularly at the senior managerial level) means a working environment that is far from optimal in terms of performance and staff welfare.

203. The Experts have identified a number of factors that have contributed to this state of affairs, some of which are to be found in many international bureaucracies, including the UN Secretariat, the individual specialised agencies and other treaty-based secretariats. These include a mixing of management approaches due to the very different cultural backgrounds of staff; slow or non-existent promotion rates; language issues; different broader cultural attitudes (e.g. towards women, junior staff or to non-professional support staff); lack of a strong organisational leadership due in part to absence of a knowledge management strategy that would enable institutionalised memory retention; added to the regular rotation of chief executives, senior management staff have substantial influence on maintaining organisational culture, and thus making change more difficult; interference in management issues by member states; and inadequate or outdated management tools and processes. Some of the recommendations below attempt to address these international system-wide shortcomings.

204. Additionally, though, staff dissatisfaction derives from, or is exacerbated by, factors unique to the Court itself - notably the way it has been structured by the Rome Statute and has been set up by the early leadership of the Court; its dual nature as both a court and an international organisation; the four Organ nature of the institution; and the principles of independence and confidentiality that (often unnecessarily invoked, in the view of the Experts) hamper closer cooperation and collegiality between the Chambers, the Registry and the OTP. Additionally, the nature of the work that the Court undertakes brings its own challenges to maintaining a satisfied and productive workforce. The various issues and recommendations on how they might be addressed are set out below.

### B. Working Environment and Culture, Staff Engagement, Staff Welfare

205. As mentioned earlier, the Court is a complex organisation that is an amalgam of management cultures. The working environment at the headquarters in The Hague too often does not live up to the spectacular office accommodation provided. The structure of the Court, with its four Organs and a leadership that is rotated at least every five-nine years, means that the senior permanent staff (i.e. Directors), uniformly male at present, largely dictates the culture of the organisation. They exert enormous weight and influence not merely over the substantive work of the Court and how it is organised, but over recruitment, placements and other staffing decisions that impact officers at all levels.

206. The Experts reviewed the most recent Staff Engagement Surveys (2010, 2018). Scores include comparison both between the two surveys and with similar surveys of other international organisations. Such analysis shows that some of the negative scores reflect

challenges that are common across international organisations. Three further observations on the overall results are relevant at this stage.

207. Firstly, the scores are significantly different between the Organs: the Chambers' scores are the lowest, followed by the OTP. The Registry's scores are notably higher. Secondly, the major cause of frustration for staff seems to be lack of mobility, training and opportunity to grow. Finally, there is a need to improve ethics throughout the organisation, provide for more equal opportunities and ensure better recruitment procedures.

208. The Experts' report has been informed by the overall scores, and its recommendations were developed considering the above conclusions.

### C. Bullying and Harassment

209. The Experts heard many accounts of bullying behaviour amounting to harassment in all Organs of the Court, though particularly in the OTP. They also heard frequent complaints that the culture of the Court's workplace was adversarial and implicitly discriminatory against women. They heard a number of accounts of sexual harassment, notably uninvited and unwanted sexual advances from more senior male staff to their female subordinates. Female interns seemed to be particularly vulnerable to such approaches, underlining the extent to which this phenomenon, not just at the Court, but in business, government, law, academia and many other professional environments around the world, frequently has more to do with power relationships than with mutual attraction.

210. Elsewhere in this report, the Experts have noted the inadequacy of the existing mechanisms in the Court to deal with complaints of bullying and harassment.<sup>127</sup> Recommendations on new and more effective complaint investigation and dispute resolution mechanisms to address the phenomena have been made in that context. The Experts wish to note that the environment and practices that have allowed this behaviour to occur, often with impunity, also needs to change.

211. Predatory behaviour in the workplace is a complex problem and needs a multi-pronged response to address the cultural dimension of the issue, and the first step to any serious change in the culture of an organisation is leadership. It is not good enough for the CEO of an organisation to announce that certain behaviour is prohibited: they must demonstrate that such behaviour will not be tolerated. In the Court, this means that the issuance of an Administrative Instruction on bullying and harassment is going to be ineffective unless staff, both senior and junior, actually believe the Principals and senior managers care about the issue and will respond resolutely to breaches of the policy. There must be avenues where victims can safely report the behaviour and which will enable this to be investigated swiftly. Staff should be able to bring their concerns to managers and receive guidance and support as to the procedure to follow, should they wish to submit complaints. If the complaint is found to be valid, there must be consequences for the offender. The Experts conclude that such leadership in the Court has been lacking in the past. Too often the Experts heard that the Principals were reluctant to involve themselves in such staffing matters and left it to the Directors or other officials to deal with them – a particularly unsatisfactory response if the accused offender happens to be a close confidant or ally of the Director concerned.

212. Secondly, there is a need for more women in managerial positions, particularly in senior positions.<sup>128</sup> While women as individuals are not necessarily more inclusive or less confrontational in their work practices than male colleagues, experience in other organisations suggests that when the composition of management approaches parity between women and men, the overall culture of the office becomes more collaborative and is less tolerant to bullying behaviour. The Court should implement initiatives that would lead, over

<sup>127</sup> See *infra* Section [IV.A. General](#).

<sup>128</sup> The Court's External Auditor made a similar finding and recommended the Court, 'based on a study to be prepared by the Human Resources Section, to introduce additional measures aimed at increasing the representation of female staff, particularly at more senior levels, such as through a mentoring programme and the establishment of a Focal Point for Women' – Final audit report on Human Resources management, [ICC-ASP/17/7](#) (2018), Recommendation 1.

time, to a situation where there is an equal number of women and men at the management level of the Court. The Experts commend in this regard the Registry's plan to focus on increasing gender equality, especially in higher-level posts.<sup>129</sup>

213. Along with a changed attitude at the leadership level should go appropriate training for all managers so they understand the impact and cost of bullying, harassment and discriminatory behaviour on the individual and the organisation. Bullying is often justified by managers as an acceptable tactic to get better performance from their work team. This is not only a self-indulgent and highly unethical excuse, but wrong: bullying and harassment contribute to unhappiness at the individual level and to cautious and risk-averse decision-making at a work unit level. Overall, this means reduced productivity for the organisation as a whole.

214. The Experts are aware that positive steps to address bullying and harassment have been taken at the Court in recent years, but the Administrative Instruction on these issues has been stuck at inter-organ consultations for too long and remains unissued. Training initiatives launched in this area have also not permeated sufficiently through all Organs of the Court to reassure staff that real change is happening. A renewed effort in this respect is needed, along with rotation of senior staff through the adoption of a policy of tenure for these positions (as proposed below), as well as initiatives to promote greater gender and geographical balance in recruitment.

### **Recommendations**

**R87.** The leadership of the Court should adopt and demonstrate a clear commitment to a multi—pronged strategy to deal with predatory behaviour in the workplace, namely bullying, harassment and sexual harassment. It must be clear to all staff, particularly supervisors, that such behaviour is inexcusable and unacceptable at the Court and will not be tolerated. There should be avenues by which staff can safely report bullying and harassment to managers and receive guidance and support as to the procedure to follow if they wish to lodge a complaint.

**R88.** The Court should work assiduously, through its recruitment, promotion and training programs, to bring more women into senior managerial positions, in part to bring about a change in the prevailing practices that have tolerated unacceptably predatory behaviour in the past.

## **D. Management of Human Resources**

### **Findings**

215. One frequent complaint in the Court is that its human resources policies and procedures are not common or consistent across Organs. The Experts have noted elsewhere that the silo approach to management as between the Judiciary, the Registry and the Office of the Prosecutor creates overlaps and distortions, promotes inefficiency, and inhibits appropriate cross-Court cooperation and coordination. Essentially, management of the human resources of the Court is a function that falls squarely into Layer 3<sup>130</sup> of the Court governance structure, i.e. it should be managed from the Registry, and broadly in accord with the UN Common System, which saves the Court from having to create new human resources policies afresh. The Experts do not see value in the Court withdrawing from the Common System as proposed by some States Parties.

216. To implement the recommendation that human resources management should be a Registry function, the Experts consider the new Prosecutor, in light of Article 42 of the Statute, could formally delegate to the Registrar broad authority over staffing matters in the OTP, a delegation that would not prevent them retrieving the authority or otherwise stepping in where they believed the prerogatives and interests of the OTP were not being observed. As far as Chambers are concerned, the staff there are already working under the nominal authority of the Registrar, though it would probably be useful for the Presidency to reinforce

<sup>129</sup> ICC, [Registry Strategic Plan 2019-2021](#), paras.6, 16-19.

<sup>130</sup> See *supra* Section [I.A.1. Structure of the Court](#).

this by indicating that they would not intend to involve themselves in this aspect of the Judiciary's business, but would defer to the Registrar.<sup>131</sup>

217. The Experts note that the Human Resources Section of the Registry is currently understaffed and would need to be strengthened significantly if it were to take over responsibility for Court-wide human resources. Along with this should go greater authority to devise and implement strategic policy in the human resources field,<sup>132</sup> possibly through upgrading its leadership or otherwise linking it more directly to the Registrar.

### **Recommendations**

**R89.** Measures should be taken to transfer general responsibility for human resources in the Court to the Registry. The Human Resources Section should be appropriately strengthened through additional staffing resources, to be able to assume this responsibility.

**R90.** The incoming Prosecutor should delegate responsibility for management of human resources in the OTP, given to that position under Article 42 of the Rome Statute, to the Registrar, as a key aspect of the implementation of Recommendation 89 above.

## **E. Adequacy of Human Resources - Recruitment**

### **Findings**

218. The principal criticisms the Experts heard of the current recruitment system at the Court related to its cumbersome nature, its lack of transparency, the time it takes to fill positions, and the fact that those recruited sometimes do not have the skills needed to do the job they are given. It was also suggested that often the system of short-term appointments (STAs) and the intern program were used as a recruitment stream, which tended to disadvantage potential applicants, particularly from under-represented geographical regions, who often did not have the opportunity to participate in STAs and intern programmes.

219. The above criticisms have some validity, but they are common to the United Nations (UN) and many other international organisations, and in some areas are contradictory (e.g. the time it takes to fill positions is partly due to efforts to make the process as fair as possible). This suggests that the challenges involved in recruitment for international agencies are somewhat different from recruitment to a national organisation and can be quite substantial. The fact that candidates come from many different countries and have qualifications and experience that can often be difficult to compare, is one example of this. Conducting interviews via remote technology and having very limited opportunity to assess the personal qualities of the candidate is another. Moreover, while competence to do the job is the primary criterion for selection, other factors such as the need for geographical and gender balance must also be taken into account by the panels set up to conduct the recruitment to fill a particular position. These panels in the UN and in the Court are ad hoc in nature, and can vary in the way they assess the candidates and make their recommendations.

220. While the OTP and Registry conduct their own recruitments separately, they follow the same procedures, basically those foreseen in the UN Common System. Ad hoc panels are intended to limit bias, but as mentioned above, they slow down recruitments since it is often difficult to take three busy officers off-line to conduct the interviews, and are seen as cumbersome. Reviews of their recommendations by the central staffing authority and the decision-maker can also slow down the process, and can add levels of opacity that prompt the criticism of a lack of transparency. Efforts to ensure geographical balance can mean that some new recruits are not as familiar, as they might ideally be, with the work of the position they have been employed to fill. It is not surprising that managers, in an effort to cut back on the time and resources involved in a comprehensive recruitment, are attracted to the option

<sup>131</sup> See *supra* Section [I.B.3. Management in Chambers](#).

<sup>132</sup> Such strategies should be informed by staff engagement surveys, carried out regularly. Beyond the scores of the individual surveys, comparisons between the several surveys should be made and analysed to identify trends throughout time.

of appointing someone with whom they are already familiar from amongst their STA or intern staff; and who they are confident possesses the skills necessary for the job.

221. Bearing all this in mind, and balancing the need for procedural fairness, efficiency and filling the position with someone competent to do the job, the Experts recommend a small number of tweaks to the recruitment system, rather than wholesale changes. For a start, if other recommendations by the Experts related to the structure of the Court and its leadership and culture are implemented, there will be a positive flow-on affect in the field of Court recruitments. Additionally, though, with all recruitments running out of the Human Resources Section in the Registry, it should be possible to have one member on all panels from that office, which would add consistency as well as professional expertise to these panels. Such panels should also have on them at least one woman and, where possible, a representative of an under-represented region. This would be calculated to help address gender and geographical representativeness concerns. All panels should also include speakers of both working languages of the Court, to ensure ability to test fluency of the candidates, especially when one of the two or both working languages are important for the position (e.g. for field positions in a francophone country).

222. The criticism that some of those recruited to the Court do not have appropriate qualifications or experience for the work of the Court is of concern and needs to be addressed. This may not be the fault of the panels that chose the recruits, but rather of unclear job descriptions and selection criteria. If the job being filled is for a trial lawyer, it should be absolutely clear in the selection criteria that appropriate experience of conducting trials is essential. Where a significant component of an advertised job is people management, experience in this area should also be mandatory. An effort should be made therefore, as part of a broad review of job descriptions in the Court, to identify the critical skills and experience required in such positions and to include these in the recruitment campaigns to fill particular positions.

223. One of the more difficult qualities of candidates to assess, particularly on a written application or even in a relatively short interview over VTC, is their capacity to work in a team, their ability to handle cultural differences, and their preparedness to accept direction - in short, their emotional intelligence. Thought should be given as to how this shortcoming might be overcome, perhaps in the case of more senior managerial jobs, by shortlisting candidates and bringing them to The Hague for interactive exercises. If this was found to be prohibitively expensive, it is recommended to at least schedule detailed follow-up discussions with former supervisors and referees of short-listed candidates.

224. The concern that the use of STAs and the intern program as a conduit for recruitment to the Court cuts out potential applicants from certain regions would best be addressed by adopting measures to include such candidates in those programs. The truth is that once individuals are recruited to the Court, it is extremely difficult to dismiss them even if they are incompetent. The Experts recognise that the STA system and the intern program do provide a way to assess the competence of potential recruits, and avoid disastrous recruitment decisions. Further, care should be paid to ensuring that recruitment processes are open and competitive for both former interns and other candidates.<sup>133</sup>

## **F. Short-Term Appointments, Local Recruitment**

225. The Court Organs should have the ability to recruit experts directly for short term assignments, and retain staff for the duration of an assignment or a case. The current system of General Temporary Assistance (GTA) contracts is insufficiently flexible, and does not allow the speeding up of the recruitment processes. This is especially important in the context of PEs and investigations.

226. For the OTP, the need for local and field-based expertise on a limited-term basis is even greater during active investigations.<sup>134</sup> While the ability of OTP investigators to be present in the field should be increased, even long-duration missions cannot dispense with the necessity of having a local professional in the team. The ability to promptly analyse the

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<sup>133</sup> See R37 (p.39).

<sup>134</sup> See *infra* Section [XIV. Error! Reference source not found.](#)

context and the political or social dynamics of a situation, as well as establish contact with relevant actors in the field, would be calculated to avoid delays and improve the thoroughness of the investigative and analytical process.

227. In recent years, the Court appears to have acknowledged the need for local knowledge. For instance, the OTP has recruited several Situation Specific Investigation Assistants and field-based investigators, but it remains a work in progress. The OTP is also looking to the future and the possibility of using GTA contracts to further increase local presence. These are all commendable efforts, but more needs to be done to ensure that the application of these recruitment models is consistent across situations, paying due regard to the security and political contexts.

### **Recommendations**

**R91.** Where this is currently not the case, all recruitment panels in future should have at least one woman, a representative of an under-represented geographical region and ex officio, a representative of the Registry HRS. All panels should include speakers of both working languages of the Court.

**R92.** A major effort is needed to re-classify all positions in the Court in terms of their core responsibilities and generic skills, with the aim of allowing officers from different Organs to apply for positions anywhere in the Court that they have the skills and experience to occupy. Care should be taken when advertising positions to ensure that the full range of skills needed is accurately reflected in the Job Description and Selection Criteria for that position to ensure that panels make appropriate recruitment decisions.

**R93.** Recognising the difficulty of interviewing candidates from different geographical regions with different educational and professional backgrounds via VTC, greater effort needs to be made by recruitment panels to follow-up with referees or even shortlist candidates for more senior positions and bring them to The Hague for a more intensive round of interviews and tests.

**R94.** The Court's ability to recruit staff on a limited- or short- term basis should be further strengthened, and so have the ability to recruit local staff on a timely basis.<sup>135</sup> Relevant human resources policies ought to be reviewed in this regard, if necessary.

**R95.** The ASP and/or the Court should consider having agreements/policy/structural documents in place to allow for different staffing models, such as short-term contracts, secondments, local recruitment.

**R96.** The fund for paid internships and visiting scholar positions should be enlarged, to enable candidates from developing nations to take up such positions in the Court.

## **G. Performance Appraisal**

### **Findings**

228. The Experts found that there is on-going criticism of the Court's performance appraisal system, even though it has only relatively recently been revised and is now applied fairly universally across the Court. The nub of the criticism is that managers do not take the appraisal system seriously; that under-performance is rarely, if ever, recorded; that appraisals make no practical difference in the workplace; that there is no provision for upward or 360-degree assessment of supervisors across the Court, and where there was, it was not always consistently or adequately implemented.

229. The Experts do not take fundamental issue with the Court's performance appraisal system, which has been carefully designed by professionals in the field and adjusted to fit the circumstances of the Court, but rather with the way it is implemented. Again, this is not an issue unique to the Court – it is common across the UN system and probably in many national systems also. Managers do not like doing appraisals and staff fear them. Honest ratings of

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<sup>135</sup> Similarly, see R80 (p.64).

under-performance or incompetence can lead to protracted, time-consuming, internal litigation and disruption to the work unit. In this situation, the temptation for a manager to avoid conflict by giving higher rating to someone for their performance, be it a superior rating for someone who has simply done their job competently or a fully effective rating for someone who has under-performed, is very strong.

230. The Court's system is underpinned by an understanding that managers and their staff will have a regular dialogue around work expectations so that when the annual review of performance happens, there are no surprises. Unfortunately, this probably happens quite rarely across the Court, and is too often a 'tick the box' exercise, so the annual review is invested with a weight and gravity that it need not have. To see the system implemented better would require stronger commitment to it from the Principals and senior managers, and very likely mandatory training for all supervisors. Successful implementation of the performance appraisal cycle with all their staff, including honest assessment of the under-performers, should be a performance criterion for the supervisors themselves. Moreover, a component of 360-degree assessment should be introduced into the system, as has occurred with some of the other international tribunals. Again, the implementation of more general recommendations of the Experts in relation to leadership and culture in the Court would also assist in strengthening the appraisal system.

## **Recommendations**

**R97.** Managers in the Court, including the Principals, need to commit to the system of performance appraisal adopted by the Court, in particular by offering honest and constructive regular feedback to staff so that the annual performance review is not a shock to the individual. Conducting proper performance appraisal and counselling of their staff should itself be a significant performance indicator for supervisors and managers.

**R98.** A system of 360-degree assessment of managers should be introduced across all Organs of the Court, which, given the hierarchical nature of the workplace there, would probably have to be via anonymous written comments to management by staff or through an annual facilitated discussion amongst the work unit staff without the manager being present.

## **H. Staff Training and Development**

### **Findings**

231. The Experts have noted elsewhere that the Court is an unusual creature in the firmament of international bodies, with a unique structure and operations and programmes that are challenging and extremely complex, carried out in a variety of countries around the world. It follows that almost all of the staff recruited to it lack the knowledge and experience to be able to slot straight into a position and perform up to expectations. Induction training for all recruits into the Court is therefore critical to maintaining the quality of its work. Such training will only be fully effective if there is a proper Court-wide knowledge management strategy, so that the trainers have a clear idea exactly what the new recruits need to know.<sup>136</sup> Such a strategy would also facilitate internal and external mobility initiatives and allow the application of tenure, since there would be less concern that critical knowledge is leaving the Court with the transfer or retirement of a staff member.

232. Elsewhere in the Report the Experts have commented on the specific issue of training for Judges newly elected to the Court and for OTP staff.<sup>137</sup>

233. The Experts have heard that the above training areas are currently inadequate due to a lack of resources. Similarly, they understand that on-going professional training is limited, particularly in fields such as leadership, management, conflict management, and gender and cultural awareness that, as mentioned, have an impact on the entire working environment.

<sup>136</sup> The Experts commend the Court's plan, following the Audit Committee's recommendation, to develop an organisational manual, as a positive step towards improved induction training and an element of knowledge management strategy - see Report of the Audit Committee on the work of its tenth session, [AC/10/5](#) (2019), para.9.

<sup>137</sup> See *infra* Section [IX.A. Induction and Continuing Professional Development](#) and R65 (p.55).

## **Recommendation**

**R99.** The Experts recommend that the ASP, the CBF and the leadership of the Court give serious consideration to strengthening the training and development function of the Court, which again should be centralised in the Registry.

### **I. Multilingualism**

#### **Findings**

234. The Statute establishes the working languages of the Court to be English and French. While there are parts of the Court where French is commonly used, in practice English appears to have become the default working language, particularly in the Office of the Prosecutor. This is unfortunate since it encourages the recruitment of predominantly English speakers, which is a disadvantage when a significant number of situation countries are francophone and Court officials need to interact with national officials in French.

235. Sustained effort should be directed at improving the French language capabilities at the Court through targeted recruitment, ensuring the presence of French speakers on selection panels, systemised French language classes, and incentives for relevant staff to improve their French language skills. A long-term goal for the Court could be to strengthen the requirement for staff to master both working languages of the Court.

236. Specific attention should be paid to ensuring that individuals recruited in positions for which specific language skills are required, be it one of the Court's working languages or another, have the necessary language proficiency. This would be the case, for example for certain positions in the field.<sup>138</sup> More effort spent at the recruitment phase on this matter would contribute to reducing budget spent on language classes.

#### **Recommendation**

**R100.** Sustained effort should be directed at improving the French language capabilities at the Court, through targeted recruitment, French language classes and incentives for staff to improve their French. More generally, when recruiting persons who will be working on a situation country or region, whether in the field or in headquarters, where communication will be predominantly in a particular language, it should be ensured that the individual selected is sufficiently capable in that language to do the job effectively.

### **J. Flexibility, Scalability and Mobility in Staffing**

#### **Findings**

237. One of the most common complaints from staff is that there is virtually no opportunity for promotion in the Court. As mentioned above, this is an issue found in many international bureaucracies, because vacant positions are very often filled from the outside, rather than through internal promotion. This is a consequence of accommodating geographical and other quotas and in response to pressure from member states. This issue however seems to be particularly prevalent at the Court, perhaps due to the fact that recruits, particularly in the legal officer ranks in the OTP, are often high performers in their own national contexts, with higher expectations than most of a career progression upwards. What they find once they join the Court instead is that with little movement of officers occupying the positions above them, opportunities for promotion as they build their skills and experience in the Court are very limited indeed.

238. It is worth noting that in the UN Secretariat for example, even if blocked from promotion in their own office, staff can apply for positions in different parts of the Secretariat or in related organisations, and at different work locations. So individuals can compensate

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<sup>138</sup> See also R83 (p.64).

for a lack of upward movement with the stimulation of new and different work challenges and environments. By contrast, because of the Court's inter-organ separation, numerous silos across them, and the way its leadership has chosen to apply confidentiality and independence considerations in the workplace, there is very little movement between even the OTP and Registry or the Chambers and OTP.

## **1. Internal Mobility**

239. The Experts consider that this issue needs to be addressed on multiple fronts if the Court is in the future to provide the satisfying work life for its staff that they deserve and which will contribute to a better performing Court across the board. At the simplest level, the leadership of each organ should embrace the concept of movement between units within the relevant Organ, to respond to changing work pressures. Some managers will be resistant to this as they see their staff as a measure of their power and authority and thus to transfer some officers to a busier work unit as effectively weakening them. But at a time when States Parties are reluctant to increase budgets, redeployment of staff is a simple and cost-effective way to improve productivity.<sup>139</sup>

240. Secondly, the leadership of the Court needs to encourage and facilitate the movement of staff across Organs, by classifying jobs in terms of broad skills categories and enabling staff to apply for vacancies in their particular job category, wherever these are vacant in the Court. This would not only provide important work variation for staff, but would build networks and habits of cross-fertilisation that would serve the Court well in the long-term and be a practical example of implementing the One Court principle. At the very least, there should be provision in the staffing practice of the Court for temporary assignments across Organs. These could be arranged relatively informally and be for a short duration, but they would help to even out work pressures across the Court and would provide new perspectives for the individual staff members involved.

241. Thirdly, the Court should also consider how to facilitate more transfers into and out of the field offices, even on a temporary and short-term basis as contemplated above. Field work is an essential component of the Court's business, but few staff get the opportunity to experience this. While a system such as employed by the UNHCR to require all headquarters staff to serve in the field at some stage is probably impractical for the Court, there is no doubt that having a larger cohort of staff in The Hague that understands the realities and challenges of working in the field would make for a better Court overall.<sup>140</sup> Again, the adoption of Court-wide job categories would facilitate such transfers into, and back from, field offices, as well as a generally more flexible attitude towards temporary assignments across Organs.

## **2. External Mobility**

242. The Principals should work to enable exchanges and secondments between the Court and other relevant parts of the international bureaucracy. This might be easier for staff with generic bureaucratic skills such as finance, management and language services. However, given the high number of legal officers scattered through the UN, the specialised agencies, the other international courts, and other treaty-based secretariats, it ought not to be difficult for officers with legal skills alone to participate in such exchanges. The Court has been a party to the UN Inter-Agency Mobility Agreement since 2019 and should now proactively work to use this platform to implement appropriate work exchanges with counterpart agencies. The Experts do not wish to be prescriptive about how long such exchanges and placements should be, but to be cost-effective, they should probably not last less than six months or longer than three years.

243. While it would be a bit more challenging to set up, the Court should also look at the modalities to enable staff exchanges with relevant NGOs and academic institutions. Again the Court has everything to gain from the new perspectives gained by its staff on such

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<sup>139</sup> To enable internal mobility, implementation of R134 (p.113) is also necessary.

<sup>140</sup> See *supra* para.200.

placements, and from the individuals coming from those very different backgrounds into the Court for a period.

### 3. Secondments

244. Some States Parties have proposed that the Court accept secondments from governments as a way of enhancing its capacity. Other States Parties have opposed this on the grounds that such secondments are more likely to come from high capacity (i.e. Western) states which could distort the political perspectives of the Court and inhibit the recruitment of staff from less developed states. The Experts acknowledge the latter concerns, and appreciate the risks involved in an open system of secondment, where some secondees might be placed in the Court to promote the interests of their government rather than those of the Court.

245. The most recent OTP Strategic Plan states that the OTP ‘will aim to explore with States Parties the possibility of secondments and other similar options (e.g. staff exchange).’<sup>141</sup> The Experts have already drawn attention to the need for local expertise in the field offices, and for the OTP at every stage of preliminary examinations, investigations, and prosecutions.<sup>142</sup> Apart from the added value in terms of speed and quality of work and savings for language services, secondments could alleviate the consequences of the Court’s limited budget, which provides little for ad hoc recruitment.

246. The Experts do see value in an approach to secondments based on the needs of the Court rather than the proposal of a state, with the Court always retaining the power to reject the offer of a secondment. Inter alia, it would be important that any secondment agreed to be only into a position that was non-managerial and specialist in nature (e.g. a financial investigation officer or a specialist in forensic anatomy), in short into a field where the Court did not have (sufficient) required technical capacity.

247. It has been reported to the Experts that restrictive rules constrain the Court’s ability to engage seconded personnel. Therefore, it is important to assess how the Court can use secondments, and review the draft Guidelines on Selection and Engagement of Gratis Personnel.<sup>143</sup> It must accordingly be ensured that it is fair, fit for purpose, and capable of providing the Court with the best expertise with the widest geographical representation.

### **Recommendations**

**R101.** The leadership of each organ of the Court should embrace the concept of movement between work units in the organ to deal with the changing work pressures. Additionally, they should encourage and facilitate the movement of staff across Organs, either short-term or long-term, by allowing staff with relevant skills and experience to apply for positions in Organs other than the one they are currently working in, subject to potential conflicts of interest. Such transfers should include movements into the field, even on a temporary or short-term basis.

**R102.** The Principals should support and encourage exchanges and secondments between the Court and other relevant international courts and organisations, inter alia through application of the UN Inter-Agency Mobility Agreement. Such exchanges could be contemplated with other external institutions, including NGOs and universities.

**R103.** The Court could contemplate secondments from national governments on the basis of its needs, rather than the wishes of the government concerned. Such secondments should concern only positions of a non-managerial, technical or specialist nature.<sup>144</sup> Guidelines on Selection and Engagement of Gratis Personnel should be drafted/updated according to the above considerations.

<sup>141</sup> [OTP Strategic Plan 2019-2021](#), p.14, para.16.

<sup>142</sup> See also R80 (p.64), R94 (p.74).

<sup>143</sup> Report on draft guidelines for the selection and engagement of gratis personnel at the ICC, [ICC-ASP/4/15](#) (2005).

<sup>144</sup> Existing draft guidelines ([ICC-ASP/4/15](#)) will have to be updated and finalised in line with the Experts’ recommendations on secondments.

## 4. Tenure

### Findings

248. The measures suggested above would help to address the challenge of staff stagnation in the Court and could mostly be implemented relatively easily with the appropriate will and commitment on the part of the Court leadership. However, in the view of the Experts, a more far-reaching and effective way to address the challenge, though admittedly with more administrative difficulty and likely strong opposition in certain quarters, would be to introduce a policy of tenure for all staff above a certain grade. It is simply not healthy for an organisation to have its senior management unchanged for the length of time that has occurred within the Court.<sup>145</sup> While there would inevitably be some work disruption from imposing a specified term limit for all officers of P-5 level and above, the benefits in terms of introducing fresh thinking, a different managerial dynamic in the work unit, and a diffusion of the power currently held at that level in the different Organs, would, in the view of the Experts, greatly outweigh that disruption.

249. The Experts do not wish to be prescriptive on the details of such a system of tenure, though they are convinced it must be applied strictly, with few, if any, exceptions. Such a system operates in the Organisation for the Prohibition of Chemical Weapons with maximum 7-year terms for all officers<sup>146</sup>, in the Organisation for Security and Cooperation in Europe,<sup>147</sup> and in the International Atomic Energy Agency<sup>148</sup> with a maximum of five years, and appears to work effectively. Bearing in mind that the elected officials in the Court have terms of either five years (the Registrar) or nine years (the Judges and the Prosecutor), the Experts would suggest some limit between those two periods. The Court could choose to apply a tenure system across the board to all staff of the Court, as occurs in the organisations mentioned above. On balance, however, the Experts consider that the downsides of this could weigh too heavily on the system, at least in its early years of application. These include the complexity and longevity of cases being dealt with in the OTP and thus the need for a degree of continuity at the working level, as well as the challenge of having to run constant recruitment campaigns.

250. An argument shared with the Experts against the implementation of tenure is the institutional knowledge that would be lost if individuals that have been at the Court since its creation would leave. Independent of whether the ASP and the Court would decide to apply a tenure policy or not, the Court should develop a solid knowledge management framework that includes mechanisms and strategies to retain and transfer knowledge. Institutional knowledge should not depend on the presence of one or another individual.

251. A slightly different tenure regime could be applied to the Chefs de Cabinet of the Principals, i.e. that these would be appointed by the newly elected President/Prosecutor/Registrar and serve only for the term of that official, possibly with the option of returning to the ranks of the Court staff if they are not already under a tenure limit. The application of tenure for senior staff would suggest that the Deputy Prosecutor, currently elected for a term of nine years, should not be a candidate for Prosecutor at the end of their term.

252. The Experts recognise the difficulty of applying a new tenure system to staff already in the Court, so they suggest that the system be applied only to new recruitments for P-5 and Director-level positions as these come vacant. This would not preclude the Court from encouraging senior staff who have served in the Court for a long time to consider taking early retirement, including through offering financial packages.

253. Notwithstanding that this would not apply to existing staff, there is likely to be considerable resistance to the introduction of tenure in many parts of the Court (even if there is also some enthusiasm for this approach in other quarters). But it is the firm view of the Experts that this is a measure essential to addressing effectively a number of the institutional

<sup>145</sup> 44% of D-1 staff and 23% of P-5s have been at the Court for more than 10 years; 33% of D-1s and 41% of P-5s have been at the Court between 5 – 10 years – based on data provided to the Experts by the Court.

<sup>146</sup> [Organisation for the Prohibition of Chemical Weapons, Staff Regulations](#), Regulation 4.4, p.22.

<sup>147</sup> [Organisation for Security and Cooperation in Europe, Staff Rules and Regulations](#), Regulation 3.08, p.17.

<sup>148</sup> [International Atomic Energy Agency, Staff Regulations](#), Regulation 3.03, p.6.

weaknesses of the Court. Not least it would bring fresh approaches and thinking, as well as more dynamism into the Court across all its Organs.

### **Recommendations**

**R104.** The Court should develop a comprehensive strategy on knowledge management, to ensure that critical information and experience is not lost every time a member of staff moves out of the work unit on transfer, secondment, retirement or resignation, and to inform the training program across the Court, including the induction training for new recruits.

**R105.** In order to encourage fresh thinking and bring more dynamism to the Court, a system of tenure should be adopted by the Court, applicable to all positions of P-5 and above. The system should stipulate a maximum tenure in positions of these levels of somewhere between five and nine years, and should admit few, if any exceptions. For reasons of procedural fairness, the limitations should not be applied to those occupying these positions currently and would only apply to those newly appointed to the positions. Nonetheless, long serving officers of P-5 or Director level might be encouraged to retire early to allow the new system to be established as quickly as possible.

## **III. ETHICS AND PREVENTION OF CONFLICTS OF INTEREST**

### **Findings**

254. Throughout the Experts' consultations, ethics has been identified as an important topic for all stakeholders. Recent allegations of conflicts of interest, potential ethics violations or inappropriate behaviour from multiple Organs have been publicly covered and speculated upon through various articles and blog posts, and at times surfaced during trials through requests for disqualification of Judges.

255. Such events, whether truly inappropriate behaviour was involved or not, can impact the Court both externally and internally. The Court's reputation, credibility and trust is eroded, risking lower support by States Parties and civil society. Internally, it can affect staff productivity and welfare, and in some instances can represent a financial risk for the institution. In absence of efficient and effective instruments on ethics and prevention of conflicts of interest, the Court is less able to defend itself against its critics.

256. States Parties, civil society, Court officials and staff alike noted the need for mandatory and clear ethical standards for all individuals working with the Court, including elected officials, complemented by a robust enforcement mechanism. Stakeholders pointed out the growing number of requests for disqualifications of Judges that – together with the fact that Judges themselves decide on the matter – erodes public trust in the bench and the Court as a whole. Specific calls were made for guidelines on interaction between officials and staff, on the one hand, and States Parties on the other, and for activities of high-ranking officials after leaving their Court posts. Concern was expressed at the lack of instruments binding former officials and staff to continue to abide by certain ethical obligations.

### **A. Ethics Framework**

257. The Court's ethics framework is comprised of several instruments, with differing scopes of application:

#### **Court staff and/or officials:**

- Articles 46-47 Rome Statute and Rules 24-26, 30, 32 Rules of Procedure and Evidence refer to misconduct by elected officials;
- Code of Judicial Ethics - for Judges;

- Code of Conduct of staff (ICC/AI/2011/002) – applicable to holders of letters of appointment of the Court, regardless of the duration of their appointment, and staff members of other organisations on secondment to the Court;
- Code of Conduct for the OTP – applicable to all members of the OTP, as well as interns, visiting professionals, gratis personnel and staff members of other organisations on secondment; it does not apply to consultants, contractors and special advisers of the OTP;
- Administrative Instruction on Sexual and other forms of harassment (AI/ICC/2005/05) – applicable to all current and former staff members of the Court (a revised and updated Administrative Instruction on harassment is underway);
- Financial disclosure programme (ICC/AI/2015/005) – applicable to the Principals and specific staff members involved with procurement of goods and services or the investment of the Court’s assets.

### **Individuals affiliated with the Court:**

- Code of Professional Conduct for (external) counsel – covering defence counsel, counsel acting for States, amici curiae, counsel/legal representatives for victims and witnesses;
- Code of conduct for investigators (ICC/AI/2008/005) – applicable to investigators of the Court and the Defence, and other investigators acting at the request of the Court.

258. Additionally, the Court has a Whistleblowing and Whistleblower Protection Policy (ICC/PRESG/G/2014/003) and an Anti-Fraud Policy (ICC/PRESG/G/2014/002), both applicable to all elected officials, staff members and other persons serving the Court, such as counsel, contractors, consultants, visiting professionals, interns and vendors.

259. The Court has undertaken a gap analysis of its values and ethics framework in recent years. The results led to the review of the Administrative Instruction on Harassment and work on a new Administrative Instruction on Sexual Exploitation.<sup>149</sup> Overall the Court concluded that it has in place, by comparison with similar organisations, a comprehensive regulatory framework governing the conduct of its sitting officials and staff.<sup>150</sup>

260. The process was initiated at the Audit Committee’s request in 2017 for the Court to submit a revised values and ethics framework, based on the Court’s values and general code of conduct applicable for all staff members, and setting out the professional conduct expected from each staff member in the performance of their activities. Wherever appropriate, Organs of the Court were invited to draft specific codes of conduct for specific activities, which would articulate with and make reference to the Court’s values and code of conduct. The Audit Committee emphasised the need to unite all staff working for the Court around the same values, in line with the ‘One Court principle’.<sup>151</sup> This request was reiterated by the Audit Committee in 2019, together with a call for the Court to develop a Court-wide Ethics Charter.<sup>152</sup> The proposal was also suggested by the External Auditor in 2018.<sup>153</sup> The approach was welcomed by the ASP.<sup>154</sup>

261. The Experts acknowledge the substantial body of instruments regulating expected behaviour at the Court and commend the Court for its recent work of identifying gaps and supplementing them through additional issuances. Nonetheless, the Experts find that the current framework is fragmented and does not provide for clear common principles and

<sup>149</sup> Update by the Court on a Court-wide values and ethics framework, AC/11/18 (2020), para.2.

<sup>150</sup> *Ibid.*, para.29.

<sup>151</sup> Annual Report by the Audit Committee in Report of the CBF on the work of its 29<sup>th</sup> session, [ICC-ASP/16/15](#) (2017), Annex F.1(c), paras.35-36.

<sup>152</sup> Interim Report of the Audit Committee on the work of its ninth session, [AC/9/5](#) (2019), paras.8-11.

<sup>153</sup> Final audit report on Human Resources Management, [ICC-ASP/17/7](#) (2018), p.38.

<sup>154</sup> Strengthening the ICC and the ASP, [ICC-ASP/17/Res.5](#) (2018), para.137; Strengthening the ICC and the ASP, [ICC-ASP/18/Res.6](#) (2019), para.143.

minimum standards applicable to all individuals affiliated with the Court, whether elected officials, staff or externals. This can lead to reduced clarity,<sup>155</sup> inconsistent implementation across the Court and leaving unacceptable behaviour unaddressed, when coming from certain individuals affiliated with the Court, but not covered by any of the instruments. This is the case, for example, for the Registrar and support staff of external defence and victims' counsel.

262. The Court's ethics framework can be improved through a unified, Court-wide Ethics Charter applicable to all elected officials, staff and individuals affiliated with the Court, with the latter currently not covered at all or not consistently covered. This would respond to repeated calls from all stakeholders to unite all individuals affiliated with the Court under the same principles, under the One Court Principle. Further, the Ethics Charter and all relevant instruments (Codes of Conduct) should foresee continued application of certain obligations (such as confidentiality) for officials and staff after they leave their office or post.

263. External defence and victims teams' support staff, though working daily from headquarters for a significant number of years, are not covered by any code of conduct, and are also often excluded from the protection granted by Court policies. The Code of Professional Conduct for external counsel should be amended to also cover support staff of external defence and victims' teams. Moreover, internal policies on welfare related matters (such as the Administrative Instruction on Harassment) should be extended to also cover external defence and victims' support staff.<sup>156</sup>

264. The Registrar is also not currently covered by any specific code of conduct. The Experts recommend staff regulations to be extended, *mutatis mutandis*, to the role through an adequate instrument.

265. Of crucial importance in ensuring high professional standards within the Court is having an effective enforcement mechanism. The Experts welcome the creation of the Independent Oversight Mechanism (IOM) and note the need to endow it with the adequate resources to enable it to fulfil its mission.<sup>157</sup> Beyond resources, access of investigative and oversight mechanisms to information is essential. The Experts were told of reluctance from Chambers and the OTP towards audit and investigation activities from Court oversight bodies. Judges opined that the current system, giving the IOM investigative powers over the Judges, is inappropriate and contrary to the Rome Statute. The Experts agree an alternative system would be desirable, where judges are investigated by judges, similar to national practices.

266. The incoming Prosecutor should review internal processes and procedures to ensure effective and efficient cooperation with the Office of Internal Audit (OIA) and IOM. Confidentiality and judicial independence can coexist with accountability and transparency, and should not be used to prevent effective oversight. Additional measures can be envisaged to alleviate concerns, such as more comprehensive confidentiality agreements to which the IOM staff would commit.

267. The IOM should be supplemented by a dedicated investigation model for Judges and, if necessary, for the OTP. Ad hoc investigative panels – composed of judges or prosecutors, respectively - would be established by the IOM on a need-basis, from a standing list (roster) of qualified individuals from States Parties. The panels would investigate allegations of misconduct against Judges, the Prosecutor or Deputy Prosecutor. A roster list should be agreed upon by the ASP Presidency and Court President or Prosecutor, respectively. The IOM would remain competent to investigate reports of misconduct against all other Court officials, staff and individuals affiliated with the Court.<sup>158</sup>

268. In the long term, the power to remove Judges, the Prosecutor, Deputy Prosecutor, Registrar, and Deputy Registrar from office and to apply disciplinary measures to them should not remain with either the Plenary of Judges, the Presidency or the ASP. Instead, a

<sup>155</sup> The Audit Committee noted that the Staff Engagement Survey results showed that 'often staff are unclear about what is meant by inappropriate and unethical behaviour and how they are expected to behave' – Interim Report of the Audit Committee on the work of its ninth session, [AC/9/5](#) (2019), para.9 and footnote 9.

<sup>156</sup> See R334 – 335 (p.270).

<sup>157</sup> See R364 (p.314).

<sup>158</sup> See *infra* Section [IV. INTERNAL GRIEVANCE PROCEDURES](#) and more specifically R125 (p.103).

form of judicial council, made up of current and former national and international judges, should be empowered to decide on such matters. This would ensure impartiality and independence of disciplinary decisions. As such a change would require amending the Statute and Rules of Procedure and Evidence, in the short-term, emphasis should be placed on strengthening prevention.

### **Recommendations**

**R106.** The Court should develop a single Court-wide Ethics Charter, laying down the minimum professional standards expected of all individuals working with the Court (staff, elected officials, interns and visiting professionals, external counsel and their support staff, consultants). Additional Codes of Conduct for specific roles can supplement the Court's Code of Conduct, as per the Audit Committee's recommendations. The instruments should foresee continued application of certain obligations (such as confidentiality) for officials and staff, after they leave their office or post.

**R107.** The incoming Prosecutor should review internal processes and procedures to ensure effective and efficient cooperation with the OIA and IOM. Additional measures can be envisaged to alleviate concerns, such as more comprehensive confidentiality agreements that IOM staff would commit to.

**R108.** Ad hoc Investigative Panels for Judges, the Prosecutor and the Deputy Prosecutor should be employed by the IOM in case of complaints against these elected officials. The IOM would establish such panels of three judges or prosecutors respectively from a roster list made up of current and former national and international judges/prosecutors. The roster would be agreed upon by the ASP Presidency, the Court Presidency and the Prosecutor, respectively, similar to the procedure indicated in Recommendation 113 (p.92).

**R109.** In the long term, the power to render decisions on complaints against elected officials should be trusted to a form of judicial council, composed of current and former national and international judges.

## **B. Prevention of Conflict of Interest**

### **Findings**

269. The Court employs three main tools to prevent conflict of interests: a Financial Disclosure Programme,<sup>159</sup> guidelines for extra-judicial activities of Judges and the possibility for recusal of Judges.

270. The Court's Financial Disclosure Programme (ICC-FDP), administered on behalf of the Court by the UN Ethics Office,<sup>160</sup> covers the President, Prosecutor, Deputy Prosecutor, Registrar, Deputy Registrar, all staff members at D-1 level and above, and certain staff members involved with procurement of goods and services or the investment of Court assets.<sup>161</sup> These individuals must submit annual financial disclosure statements, as well as declaration of interest and third party transaction statements. From the scope of the statements, and discussions with the Court, the Experts find the objective of the ICC-FDP is preventing and identifying financial conflicts of interest.

271. The Experts find a need for the Court to go beyond the current framework. Firstly, the ICC-FDP should be extended to more individuals, starting with Judges.<sup>162</sup> Currently, their participation in the ICC-FDP is voluntary. Secondly, the ICC-FDP should be supplemented by an extended declaration of interest, following the model employed by the EU. Such declaration should be conceived as an additional tool to identify risks, rather than to sanction.

<sup>159</sup> Disclosure Requirements – Financial Disclosure Programme of the Court (ICC-FDP) and IPSAS Related Party Disclosures, [ICC/AI/2015/005](#) (2015).

<sup>160</sup> *Ibid.*, Art.1.1.

<sup>161</sup> *Ibid.*, Section 3.

<sup>162</sup> This is the case in other international jurisdictions, as for example the European Court of Justice – see [Code of Conduct for Members and former Members of the Court of Justice](#), Art.5.

The Declaration would cover the individual's activity for the previous three-five years, in the following areas:

- previous professional activity, including consultant activities and non-permanent activities;
- participation in any boards, committees or supervisory bodies of any organisation;
- *pro bono* functions with any organisations;
- membership or participation in any associations, political parties, trade unions, non-governmental organisations or foundations;
- teaching positions or research work;
- current professional activities of partner;
- any additional issues one might consider relevant to share.

272. Extra-judicial or outside activities of Judges are subject to Article 10 of the Code of Judicial Ethics. Broadly, these activities could encompass extra-judicial activities carried out as official Court business; those performed during private time and of a private nature and events of a private nature but undertaken during official time. Guidelines on some of these settings have been formulated and put in place by successive Presidencies through internal memoranda. These have now been merged, harmonised and complemented by the Presidency into internal 'Policy guidelines' on Judges' extra-judicial outside activities.

273. The Experts see benefit in the further development of the guidelines and its usefulness in assisting Judges in the identification and management of extra-judicial activities, including the handling of ethical issues that may affect their independence and impartiality or interfere with the performance of their judicial duties. In practice, contradictory demands can be observed with some States Parties wishing Judges to commit all their time to the Court, and with other States Parties inviting Judges to participate in outreach events or conferences that they organise. For this purpose, States Parties' input should be sought on proposed improvements to the current guidelines and on any subsequent substantial changes, before the Presidency adopts and transforms them into a policy. Such a policy should incorporate general principles of a mandatory nature (e.g. the obligation for extra-judicial activities to be fully compatible with the independence and impartiality of Judges; the requirement for Judges to devote their official working time to their primary judicial functions; tenets governing remuneration or fees earned by Judges in the course of extra-judicial activities undertaken during official working time) and provide for specific procedures for its application (e.g. approval process by the Presidency of requests by Judges). Such a policy would enrich the guidelines, minimise potential risks of conflicts of interest, enhance transparency and ensure consistency and stability in application, irrespective of changes in Presidency.

274. Under Articles 41 - 42 of the Statute, complemented by Rules 34 - 35 RPE, Judges, the Prosecutor and Deputy Prosecutor are obliged to excuse themselves from a case, in certain situations. Additionally, parties have the possibilities to seek the disqualification of a Judge, of the Prosecutor and Deputy Prosecutor. However, recusals occur at too late a stage to inform or modify behaviour, lead to delays in judicial proceedings and regardless of their outcome, can significantly affect the reputation of the Court. The additional declaration of interest required of Judges, participation in the ICC-FDP and the possibility to engage in discussions with a specialised body would further enable identification of potential conflicts of interest early on, enabling Judges to rectify the situation where needed.

275. To implement these additional measures aimed at prevention of conflicts of interest, the Experts recommend establishing a new Ethics Committee.

276. In the past decade, substantial efforts have been made on both national and international levels to increase transparency and accountability of public institutions. Several

IOs have a form of ethics committee.<sup>163</sup> They generally aim to promote and ensure coherent high levels of integrity and professionalism across the organisations, advise leadership on matters related to the applicable code of conduct, offer guidance and advice on ethical issues to individuals taking part in the organisation's activities. Ethics committees can also be found in the judiciary at the national level. Ethics officers or offices exist on both national and international levels and in IOs.

277. The Ethics Committee would serve a preventive and advisory role for the Court, through the following functions:

- Dialogue with Judges and senior staff when they take office, focusing on helping them identify and consider potential conflicts of interests;
- Issuance of guidelines on relevant topics such as interactions between Court officials/staff and States Parties, post-Court employment guidelines for senior Court officials,<sup>164</sup> based on international and national best practices, raising awareness on ethical issues and ensuring a coherent approach by all Court Organs and individuals affiliated with the Court;
- Issuance of advisory opinions to Court Principals and individuals working with the Court, on matters related to ethics. The Ethics Committee could also advise the ASP on ethics-related matters, where there are differing views among the Court and States Parties as to the applicable standard;
- Deciding in case of disagreement between the IOM and Principals, for instance when there are differing views as to whether confidentiality and independence in a specific case would be a bar to IOM oversight.

278. The Ethics Committee would be an independent entity, with Court-wide competency. It would not be permanently staffed, but rather act on a needs-basis, with its members working – in principle – remotely. It would be composed of three current and former national and international judges, from ASP States Parties, with relevant knowledge and experience in matters of ethics. Members could be appointed for five-six years for a non-renewable mandate, ensuring diversity in gender, legal systems and geographical representation. They could be appointed as follows:

- two national judges with experience in ethics, appointed by the ASP Presidency, on the Bureau's proposal,
- one former Court Judge, appointed by the Court President.

279. In the long term, a joint Ethics Committee servicing several international courts and tribunals is recommended to ensure coherence in standards and rationalise expenses. For this purpose, the terms of reference establishing the Ethics Committee should enable its members to fulfil similar roles for other international judicial organisations.

280. The relation and chain of communication among all internal and external oversight bodies should be clearly laid out (e.g. what information needs to be shared with what entity) to enhance cooperation and avoid duplications.

## **Recommendations**

**R110.** The ICC-FDP should be extended to also cover Judges, and be supplemented by an additional declaration of interests to be completed by all elected officials and staff members at D-1 level and above. Candidates for the role of elected officials would submit such a declaration to the ASP advisory body reviewing nominations/candidacies. For those who are

<sup>163</sup> See for example [UN Ethics Office](#), [Council of Europe Ethics officer](#), [Independent Ethical Committee for the EU Commission](#).

<sup>164</sup> Various degrees of guidelines exist in other international organisations. See for example for CJEU Judges - [Code of Conduct for Members and former Members of the Court of Justice](#), Art.9; for the EU Ombudsperson – [Code of Ethics for the European Ombudsman](#); for EU Commissioners - [Code of Conduct for Members of the European Commission](#), Art.11; for UN staff involved in the procurement process – [Secretary-General's Bulletin ST/SGB/2006/15 on Post-Employment restrictions](#). More generally, see [Burgh House Principles on the Independence of the International Judiciary](#), Art.13.

elected, a copy would be shared with the Ethics Committee. The information to be provided under this recommendation should be treated as confidential and not rendered public.

**R111.** The current guidelines on extra-judicial activities of Judges should be formalised into a binding policy by the Presidency, after clarifying the extent to which Judges can engage in extra-judicial activities during work hours and the type of outside activities that are acceptable. Input from States Parties should be sought in this regard. The policy should foresee consultation of the ASP before any substantial change to the policy is adopted.

**R112.** An Ethics Committee should be established, as an independent entity, with Court-wide competency. The Ethics Committee would serve a preventive and advisory role, through the following functions:

- Dialogue with Judges and senior staff when they take office, focusing on helping them identify and consider potential conflicts of interests;
- Issuance of guidelines on relevant topics such as interactions between Court officials/staff and States Parties, post-Court employment guidelines for senior Court officials), based on international and national best practices, raising awareness on ethical issues and ensuring a coherent approach by all Court Organs and individuals affiliated with the Court;
- Issuance of advisory opinions to Court Principals and individuals working with the Court, on matters related to ethics. The Ethics Committee could also advise the ASP on ethics-related matters, where there are differing views among the Court and States Parties as to the applicable standard;
- Deciding in case of disagreement between IOM and Principals, for instance in case of differing views as to whether confidentiality and independence in a specific case would be a bar to IOM oversight.<sup>165</sup>

**R113.** The Committee would be called to address issues on a needs-basis and work – in principle - remotely. The Ethics Committee would be formed of three current or former judges, from ASP States Parties, from national and international jurisdictions, with knowledge and experience in matters of ethics. Members would be appointed for five-six years for a non-renewable mandate, ensuring diversity in gender, legal systems and geographical representation. They could be appointed as follows:

- two national judges with experience in ethics by ASP Presidency based on the Bureau's proposal,
- one former ICC judge appointed by the Court President.

**R114.** In the long term, a joint Ethics Committee servicing several international courts and tribunals is recommended to ensure coherence in standards and rationalise expenses.

## IV. INTERNAL GRIEVANCE PROCEDURES

### A. General

#### **Findings**

281. The Rome Statute makes general references to internal grievances procedures, but does not enter into details. Similarly, in Article 112(4), it awards the ASP the capacity to decide on the establishment of subsidiary bodies, including an internal oversight mechanism.

<sup>165</sup> Once the Judicial Council mentioned in R109 (p.88) and R126 (p.104) is created, this final responsibility for the Ethics Committee would ideally be transferred to the Council.

282. Staff Regulations provide that the Registrar or the Prosecutor shall establish the administrative machinery in case of appeal relating to disciplinary, as well as administrative decisions by both the Registrar and the Prosecutor, but it does not establish any organ for that purpose.<sup>166</sup> A judicial remedy is foreseen by reference to the International Labour Organisation Administrative Tribunal (ILOAT).<sup>167</sup>

283. Disciplinary proceedings are regulated; the Registry and/or the Prosecutor can impose sanctions after the Disciplinary Advisory Board (DAB) has advised them.<sup>168</sup> Against those decisions, complainants may lodge a complaint with the ILOAT, a judicial instance, whose decisions are final and firm.

284. Resolution ICC-ASP/8/Res.1<sup>169</sup> established an Independent Oversight Mechanism (IOM) whose functions are inspection, evaluation and investigation.<sup>170</sup> It may open investigations on its own volition and also covers whistleblower protection and anti-fraud matters.<sup>171</sup> The IOM investigates alleged misconduct by contractors (those not considered to be staff),<sup>172</sup> by elected officials, and also deals with staff underperformance and misconduct even when it must not conflict with DAB. Actually, they overlap in some part.

285. The IOM does not as yet enjoy the full confidence and trust of all staff. There is a disinclination to make complaints freely and willingly about, and to report officially, alleged impeachable conduct, especially by elected or senior officials. In turn, this makes it more difficult to assess the real extent of the occurrence of misconduct and misbehaviour, and could be a significant factor in the underreporting of reprehensible conduct.

286. A further ongoing challenge still remains in IOM's disciplinary investigations against OTP staff, despite cooperation extended by it. The Experts were informed that there has been an instinctive reaction on the part of the OTP that its independence precludes any oversight by the IOM, and at times it would appear to be 'walled off'.

287. Despite the operationalisation of the IOM in late 2015, there is a perception from staff that individuals who officially complain may still bear a personal risk and the repercussions, including possible reprisals for a staff member, if publicly known, stand very high.

288. This apprehension is reflective of the overall environment at the Court as reported to the Experts. A number of staff were only willing to come forward and share information and experiences with the Experts after numerous assurances and a guarantee of anonymity and confidentiality, including significant persuasive efforts by the Staff Union.

289. The IOM still faces very serious human resource constraints for the effective accomplishment of its mandates.

290. Administrative issues, decisions on contract of employment and terms of appointment are adopted by the Registrar and/or the Prosecutor, providing the reasons supporting them.<sup>173</sup> Against those decisions, recourse may be made to the Appeals Board, which can recommend the given Principal either confirm their decision or to change it.<sup>174</sup> Against those decisions, individuals may lodge a complaint with the ILOAT.

291. The system only provides for the settlement of disputes. No conflict (or general situation) resolution is envisaged.

292. The Court appointed an independent expert in 2019 requesting a detailed report on the establishment of an ombudsperson office and there have been movements to establish a Focal Point on Gender. There have also been initiatives to adopt a comprehensive policy against

<sup>166</sup> [Staff Regulations](#), Article X, Regulation 10.1 and Article XI, Regulation 11.1.

<sup>167</sup> *Ibid.*, Article XI, Regulation 11.2.

<sup>168</sup> See Disciplinary Procedures, [ICC/AI/2008/001](#) (2008), Section 3 and Rules of Procedure of the Disciplinary Advisory Board, [ICC/INF/2007/003](#) (2007).

<sup>169</sup> Establishment of an independent oversight mechanism, [ICC-ASP/8/Res.1](#) (2009).

<sup>170</sup> Independent Oversight Mechanism, [ICC-ASP/12/Res.6](#) (2013).

<sup>171</sup> *Ibid.*; see also ICC Whistleblowing and Whistleblower Protection Policy, [ICC/PRES/D/G/2014/003](#) (2014), ICC Anti-Fraud Policy, [ICC/PRES/D/G/2014/002](#) (2014); ICC website, [Independent Oversight Mechanism](#), sixth paragraph.

<sup>172</sup> [Staff Regulations](#), Regulation 4.7.

<sup>173</sup> *Ibid.*, Regulation 9.1.

<sup>174</sup> *Ibid.*, Regulation 11.1; ICC/AI/2019/005, Annex.

harassment, especially sexual harassment. Such an Administrative Instruction was at the inter-organ consultation stage in June 2020.

293. On its side, the ASP has requested the External Auditor to carry out an evaluation on oversight bodies of the Court.<sup>175</sup>

294. There is a general negative perception of the Court's internal grievances procedures. Staff feel that the Court has dealt with its internal grievances procedures in a too legalistic approach, especially criminal law approach; that it translated into very complex rules and procedures, which are viewed as an obstacle (especially by non-legal staff) and overall dissuade staff from complaining.

295. The Experts find that the procedures in place are not efficient. Disputes are either resolved by the action of the internal mechanisms or escalate to the ILOAT. The Court lacks mechanisms to deal with conflicts.

296. Staff members elected to be part of the peer-based mechanisms are not trained for these additional responsibilities and are not given enough time to work on them. Moreover, the Court lacks transparency in the appointment of members of these bodies.

297. Between 2007 and 2020,<sup>176</sup> 49 cases have been deferred to ILOAT and received a ruling. Only 20% of the rulings upheld the Court Principals' decisions. The Court paid around €2 million for those cases. In April 2020, there were 41 ongoing cases before the ILOAT (including Judges' cases).<sup>177</sup> The Court noted the high procedural costs incurred through the ILOAT proceedings, regardless of their end result, and the long duration of proceedings.

## **B. Accountability of Judges**

### **1. Disciplinary Mechanisms and Complaints**

298. The Experts were informed of a number of alleged acts of bullying and harassment by a slender number of Judges, past and present. There have also been a number of incidents involving staff members' inappropriate behaviour towards Judges. Overall however, the relationship between Judges and staff in the Judiciary has been one of mutual respect, with such incidents constituting aberrations.

299. The Presidency, at its initiative, commendably organised a session on anti-bullying and anti-harassment during the 2019 Judges' Annual Retreat, having as its aim the promotion of awareness of the standards of acceptable behaviour in the interactions of Judges and staff of the Judiciary, and the imperative to prevent any such acts. The session, which took place in a collaborative environment, was led by an external facilitator and was well attended by Judges and staff. The feedback continues to be very positive. Reference must also be made to the Court's Staff Engagement Survey (2018) and to its follow-up by the Heads of Organs in prioritising ethics and standards of conduct, with a focus on harassment.<sup>178</sup>

300. It is right to add that, if concrete action were to be taken sooner than later, it would reassure staff of the Court's and the Presidency's determined commitment to arrest bullying and harassment. It would also significantly raise staff confidence in accountability measures for elected and senior officials.

301. These measures by the Heads of Organs should be complemented by effective implementation of the Court's Whistleblowing and Whistle-blower Protection Policy,<sup>179</sup> also applicable to elected officials, which guarantees safe and confidential disclosure. By enabling a risk free reporting of complaints, the effective implementation of this policy will contribute to addressing the non-reporting or under-reporting of alleged acts of misconduct.

<sup>175</sup> The ASP '[r]equests the External Auditor to conduct an evaluation of the oversight bodies of the Court as part of its work in 2020, replacing the performance audit, and to recommend possible actions on their respective mandates and reporting lines, while fully respecting the independence of the Court as a whole', see [ICC-ASP/18/Res.1](#) (2019), I, para.6.

<sup>176</sup> Case No.2573 (2007) – Case No.4271 (2020). See [ILOAT website](#).

<sup>177</sup> Based on information shared by the Court with the Experts in April 2020.

<sup>178</sup> Report of the Court on Human Resources Management, [ICC-ASP/18/4](#) (2019), para. 18 (d).

<sup>179</sup> [ICC/PRES/D/G/2014/003](#).

302. In the Experts' assessment, there is a general reluctance, if not extreme fear, among many staff to report any alleged act of misconduct or misbehaviour by a Judge (and in general, by a senior official). The perception is that they are all immune. A belief runs high that Judges are bent on protecting each other. It was further claimed that one of the consequences of reporting, if known, was possible retaliation or reprisal. This rendered it extremely difficult to formally lodge a complaint against a Judge.

303. The self-regulation or peer-to-peer disciplining of judges as a form of accountability is recognised in all international criminal tribunals and courts, well established in international and regional instruments, and is firmly entrenched in almost all major legal systems.<sup>180</sup> The almost universal standard is that judges predominantly superintend each other. This is both inherently an attribute of judicial independence and that of protecting the judiciary from political and external interference in the performance of its judicial mandate. Experience is common in national criminal proceedings that judicial officers convict other judicial officers.

304. The current arrangement involving the IOM and the accountability of Judges (as well as elected officials, in general) for serious misconduct, serious breach of duty or misconduct of a less serious nature, signals and presents a series of principled, structural, and operational challenges and limitations. In the Experts' consideration, its suitability, in the eyes of the staff and other stakeholders, to investigate Judges effectively and credibly, is questionable.

305. The Head of the IOM is currently a P-5 staff position, while some of the elected officials it has been mandated to investigate and, if need be, make adverse findings against, are at a higher level.

306. The assignment under amended Rule 26(2) of the RPE functions relating to investigating and determining aspects of complaints against individual Judges<sup>181</sup> from the Presidency or a judicial Organ, to the IOM, a non-judicial and subsidiary body of the ASP, itself a political entity, raises arguable concerns. It is essential to maintain full respect for established international and regional standards on judicial accountability, and the sanctity of judicial independence enshrined in Article 40(1) of the Rome Statute. The Experts note that the operational mandate of the IOM is currently under consideration by the ASP and the Bureau, with a view to strengthen it.<sup>182</sup>

307. Rule 26 of the RPE was amended on 11 December 2018. However, Regulation 129 and 130 of the Regulations of the Court have not yet been correspondingly revised to reflect the provisions of the new Rule 26. Furthermore, Regulation 120 is now mostly redundant as it was part of the Presidency's previous authority under the old Rule 26(2), with the assistance of one or more Judges, to set aside anonymous or manifestly unfounded complaints.<sup>183</sup>

308. The IOM has purposefully and commendably used its experience to cultivate cooperative relations with the Presidency, Chambers and the Prosecutor. However, the possibility of potent disagreement or dispute cannot altogether be excluded in relation to possible disciplinary investigations against Judges or the Prosecutor and Deputy Prosecutor. In this context, disputes may arise in the IOM's investigations against Judges, the Prosecutor or OTP staff, in relation to access to confidential information on investigations and prosecutions, protected by prosecutorial independence or by judicial decisions, as well as to judicial deliberations, whose secrecy under Article 74 (4) of the Statute is peremptory. Should such disagreements on judicial and prosecutorial independence or similar legal disputes emerge, the IOM would be unable to adjudicate thereon, being an interested party to the very disagreements in issue. Moreover, the Experts wish to emphasise that the normative character of prosecutorial and judicial independence under the Court's legal texts must at all times apply and be fully guaranteed in any new dispute settlement arrangement. At the same time,

<sup>180</sup> See Jan van Zyl Smit, [The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice](#), (Report of Research Undertaken by Bingham Centre for the Rule of Law), Commonwealth Secretariat (2015); Report of the Special Rapporteur on the independence of judges and lawyers, U.N.Doc [A/HRC/38/38](#) (2018), paras. 21-26.

<sup>181</sup> Resolution on amendments to rule 26 of the Rules of Procedure and Evidence, [ICC-ASP/17/Res.2](#) (2018).

<sup>182</sup> Strengthening the International Criminal Court and the Assembly of States Parties, [ICC-ASP/18/Res.6](#) (2019), Annex I Mandates for intersessional work, p.23, para.15(a).

<sup>183</sup> [Regulations of the Court](#), Regulations 120, 129-130.

as noted elsewhere, the concepts of independence and confidentiality should not be used to prevent effective oversight.<sup>184</sup>

## 2. Disciplinary Standards

309. A disciplinary regime for misconduct or misbehaviour of Judges should, as a minimum, contain the following elements: (i) a reliable and trustworthy channel which can be unreservedly relied upon by complainants, internal and external, for communicating alleged complaints, on a secure basis; (ii) strict confidentiality of the disciplinary process and of persons involved; (iii) a credible and reliable complaints receiver; (iv) an impartial and independent investigation of complaints; (v) the conduct of an independent and impartial enquiry or hearing of the complaint, with full respect for fair hearing and due process rights; and finally (vi) a competent disciplinary decision-making authority with competence to impose sanctions. In assessing or re-designing a disciplinary scheme, the question of appellate review is also one to be imperatively factored.

310. Considering the Court's legal texts and in the context of the mandates of the Court's Organs, four additional elements are also paramount, namely (i) openness and transparency of the disciplinary arrangement and its procedures; (ii) access to information and evidence during investigations and hearings; (iii) confidentiality of information generated in the course of judicial proceedings or information on judicial deliberations or on internal working methods of Judges, as well as confidential prosecutorial and protected matters and materials; (iv) the independence of Judges and that of the Prosecutor and OTP and (v) public confidence and trust in the Court and its Judges.

## 3. A Readjusted Disciplinary Arrangement

311. In the Experts' opinion, a disciplinary scheme for the effective accountability of Judges, which could, in the short term, be considered by the ASP and the Court, is a suite of integrated arrangements that involves the IOM, but which is essentially centred on the establishment of (i) an Ad Hoc Judicial Investigation Panel, and (ii) a corresponding First Instance Panel, where both panels would be non-permanent, independent, impartial and external, and formed of three judges each.

312. First, all complaints against elected officials, in particular Judges, could continue to be initiated and lodged on a confidential basis to the IOM, with a copy, if a complainant elects, shared with the President. The IOM would be responsible for ensuring that all complaints are properly lodged, processed, meet all the required criteria, and are accompanied by the necessary evidence and relevant supporting material. The IOM has already acquired this experience in relation to its investigations of staff against staff complaints. In cooperation with the Registrar, the IOM should continue to instil confidence and trust in staff and other external stakeholders, to freely come forward to report any alleged serious misconduct or serious breach of duty or misconduct of a less serious nature or any other sanctionable behaviour against a Judge.

313. The IOM could additionally be tasked to conduct a preliminary assessment to determine whether the complaint is admissible or proper; if it is in fact and law of a disciplinary nature, and whether the disciplinary machinery is properly seized of the complaint. It would also continue to outreach and be tasked to advise complainants on the disciplinary procedures, their rights, and steps involved in the determination of the complaint. All these responsibilities are by no account nominal.

314. Second, the Ad Hoc Judicial Investigation Panel would then be commissioned by the IOM to fully investigate the allegation, collect and assess evidence and all relevant material, hear the complainant and afford an opportunity to the defendant to respond. It would attend to any other witness or relevant person. It would determine whether or not any further action is warranted. It would further have the mandate to set aside anonymous or manifestly unfounded complaints. The Panel could, as a remedial measure, refer the complaint to mediation, if amenable and agreed to by the complainant and impugned elected official. It

<sup>184</sup> See *supra* Section [I.A. Unified Governance](#), para.27.

could determine whether the complaint meets a required threshold (e.g. prima facie reason to believe that a serious misconduct or serious breach of duty or misconduct of a less serious nature has occurred) to warrant activation of the further steps in the disciplinary arrangement.

315. The *Ad Hoc* Judicial Investigation Panel would also be required to compile as complete and concrete as possible an investigation dossier or file on the complaint, including all relevant material. They would be required to recommend if an enquiry (hearing) is justified on the totality of the information and material available, for the appointment of a First Instance Panel for adjudication.

316. Third, the competent disciplinary authorities<sup>185</sup> would continue to enjoy the discretion to decide whether or not the complaint should further proceed to a formal hearing before the First Instance Panel. If so, it would be determined on the merits, due regard being given to fair hearings, contradictory deliberations, the right to legal representation and the application of all other due process guarantees. A decision to institute disciplinary proceedings against a Judge by convening a First Instance Panel should not be taken lightly.<sup>186</sup>

317. The First Instance Panel would be specifically empowered to compel or collect additional evidence, if needed. It would assess evidence, arrive at reasoned findings of facts and legal determinations, and make recommendations and conclusions on the complaint. That would then be referred to the relevant disciplinary authority for its final decision on the matter, including the imposition of any sanction. Pursuant to this scheme, all the competent disciplinary decision-making authorities under the Court's legal texts would remain unchanged.

318. A disciplinary arrangement as the one proposed, having as key external components an ad hoc, independent, impartial and external Judicial Investigation Panel and a First Instance Panel, would neither undermine nor weaken the existing mandates of any of the appointed disciplinary authorities under the Statute and the RPE. It would appropriately respond to the distrust, particularly by staff, of the IOM's ability to investigate elected officials and of partly internal disciplinary arrangements against Judges.

319. Moreover, through the central involvement of eminent and experienced non-sitting and independent judges, it is more likely to dissipate any perception of the self-protection of serving Judges. It would divest and unburden the Judges of any involvement in any adverse determination against a colleague Judge, particularly in a setting where the Judges enjoy a long tenure. Finally, it would buttress the effectiveness of accountability measures and the integrity of the Judiciary. It is also bound to enhance the credibility of the disciplinary mechanism against Judges.

320. In the context of the Court, while the disciplinary schemes for elected officials and that for staff, must be customised to meet their own demands, respect international and regional standards and professional requirements, it is also relevant that they do not appear as advantaging a particular constituency. In this regard, the proposed disciplinary mechanism recommended for Judges mirrors to a certain degree that suggested for staff, as further elaborated in the following paragraphs.

321. Issues of access to confidential and protected information, judicial deliberations and judicial or prosecutorial independence guaranteed by the Rome Statute and other legal texts could still arise in the course of the investigation or determination of the merits of the complaint. As recommended above,<sup>187</sup> the Ethics Committee should be responsible for determining any such issues between contesting parties pending the establishment of a Judicial Council.

<sup>185</sup> [Rome Statute](#), Art. 46(2)-(3); [RPE](#), Rules 29(a), 30(1)-(4).

<sup>186</sup> 'The mere fact that tribunal proceedings have been commenced will generally be understood as signalling that the judge faces credible allegations of misconduct which are serious enough that, if proved, would warrant the removal of the judge from office. The impact is usually immediate and may not be fully undone even if the judge is subsequently cleared.', *supra* n 180, Jan van Zyl Smit, [The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice](#), paras.3-5.

<sup>187</sup> See *supra* Section [III.B. Prevention of Conflict of Interest](#), R112 (p.92).

#### 4. Judicial Council of the Court

322. Further, as already mentioned above, in the long term, serious consideration should be given by the ASP and the Court to the establishment of an independent and impartial Judicial Council of the Court. It would be a fully-fledged disciplinary entity, either as a subsidiary body of the ASP under Article 112(4) or a body under a new article of the Statute, as the sole disciplinary authority for Judges and elected officials.<sup>188</sup>

323. The Judicial Council or Conseil supérieur de la Magistrature, i.e. High Council of the Judiciary is one of the most widely established and practiced models, in both civil and common law countries, having as one of its basic missions the discipline and superintendence of judges and the enforcement of judicial accountability.<sup>189</sup> In many countries, it is constitutionalised. In 2018, the UN Special rapporteur on the Independence of Judges estimated that over 70% of the countries in the world have some form of judicial council.<sup>190</sup> Numerically, this represents more countries than the current total number of State Parties to the Rome Statute.<sup>191</sup> International and regional legal standards also exist on Judicial Councils.<sup>192</sup>

324. The Judicial Council could be fully endowed with a number of key competences relating to the accountability of Judges, including investigation and inquiry. Moreover, the Council could also serve as advisory body to the ASP on questions related to judicial or prosecutorial independence and judicial performance; provide comment on amendments to the RPE or regulations concerning Judges, the prosecution and counsel; contribute in the formulation or revision of policies, strategies and other related matters concerning the Judiciary and Judges; and support the work of any of the ASP bodies in regard to Judges. In establishing the Judicial Council's mandate, attention should be paid to the mandate of the Ethics Committee, to ensure the two bodies are complementary and avoid any overlap.

325. This combination of functions in one body, and its institutionalisation as a quasi-judicial body would have the benefit of accumulating and building institutional memory and best practices. This would be preferable to the case by case assignment, on an ad hoc basis, of non-permanent Panels of Judges to hear and determine disciplinary matters.

326. The Judicial Council could be composed exclusively of current or former national and international judges. The five-seven judges of the Council could be nominated jointly by the President of the Court and the President of the ASP, and serve on a ratio or rotation to be decided.

327. In the long term, a Judicial Council servicing several international courts and tribunals is recommended, to ensure coherence in standards and rationalise expenses. For this purpose, the legal framework establishing the Judicial Council should enable its members to fulfil similar roles for other international judicial organisations.

#### **Recommendations**

**R115.** The Court's internal justice system should be open to all, including non-staff, former staff and elected officials. In the spirit of the One Court principle, and with the aim of simplifying and centralising the various disciplinary procedures, the Court should employ one internal justice system for all. This will emphasise equality of treatment, promote equal

<sup>188</sup> See R109 (p.88), R126 (p.104).

<sup>189</sup> Bureau of the Consultative Council of European Judges (CCJE), Report on judicial independence and impartiality in the Council of Europe member States in 2017, [CCJE-BU\(2017\)11](#) (2018); Report of the U.N. Special Rapporteur on the independence of judges and lawyers, [U.N.Doc A/HRC/38/38](#) (2018); *supra* n 180, Jan van Zyl Smit, [The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice](#); Wim Voermans & Pim Albers, Councils for the Judiciary in European Union Countries, European Commission for the Efficiency of Justice (ECCJ), Council of Europe, Leiden/The Hague (2003).

<sup>190</sup> [U.N.Doc A/HRC/38/38](#), para.14.

<sup>191</sup> As of 30 September 2020, [123 countries were State Parties to the Rome Statute of the ICC](#).

<sup>192</sup> See *supra* n 189, [U.N.Doc A/HRC/38/38](#), paras. 21-26; Violaine Autheman and Sandra Elena, Keith Henderson (eds), [Global Best Practices: Judicial Councils. Lessons Learned from Europe and Latin America](#), IFES Rule of Law White Paper, (2004).

minimum standards of ethics and professionalism for everyone as well as increase the clarity and thus the use of the system.

**R116.** The Court's settlement of disputes would be better served if handled by professionals. The cost-benefit relationship of this proposal is favourable to the Court, and will enhance the settlement of disputes and conflicts and, accordingly, reduce the escalation to the ILOAT. This would involve dissolving the Disciplinary Advisory Board and the Appeals Board, as well as *ad hoc* mediation currently operated by staff. Such approach would be consistent with other international organisations' decisions to move away from peer-based internal justice mechanisms, such as the UN's decision in 2006.

**R117** Instead of peer-based appeals against administrative decisions, a straight-forward and simple procedure could be set up by employing a First Instance Dispute Judge – a national or international judge, with experience in international administrative matters. The First Instance Dispute Judge would not be a permanent position, but called on to act on a need-basis. A roster of suitable judges could be set up for such purpose. In the case of serious complaints against Judges, the Prosecutor or Deputy Prosecutor, a First Instance Panel, made up of three judges, would decide in first instance.

**R118.** The Court should consider the establishment of an Ombudsperson (an ungraded position to be filled through a competitive recruitment exercise, a true outsider) to deal with disputes and conflicts in an informal, friendly and effective way together with Mediation Services, as a preliminary, non-compulsory instance (subject to the following paragraph) for solving disputes and conflicts.

**R119.** Recourse to mediation services would only be mandatory for parties in an administrative dispute before bringing their complaint to the First Instance Judge. Similarly, complaints dealing with underperformance would initially be reviewed by a human resources analyst and, if necessary, by an independent reviewer appointed by the Head of HRS, before the complaint could be submitted to the First Instance Judge.

**R120.** The Court is encouraged to explore whether resorting to the UN Appeals Tribunal for administrative matters, rather than the ILOAT, would be more cost efficient for the Court. Such a decision would also be in line with the Court's use of the UN Common System.<sup>193</sup>

**R121.** Any exercise envisaged by the Court in this field should consider the convenience of strengthening transparency, confidentiality and trust for the staff to be able to use it more frequently and for it to be more efficient.

**R122.** The Court should also consider the convenience of establishing an Ethics and Business Conduct Office (EBCO) to promote common values and preventing conflicts of interests, and also to deal with disciplinary proceedings, hosting the unit dealing with serious misconduct. It should also serve as the context for whistleblower policies, as well as host focal points on gender issues, sexual and other forms of harassment, and anti-fraud matters. The EBCO would be headed by a suitable ungraded individual.

**R123.** The focal points would each work on raising awareness within the Court in their respective field (i.e. whistleblower policies, gender issues, sexual and other forms of harassment, and fraud matters), including by explaining and advising on relevant policies and complaint/whistleblowing procedures.

**R124.** The ASP should consider enabling the IOM to provide support to the EBCO, staffed with outside professionals (investigator, legal officer).

**R125.** The IOM would retain its functions of inspection, evaluation and investigation. In case of complaints against Judges, the Prosecutor and Deputy Prosecutor, it would delegate investigations to *Ad Hoc* Investigative Panels,<sup>194</sup> after carrying out an initial assessment of the complaint. The IOM would further act as the executive and permanent secretariat, supporting non-permanent bodies within the EBCO, striving to ensure an efficient and timely resolution of complaints. So too, in respect of the Ombudsperson and Mediation Services, the *Ad Hoc* Investigative Panels, the Ethics Committee,<sup>195</sup> the First Instance Judge and the

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<sup>193</sup> See *supra* R13 (p.23).

<sup>194</sup> See *supra* Section III.A. [Ethics Framework](#) and R108 (p.87) more specifically.

<sup>195</sup> *Ibid.*

First Instance Panels. The IOM would be responsible for providing immediate support when needed, and work on raising awareness and building capacity within the Court on issues related to EBCO's scope of work. For this purpose, the IOM should be adequately resourced.

**R126.** The ASP and the Court should consider in the long-term the establishment of a Judicial Council of the Court, with full mandate over the discipline and judicial accountability of Judges.

**R127.** Such a Council, servicing several international courts and tribunals, is further suggested, to ensure coherence in standards and rationalise expenses. For this purpose, the legal framework establishing the Judicial Council should enable its members to fulfil similar roles for other international judicial organisations.

**R128.** The IOM and EBCO should develop a strategy and plan of action aimed at increasing staff confidence and trust in the IOM and the Court's internal disciplinary scheme.

**R129.** The Presidency should continue its efforts towards cultivating increased collegial cooperation between, and respectful working environment for the Judges and Chambers staff in the Judiciary.

**R130.** The Heads of Organs should deliver on their commitment and plans to prioritise zero tolerance of bullying and harassment and the development of a more effective, productive and mutually respectful relationship and atmosphere at the Court.

**R131.** In summary, the Court-wide internal justice system recommended by the Experts is as follows:

*Misconduct*

- Complaint submitted to IOM
  - Against staff or other individuals affiliated with the Court: IOM investigates and follows the procedure as detailed in its mandate;
  - Judges, Prosecutor and Deputy Prosecutor: after a first assessment by the IOM, investigation is delegated to an *ad hoc* judicial / prosecutorial investigative panel;
- Staff: First instance Judge; Judges, the Prosecutor and Deputy Prosecutor: First instance Panel;
- UN Appeals Tribunal.

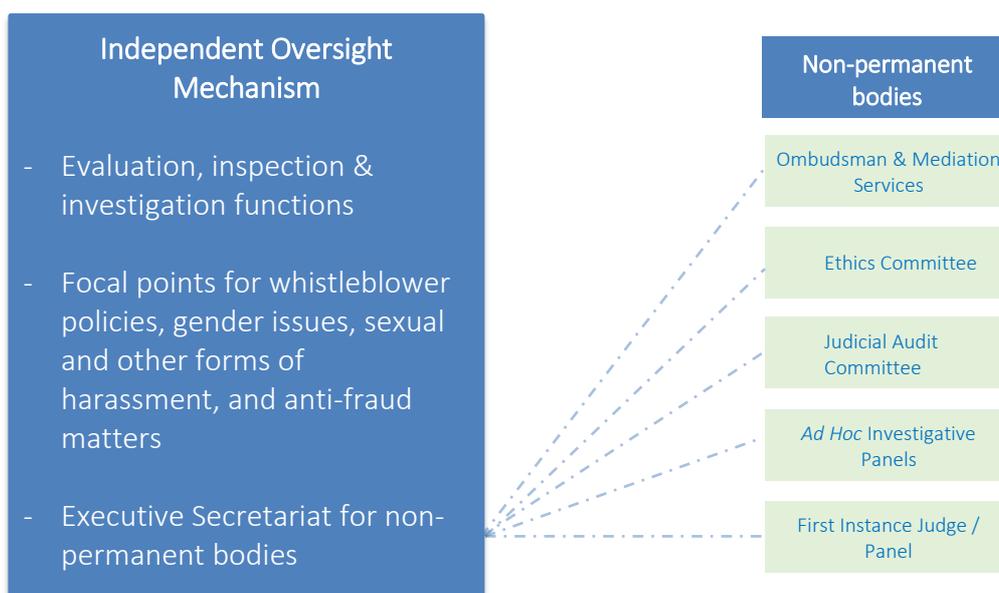
*Administrative disputes*

- Mandatory Mediation Services;
- First Instance Judge;
- UN Appeals Tribunal.

*Disputes related to underperformance*

- Mandatory initial review by a human resources analyst and if necessary, by independent reviewer appointed by Head of HRS;
- First Instance Judge;
- UN Appeals Tribunal.

**Figure 2: The Ethics and Business Conduct Office**



## V. BUDGET PROCESS

### **Findings**

328. Submissions by States Parties, Court representatives and civil society organisations alike conveyed to the Experts the need to simplify the budget process and reduce underlying bureaucracy. The process has been in continuous development since the early days of the Court, with different practices being trialled<sup>196</sup> and improvements made on various points throughout the years.<sup>197</sup>

329. The ASP's Study Group on Governance (SGG) submitted a substantial list of recommendations in 2012 on improving the predictability and transparency of the budgetary process, as States Parties considered the process and the Court's interaction with the CBF could benefit from a more strategic and consolidated approach.<sup>198</sup> The process was also subject to external audit in 2019.<sup>199</sup>

330. The budget process is one instance where it is apparent that the trust relation between the Court and the ASP (including its subsidiary bodies) can and should be improved.<sup>200</sup> On the one hand, some States Parties believe that the Court could and should be able to deliver more with the resources it has available. On the other hand, there seems to be a perception within some quarters of the Court that States Parties are using the budget process to interfere with the Court's cases. Increased transparency, efficiency and enhanced dialogue between the Court, CBF and ASP should improve relations between stakeholders on this topic. Increased trust would also reduce the perceived need to micromanage the budget.<sup>201</sup>

<sup>196</sup> See Osvaldo Zavala, *The Budgetary Efficiency of the International Criminal Court* (2018), 18 *International Criminal Law Review* 461, pp.474-479, 481-483.

<sup>197</sup> The External Auditor found that 'every year, incremental modifications are brought to the budget process' - [ICC-ASP/18/2/Rev.1](#), Finding, p.4.

<sup>198</sup> Report of the Bureau on the Study Group on Governance, [ICC-ASP/11/31](#) (2012), Annex II, (Cluster II, budget process), B, paras.5-45.

<sup>199</sup> [ICC-ASP/18/2/Rev.1](#).

<sup>200</sup> See further on this *infra* para.948.

<sup>201</sup> 'The Study Group emphasised that the Assembly should not micromanage the Court's budget, nor should it attempt to duplicate the efforts of the Committee' - Report of the Bureau on the Study Group on Governance, [ICC-ASP/11/31](#) (2012), Annex II (Cluster II, budget process), B, para. 28; See also [ICC-ASP/18/2/Rev.1](#), Findings, p.10, p.27.

## A. Court Budget Process<sup>202</sup>

331. The Experts note the recommendations made by the External Auditor on improving the Court's budgetary process, and understand the Court is working on implementing them. A specific area the Experts wish to highlight is the need to better link strategic planning with the budget. One element in this process relates to the use of Key Performance Indicators, which are the topic of a separate section of this Report.<sup>203</sup>

332. Coordination of budget preparation has improved with the introduction of a top-down approach, namely the beginning of the process through the identification of high-level assumptions established at CoCo level.<sup>204</sup> The Experts heard that there is still some disconnect between the different Organs in terms of budget planning and that more could be done to ensure the different stakeholders drive the process in the same direction.

333. While the high-level assumptions tend to cover an expected number of e.g. preliminary examinations, investigations, pre-trial, trial and appeal proceedings in a year,<sup>205</sup> an additional exercise at the Court-wide level should be carried out - in parallel or subsequently - to identify and agree on a cohesive strategic vision that can guide Organs in their budget planning. For example, if the Court plans to close a certain field office, this should be taken into account at the planning stage, and not in the review of the first draft of the budget. Further, close consultations should be held between the OTP (as main budget driver) and the Registry (as responsible for service-delivery) on these strategic priorities and the Registry's capacity. Enhancing consultations before/at the planning stage would lead to a more efficient internal process, eliminating the need for re-adjustments and reducing consultations after a first draft is proposed, as well as a more cohesive budget document.

334. As a consequence of the Expert's recommendation in the Unified Governance section, a more empowered role can be foreseen for the Registrar in the budget process. This is in line with ASP resolutions<sup>206</sup> and the External Auditor's recommendations.<sup>207</sup> Such empowered role could contribute to a better implementation of the One Court principle in the budget process, e.g. by centralising resources for training under one budget line, rather than across several Major Programmes.

335. It was submitted to the Experts that, at times, the CBF receives contradictory information from different Court representatives. To streamline communications with oversight bodies and ensure delivery of information on behalf of the entire Court, the Registrar should be the representative and spokesperson of the Court in such meetings. This is in line with their role under Layer 3 as Chief Administrative Officer.

336. A topic that came up often during the consultations held by the Experts was the need for more flexibility in managing resources.<sup>208</sup> The inability to move resources with ease between Major Programmes hampers the Court's ability to respond in an agile manner to fluctuating workloads, leading to inefficient resource allocation. The Experts believe it is in the States Parties' interest to empower the Registrar by granting them more flexibility in managing resources. Consequently, the Experts endorse the External Auditor's recommendation to amend the Financial Regulations of the Court so that the Registrar can transfer resources across Major Programmes.<sup>209</sup> Also to be considered is the extent to which

<sup>202</sup> The Court's budget is outlined in detail in the aforementioned External Auditor's recent report on the topic. As such, this Report will not repeat the different phases and elements of it.

<sup>203</sup> See *infra* Section [VI. PERFORMANCE INDICATORS AND STRATEGIC PLANNING](#).

<sup>204</sup> These represent quantitative indicators of the expected activity of the Court in the year for which the budget is proposed. It includes, for example, the number of preliminary examinations, investigations, cases in pre-trial, trial and appeal likely to take place that year.

<sup>205</sup> For an example of the public assumptions, see 'Assumptions and parameters for the 2020 Proposed Programme Budget', [ICC-ASP/18/10](#) (2019), Annex II.

<sup>206</sup> See for e.g. [ICC-ASP/18/Res.1](#) (2019), K, para. 3 'Invites the Court to continue to ensure a stringent internal budgetary process steered by the Registry...', L, para.9 'Requests the Court (...) to continue to develop its budgetary process, guided by the Registry (...)'; Resolution on the ASP on the proposed programme budget for 2019, (...), [ICC-ASP/17/Res.4](#) (2018), K, para.3, L, para.8; [ICC-ASP/16/Res.1](#) (2017), L, para.2.

<sup>207</sup> [ICC-ASP/18/2/Rev.1](#), Finding, p.8 and Recommendation no.1.

<sup>208</sup> See *supra* Section [II.J. Flexibility, Scalability and Mobility in Staffing](#).

<sup>209</sup> See [ICC-ASP/18/2/Rev.1](#), Recommendation no.7.

more flexibility can be granted to the Registrar in the way cuts are implemented.<sup>210</sup> Appropriate reporting and transparency mechanisms from the Registry should naturally accompany such increased flexibility.

## B. Committee on Budget and Finance (CBF)

337. The CBF is composed of 12 experts in the areas of budget, finance and administration, tasked to advise the ASP and the Court on such matters. It sits for three weeks at the seat of the Court and its members are expected to carefully look into an increasing list of topics, including an ever-growing number of so-called ‘standing-agenda items’. Input from certain CBF members points to difficulties for all members to thoroughly follow all aspects of the Court. The Experts heard that the risk for over-arching and associated loss of focus is the main threat to the CBF’s efficiency, effectiveness and credibility. In this regard, the CBF should draft a list of the most important topics it ought to follow up on. Such list would then be endorsed by the States Parties. The CBF is further recommended to reflect on additional methods through which it can render its working methods more efficient.

338. A more focused agenda should also be reflected in more concise reports. Combined with their issuance as soon as possible after the CBF’s session,<sup>211</sup> such approach can render the report even more useful to the ASP.

339. The approach should also give the CBF more time to elaborate on the recommendations it suggests and underlying reasons. Moreover, in the interest of more efficient consultations between the Court, the CBF and ASP, it is recommended that the CBF reports also include the Court’s position on, or response to, CBF’s recommendations.

## C. Enhancing Dialogue

340. Between the moment the Court issues its budget proposal to the CBF and the issuance of the latter’s report, its members send around 100 inquiries per session.<sup>212</sup> The Experts were informed that once the CBF report is issued, some States Parties repeat scrutiny of relatively minor budget lines. It is the Experts’ belief that enhanced consultations between the three entities (Court, CBF and ASP) could increase the efficiency of the process, maximise the CBF’s role as advisory body to both ASP and the Court, and enable the States Parties’ to dedicate more of its resources and attention on less-technical matters.

341. Once in receipt of the Court-proposed budget, a meeting between States Parties (through ASP facilitation), the Court (represented by the Registrar) and the CBF should take place, enabling States Parties to share a preliminary indication of their questions and concerns, and areas on which they might specifically wish the CBF’s advice.

342. A workshop is held annually, in spring, between the CBF and the Court on strategic matters, where the Court can explain how it intends to approach certain topics and the CBF can communicate its expectations. The Experts recommend maximising the potential for this workshop, so that it allows for a discussion between the two, and less of a one-sided presentation.

343. Between the moment the Court issues its budget proposal and the autumn session of the CBF, an additional workshop or workshops, held remotely, ought to be organised. This should be the main forum for dialogue between the CBF and the Court.

<sup>210</sup> *Ibid.*, Finding, p.10: The External Auditor referred to the Court’s position, expressed to The Hague Working Group (2018) that ‘with its ultra-detailed line-by-line recommendations, the CBF eliminates the possibility of actual flexibility in the implementation of the cuts and *de facto* interferes with the independence of the Prosecutor’.

<sup>211</sup> As requested by the ASP – see e.g. Resolution of the ASP on the proposed programme budget for 2017 (...), [ICC-ASP/15/Res.1](#) (2016), M, para.3; Resolution of the ASP on the proposed programme budget for 2018 (...), [ICC-ASP/16/Res.1](#) (2017), L, para.3; Resolution of the ASP on the proposed programme budget for 2019, (...), [ICC-ASP/17/Res.4](#) (2018), L, para.1; Resolution of the ASP on the proposed programme budget for 2020, (...), [ICC-ASP/18/Res.1](#) (2019), L, para.1 (‘(...) requests the [CBF] to ensure that its reports are published as soon as possible after each session’).

<sup>212</sup> The average number of queries sent by the CBF to the Court between its 29<sup>th</sup> and 33<sup>rd</sup> sessions was 88,6 per session. For the same sessions, the Court submitted an average of 17,6 reports and 19,4 papers per session, amounting to an average of 527,2 pages submitted to the CBF per session - based on data shared with the Experts by the Court.

344. Ensuring that the Court communicates with one voice, through the Registrar, as well as presenting the Court's opinion on the CBF recommendations would further assist in strengthening the efficiency of the communication between the stakeholders. A stronger CBF report, together with the other recommendations presented above, might also alleviate States Parties' concerns and enable them to defer judgment on technical details to the Committee, enabling them to focus on political matters during the ASP.

345. The Experts also note further recommendations made by the Study Group on Governance (SGG) on this topic, which might continue to be relevant and thus the ASP may wish to consider:

- For The Hague Working Group facilitator to be present in the CBF meetings, as appropriate;
- A more streamlined process for States Parties sending queries to the Court, including templates (for both questions and responses);
- Queries and answers to be sent in writing and also shared with the CBF;
- For queries from States Parties regarding the possibility to find/make additional savings to be as detailed as possible, developed in consultation with the ASP budget facilitator, and shared with the Court and the CBF, and for the Court to explain in detail how the suggestion would impact Court operations and potential cost savings;
- Support for the budget facilitator, by e.g. appointing co- or sub-facilitators for particular budget matters;
- Agendas and preparatory material including relevant background, discussion and decision points to be shared with States Parties for budget discussions prior to the meetings;
- ASP discussions on budget to be more streamlined and focused by using a thematic approach to deliberations, based on the CBF recommendations (rather than the Court's Major Programmes).<sup>213</sup>

#### D. Assembly of States Parties

346. From the States Parties' point of view, there is a concern that ASP meetings tend to be dominated, in recent years, by technical, budgetary discussions, at the expense of strategic policy discussions. It was submitted that concluding the debate on the budget prior to the ASP meeting, moving the debate outside the regular ASP session or prolonging the financial period from one to two or three years, could address this matter.

347. Different views were expressed on the ideal financial period for the Court, and significant advantages and disadvantages exist for both one- or two-year periods. A two-year budget would improve the ability of the Court to plan for longer-term, reduce somewhat the resources and bureaucracy needed for an annual budget process, and increase predictability for States Parties. On the other hand, a one-year budget allows for improved budgetary precision, more flexibility to respond to changes between budget periods, and possibility to work with more up to date estimates.<sup>214</sup>

348. The Experts are not convinced that increasing the budgetary duration would lead to a substantial reduction of resources involved in the budget process, at least not to the extent of outweighing the difficulty of having inaccurate assumptions. Even if the budget would only need to be adopted every other year, assumptions would need to be updated for the second year, re-calculation exercises carried out to adjust the budget based on inflation, and

<sup>213</sup> [ICC-ASP/11/31](#), Annex II (Cluster II, budget process), B, paras.5-45.

<sup>214</sup> See further Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity* (Sixth Revised Edition, Brill Nijhoff 2018), §1101.

supplementary budgetary requests potentially considered. Further, the great majority of international courts and tribunals (19)<sup>215</sup> use yearly budgets, compared to six<sup>216</sup> that have a two-year financial period.<sup>217</sup> The Experts suggest however, throughout this section, alternative methods which could achieve the goal of reducing bureaucracy of the budgetary process.

349. Besides aiming to reach consensus on the budget prior to the ASP session, States Parties could also plan to cover the topic in a specific segment early in the session. This agenda item would be attended by specialised state representatives and be separate from the political part of the session – the main element of the conference – where high-level political representation could be encouraged.

## E. Miscellaneous

350. The Experts took note of the liquidity crisis facing the Court, due to absence of and delayed payment of assessed contributions.<sup>218</sup> While this is not a challenge unique to the Court, but common to numerous other IOs, the Experts agree with the CBF<sup>219</sup> that additional means could be explored, based on the practice of other international organisations.<sup>220</sup> For example, the ASP could explore setting a lower threshold of arrears beyond which States Parties lose their voting rights or inability of States Parties in arrears to present candidates for elected officials' positions.

351. In the meantime, in line with the mechanism put in place by the States Parties, the Court needs to be able to make use of the Contingency Fund and Working Capital Fund when appropriate. For this matter, the Experts recommend that at a minimum, the levels of the two funds should be annually maintained at the fixed levels,<sup>221</sup> if not increased.

352. Increased transparency on the organisational structure and organigram should be introduced, with the number of full-time equivalent (FTE) posts by Section and Office indicated, not only at Division level.

353. For a more efficient use of the overall resources dedicated to international justice, States Parties could make further use of having several international courts and tribunals in the same city. For example, joint activities – such as trainings – could be organised for

<sup>215</sup> The African Court of Human and People's Rights, the Economic Court of the Commonwealth of Independent States, the African Economic and Monetary Union Court of Justice, the Benelux Court of Justice, the CEMAC Court of Justice, the Central American Court of Justice, the COMESA Court of Justice, the Court of Justice of the Andean Community, the Court of Justice of the European Union, the East African Court of Justice, the EFTA Court, the Eurasian Economic Community Court, the International Court of Justice, the Judicial Tribunal of OAPEC, the OHADA Court, the Permanent Tribunal of MERCOSUR, the Residual Mechanism for the Special Court for Sierra Leone, the Special Tribunal for Lebanon, plus the ICC.

<sup>216</sup> The Caribbean Court of Justice, the European Court of Human Rights, the Extraordinary Chambers in the Courts of Cambodia, the Kosovo Specialist Chambers and Specialist Prosecutor's Office, and the WTO Appellate Body.

<sup>217</sup> The Inter-American Court for Human Rights has not been included in either category as it seems to employ a mixture between the two models.

<sup>218</sup> At its most recent session, the CBF noted 'with great concern that, as of 31 May 2020, a grand total of €70.45 million was outstanding for all years, including contributions for the host State loan. This figure represented 47 per cent of the 2020 approved budget. The Committee recalled that it was imperative for States Parties to make their contributions on time. Failure to do so may result in a cash flow shortfall, which would impede the Court's core activities and operations and would require the Court to access the Working Capital Fund at the end of the year. (...) Taking into account the status of contributions as described (...), the issue of liquidity also remained a concern to the Committee. The Committee noted with particular concern that, if 2019 payment patterns were used to calculate 2020 income, the Court would not be able to meet its financial obligations during the last quarter of the financial year.' – Report of the CBF on the work of its 34<sup>th</sup> session, [ICC-ASP/19/5](#) (2020), paras.37,40.

<sup>219</sup> Report of the CBF on the work of its 32<sup>nd</sup> session, [ICC-ASP/18/5](#) (2019), para.35.

<sup>220</sup> For example, the World Trade Organisation has an Early Payment encouragement scheme (see 'WTO Early Payment Encouragement Scheme' - Annex A, WTO Financial Regulations), as well as a catalogue of consequences for lack of payment of one's contribution to the WTO, in case of delays between more than one and more than three years. For instance, after one year of delay, *inter alia*, representatives of the concerned state can no longer be nominated to preside WTO bodies; documentation will not be posted neither to the state's delegation in Geneva, nor to their capitals; after two years, states in question no longer have access to the WTO Members' website and they can no longer act on recommendations of the CBFA to the General Council; observers can no longer benefit from training or technical assistance; after three years, they are designated as inactive members/observers ('Administrative Measures for Members and Observers in Arrears' - Annex B, WTO Financial Regulations). Observers cannot accede to the WTO without having paid their contributions in full - [WTO Financial Regulations](#), Regulation 15.

<sup>221</sup> The Working Capital Fund is set at one month of the Court's expenditure. The Contingency Fund was set at €7 million.

officials/staff from such institutions in The Hague, certain administrative services could be pooled (e.g. recruitment), and common procurement could be envisaged to obtain more advantageous rates from vendors.

### **Recommendations**

**R132.** In parallel with or subsequent to the elaboration of high-level assumptions, inter-organ consultations should be held on a cohesive strategic vision to guide Organs in their budget planning. Additional close consultations should be held between the OTP and Registry on these strategic priorities and the Registry's expected capacity.

**R133.** An enhanced role for the Registrar, in line with the Experts' recommendations in the Unified Governance section, would also enable a more centralised budget process, in line with the One Court principle. The Court should be represented by the Registrar at budget oversight meetings.

**R134.** Financial Regulations of the Court should be amended to enable the Registrar to make transfers across Major Programmes, to adapt based on workload. Similarly, ways through which the Registrar could be given more flexibility in implementing CBF/ASP decided cuts ought to be explored. Such increased flexibility should be accompanied by appropriate reporting and transparency mechanisms.

**R135.** The CBF should make an inventory of the most important topics it considers should form its 'standing agenda', for ASP endorsement. This should result in more concise reports, issued as soon as possible after the CBF's session.

**R136.** The Committee should include alongside its recommendation, sufficiently detailed explanations of its reasons, as well as the Court's position on the proposal.

**R137.** States Parties are encouraged to consider a meeting with the CBF and the Court after consulting the Court-issued budget proposal, to share preliminary indications as to questions and concerns relating to which they wish to receive the CBF's advice.

**R138.** Additional (remote) workshops between the Court and the CBF should be held, ahead of the Committee's fall session, as the main forum for dialogue between the two on the Court-issued budget proposal.

**R139.** To maximise the potential of ASP sessions, States Parties are suggested to defer to the CBF on technical budgetary details, reach consensus on the budget ahead of the ASP session, and dedicate an early slot of the session on budget, attended by specialised state representatives, before the political part of the conference, where high-level political participation can be encouraged.

**R140.** Noting the concerning state of arrears and potential liquidity crisis facing the Court, the Experts recommend that the ASP explore additional means to encourage timely and in full payment of contributions by States Parties, taking into account practices from other international organisations. For example, the ASP could explore setting a lower threshold of arrears beyond which States Parties lose their voting rights or inability of States Parties in arrears to present candidates for elected officials' positions.

**R141.** At a minimum, the ASP should ensure the levels of the Working Capital Fund and the Contingency Fund are maintained at the fixed levels,<sup>222</sup> if not increased.

**R142.** Increased transparency on the organisational structure and organigram should be introduced, with the number of full-time equivalent posts by Section and Office indicated.

**R143.** States Parties should consider joint approaches with other international courts and tribunals housed in The Hague, such as organising joint trainings, pooling administrative services and exploring possibilities for joint procurement to obtain more advantageous rates.

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<sup>222</sup> *Ibid.*

## VI. PERFORMANCE INDICATORS AND STRATEGIC PLANNING

### Findings

354. In 2014, the ASP requested the Court to ‘intensify its efforts to develop qualitative and quantitative indicators that would allow the Court to demonstrate better its achievements and needs, as well as allowing States Parties to assess the Court’s performance in a more strategic manner’.<sup>223</sup> A Retreat on Indicators was hosted by Switzerland in 2016, in cooperation with the Court and the Open Society Justice Initiative (Glion Retreat). It aimed to enable stakeholders (Court leadership, States Parties and civil society) to develop a shared understanding of the value and purpose of Court-wide indicators, refine the scope and definition of specific categories of indicators the Court made use of in the previous year, and discuss next steps in the process.<sup>224</sup> Since then, Key Performance Indicators (KPIs) have been subject to several recommendations from the SGG, CBF and External Auditor.<sup>225</sup> The ASP welcomed in 2019 the continued work of the Court in this field and expressed its wish to continue having an active dialogue with the Court on performance indicators.<sup>226</sup>

355. While there seems to be an agreement on the importance of KPIs among stakeholders, divergent views were expressed to the Experts as to the next steps. On the one hand, some stakeholders advocated for a revitalisation of the Glion process, whereas others noted the topic has been under discussion within the ASP for years, and there is a need for a conclusion to be reached.

356. Similar to the ASP in 2019, some States Parties emphasised the need for the Court to implement its intended approach to produce results which can form the basis of further dialogue,<sup>227</sup> and that the Court should report on its performance against the Strategic Plans. Stakeholders further noted the importance of consistency in administrative arrangements for which Strategic Plans are key, and for KPIs to be employed by all Organs of the Court. It was also suggested that indicators could be used to forecast timing of trials and resource needs.

357. Civil society representatives pointed out the need for more qualitative assessment, and for performance indicators to evaluate affected communities’ satisfaction with the Court’s performance. Follow-up work on the information generated through indicators is essential to identify means of improving efficiency.

358. The Court has achieved significant progress in the last years, as demonstrated by the 2019 Court report on performance indicators, and the Registry’s KPIs, as annexed to its Strategic plan. The Court plans to issue a new report in November 2020 on Court-wide KPIs, which would be better aligned with the strategic goals included in the Strategic plans for the Court, OTP and Registry (2019-2021). The Court presents yearly to the CBF an annual ‘Report on activities and programme performance at the ICC’, which includes reporting on the KPIs that are part of the programme budget the year before.

359. While recent progress is to be commended, the Experts find that the 2019 Court report lacks unity and uniformity, and relies heavily on how matters are viewed by the different Organs. Further, the Registry is the only organ to have detailed KPIs annexed to their Strategic Plan. Expected results, performance indicators and targets for all Major Programmes are annexed to the budget draft for 2020.

360. The External Auditor concluded that there is ‘no correspondence between the KPIs established at Court level and the KPIs by organ of the Court, as disclosed in the annexes to the annual budget performance reports’, that the KPIs ‘are not linked with the budget’, and that the high number of KPIs, without any prioritisation made among them, ‘makes it very

<sup>223</sup> Strengthening the ICC and the ASP, [ICC-ASP/13/Res.5](#) (2014), Annex I, para.7(b).

<sup>224</sup> See [ICC Retreat on Indicators](#), Glion, Switzerland (2016), Convener’s Summary.

<sup>225</sup> See [ICC-ASP/12/2/Rev.1](#), pp.41-42.

<sup>226</sup> Strengthening the ICC and the ASP, [ICC-ASP/18/Res.6](#) (2019), paras.91-92.

<sup>227</sup> *Ibid.*

difficult for the States Parties to draw any conclusions on the efficiency and the performance of the Court'.<sup>228</sup>

361. While there has been progress in the elaboration of performance indicators, they are not currently employed to their full potential, as they are not adequately linked with the budget<sup>229</sup> or audit processes, and comparisons are difficult.

362. Indicators exist in many national judicial systems and in other international organisations. There is a similar need for the Court to measure its activity, to ensure transparency and accountability. These indicators should not be perceived as a tool to micro-manage, but rather as a way to explain the needs of the Court and find ways to increase productivity.

363. The Experts note that indicators are useful tools for two different objectives: to measure efficiency (internal performance) and effectiveness (impact). As such, the two objectives require a different methodology.

## A. Efficiency

364. To assess efficiency, quantitative indicators are needed to measure activity, guide budget preparations and help identify problems and underperformance. For this, 'raw' data should be presented, meaning data that does not depend on a qualitative appreciation by the Court itself. The Court can supplement data with explanations if needed, but this should not replace the presentation of the data itself. The raw data should be collected and presented in a reader-friendly, uniform and coherent way across all Organs and independent offices/units (e.g. ASP Secretariat, TFV Secretariat, IOM, OIA). The KPIs should be 'selected' based on their relevancy for the user – including usefulness for the budget process and facilitating audit.

365. To accurately measure efficiency, data needs to be compared – in time and with other courts or international organisations. This requires (i) consistency in data collection and presentation in time, to enable comparisons to be made; and (ii) standardisation in relevant data collected between international judicial institutions, to enable inter-courts comparison.<sup>230</sup>

366. Such approach would enable benchmarking and determining 'normality' in international justice, i.e. recognised standards of what can be expected from an international court. This methodology is similar to what 'inspectors general of the judiciary' or 'judicial inspections' carry out at the national level. This could also help decrease tensions during the budget discussions, as budget requests could be assessed with a more objective perspective.

367. To ensure constructiveness of the exercise, as well as respect of judicial independence, it is essential that reports on performance indicators are not used to evaluate judicial or prosecutorial decisions. They are not - and should not be considered as - adequate tools in this regard. However, performance indicators shall measure data related to administration of justice (e.g. number of sitting hours, time taken to issue specific decisions, accuracy of expected timelines).

## B. Effectiveness

368. Assessing the Court's effectiveness means evaluating the impact of the Court on affected local communities and victims, as well as the Court's deterrent effect. Different indicators and methodology are required, including qualitative indicators assessed through – for example – polls and questionnaires among local communities. For an objective assessment of the Court's impact, such analysis would best be carried out by entities external

<sup>228</sup> [ICC-ASP/12/2/Rev.1](#), para.211, Finding, p.42.

<sup>229</sup> The Court's Strategic Plan indicates a commitment for the link between the plans, the budget and related performance indicators to be further elaborated upon in the upcoming years – [ICC Strategic Plan 2019-2021](#), para.45. No concrete plans in this regard were available to the Experts by May 2020.

<sup>230</sup> See in this regard [Paris Declaration on the Effectiveness of International Criminal Justice](#) (2017), paras.28-29.

to the Court. Civil society organisations and academics can play an essential role in this regard – as they have strong partnerships and presence with different actors in affected communities, as demonstrated by existing initiatives.<sup>231</sup> Partnerships with international or regional organisations for this purpose could also be explored.

369. An assessment of the Court’s impact, carried out by external partners could be funded through voluntary contributions and follow a methodology discussed with the Court. Externalising implementation does not prevent the Court and the ASP from reflecting on the results and considering whether any actions are needed based on the report’s conclusions.

## **Recommendations**

**R144.** All Major Programmes should develop concrete and measurable KPIs, in relation to the strategic goals identified in the Court’s or relevant organ’s specific Strategic Plans, following the Registry model.

**R145.** The Court should implement the External Auditor’s recommendation as to means of employing KPIs in budget proposals and budget performance reports.<sup>232</sup>

**R146.** To assess the Court’s efficiency, a report presenting raw data based on quantitative indicators should be compiled. The data should be presented in a coherent, consistent and reader-friendly manner. The document should be available to the oversight bodies and the States Parties. Data collection and presentation should be standardised, to enable comparison across several years. Review of KPIs based on lessons learnt should take into account this need for stability in data.

**R147.** To enable comparison with other international organisations, including other international courts and tribunals, the Registrar should engage in dialogue with various such institutions and agree on the type of indicators that can be tracked and shared (e.g. with other international courts - number of days of Courtroom use; with other international organisations - staff engagement, sick leave).

**R148.** Assessing the Court’s impact should be delegated to external partners (civil society organisations, academia, international/regional organisations), and encompass quantitative and qualitative indicators. Such efforts could be funded through voluntary contributions.

## **VII. EXTERNAL RELATIONS**

### **A. Relations with the United Nations**

#### **Findings**

370. Relations between the Court and the UN are governed by the Relationship Agreement concluded in 2004, which addresses not only the legal foundation for cooperation between the two organisations, but also the more practical assistance that the UN and its offices can provide the Court. The Agreement is fundamental to the operation of the Court since it enables it to take advantage of the global presence and infrastructure of the UN.

371. Notwithstanding the provisions of the Agreement, and the fact that the two organisations have mandates and goals linked to the UN Charter that overlap in some areas, in practice the relationship has often proven difficult. This reflects the delicate balance inherent between the independence of the Court and its frequent need for confidentiality on the one hand, and its reliance on the goodwill of UN offices, particularly in the field, on the other.

372. Another factor that complicates the relationship is the fact that the Court is a treaty-based organisation that is not universal. Some 70 Member States of the UN are not party to the Rome Statute, including three of the five Permanent Members of the Security Council. It

<sup>231</sup> See for example Human Rights Watch, *Making Justice Count: Lessons from the ICC’s Work in Côte d’Ivoire* (2015), examining the impact of Court proceedings in Côte d’Ivoire.

<sup>232</sup> [ICC-ASP/12/2/Rev.1](#), Recommendation no.10.

is for this reason that although the Statute anticipates referrals to the Court by the Security Council, this has only happened twice (Darfur in 2005 and Libya in 2011). In recent years, attitudes in the Council to the Court have become distinctly less positive. Partly with an eye to improving the relationship with the UN in New York, and to facilitate cooperation in the field, a Court liaison office was established there in 2005.

## **B. Role of the Court's New York Liaison Office to the UN (NYLO)**

373. Notwithstanding that the Liaison Office in New York has existed now for more than 15 years, relations with key UN Secretariat offices (such as the Office for Legal Affairs), with the Missions of States Parties, particularly those that do not have diplomatic representation in The Hague, and with civil society organisations based in New York, continue to be challenging. This is due, in part, to factors mentioned in paras. 371 and 372 above, but also to a tendency of different Organs and offices in the Court in The Hague to bypass the NYLO in conducting their business with counterparts in the UN Secretariat. The justification for this is sometimes the need for confidentiality, for others a sense that this is more efficient, but the result is that the NYLO is too often left unsighted and caught unaware when it is called to intervene. This undermines its credibility in the New York context and leaves its clients and contacts sometimes dissatisfied.

374. Additionally, the potential range of activities that the NYLO could usefully engage in, and which some States Parties expect it to undertake, such as providing an active channel of information on the Court to them and to other interested groups in New York; promoting the role of the Court in relevant discussions and fora within the UN context; promoting the accession to the Statute of states not yet parties; supporting the New York Working Group and ASP meetings when held in New York; and providing a platform for a public communications program. This, in addition to conducting its core business of facilitating operational cooperation between the Court and the UN in accordance with the relationship Agreement, is simply beyond the staffing and financial resources of the NYLO as currently structured.

375. The Court should ensure that efficient communication and coordination processes are established, enabling the NYLO to benefit from up-to-date information on Court developments, so that it can timeously and reliably respond to queries from the diplomatic community in New York.

376. The Experts find that the role of the NYLO should be reviewed and updated. Depending on the range of activities that are finally assigned to it, the NYLO should be sufficiently resourced and adequately staffed to be able realistically to carry out these various tasks.

## **C. Relations with UN Agencies and Other International and Regional Organisations**

377. While the relationship with the UN in New York is important for the Court, relations with its related agencies in the field, particularly the UN High Commissioner for Refugees (UNHCR), UN Office for the Coordination of Humanitarian Affairs, UN Development Programme (UNDP) and UN International Children's Emergency Fund (UNICEF), are critical to its operations in situation countries. For example, the Court often has to rely on the UN Resident Representative for logistical support and on UNHCR to gain access to victim populations in order to conduct investigations.<sup>233</sup> The Experts understand that in some places the level of such cooperation is very low, thus seriously hampering the Court's activities and slowing down or impeding the process of its investigations. This lack of cooperation seems to arise from a number of factors including that the Court is not, and is not seen as, a UN agency itself; that its investigators often do not, for reasons of confidentiality, share information with the UN agencies in the field; that the activities of the Court in the relevant country sometimes create tensions with the host government; and that the objectives of the Court are not always in accordance with the objectives and priorities of the UN agency concerned or at least its representative office in that country.

<sup>233</sup> See *infra* Section [XIV.B.1. Cooperation for Evidence Collection](#).

378. There is some indication that at times the leadership of the Court has sought to interact with the leadership of the relevant agencies to try to iron out these difficulties, but this seems to have been ad hoc and sporadic. Clearly there is a need for more formal and regular channels of communication between the Prosecutor and the Registrar, and the High Commissioner for Refugees, the Administrator of UNDP, the Executive Director of UNICEF, the Director-General of International Organisation for Migration, and others. The purpose of such meetings would be to keep the latter informed of the Court's planned activities and strategies, to encourage an inclusion in the various agencies briefing of officers going into the field of an appreciation and understanding of the role of the Court, and to build habits of inter-agency collegiality that would, hopefully, trickle down to the field.

379. The Court has also worked to engage with international, inter-regional and regional organisations, particularly the relevant political and legal organisations such as the African Union, the Organisation of American States, the EU, the Caribbean Community, the Commonwealth, the Organisation Internationale de la Francophonie and others, with the aim of helping relevant states better understand the purpose and value of the Court and thereby building support for its activities. Nowhere has this been more important, though also challenging, than with respect to the African Union. These activities should be maintained and where resources allow, strengthened and extended, particularly in regions where the OTP is conducting preliminary investigations or has an ongoing investigation.

### **Recommendations**

**R149.** The Court leadership should decide on and identify a focal point in The Hague responsible for relations with the UN Secretariat.

**R150.** The role of the NYLO needs to be reviewed. Depending on the range of activities that are finally assigned to it, the NYLO should be sufficiently resourced and adequately staffed to be able realistically to carry out these various tasks.

**R151.** The Court should ensure that efficient communication and coordination processes are established, enabling the NYLO to benefit from up-to-date information on Court developments, so that it can timeously and reliably respond to queries from the diplomatic community in New York.

**R152.** The leadership of the Court, particularly the Prosecutor, should establish regular consultations with the heads of the UN agencies most relevant to the Court's operation, in cooperation with the UN Office of Legal Affairs, in order to facilitate the assistance required by Court officials in the field.<sup>234</sup>

## **D. Relations with Civil Society and Media Organisations**

### **Findings**

380. Civil society organisations (CSOs), notably NGOs in the development, human rights, humanitarian, legal and other fields, are a force multiplier for the Court in promoting and carrying out its work. They were an important ginger group in building support for the adoption of the Rome Statute, and continue to play a role in strengthening support for, and spreading information about the activities of the Court at the national, regional and global level. Support from local CSOs and media is key to acquiring cooperation from the affected populations and victims' groups, as well as to put pressure on political organisations in the situation countries. Local NGOs are sometimes a critical interface with victim communities, and a source of advice and counsel in the Court's interaction with local authorities. They are also a very useful ally in blunting local press and propaganda campaigns, often conducted by authoritarian leaders that misrepresent the purpose and activities of the Court.

381. The Court's ability to develop and maintain positive relations with CSOs and the media is in need of improvement, especially in situation countries. For example, the Experts were informed of a number of issues regarding the OTP's external relations, such as limited

<sup>234</sup> See R272 (p.243) and R275 (p.243).

efforts and resources directed at communications; insufficient information provided by the OTP to local stakeholders; lack of direct engagement with local CSOs and the media; and unclear communication channels.

382. The CSOs consulted by the Experts raised the need for the Court, and especially the OTP, to recognise that civil society can constitute a strong partner, with both sides retaining their independence. The relationship between the OTP and CSOs is especially important in the context of fact-finding during Preliminary Examinations and investigations. Civil society can only complement or facilitate the work of the OTP if a clear and mutually reinforcing relationship is in place. The same aforementioned CSOs highlighted the need to clarify and formalise the OTP's relationships with civil society. Currently, there are no guidelines for CSOs to follow in order to ensure that their work is complementary to that of the OTP. They fall outside the category of intermediaries.

383. Another impediment to supportive relationships between local CSOs and the OTP is the reported lack of understanding of the latter's mandate, and that of the Court overall, standards for collection and communication of evidence, and international criminal law. As local CSOs and the media are likely to be the first responders when a criminal incident occurs, it is important for them to be aware of and abide by the standards applicable in order to submit the information to the OTP in a form that it can be used. Therefore, it would be helpful if the Court and CSOs could establish channels of communicating and sharing their best practices and expertise.

384. The Experts also heard concerns about the attitude of the OTP towards local CSOs. They were informed that during official visits, the OTP focuses on meeting with high level government representatives, to the exclusion of civil society and victims groups. This creates an image of the focus being on the politicians, and not the people working on and affected by the alleged criminal conduct. While the OTP regularly collects information from civil society during investigations, the CSOs do not feel that they are taken seriously by the OTP. The impression is that the OTP uses CSOs only when that is deemed convenient. Furthermore, apart from high-level visits to situation countries, the OTP does not have field-based staff to act as focal points and develop or maintain relationships with civil society. Thus, there is no direct channel of communication for organisations based in the field. Finally, some CSOs noted that it is difficult to communicate with the OTP, as there is no focal point for NGOs.

385. The Court should be nurturing its relations with civil society at all levels, by consulting with them, listening to their suggestions and advice, briefing them when possible on Court developments, and taking advantage of their services where it is sensible and cost-efficient to do so. To some extent this is already the case – NGOs are part of The Hague and New York Working Groups – but there still exists a reluctance to bring them too close, perhaps because of concerns of confidentiality and of an awareness of government distrust of civil society in many parts of the world, as well as legitimate concern that some NGOs could use a closer relationship with parts of the Court to promote their own narrow objectives. Within these confines however, there should be opportunities to engage more actively with relevant NGOs, participate in their events, and use a deeper relationship to promote awareness of the work of the Court to a wider audience, e.g. through partnering with them in outreach activities in situation countries.

## **Recommendations**

**R153.** The Court should maintain its practice of engaging actively with regional organisations and should take advantage of opportunities to expand its engagement with other relevant regional bodies.

**R154.** Similarly, the Court should continue to work with civil society to the extent it can, with the aim of bolstering NGO support and advocacy of the Court in particular countries and regions, as well as maintaining the cooperative arrangements with civil society in situation countries that have been so important to the successful implementation of its mandate in those countries.

**R155.** Consideration should be given to making sufficient resources available for maintaining relations with CSOs, jointly across the Courts' Organs.

**R156.** The OTP should consider establishing a focal point for maintaining bilateral relations with the CSOs, and responding to their information needs.

**R157.** The OTP should appoint a field staff member to be responsible for relations with relevant CSOs and the media, jointly with the Registry's Outreach staff.

**R158.** Consideration should be given to hosting regional workshops for CSO and local media representatives on the Court's legal framework, evidentiary standards, and collection of information.

**R159.** During Court/OTP official visits to situation countries, side events with local CSOs and media should be organised.

**R160.** Relationships with CSOs should be formalised, similar to the Guidelines Governing the Relations between the Court and the Intermediaries.

**R161.** Paid visiting professional positions dedicated to journalists/media professionals from situation countries could also contribute to increasing the internal and external capacity of the Court to communicate directly with the situation countries, and especially the victims.

**R162.** A scholarship/grant fund for journalists from situation countries could be considered, to enable them to report from The Hague for limited periods of time.

## **E. Communications Strategy<sup>235</sup>**

### **Findings**

386. It is clear from the above that, given the Court's reliance on cooperation with relevant governments, international and regional organisations, NGOs and individuals, it should have a dynamic and comprehensive communications strategy. This is all the more important given the current external threats the Court faces. However, it seems that the Court does not have a joint or integrated communications strategy. Decisions on how to present their activities, respond to criticism, win support from different quarters and promote the Court's image are taken in an ad hoc fashion in the different Organs. There are attempts to coordinate on communications between the relevant Organs on important issues, but too often the Public Information and Outreach Section of Registry (PIOS) (which should be the central clearing house for a communications strategy) is caught unprepared by statements issued by the OTP or Presidency in respect of which they have been given little or no advance notice. Decisions on public statements by the Court tend to be made in the cabinets of the President or the Prosecutor, without the benefit of either consultation across the Court or a carefully thought-out strategy.

387. At every step of the process, from a preliminary examination through to conviction or acquittal, the Court should have in place the capacity to explain what is happening to the different audiences, following developments in the investigations and prosecutions that it is conducting. Even in the case of an acquittal, the Court should be able to promote the message that it has done its job in highlighting a situation of gross abuse of individuals' rights, and carrying out a fair trial of an accused, even if in the end no individual has personally been held responsible.

388. Consequently, the Court should develop a communication strategy tailored to the needs of specific target groups. It should include the Court's strategic communication priorities and a clear and efficient process as to actors involved and final decision-makers on messaging for both communications on the day-to-day work of the Court and responses to events or attacks that require a timely reaction. The process should also foresee the need for the Chambers and the Prosecution to give advance notice of important decisions to the PIOS, enabling those responsible in the respective Sections to work together on key messages and

<sup>235</sup> For OTP-specific communications see *supra* Section [I.C.2.Immediate Office of the Prosecutor \(IOP\)](#).

approach. The strategy should build on past expert advice developed for this purpose,<sup>236</sup> and could include specialised training for Judges and prosecutors so that they are better able to appreciate how Court judgments, decisions and officials' actions are perceived. There may be value in engaging an expert in 'branding' to advise on how the Court might more effectively publicly promote itself as an institution. The Court's communication strategy should also include cultivating and building productive relationships with journalists and other media with an interest in the Court.

389. The Court's PIOS could also develop communication materials and online updates in various languages of States Parties. Such materials and updates could also serve to assist States Parties in carrying out national communication campaigns, aimed at increasing awareness of their citizens on the work of the Court.<sup>237</sup>

390. States Parties have also shared with the Experts additional ideas for public information activities that the ASP and individual States Parties could consider: organising a high-level event to promote the Rome Statute and TFV on the side-lines of the UN General Assembly (UN GA), the continued leveraging of formal and informal political groups and platforms such as the Informal Ministerial Network for the ICC, ensuring greater visibility for the Court and Rome Statute System during the International Law Week, that takes place in the Sixth Committee of the UN GA.

## F. Outreach Strategy

391. Outreach differs from communications in that it is more specific and directed at very particular communities. Its purpose is to win the confidence, support and cooperation of people and communities that have often been traumatised and scarred by the events the Court is investigating. While the PIOS is responsible for outreach on behalf of the Court, the OTP also carries out outreach activities.

392. The Experts are concerned with the lack of effective Court outreach. Reportedly, the messages communicated by the Court are insufficient and lack relevant information to enable the recipients to understand the Court's involvement in the situation. Those communications often fail to sufficiently take into account local conditions, cultural sensitivities, and language.

393. Furthermore, there appear to be significant delays in the Court/OTP outreach. Importantly, the Court outreach does not commence until a formal investigation is opened. Currently, the only information provided by the OTP during preliminary examinations (PEs) is the annual report, and occasional statements at some key moments during the PEs.

394. While the Court nominally has a Strategic Plan for Outreach, it appears that this has not been effectively implemented. What is clear is that such a plan, at least for every situation country, if not also per region, should be devised and then implemented at the earliest possible moment – preferably at the time of the PE. States Parties and civil society alike have stressed to the Experts the need for the Court to carry out outreach activities from the outset of the Court's involvement in a country, including during PEs. This is in line with a request made by the ASP for several years.<sup>238</sup> If outreach is delayed, those in the country who are hostile to the Court's actions will move to undermine its efforts through misinformation and propaganda and the Court will start its work at a massive disadvantage. The Court's outreach activities are however bound by the mandate entrusted to it that enables it to start activities only once there is a situation.<sup>239</sup> The Registry's Regulations, limiting outreach to situations and cases, should be amended accordingly.

<sup>236</sup> See for example OSJI and ICC, Expert convening on ICC Communications, Final Report and Recommendations (2017).

<sup>237</sup> See in this regard [Expert initiative on promoting effectiveness at the ICC](#) (2014), pp.40-41.

<sup>238</sup> Resolutions on Strengthening the ICC and ASP, [ICC-ASP/9/Res.3](#) (2010), para.38; [ICC-ASP/10/Res.5](#) (2011), para.39; [ICC-ASP/11/Res.8](#) (2012), para.46; [ICC-ASP/12/Res.8](#) (2013), para.44; [ICC-ASP/13/Res.5](#) (2014), para.63; [ICC-ASP/14/Res.4](#) (2015), para.68; [ICC-ASP/16/Res.6](#) (2017), para.63; [ICC-ASP/17/Res.5](#) (2018), para.71; [ICC-ASP/18/Res.6](#) (2019), para.66.

<sup>239</sup> 'Outreach programmes shall be aimed at making the Court's judicial proceedings accessible to those communities affected by the situations and cases before the Court' (emph. added) – [Regulations of the Registry](#), Regulation 5 *bis*.

395. The absence or insufficiency of active outreach and communication places the burden on civil society to keep the affected communities informed about the developments at the Court. The CSOs hence become responsible for combatting the spread of false or incorrect information and managing the expectations of their constituents. This role can be difficult to play, especially in the absence of official information or guidelines from the Court. The small budget of many of these organisations should be borne in mind. The Court should consider ways in which it might capitalise on the presence of local CSOs and media to support its outreach efforts.

396. It is suggested that, with appropriate safeguards in place to protect confidentiality, PIOS should be included in preparations for PEs by the OTP as early as feasible. They have the experience and staff to help the OTP shape an outreach strategy to suit the situation that will be investigated. Once the strategy has been drafted, it should be shared with relevant country experts in the Court or in the country concerned, if the Court already has an office there. Once the strategy is agreed and adopted, it should be ready to be implemented on the ground, as soon as the PE is opened and public, presumably when the Pre-Trial Chamber has authorised it.

397. Inevitably, activities involved in an outreach program for a particular situation will evolve and change in response to local developments and as the case moves ahead. The critical consideration is that those implementing outreach activities should have the ability to adjust to these developments by revising their messages. If necessary, such developments should be incorporated in updated written material and distributed in the country.

398. Currently, the resources allocated to outreach strategies in situation countries are minuscule (around €50,000 per annum). Outreach activity should be recognised by the OTP, the Court, the CBF and the ASP as an integral part of any investigation, and therefore funded appropriately. If this is not done, at the very least the Registry should be permitted to engage with outsiders, including NGOs to conduct this activity on the ground, and should be allowed to raise funds for aspects of the strategy such as printing booklets, setting up telecommunications links, preparing information kits, be it from States Parties, civil society and other national or international donors. The Registry is also encouraged to evaluate the efficiency and effectiveness of splitting up the outreach budget across the different field offices. The Experts recommend that PIOS should retain authority over outreach officers in field offices, working in cooperation with the Heads of said offices, and have available a centralised outreach budget that enables them to more flexibly allocate resources based on needs (workload, judicial developments and priorities among the different situations).

## **Recommendations**

**R163.** The Court needs a cross-Organ, coordinated communications strategy. Most importantly, it needs the different Organs to be talking to each other and coordinating public information responses to issues and developments in the Court's business even in the absence of such a strategy. An outreach plan, at least for every situation country, if not also per region, should be devised and then implemented from the PE stage of every situation.

**R164.** Outreach programs and activities should be built into decisions to pursue particular investigative activities from the start, given the critical importance of winning the support of communities impacted by the events to be investigated. Outreach strategies for new situations should be coordinated across the Court and should be ready to be implemented at the time that any new preliminary examination is announced. The Registry's Regulations, limiting outreach to situations and cases, should be amended to enable outreach activities to be carried out from the PE stage.

**R165.** Outreach activities should be built into the program budget of any new investigation, to ensure that this dimension of the case is not ignored. Given the budgetary challenges faced by the Court, consideration should be given to innovative ways of raising essential funding, including lobbying of interested States Parties and drawing on the expertise and resources of civil society.

**R166.** The Court should develop communication materials to be shared during outreach activities, according the specific Outreach Strategy. Such materials should cover:

- (i) The role and mandate of the Court;
- (ii) The role and mandate of the OTP and its strategy;
- (iii) The goals and steps of PEs/Investigations;
- (iv) The specific progress of a PE/Investigation in a given situation;
- (v) Next steps envisioned within each PE/Investigation;
- (vi) The rights of victims in the Rome Statute system, at each stage of the proceedings;
- (vii) The independent character of the OTP and the parameters under which the Court can and cannot act in relation to different country situations.

**R167.** PIOS should retain coordination over outreach officers in field offices, working in cooperation with the Heads of said offices, and have available a centralised outreach budget that enables them to more flexibly allocate resources based on needs (workload, judicial developments and priorities among the different situations). The OTP should consult the PIOS in designing its outreach activities to ensure a coordinated approach and avoiding overlaps.

**R168.** In order to improve media access to the Court/OTP, the Court/OTP should simultaneously host video press conferences with situation/regional countries.

## G. External Political Measures against the Court

### Findings

399. While a lack of cooperation from certain non-states parties has been an issue dogging the work of the Court from the start, in recent years it has faced an even bigger challenge in the adoption by certain countries of policies of active opposition to the Court. This has resulted in threatened sanctions against members of the Court, including the Prosecutor herself, as well as a questioning of the integrity of the Judges and of the OTP. This intimidation has not only impacted the morale of the Court, but has undermined its credibility in certain quarters, including in countries that hitherto had provided at least some cooperation.

400. The leadership of the Court has taken occasional opportunities to defend itself publicly against these attacks, in speeches, articles, and briefings, but clearly feels constrained by the need to maintain working relations with some of these critics, particularly the members of the UN Security Council. There is also a sense that it is more appropriate to the dignity of the Court not to engage in such a political debate. There is some sense in both of those points and it may be that the best vehicle for mounting a defence of the Court is the ASP, its President and subsidiary bodies, as well as the governments of members of the ASP. Indeed, given the capacity of these attacks to undermine the effectiveness of the Court and impact its impartiality over the long-term, the ASP should take action. This could include the adoption of a strategy to deal with such attacks in the future and agreement to react quickly and robustly to unfair and untrue criticisms of the Court by issuing appropriate rebuttals. More positively, the ASP and individual States Parties could conduct public outreach activities – conferences, seminars, television debates and so on, to explain better what the Court is and what it is trying to achieve. This would be in line with the ASP’s finding that the issue of public information and communication is a shared responsibility of the Court and States Parties.<sup>240</sup>

<sup>240</sup> Strengthening the ICC and the ASP, [ICC-ASP/9/Res.3](#) (2010), para.40; Strengthening the ICC and the ASP, [ICC-ASP/10/Res.5](#) (2011), para.40; Strengthening the ICC and the ASP, [ICC-ASP/11/Res.8](#) (2012), para.47; Strengthening the ICC and the ASP, [ICC-ASP/12/Res.8](#) (2013), para.45; Strengthening the ICC and the ASP, [ICC-ASP/13/Res.5](#) (2014) para.64; Strengthening the ICC and the ASP, [ICC-ASP/14/Res.4](#) (2015), para.69; Strengthening the ICC and the ASP, [ICC-ASP/16/Res.6](#) (2017), para.64; Strengthening the ICC and the ASP, [ICC-ASP/17/Res.5](#) (2018), para.72; Strengthening the ICC and the ASP, [ICC-ASP/18/Res.6](#) (2019), para.67.

401. The Experts note in this context the prompt joint response by the Court Principals to the US Executive Order providing for sanctions against the Court and its officials.<sup>241</sup> The same day, the ASP President issued a statement in support of the Court,<sup>242</sup> followed by States Parties and civil society organisations,<sup>243</sup> including a joint response of 67 States Parties.<sup>244</sup>

402. The Court employed two different models to respond to recent political threats and health crisis, namely through an inter-Organ task force and a crisis management team, respectively. The Experts recommend that the Court evaluates the approach employed in these two instances and formalises a crisis management policy that clarifies responsibilities, chain of command and process. The policy should foresee clear and timely mandates from the Principals of the Court, to avoid delayed reactions and communications, which decrease the ability of the crisis management structure to use the expertise available within the organisation and liaise with external stakeholders supportive of the Court.

### **Recommendations**

**R169.** The ASP and States Parties should develop a strategy for responding to attacks on the Court by non-States Parties, and should be prepared to speak up in the Court's defence, given that its dignity and political impartiality seriously inhibits its ability to defend itself against unsubstantiated and biased attacks. The ASP and States Parties could further conduct public information campaigns in their countries, with support from the Court's PIOS in developing communication materials.

**R170.** The Court should formalise a crisis management policy that clarifies responsibilities, chain of command and process, enabling concerted action on behalf of the Court and timely responses.

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<sup>241</sup> ICC, Statement of the ICC on recent measures announced by the US ([11.06.2020](#)), issued the same day as the US Executive Order.

<sup>242</sup> ICC ASP, 'ASP President O-Gon Kwon rejects measures taken against ICC' ([11.06.2020](#)).

<sup>243</sup> See for example Statement by the High Representative of the European Union following the US decision on possible sanctions related to the ICC' ([16.06.2020](#)), joint letter by 37 CSOs in the US ([11.06.2020](#)), Open Society ([11.06.2020](#)), International Bar Association (IBA) ([12.06.2020](#)), American Bar Association ([12.06.2020](#)).

<sup>244</sup> 'Statement in support of the ICC following the release of the US Executive Order of 11 June 2020' ([23.06.2020](#)).

## *Organ Specific Matters: Chambers*

### VIII. ELECTION OF THE PRESIDENCY

#### **Findings**

403. In November of every three years six new Judges are elected to replace those whose term of nine years has ended. The new Judges attend at the Court in the following March. Their nine-year term of office begins on 11 March of the year following their election. During their attendance, each makes a solemn undertaking to serve honourably, faithfully, impartially and conscientiously, a prerequisite for taking up their official duties. However, the extent to which they will be required to serve on a full-time basis is for the Presidency to decide. The election of the Presidency, comprising the President and the First and Second Vice-Presidents, to serve for the following three years, takes place during that period of attendance.

404. The authority to call up Judges is just one of a number of responsibilities that fall within the gift of the Presidency. Another one is assigning Judges to Chambers.<sup>245</sup> While Article 38 envisages the Court organising itself into Chambers, order is brought to the exercise by ceding control to the Presidency.<sup>246</sup> So the actions of the Presidency can have a significant impact on the immediate future of newly-elected Judges. Pre-election discussions between candidates and new Judges about their possible assignment have on occasion taken place.

405. The practice of candidates campaigning and offering inducements to vote for them, such as the exercise of these responsibilities in a particular way, has been a feature of recent elections for posts in the Presidency. That is probably the result of the influence new Judges can wield in that election. Since it is likely that many of the other Judges already serving at the Court will have formed allegiances, the votes of the newly-elected Judges, who will generally be unfamiliar with the candidates, are likely to be decisive. Many Judges find the campaigning practices followed distasteful and for that reason would decline to stand for election to the Presidency. The process has on occasion soured relations and caused lasting tensions among Judges, which is not conducive to the development of good working relations. The Experts cannot predict what will happen at the election in March 2021 since it depends on the personalities involved. However, it is earnestly to be hoped that before the election takes place, the current Judges will agree upon, and commit to writing, procedural guidance for the conduct of the election, including provisions designed to avoid practices which should have no place in such an election.

406. One possibility would be for an appropriate provision to be added to the Code of Judicial Ethics,<sup>247</sup> possibly to Article 5, obliging Judges who are declared candidates for a position in the Presidency not to make directly or indirectly to any Judge any offer that might in the context of the election be construed as an inappropriate personal gift, advantage, privilege or reward.<sup>248</sup> Indeed, it would be appropriate to both amend the Code and draw up broader guidelines about the way in which candidates should present their case for election to their colleagues. The guidelines could, for example, indicate the nature of the information that would be regarded as appropriate to address to colleagues to support their candidature. This could include a description of their personal attributes which they consider fit them for the office sought and their plans for their term of office. Provision could be made for a forum at which each candidate might be allocated a reasonable time to present their case for election to the plenary in a dignified and judicious manner.

<sup>245</sup> [RPE](#), Rule 4 *bis*.

<sup>246</sup> [Rome Statute](#), Art. 38.

<sup>247</sup> See [Regulations of the Court](#), Regulation 126, stating '1. The Presidency shall draw up a Code of Judicial Ethics, after having consulted the judges. 2. The draft Code shall then be transmitted to the judges meeting in plenary session for the purpose of adoption by the majority of the judges.'

<sup>248</sup> Code of Judicial Ethics, adopted and entered into force on 9 March 2005, [ICC-BD-/02-02-05](#), Art. 5, deals with 'Integrity'.

407. That suggestion may be opposed on the ground that, because the newly-elected Judges, who comprise one-third of the electorate, are not generally familiar with the candidates and may know little about them, the candidates should not be unduly restrained from seeking their support. While holding the election some months later would resolve that problem, it would leave the Court rudderless for a period in the event that the outgoing President is due to leave the Court and could have the effect that the new President might serve for less than three years. So to address the importance of providing an adequate opportunity for the new Judges to get to know the candidates better, there are proposals elsewhere in this Report<sup>249</sup> relating to Induction and Continuing Professional Education and Development, for an expanded, intensive Induction Programme for new Judges, to be delivered before the Presidency election takes place. This would provide an opportunity for new Judges to get to know the candidates.

408. In addition to the problem of the practices that are followed in the election process, there are other less-than-satisfactory features of the election. It comes at a time when the new Judges have not had an opportunity to become familiar with the functioning of the Court in practice. The history of the Court shows that, with the inevitable exception of the situation following the very first election of Judges, no Judge has been elected President immediately upon arrival at the Court. It is unlikely that any will ever be a candidate.

409. Candidates generally come from the ranks of Judges already at the Court for at least three years. However, some of them may be ineligible on account of their commitments. Article 39(1) provides that the Appeals Division shall be composed of the President and four other Judges. The President in that phrase is generally interpreted as the President of the Court since the last preceding reference to ‘the President’ is to the President of the Court. That is the interpretation generally favoured within the institution. There is an argument that ‘the President’ refers to the President of the Division.<sup>250</sup> That seems unlikely.

410. The effect of that provision appears to be that whoever is elected President must be available to be assigned to the Appeals Division. The Judges assigned to the Appeals Division are required to serve only in that Division for their entire term of office.<sup>251</sup> There is thus no scope for temporary attachment to any other Division. Any judge committed to Pre-Trial or Trial proceedings at the time of the Presidential election would accordingly appear to be rendered ineligible to stand as a candidate. That can have the effect of ruling out an obviously well-qualified candidate.

411. The provisions of Article 39(2)-(4) are not easy to construe. Nor does the way in which they have been interpreted over the years appear to be entirely consistent with their terms. The intention of the drafters of the Rome Statute appears to have been that, when reference was made in Article 39(3)(b) to Judges of the Appeal Division serving in the Division ‘for their entire term of office’, that meant the whole period of nine years. That would preclude Pre-Trial and Trial Judges being ‘elevated’ to the Appeals Division. At first glance, that is in itself a problem since the Appeals Chamber sits as a bench of five, the whole complement of the Appeals Division, and would be unable to sit in the absence of one Judge, e.g. on account of illness. However, Regulation 12 of the Regulations of the Court provides for a Judge from either the Trial or Pre-Trial Division being attached to the Appeals Chamber in the event that one of the Judges of the Appeals Chamber is disqualified or unavailable for a substantial reason.<sup>252</sup> Circumstances soon arose in which a Judge who had served for three years in one of those Divisions was thereafter assigned to the Appeals Division. The Appeals Chamber now sits frequently in a composition that is not composed of ‘all the Judges of the Appeals Division’ as mandated by Article 39(2)(i), but includes a Judge or Judges from the Pre-Trial or Trial Division.<sup>253</sup> Regulation 12 also provides that ‘[u]nder no circumstances shall a judge

<sup>249</sup> See *infra* Section [IX.A. Induction and Continuing Professional Development](#).

<sup>250</sup> [Rome Statute](#), Art. 39(1); see also Hiram Abtahi and Rebecca Young, ‘Article 39: Chambers’, in Otto Triffterer and Kai Ambos (eds) *The Rome Statute of the International Criminal Court: A Commentary* (C.H. Beck: Hart: Nomos, 2016) 1247-1252, where there is no mention to the President being either the President of the Court or of the Appeals Division.

<sup>251</sup> *Ibid.*, Art. 39(3)-(4).

<sup>252</sup> [Regulations of the Court](#), Regulation 12.

<sup>253</sup> See composition of the Appeals Chamber in *Situation in the Islamic Republic of Afghanistan*, of which Judge Kimberly Prost from the Trial Division was a part; see *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, [ICC-02/17-138](#), 5 March 2020.

who has participated in the Appeal phase of a case be eligible to sit on the Pre-Trial or Trial phase of that case'. The final words 'of that case' seem to indicate the absence of any general prohibition upon an Appeals Division Judge sitting in one of the other Divisions, unless that provision is simply intended to address the possibility of a member of the Pre-Trial or Trial Divisions drafted in to sit on a case in the Appeals Chamber thereafter being proposed to sit in the pre-trial or trial phase of the same case. Against that background it is not surprising that some current Judges consider that, in keeping with the evolution of flexibility in the application of Article 39, a Judge sitting as part of a Trial Chamber could be assigned to the Appeals Division although they may spend most, if not all, of their time in the Trial Chamber. However, it has to be noted that no Judge committed to a Trial Chamber has ever stood as a candidate for election as President. Taking all of the foregoing factors into account, it is easy to envisage a situation where a substantial proportion of the Judges are effectively ineligible to stand.

412. As matters have developed, those most suited to the role of President are just as likely to be serving in the Pre-Trial or Trial Divisions as in the Appeals Division. In spite of the foregoing developments that have led to rotation of Judges beyond that contemplated by the Rome Statute, the provisions discussed above appear, on balance, to rule out the election as President of a Judge who must inevitably continue to serve in the Pre-Trial or Trial Divisions. Ensuring that no experienced Judge is prevented from standing would require legislation to remove the requirement for the President to serve exclusively in the Appeals Division.

413. A comparison of the judicial credentials of the current Judges indicates that the Trial Division is home to Judges whose record of judicial experience would suggest that they could fill the role of President with distinction, and not all are due to depart the Court. Any Judge in the Trial Division who has started or will start work on a new trial in the next few months will be rendered ineligible to be a candidate. There is no good reason why Judges who have proved themselves in their national jurisdictions and at the Court should be rendered ineligible for the office of President of the Court by membership of a Division other than the Appeals Division. Experience shows that over the life of the Court, the Appeals Division has not been the exclusive domain of the most distinguished members of the Court. The removal of the requirement referred to above would have the effect of expanding the pool of eligible and worthy candidates.

### **Recommendations**

**R171.** The Presidency should draft guidelines to be approved by the Plenary session of Judges, for the conduct of the election of the Presidency, including provision that candidates should not make directly or indirectly any offer to a colleague that might in the context of the election be construed as an inappropriate personal gift, advantage, privilege or reward, and include a similar provision in the Code of Judicial Ethics.

**R172.** Candidates should restrict campaigning to addressing colleagues on their personal attributes that fit them for the office sought and their plans for their term of office.

**R173.** The Statute should be amended to remove the provision requiring the President to serve the entire term of office in the Appeals Division and only in that Division.

## **IX. WORKING METHODS**

### **A. Induction and Continuing Professional Development**

#### **Findings**

##### **1. Induction Programme**

414. On commencement of their judicial mandate, newly elected Judges currently benefit from a short induction programme organised by the Presidency with the participation of other

Organs of the Court. While this orientation is an appreciable starting point, it is highly insufficient. The lack of substance and documentation was commented on.

415. The Court is a unique institution with a structure that bears resemblance in parts to that of other international criminal institutions, but has many distinctive features not repeated elsewhere. Reading about such a unique institution and studying it from afar can go only part of the way towards familiarising a new Judge with the Court. A full understanding of its important features and exactly how it operates in practice can only be acquired by a close study from within. For that and other reasons set out hereafter, the existing short induction programme cannot be considered adequate.

416. The Court is governed by its own set of legal texts, substantive law and specific procedures. It has developed a significant amount of jurisprudence and court practices. In-depth knowledge by new Judges of the progress that has been made on these and other relevant subjects can only accelerate the pace of their transition and integration into the Judiciary.

417. A concern was expressed to the Experts about the possible lack of experience, knowledge and interest in international criminal law of some Judges. The Experts recommend elsewhere<sup>254</sup> in this Report the possibility for the Advisory Committee on Nominations (ACN) to report on knowledge and experience of international criminal law in relation to each candidate.

418. Many new Judges find presiding in an international court to be second nature and fit seamlessly into the role; others, with less experience of the environment and the additional switches and buttons for operating the technological support, take more time. Induction offers an opportunity for familiarisation.

419. Furthermore, the issue of a lack of judicial collegiality is addressed elsewhere.<sup>255</sup> As a subject in the Induction Programme, it would afford an early opportunity to collectively address the matter, the aim being to encourage among Judges, as they commence their nine-year term of office, a genuine sense of belonging in, and a proper understanding of their role as members of the judiciary.

420. One of the main objectives of both the Induction Programme and the Programme of Continuing Professional Development (CPD), which the Experts also recommend, is to inspire in the Judges a sense that this is their Court, to promote a spirit of mutual understanding of and respect for Judges and staff from a variety of cultures. In that way, the programme would strengthen the bond of collegiality among the Judges and thereby enhance the prospect of the development of collaborative working practices.

421. Information was shared with the Experts on the negative attitude of a minority of Judges towards staff and their treatment of them. That indicates that some Judges are used to staffing support arrangements for judges and a relationship between judges and staff that are alien to those experienced by the majority of Judges at the Court and by the Judges and senior personnel of other international courts and institutions based in The Hague. This provides an additional reason for the restructuring of the existing Induction Programme for new Judges into an intensive and comprehensive programme of induction, and indeed also the development of a planned and structured CPD programme.

## 2. Timing

422. Since it remains likely that new Judges will participate in the election of the new President shortly after their arrival in 2021, this Programme should coincidentally provide an opportunity to become familiar with colleagues, including the candidates in the election for the Presidency. It would be highly beneficial for a new Induction Programme to be in place by February 2021 for the arrival of the new Judges. While outside assistance might not be required in the actual organisation and conduct of the course, the Chambers might consider seeking advice or sourcing input from an appropriate and accessible university, institute or

<sup>254</sup> See *infra* Section [XX. IMPROVEMENT OF THE SYSTEM OF NOMINATION OF JUDGES](#).

<sup>255</sup> See *infra* Section [IX.D. Judicial Collegiality](#).

other organisation with experience in the pedagogy and delivery of induction and CPD courses.

### 3. Contents

423. The re-design and the methodology of the intensive Induction Programme is important to its effectiveness and delivery. Pedagogically, it should be attuned to pro-active learning. It should be ‘judge to judge’ oriented. There is a readily available pool of highly experienced current and former Court Judges, as well as judges past and present of the UN ad hoc Tribunals and other special criminal courts and tribunals, whose cooperation could be sought. In addition, legal staff from Chambers could also provide certain modules in this Induction Programme. That might also assist with improving relations amongst Judges and staff.<sup>256</sup>

424. In re-designing the Induction Programme, it is also proposed that consideration be given to the provision of detailed information on the institution, its history, and practices, including the role of each of its many Sections, whether or not they play a part in the courtroom. Other sessions of particular importance might relate to the elements of crimes, joint criminal responsibility, comparative criminal procedure (including differences between common and civil law systems), cultural and sensitivity training in investigating and eliciting testimony of victims of sexual and gender based crimes (SGBC), recent controversial decisions, the Chambers Practice Manual, Guidelines and Policies of the Judiciary and the Court, and other issues that are regarded at the time of the induction as worthy of debate.

425. Topics that merit consideration include challenges in managing and conducting lengthy and complex trials and how to approach deliberations and judgment-writing.<sup>257</sup> Collegiality, transition to the Court, culture and respect for diversity, challenges of a multinational/multi-ethnic working environment, ethics and judicial conduct, bullying, stress management, working under time pressure, and use of technology at the Court are all important subjects for consideration. It could also usefully cover topics relating to life in The Netherlands. It is essential that the re-scaled Induction Programme be customised.

426. Another core element of the programme for consideration would be to study the way the three Divisions and their respective Chambers operate, including with regard to changes made in light of recommendations made in this Report. Closely studying the work of the Pre-Trial Division in particular would give new Judges a perspective on the challenges that can arise in consequence of the state of preparedness of cases at the time charges are presented by the OTP to a Pre-Trial Chamber.

427. Such a rejuvenated and intensified Induction Programme should continue to include participation by the Prosecutor, the Registrar, a number of the Judges and others from among the most senior officials of the Court. The programme may also present an opportunity for interaction with officials of the ASP.

428. The possible agenda of subjects is almost endless, but should also include a review of the business currently before the Court, the Key Performance Indicators, information about situations where work is ongoing, and an outline of the role and mandates and current workload of the Trust Fund for Victims and the position in cases at the Reparations stage. In planning for the induction, particular attention should be paid to the issuance of relevant and comprehensive documentation.

429. Judges, former and current, some States Parties and other stakeholders with whom the Experts interacted were unanimous in commending an expanded Induction Programme for new Judges. While an Induction Programme in itself might not be able to tackle all the challenges that have surfaced, nonetheless it would offer an organised, structured and congenial arena for professional development.

<sup>256</sup> See *supra* Section [I.B.1. Working Environment and Culture](#).

<sup>257</sup> In this regard, it is noted that the judges recently adopted ‘Guidelines for ICC Judgment Drafting’ and ‘Guidelines for ICC Judgment Structure’; see ICC Website, Press Release, [ICC judges hold retreat, adopt guidelines on the judgment drafting process and on the timeframe for issuance of key judicial decisions](#) (2019).

#### 4. Continuing Professional Development

430. The Experts are aware of the apprehension that may still exist among a few Judges who may find continuing professional development an anathema to the standing of a judge of an international criminal court.<sup>258</sup> In the words of one Judge, at one time, the attitude of some Judges to such participation was of the ‘strongest possible hostility’. There would also appear to be a concern about creating a public perception that Judges are still enhancing their knowledge, when they are legitimately in office because they already possess the qualifications for appointment to the highest judicial offices in their national jurisdictions.

431. Article 7(3) on the principle of diligence of the Court’s own Code of Judicial Ethics provides that ‘Judges shall take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office’. Moreover, professional development, also referred to as ‘continuing judicial education’, is now generally accepted in the highest courts in many jurisdictions as an integral part of the judicial life of judges. In many of those jurisdictions the obligation upon judges to pursue continuing professional development is mandatory, and incorporated in judicial codes of conduct. Judicial education is now the norm in civil law jurisdictions and their common law counterparts.<sup>259</sup>

432. The information available to the Experts is that some years ago, the term ‘judicial capacity strengthening’ did not gain wide acceptability among Judges, and the term ‘judicial training’ is of more common usage in the Judiciary. The Experts note that Article 31 of the Declaration of Paris on the Effectiveness of International Criminal Justice, adopted by representatives of international courts and tribunals, including the Court, calls for the ‘continuous education’ of judges and legal officers.<sup>260</sup>

433. The phrases ‘judicial education’, ‘continuing professional legal education’ or ‘collegial judicial education’ are now widely accepted and employed, both nationally and internationally, including by other international organisations.<sup>261</sup> Reference can also be made to the World Intellectual Property Organisation’s ‘Continued Judicial Education on Intellectual Property (IP)’ programme designed by judges for judges and other members of the Judiciary.

434. A judge’s participation in a professional development programme is in no way a commentary on judicial credentials; on the contrary, it is simply a means of augmenting a judge’s knowledge and skills, and enhancing the particular context and environment in which the Court dispenses justice. It is a supplement to judicial efficiency. As the conduct and content of the intensive Induction Programme or any professional development initiative would remain the full responsibility of and under the control of the Presidency, no interference or threat to judicial independence arises.

435. A starting point for a continuous professional development programme could be the Judges’ annual retreat, a most meaningful initiative by the Judiciary. The opportunity could be taken to build into its content, as a regular feature, a professional development component. Judges would also benefit greatly from a structured and phased programme presented throughout their judicial tenure. The acceptance by Judges of continuous professional development and increased knowledge and skills acquisition in the various fields of relevance to the Court would further enhance judicial performance.

436. Again, taking a lead from many superior courts in national jurisdictions, throughout their tenure, judges benefit from and participate in such programmes aimed at acquiring deeper knowledge of new and developing areas of the law, and exchanging best court

<sup>258</sup> See also, Daniel Terris, Cesare P.R. Romano, Leigh Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World’s Cases*, (Brandeis University Press: 2007), pp. 208-209.

<sup>259</sup> Joby S. Goldbach, ‘From the Court to the Classroom: Judges Network in International Judicial Education’ (2016) 47(3), *Cornell International Law Journal*, p. 634; see also the [European Judicial Training Network \(EJTN\)](#), which organizes trainings, language courses and exchanges for judges from the EU.

<sup>260</sup> See [Paris Declaration on the effectiveness of international criminal justice](#) (2017).

<sup>261</sup> See Sandra Oxner, ‘Judicial Education: A Key Component of Reform’, in Waleed Haider Malik, Carlos Esteban Larios Ochaita (eds) *Furthering Judicial Education in Latin America, Conference of Judicial Schools in Latin America*, World Bank, Technical Paper no: WTP 528, W.D.C.(2002) pp. 76-79; among regional and international organisations focusing on the subject are the OECS Judicial Education Institute of the Eastern Caribbean Supreme Court; the Commonwealth Judicial Education Institute and the International Organization on Judicial Training (IOJT), which has as over 123 member Judicial Education Institutes from about 75 countries.

practices. For the Judiciary at the Court, topics could include forensic science and the law; law relating to the tracing, seizure and forfeiture of assets; electronic and digital evidence; reparations project management, and many more. Presentations by noted academics on current controversial issues relative to the work of the Court might be included.

437. The proposed professional development programme for any given year should extend far beyond the topics relevant to the daily diet of the Court. The Hague is constantly visited by world-renowned international law experts, as well as experts in other areas related to international peace and security. There is a readily-available galaxy of international speakers with whom the Chambers might have a conversation about aspects of international law or, indeed, unrelated topics of interest. The idea is to devise a comprehensive programme of a handful of meetings over the course of the year to bring the Judges together in a collegial setting with renowned and interesting experts in a variety of subjects.

438. It is laudable that since 2018, the Court has been organising an Annual Judicial Seminar at The Hague, attended by Judges, a number of Presidents of Supreme Courts from States Parties, as well as Presidents and Judges of other international and regional courts. These half-day seminars, organised on a minimal budget, have assembled on an average 50 participants. The two thematic subjects for the Judicial Seminar held on 23 January 2020 were ‘Use of Time Limits for Issuance of Decisions in Criminal Proceedings: Experiences and Perspectives’ and ‘Separate and Dissenting Opinions’. In the Experts’ opinion, this initiative merits further development, in terms of the content, duration, and participants from States Parties’ highest courts. Progressively, the forum should provide a real opportunity for intensifying the exchange of experiences between ICC Judges and those from other international, regional and national courts on subjects of common interest, jurisprudence and best judicial practices.

### **Recommendations**

**R174.** The Presidency should design and organise a compulsory, intensive and comprehensive Induction Programme of sufficient duration for new Judges, soon after commencement of their judicial mandate, and in cooperation with other partners and stakeholders. The contents of the re-designed induction should be tailor-made (taking into account the background and profiles of the newly elected Judges), with sufficient consideration given to the subjects proposed by the Experts.

**R175.** The Presidency should also design and organise annually a Continuing Professional Development Programme of a series of events in The Hague and elsewhere at which the Judges can engage with experts in international law and other professional activities to address matters of interest relevant to the development of their professional, scientific and cultural knowledge, skill and experience, including therein an event similar to the current Judges Annual Retreat.

**R176.** The Presidency should consider, in the organisation of the re-designed Induction and Professional Development Programmes, obtaining the advice, cooperation and support of universities, institutes and other organisations with recognised experience in professional development in the subject areas intended for the programme.

**R177.** The Court should consider developing further the Annual Judicial Seminar, including its content, duration and participants from State Parties’ highest courts.

## **B. Full-Time Service of New Judges**

### **Findings**

439. One of the key issues of concern raised with the Experts centres on the calling to serve full-time at the Court by the Presidency<sup>262</sup> of six newly-elected Judges. The Experts heard the concerns by some that the call to full-time service in March 2018 might have been motivated by inappropriate or extraneous considerations such as the election of the new

<sup>262</sup> [Rome Statute](#), Art. 35(3).

Presidency. It was suggested further that the decision was motivated not by the workload of Chambers, but rather by election campaign promises or pledges made by some of the newly elected Judges.

440. The six new Judges to the Court were elected at the Sixteenth Session of the ASP held in New York, from 4-14 December 2017. They made solemn undertakings under Article 45 of the Statute on 9 March 2018. The Presidency, on 16 March 2018, assigned or reassigned all the 18 Judges of the Court to Divisions and Chambers under Article 39(1) and Rule 4 bis (2) RPE.<sup>263</sup> This was on the basis of many factors, including the current level of activity in cases. Regulation 9(1) of the Regulations of the Court provides that the term of office of Judges shall commence on the 11th of March following the date of their election.<sup>264</sup> The Presidency, after consultation with the six Judges, called them to assume full-time service, which they all did, effective on 11 June 2018.<sup>265</sup>

441. The 2018 Programme Budget had provided for the call to serve full-time of only four of the six newly-elected Judges, immediately upon their swearing in on 9 March 2018, workload justifying it. Moreover, at the time the six Judges were called to serve full-time, two of the departing Judges, whose terms of services had expired, had had their judicial mandates extended under Article 36(10) in order for them to complete cases that had commenced, but had not been concluded.

442. For a period this elevated the number of Judges serving full-time to 20, whereas the Court's full complement of Judges, under Article 36(1), is 18 Judges. The 2018 Programme Budget made provision for only the latter number. This may also have compounded the disquiet.

443. Given the three-year election cycles in which six new Judges are elected to fill one-third of the Court's full complement of 18 Judges, the calling of Judges to serve full-time is foreseeable at every periodic election. In this regard, it is worth noting that at the forthcoming 19th session of the ASP to be held from 7-17 December 2020 in New York, six new Judges will be elected for a term of nine years (2021-2030) to fill the vacancies of six outgoing Judges whose mandates will expire on 10 March 2021. The propriety of calling to serve full-time and when to do so is, therefore, destined to resurface.

444. Although Judges are elected as full-time members of the Court and are to be available to serve full-time from the commencement of their terms of office, the Presidency has the discretion, on the basis of the workload and in consultation with its members, to decide the extent to which newly-elected Judges shall be required to serve on a full-time basis.<sup>266</sup> This arrangement is without prejudice to Article 40 on the independence of Judges. Since the establishment of the Court, not all Judges have served their nine years term of office on a full-time basis.

445. Following the calling of the six new Judges in 2018, the Second Vice-President addressed this issue before The Hague Working Group through the Budget Facilitation on 12 April 2018. The President did the same before the Committee on Budget and Finance on 16 April 2018.<sup>267</sup> In sum, they explained that the calling to full-time service of the six newly-elected Judges had been made in consultation with them and was essentially grounded on (i) the need to replace the departing Judges, (ii) the current and projected workload, (iii) other judicial workload considerations requiring the presence of the whole complement of 18 Judges and (iv) affording fair and equal treatment to the Judges concerned, given the effect the calling to service full-time has on the calculation of their repatriation allowance and

<sup>263</sup> Decision assigning judges to divisions and recomposing Chambers, [ICC-Pres-01/11-59](#), 16 March 2018; See also, Decision assigning judges to divisions, [ICC-02/04-01/15-209](#), 13 March 2015; see also [Rome Statute](#), Art. 39(1); [RPE](#), Rule 4 bis(2).

<sup>264</sup> [Regulations of the Court](#), Regulation 9(1).

<sup>265</sup> Judge Marc Perrin de Brichambaut, Second-Vice President of the International Criminal Court, *Remarks to the Budget Facilitation on the 'budget issues relating to (re)assignment of judges'*, The Hague, 12 April 2018; Judge Chile Eboe-Osuji, President of the International Criminal Court, *Remarks to Committee on Budget and Finance*, The Hague, 16 April 2018.

<sup>266</sup> [Rome Statute](#), Art. 35(3).

<sup>267</sup> *Supra* n 265.

pension, their entitlement to other rights such as permanent disability and survivor pension, and the payment of their full-time salary.

446. It may be recalled that the newly-elected Judges, at the time they made their solemn declaration on 9 March 2018, had expressed a wish to be called to serve full-time together.<sup>268</sup> The President furthermore informed the Committee that there were strong and serious bases for the assumption of full-time duties of the new Judges on 11 June 2018.<sup>269</sup>

447. As indicated above, any delay in the calling of newly-elected Judges to serve on a full-time basis has financial implications. It affects their future repatriation and pension rights at the Court, and for some Judges may also affect their rights to employment arising out of any domestic legal obligation to forthwith terminate their employments in their home countries once elected as Judges at the Court.<sup>270</sup> In March 2018, during consultations, all the newly-elected Judges had indicated to the Presidency that, following their elections, they had resigned from their previous posts.<sup>271</sup> The significance of being called to serve full time was emphasised by Judges past and current. In the words of one Judge: ‘To be called or not called to serve full-time is of significant interest to a newly-elected Judge; it is also “a matter of fairness”’.

448. In addition, in the past, the distinction between full-time and part-time Judges has been known to create undesirable tension among members of the Judiciary.<sup>272</sup> There have also been instances, the Experts were informed, of political pressure on the Presidency by a small number of States Parties to call their elected Judges to serve full-time.

449. In the Experts’ opinion, it is crucial that any call to serve full-time meets the dictates of Article 35(3), and that in determining the matter the Presidency exercises its discretion appropriately.

450. Given the serious concern raised surrounding the 2018 calling to full-time service of Judges, it is important that there be increased transparency. The Presidency should provide reassurance to States Parties, the Court and other stakeholders that any future calling of newly-elected Judges to serve full-time will be guided by the workload, following consultation among the members of the Presidency, as expressly provided for in Article 35(3). Any calling to service full-time or otherwise should be dictated solely by the interests of the Court and not the self-interests of any Judge.

451. The call to full-time service is also a matter of succession planning. Because the Court is required to operate on a tight budget, the concern will often arise, as the end of the term of one-third of the Judges approaches, that cases may overrun and result in the necessary extension of the terms of Judges under Article 36(10) of the Statute. The Presidency should consider deferring the call to serve full-time of some of the newly-elected Judges until the overrunning Judges have completed their trials or appeals. An alternative approach to proper succession planning is the synchronisation of the judicial workload and appointed time of the conclusion of the nine-year term of office of departing Judges. This would require more investment in case management and proper succession planning, particularly realistic and periodic assessments of the progress of individual cases, the individual assignments of each concerned judge, the Chambers judicial portfolio and the workload assumptions for the new Judges. In addition to this, as part of the information provided to candidates before being elected as Judges<sup>273</sup>, States Parties should ensure that candidates are made aware of the possibility of not being called to full-time service immediately after being elected.

<sup>268</sup> *Ibid.*

<sup>269</sup> *Ibid.*

<sup>270</sup> ‘The Committee noted that, in accordance with Article 35(3) of the Rome Statute, the President of the Court may decide, based on workload and upon consulting his or her fellow judges, to what extent any judges not comprising the Presidency shall be required to serve full-time. In this regard and with a view to ensuring transparency about the service of judges, the Committee recommended that the text of Article 35(3) be included prominently in the note verbale seeking nominations for the election of judges, and that the Advisory Committee on Nominations of Judges ensure that judicial candidates are made aware of this provision’, Report of the Committee on Budget and Finance on the work of its thirty-first session, Item II, Consideration of the 2019 proposed programme, budget, [ICC-ASP/17/15](#) (2018) paras. 42-43.

<sup>271</sup> *Supra* n 265, p. 2.

<sup>272</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Second Edition, (Oxford University Press, Oxford: 2016), p. 680.

<sup>273</sup> See *infra* Section [XX. IMPROVEMENT OF THE SYSTEM OF NOMINATION OF JUDGES](#).

## **Recommendations**

**R178.** To afford greater transparency on the calling to serve on a full-time basis by newly-elected Judges, the Presidency should consider issuing a formal public statement intimating the decision and the grounds for making it.

**R179.** The Presidency should, with the assistance of the Registrar, give priority to and ensure effective succession planning of Judges.

**R180.** The Registrar should ensure the timely provision of full details on the conditions and terms of service of Judges, including their repatriation, pension, medical, and other entitlements and their obligations to States Parties for onward transmission to candidates for nomination.

## **C. Code of Judicial Ethics**

### **Findings**

452. Crucial to the accountability of Judges is the Code of Judicial Ethics.<sup>274</sup> Adopted by Judges over 15 years ago, it entered into force on 9 March 2005. The Code is a self-regulatory instrument that serves as a guideline. It is specifically meant to be advisory and to assist Judges in dealing with and resolving ethical and professional issues they confront. It also represents a keynote statement generated by the Judges, informing the international community and the public on the standards of judicial ethics and conduct they should expect from the Judges, and committing themselves to voluntary adherence to these standards. Nothing in the Code is intended to limit or restrict their judicial independence in any way.

453. When adopted, the Code broke new ground, and acted as a template according to which other international criminal tribunals and courts shaped their own codes of judicial ethics.<sup>275</sup>

454. The Experts were informed that the Code was purposely designed as a vague instrument. It provides little detail and some of the principles contained therein are general.<sup>276</sup>

455. A comparison of the Court's Code with a number of the Codes of other international criminal courts and tribunals adopted subsequently, and those of regional courts and others, reveal the following. First, while the preambles of the Code of Professional Conduct for judges of the UN International Residual Mechanism for Criminal Tribunals (IRMCT),<sup>277</sup> the Code of Professional Conduct for the Judges of the Special Tribunal for Lebanon (STL)<sup>278</sup> and the Code of Professional Conduct for Judges of the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>279</sup> recognise that judges are members of a collegial court, that of the Court has no mention of it.

456. Second, on integrity, while the Codes of IRMCT, the STL and ICTY 280 require judges to treat other judges and staff with dignity and respect, and not to engage in any form of discrimination and harassment, including sexual harassment and abuse of office, the Court's Code is silent.

457. Third, on public expression and association, while the Codes of IRMCT and STL bar judges in their public expressions from evincing disrespect for the views of other judges and the staff,<sup>281</sup> the Court's Code does not contain that advice.

<sup>274</sup> [Code of Judicial Ethics](#).

<sup>275</sup> Joseph Powderly, *Judges and the Making of International Criminal Law*, (Koninklijke Brill NV, Leiden, The Netherlands: 2020), p. 126.

<sup>276</sup> Daniel Terris, Cesare P.R. Romano, Leigh Swigart, *supra* n 258, p. 195.

<sup>277</sup> Code of Professional Conduct for the Judges of the Mechanism, [MICT/14/Rev.1](#) (2018).

<sup>278</sup> Code of Professional Conduct for the Judges of the Special Tribunal for Lebanon, [STL-CC-2016-4](#) (2016).

<sup>279</sup> Code of Professional Conduct for the Judges of the Tribunal, [S/2016/976](#) (2016).

<sup>280</sup> [MICT/14/Rev.1](#), Art. 4(3); [STL-CC-2016-4](#), Art. 4 (3); [S/2016/976](#), Art. 4 (3).

<sup>281</sup> [MICT/14/Rev.1](#), Art. 8 (2); [STL-CC-2016-4](#), Art. 8(2).

458. Fourth, while the ICC Code does not apply to former Judges, the Code of Conduct for members and former members of the Court of Justice of the EU does apply to both current and former judges.<sup>282</sup>

459. Taking into account the above, including the experiences gained by the Court since the adoption of the Code in 2005, and the continued development of jurisprudence and best practices in codes of judicial ethics in national, regional<sup>283</sup> and international courts and tribunals, the Experts are of the opinion that the Code of Judicial Ethics is in need of review and updating as a matter of priority.<sup>284</sup>

460. Some of the additional matters that should be considered in revising the Code include post-decision public communications by Judges, and specifying appropriate relationships and interaction between representatives of States Parties and civil society organisations and Judges in the performance of their judicial duties.

461. Taking into account that the Judges are already duty-bound by the solemn undertaking under Article 45 and Rule 5, made before they exercise their judicial mandate and which is applicable throughout their tenure,<sup>285</sup> the Code's deontological nature and the expression of principles or standards of ethical conduct contained therein, it bears emphasis that Judges should be obliged to abide by the Code, and ensure its utmost respect.

### **Recommendations**

**R181.** The Presidency should undertake, as a matter of priority, a review directed to update and strengthen the Code of Judicial Ethics.

**R182.** The Presidency should include in the Code an express prohibition of inappropriate campaigning and pledges, promises or indications in the election of the Presidency and for any other judicial leadership position.

**R183.** The Presidency should, in reviewing the Code, consider comparable Codes of other international criminal tribunals and courts, as well as regional and national courts, and take into account lessons learnt and other relevant developments.

**R184.** The Presidency should consider including in the Code a provision requiring its review and update at least every five years.

## **D. Judicial Collegiality**

### **Findings**

462. A lack of collegiality in the Judiciary was identified by many States Parties, Judges (both current and former), civil society organisations, scholars, and individuals as a factor contributing to the lack of a continual and productive working relationship among Judges.<sup>286</sup> At times, it is said to have posed a major challenge to efficient and effective judicial decision-making, including attempts to strive towards unanimity. That members of the Judiciary have themselves identified this as a legitimate challenge is most positive. As remarked by one Judge: 'Collegiality is practised; the issue is in its full realisation'.

463. From the Experts' consultation process, this lack of collegiality is said to have manifested itself in a variety of ways: poisonous relations, both judicial and personal,

<sup>282</sup> Code of Conduct for Members and former Members of the Court of Justice of the European Union, [2016/C483/01](#) (2016).

<sup>283</sup> E.g. Caribbean Court of Justice, [Code of Judicial Conduct](#) (2013).

<sup>284</sup> According to the Regulations of the Court, the Presidency was to draw up the Code of Judicial Ethics after consulting the Judges, the draft Code was then to be transmitted to the Judges in a plenary session for the adoption by a majority; see [Regulations of the Court](#), Regulation 126.

<sup>285</sup> According to the RPE, the judges are required to make the following solemn undertaking: 'I solemnly undertake that I will perform my duties and exercise my powers as a judge of the International Criminal Court honourably, faithfully, impartially and conscientiously, and that I will respect the confidentiality of investigations and prosecutions and the secrecy of deliberations'; see [RPE](#), Rule 5(1)(a), see also [Rome Statute](#), Art. 45.

<sup>286</sup> See Hemi Mistry, 'The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals', (2017) 17 *International Criminal Law Review* 703-727.

following the elections of the Presidency; public expressions of the lack of respect by a Judge towards other Judges; limited Chamber deliberations; excessive adherence and devotion to a Judge's own legal system; very late circulation of draft written decisions; infrequent intra-Chamber and intra-Division communications; existence of cliques, factions or open friction among Judges; lashing of disparaging comments on colleagues on the issuance of decisions; deliberate snubbing of associates; persistent failure to reach unanimity; and non-communication.

464. Instances were mentioned of the over-reliance by a few Judges on legal officers. Such a relationship can, among other things, stand in the way of effective judge-to-judge communications or deliberations, including on cases and other substantive issues requiring joint and collegial decision-making by Judges. Moreover, because of this, issues which should be resolved by constructive inter-judge dialogue and deliberations are instead unduly laden on legal officers by this over dependency and what could possibly be regarded as avoidance of judicial responsibility.

465. The Experts were informed of recent controversial interpretations of the law and authoritative accounts of working relationships among Judges breaking down to the point that they could not communicate directly with one another or deliberate together in Chambers. These reports have persuaded the Experts of the need to include within their Report specific recommendations on the development of processes and procedures to promote coherent and accessible jurisprudence and decision-making.

466. The Experts do not seek in any way to present an exhaustive analysis of the judicial behaviour of the bench or to fully explain the dynamics and decision-making processes in each and every decision or in the Chambers. While the fact that the instances mentioned have occurred since the Court's establishment and at a variety of different times signals a non-collegial working environment, the whole picture is more complex.

467. Taking into account the overall judicial output, working environment, longevity of the interactions within Chambers, and the numerous joint initiatives and marked efforts to improve processes, procedures and working methods made by members of the Judiciary, it is certainly not the case that lack of collegiality was or is the custom or a systemic pattern of conduct and occurrence in all the Chambers and at all times. The Experts were also informed that collegial relations, as well as a collegiate atmosphere, fully prevail in the Presidency<sup>287</sup> and in a majority of the Chambers.

468. A number of significant outcomes have been realised by the Judiciary working together and in harmony. These include the Chambers Practice Manual, Guidelines on Judgment Drafting and proposals on amendments to the RPE and Regulations. These and other judge-driven initiatives do evidence collegiality. Collegiality was also a subject at the Judges' Annual Retreat in 2018. However, as candidly admitted to the Experts by members of the Judiciary and others, in a few Chambers and at various moments, collegiality was at its lowest or even absent.

469. Considering the centrality of collegiality to the Rome Statute system and the working of the Court, and having regard to the adverse effect that the absence of collegiality can have on the work of the Court, close attention should be paid, and priority given, by the Presidency and all the members of Chambers, to promoting a greater spirit of judicial collegiality. High quality justice, as suggested by one of the former Presidents of the Court, cannot be ensured by an international tribunal 'by the efforts of individual Judges acting on their own, but requires that Judges are able to work collegially with others, within each Chamber and across Chambers and Divisions'.<sup>288</sup>

470. The Rome Statute framers intended the Court to be a collegiate one. All Judges are of equal status and serve an identical tenure; the Appeals and the other Chambers (i.e. Pre-Trial and Trial) are respectively composed of five and three Judges; decision-making, by the multi-

<sup>287</sup> See [Regulations of the Court](#), Regulation 11(1). The members of the Presidency shall attempt to achieve unanimity in any decision taken in carrying out their responsibilities under Article 38 (3), failing which any such decision shall be taken by majority.

<sup>288</sup> Silvia Fernandez de Gurmendi, 'Selection, Competence, Collegiality, Symposium on The Rome Statute at Twenty', (2018) 112, AJIL Unbound, pp.163-167, p. 166.

judge panels and its outcome were meant to be a collegiate product.<sup>289</sup> Furthermore, Article 74(3) requires the Judges of the Trial Chamber to attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the Judges.<sup>290</sup> They share a common frame of reference in the Rome Statute system and the Court. Collegiality promotes public confidence and trust and is in the common interest of the Judges and the Court.

471. Neither is there a magic formula for attaining optimal collegiality, nor is it appropriate for mandatory legislation. It is essentially a combination of many undertakings, institutional and others - a process, procedure, method, custom, practice, behaviour, culture and mindset.

472. As mentioned above, Article 74(3) of the Statute requires Trial Judges to attempt to achieve unanimity in reaching a decision. Should it not be available, Article 74(5) provides that the decision shall contain the majority and minority views.<sup>291</sup> Thus it bears acknowledging that it should be accepted as a fact of judicial life that in judicial decision-making unanimity will not always result. Articles 74(5) and 83(4) of the Rome Statute plainly accept and legitimise this. It is also a matter of the independence of Judges safeguarded in Article 40(1). This issue is also specifically addressed in relation to the coherence and consistency of the Court's jurisprudence.

473. Another essential ingredient of collegiality is the quality of working relationships. Other elements that may be considered by the Judiciary for encouraging and promoting increased collegiality include: an increase in the flow of information and multi-way communication among Judges; the consideration and appreciation of alternative or different points of view or perspectives; respectful disagreements and differences of opinion; accepting, conceding or moderating one's own views; understanding the nature of the Court being an international institution governed by specific rules, where national provisions and practices should not necessarily be promoted or indirectly applied in order to solve substantive or procedural questions; purposeful deliberations; timely circulation and re-circulation of draft decisions and opinions; striving for unanimity and endeavouring to a common outcome; promotion of the Court's interest rather than the pursuit of self-interest. All these require openness, effort and, most important, sincere commitment and ownership by all Judges.

## **Recommendations**

**R185.** The Presidency and the Presidents of the Divisions and Chambers should as a matter of priority actively and continuously promote a more cohesive judicial culture of collegiality in the discharge of the judicial functions of Judges and Chambers.

**R186.** The Presidency should consider including or reintroducing collegiality as a subject for facilitated discussion among Judges at the Induction Programme for new Judges, the Judges' Annual Retreat or other judicial professional development events.

**R187.** The Presidency should consider the incorporation of a reference to collegiality in the Code of Judicial Ethics.

**R188.** The Presidency should, in consultation with the Judges, consider more specific measures and the issuance of guidelines designed to foster collegiality, including improvements in the quality of the working relationships, through (i) improved methods and means of communications, (ii) increased intra-Chamber and intra-Division dialogue and discussions, (iii) augmented intra-Division consultations, (iv) promoting the awareness that lack of collegiality leads to dysfunctionality of Chambers, affects the final result of their work and as a consequence also the credibility of the Court, and (v) reinforcement of mutual respect and trust among Judges, and between Judges and staff.

<sup>289</sup> [Rome Statute](#), Art. 39(1)-(2).

<sup>290</sup> *Ibid.*, Art. 74(3); see also in respect of the Appeals Chamber, Art. 83(4).

<sup>291</sup> [Statute of the International Tribunal of the Law of the Sea \(ITLOS\)](#), Art. 30(3) entitles a judge to deliver a separate opinion where he or she does not represent in whole or in part the unanimous opinion of the members of the Tribunal.

## X. EFFICIENCY OF THE JUDICIAL PROCESS AND FAIR TRIAL RIGHTS

### Findings

474. The mandate of the Experts involves a review of the efficiency of the judicial process, cutting across all stages of the proceedings at the Court. By engaging with both current and former Judges, staff, external counsel, civil society and academics, the Experts heard several concerns relating to issues that pertained to the Court's efficiency in terms of the conduct and completion of its judicial proceedings. A number of issues affecting the efficiency and effectiveness of judicial process have been addressed in other sections of this Report.<sup>292</sup> Various other issues relating to judicial process were also raised. Many interlocutors of the Experts were critical about the lack of consistency in the way different Chambers deal with the same issues, the failure to apply agreed procedures, delays in the delivery of decisions and judgments, fractured decisions, and the acceptance of applications through procedures not provided for under the Rome Statute. Some of these warrant particular focus. While certain issues pertain to all three stages, i.e. Pre-Trial, Trial and Appeals, others are specific to particular stages. The Judges to whom the Experts spoke are already aware of weaknesses in the practices of the Court and have undertaken steps to address some of them. The Judges have also helpfully pointed out those on which they hope that the Experts will provide useful recommendations.

#### A. Pre-Trial Stage

475. Concerns were expressed that the pre-trial stage is lengthy and cumbersome at times. In addition, it was suggested that practices followed by different Chambers can be inconsistent and contradictory; that the roles of the Pre-Trial and Trial Chambers are duplicated; that some decisions rendered are unnecessarily voluminous. It was further suggested that some Chambers fail to order the application of the protocols regarding e.g. disclosure, redactions and witness protection that were used in previous cases, and by doing so prevent the development of consistent and well-understood procedure. On some occasions, the agreed practices, such as the appropriate form for a confirmation of charges decision, are not being followed.

#### 1. Disclosure of Evidence

476. Areas that were the subject of particular concern were the disclosure of evidence and measures for witness protection, including redactions, during both the pre-trial and trial stages. Accounts were given of alleged regular violation of the Prosecutor's disclosure obligations (regulated by the Statute and RPE), by seeking to disclose new incriminating evidence after the disclosure deadlines set by Chambers.<sup>293</sup> This has occurred in some cases after the commencement of the trial, notwithstanding the fact that the Prosecutor had been in possession of such evidence for months prior to disclosure. In one of the submissions it was stated that the reason advanced for the failure by the Prosecutor to disclose the evidence in a timely manner for the preparation of the defence, under Rule 77, was explained as an 'oversight error'. It was submitted that often, the evidence was disclosed very shortly before the witness was called to testify.

477. The RPE provide for time limits for the submission of incriminating evidence: 30 days before the confirmation hearing, and for new evidence 15 days before the confirmation hearing.<sup>294</sup> The time for the disclosure by the Defence is also 15 days before the confirmation

<sup>292</sup> See *infra* Section [XI. DEVELOPMENT OF PROCESSES AND PROCEDURES TO PROMOTE COHERENT AND ACCESSIBLE JURISPRUDENCE AND DECISION-MAKING](#).

<sup>293</sup> [Rome Statute](#), Art. 61, 67(2); [RPE](#), Rules 77, 81-82.

<sup>294</sup> [RPE](#), Rule 121(3)-(4).

hearing.<sup>295</sup> Failure to adhere to these time limits causes delays in the proceedings. In that context, consideration should be given to the consequences of such failure provided for in Rule 121(8). In a procedural Order early in the confirmation process, it should be made clear by the Chamber/Single Judge, in the clear prescriptive terms of Rule 121(8), that evidence presented after the time limit has expired shall not be taken into consideration in the absence of compelling reasons justifying its late presentation.<sup>296</sup> The failure to give effect to Rule 121(8) appears to be a major factor causing delay in pre-trial proceedings.

478. However, in light of the rights of the accused and rights of the victims, application of Rule 121(8) should be thoroughly reassessed. That should be done in conjunction with consideration of the absence of adequate sanction for failures in disclosure of Rule 77 material, bearing in mind that Article 71 is not applicable in the absence of evidence of deliberate conduct.

479. The Experts were informed that the word ‘disclosure’ has featured constantly as a major, if not the primary, factor in determining the duration of proceedings at the Court. In the Experts’ experience, this was also a frequent problem in other international criminal tribunals. There is a danger that it will come to be accepted within the Court as an unavoidable problem that will always just have to be managed. It is nonetheless recognised that dealing with disclosure has become increasingly difficult with the proliferation of material relating to events that are the subject of the Court’s trials. On the other hand, the very features of our digital age which cause the proliferation of available material should be capable of being harnessed to aid the identification of what matters and what does not.

480. It was submitted that during the confirmation stage the Prosecutor does not commence redaction and disclosure until the Chamber first adopts a redaction protocol. Chambers tend to allow the Prosecution to redact and withhold a significant amount of information or to rely on anonymous summaries of statements during the pre-confirmation process. According to counsel who spoke to the Experts, this means that it is very difficult to conduct effective Defence preparation and investigations during this phase. Once the charges are confirmed, however, the redactions have to be reviewed.

481. Since disclosure, including the related subject of redactions, is probably the most significant factor in causing international criminal trials to last so long and since the problems it causes appear to be endemic, it requires special attention. It should be made the subject of urgent review. Any review would require the cooperation of staff throughout the OTP in view of the detailed nature of the problem. The review team should be chaired by a Judge and should include a senior prosecutor, a senior member of Chambers staff, the Head of OPCD and the President or nominee of the ICCBA.

482. The Experts have observed that working groups within Chambers have previously been established to deal with matters concerning disclosure and redactions.<sup>297</sup> Unfortunately, work on these subjects appears to have been discontinued. The Experts note this with concern, particularly in light of the obvious need for review.

## 2. Confirmation of Charges

483. The confirmation of charges process was indicated by many of the Experts’ interlocutors as problematic and requiring improvement. The drafters of the Rome Statute designed the whole pre-trial phase with the aim to define clearly the charges against the suspect. That was intended to shape the scope of the trial. The pre-trial proceedings were intended to constitute a filter, allowing only those charges that meet the test of confirmation to proceed to trial. This appears not to have been universally appreciated by Judges. Some concerns were also relayed by the OTP, which is faced with contradictory rulings on procedural issues, such as witness proofing, admissibility of evidence and some aspects of evidence evaluation. Some in the OTP state that these inconsistencies are partly responsible for the undue length and complexity of pre-trial proceedings.

<sup>295</sup> [Rome Statute](#), Art. 61(4); [RPE](#), Rule 121(5).

<sup>296</sup> See *infra* R192 (p.164).

<sup>297</sup> International Criminal Court, Presidency 2015-2018: [End of Mandate Report by President Silvia Fernández de Gurmendi](#), (2018), p. 8.

484. The requirement that the charges set out in the Document Containing Charges (DCC) must be considered by a Pre-Trial Chamber and confirmed in order to proceed to trial, as provided by the Rome Statute, does not exist in other international courts or tribunals. Those involved in work at both pre-trial and the trial level expressed concerns about the structure of the DCC. They referred to the efforts required of Chambers on occasion to ‘extract’ from its content a precise description of charges, including the material facts and circumstances related to them, and to relate them to the supporting evidence. Moreover, it was claimed that the structure of decisions confirming the charges failed to clearly delineate the charges separately from the legal analysis. An integral part of the pre-trial stage is to set out clearly the charges that have been confirmed for trial. Not having clearly defined charges has also been attributed as a factor for delay in the start of trials. This is linked with the need for consistency with regard to the evidence threshold and the level of detail required at this stage. It is therefore only right to underline here that the Judges have already taken steps to unify and make more efficient the practice at pre-trial with regard to the extent that live evidence should be presented during the confirmation hearing.<sup>298</sup> The Chambers Practice Manual provides that the use of live evidence should be exceptional and subject to authorisation by the Pre-Trial Chamber.

485. In spite of that, the evidence threshold required for confirmation and its application remain unclear in light of continuing inconsistent approaches which have been attributed to decisions of the Appeals Chamber pertaining to the amount of evidence and the level of detail required. That seems to reflect an inconsistent understanding of the role of the Pre-Trial Chamber, whether it is effectively a filter to sift out weak charges or is instead required to comprehensively set out the scope of the case and prepare for trial by examining the witnesses and assessing the wider volume of evidence. In the case of Lubanga however, the Appeals Chamber clearly said ‘there can be no doubt that the decision on the confirmation of the charges defines the parameters of the charges at trial’.<sup>299</sup>

486. Article 61(5) of the Statute, which regulates the process, allows scope for judicial interpretation, which has led to non-consistent application of the provision. To date, different Pre-Trial Chambers have expressed diverse understandings of that provision and presented contradictory interpretations of it. In some of the cases, the Pre-Trial Chamber has been involved in hearing a significant volume of evidence, including hearing many of the witnesses presented by the parties. Reading the decisions and separate opinions of some Judges of the Pre-Trial Division shows one understanding of the role of that stage is that ‘the role of the Pre-Trial Chamber (...) is not to conduct a “marginal assessment”’.<sup>300</sup> Rather, its role, *inter alia*, is to ‘provide a clear and well-reasoned decision, which presents a full account of the relevant facts and law in order to reveal transparency of the judicial process and guarantee a considerable degree of persuasiveness’.<sup>301</sup> Such an approach should be discouraged however for the reasons explained in the following paragraphs.

487. In some other cases, the Pre-Trial Chamber considered that it was not the correct stage of the proceedings for the bench to assess the evidence of large numbers of *viva voce* witnesses. One good example of that approach was Pre-Trial Chamber II in the case of Ruto *et al.*, which ‘in light of the limited scope and purpose of the confirmation of charges hearing, instructed the Defence teams to call a maximum of 2 witnesses per suspect’ out of 43 witnesses initially proposed.<sup>302</sup> Considering the wording of Article 61(5) indicating that the Prosecutor ‘need not call the witnesses expected to testify at the trial’, that seems to be the correct approach taking into account the purpose of the pre-trial stage as a whole. The centre piece of judicial proceedings of the Court is the trial. The only *raison d’être* of the pre-trial

<sup>298</sup> [Chambers Practice Manual](#), 29 November 2019, para. 44.

<sup>299</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, [ICC-01/04-01/06-3121-Red](#), 1 December 2014, para. 124.

<sup>300</sup> *Situation in the Republic of Mali*, Separate Opinion of Judge Péter Kovács, [ICC-01/12-01/15-84-Anx](#), 9 May 2016, para. 6.

<sup>301</sup> *Situation in Georgia*, Separate Opinion of Judge Péter Kovács, [ICC-01/15-12-Anx-Corr](#), 27 January 2016, para. 11-12; see also [ICC-01/12-01/15-84-Anx](#), paras. 6-7; Separate Opinion of Judge Marc Perrin de Brichambaut, [ICC-02/04-01/15-422-Anx-tENG](#), paras. 5-6; [ICC-01/12-01/18-767-Corr-Red](#).

<sup>302</sup> See *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Song*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, [ICC-01/09-01/11-373](#), 23 January 2012, para. 14.

phase is to check on the appropriateness of the Prosecutor's charges and preparation of the case for the main trial. It should protect the rights of the defence and avoid lengthy and costly, but futile trials. There have been cases, however, which, thanks to the efficient use of the 'sifting role', were discontinued: Abu Garda,<sup>303</sup> Mbarushimana,<sup>304</sup> Kosgey,<sup>305</sup> Hussein Ali<sup>306</sup> or Muthaura.<sup>307</sup> In those cases either the Pre-Trial Chamber declined to confirm charges, or the charges were withdrawn after the confirmation decision.

488. In this context, the evidence assessment and the evidentiary threshold are the issues that require particular attention. They also have been subject to different approaches. Article 61(5), (7) provides as the evidentiary threshold the 'existence of sufficient evidence to establish substantial grounds to believe'. That formulation of the evidentiary test at the confirmation stage has been applied in different ways. Chambers agreed, however, that the evidentiary standard for the purposes of the confirmation decision should be higher than the one necessary to be reached for an arrest warrant to be issued, but lower than required for the purpose of a decision on guilt.<sup>308</sup> The term 'substantial' has been articulated in the jurisprudence of the Court in cases such as Bemba<sup>309</sup> and Ruto and Sang,<sup>310</sup> and it means in practice, that the Prosecutor 'must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning his specific allegations'.<sup>311</sup> The existing jurisprudence of the Court is clear about the purpose of the above-mentioned formulation of Article 61(7) being the protection of the suspect against wrongful prosecution and safeguarding judicial economy;<sup>312</sup> in other words for the effective preparation of the case for a fair and expeditious trial.

489. Once the confirmation hearing ends, the Pre-Trial Chamber shall deliver its findings on each of the charges within the following 60 days.<sup>313</sup> The decision confirming the charges is based on the determination of the existence of sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged (Article 61(7)(a)).<sup>314</sup> According to Article 74(2) the decision shall not exceed the facts and circumstances described in the charges and any amendments to them. The nature and purpose of the confirmation of charges process delineates the content of the decision issued on the basis of Article 61(7). As the task of the Pre-Trial Chamber is to define charges and indicate the scope of the trial, the reasoning should be confined to the following elements: determination related to the decision to confirm or decline to confirm the charges, and the arguments in support of the findings. In order to resolve the question of differences in the practices of Chambers, the Chambers Practice Manual introduced guidelines as to how the decision on confirmation of charges should be formulated.<sup>315</sup> Following the provisions of the Manual would help reach a unified approach to the content and shape of the Decision. It would avoid unduly lengthy confirmation decisions. The failure of the Pre-Trial Division to consistently follow the guidance of the Chambers Practice Manual in relation to the way the confirmation decision

<sup>303</sup> See *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, [ICC-02/05-02/09-243-Red](#), 8 February 2010; see also *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the 'Prosecution's Application for Leave to Appeal the "Decision on the Confirmation of Charges"', [ICC-02/05-02/09-267](#), 23 April 2010.

<sup>304</sup> See *The Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, [ICC-01/04-01/10-465-Red](#), 16 December 2011; see also *The Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of the Prosecutor against decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', [ICC-01/04-01/10-514](#), 30 May 2012.

<sup>305</sup> [ICC-01/09-01/11-373](#).

<sup>306</sup> See *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, [ICC-01/09-02/11-382-Red](#), 23 January 2012.

<sup>307</sup> *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the withdrawal of charges against Mr Muthaura, [ICC-01/09-02/11-696](#), 18 March 2013.

<sup>308</sup> [ICC-01/09-01/11-373](#), para 40.

<sup>309</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, [ICC-01/05-01/08-424](#), 15 June 2009, para. 27.

<sup>310</sup> [ICC-01/09-01/11-373](#), para. 40.

<sup>311</sup> [ICC-01/05-01/08-424](#), para. 29.

<sup>312</sup> [ICC-01/09-01/11-373](#), para. 41.

<sup>313</sup> [Regulations of the Court](#), Regulation 53.

<sup>314</sup> [Rome Statute](#), Art. 61(7)(a).

<sup>315</sup> [Chambers Practice Manual](#), paras. 63-64.

should be set out has been observed in some cases.<sup>316</sup> The formulation of the decision confirming the charges in the Ongwen case is, however, an example of the clarity that would result were the Division as a whole to adhere to the agreed recommendation contained in the Chambers Practice Manual.<sup>317</sup>

### 3. Length of Pre-Trial Stage

490. The length of pre-trial proceedings is an issue that requires to be addressed. The data available online establishes that the average length was 362 days. While no statutory timeline for the pre-trial stage exists,<sup>318</sup> the issue of timelines was recently addressed by the Judges and included recommended deadlines for various proceedings pertaining to all three judicial Divisions. The result appears in the amendment of the Chambers Practice Manual.<sup>319</sup>

491. Important factors affecting the length of proceedings at the pre-trial stage relate to frequent requests of the OTP for postponement or amending the DCC; frequent requests for extension of page limits (as was the case for the DCC in *Al Hassan and Yekatom and Ngaïssona*);<sup>320</sup> and the quantity of documents submitted by the Prosecutor even after the confirmation. Such OTP practices, however, may be linked to the inconsistent pre-trial procedures, obliging the OTP to attempt to satisfy all of the, sometimes contradictory, requirements of Chambers. The length of the pre-trial stage also has an impact on the rights of the detainee, as the arrested accused generally remains in custody throughout the pre-trial phase.

492. There appears to be an overall need to enhance and further develop proper and effective case management at the pre-trial stage in order to refine proceedings and avoid an overlap with the proceedings at trial and unnecessary delay. The existing legal framework, together with written compilations of recommended agreed practices, to a great extent allows for conducting speedy and efficient proceedings.

493. For all the reasons mentioned above, the overall assessment of the pre-trial stage as not serving the scope of sifting weak cases is widespread. A lengthy process, which does not conclude with precisely defined charges, does not seem to satisfy the intent of the drafters of the Rome Statute. Moreover, protracted pre-trial proceedings have no visible benefits in preparing the case for trial. The efforts of the Judges who developed the Chambers Practice Manual, including the recently introduced timelines, and addressed deficiencies in the way the proceedings were run, are to be commended. The need, however, for practice to be consolidated appears evident in order to avoid the overlapping and duplication of certain activities at both pre-trial and trial stage.

494. Several Judges and counsel emphasised the need for the investigation being completed before the initiation of proceedings. A suggestion put forward by Judges consisted of a requirement upon the Prosecutor, at the commencement of the proceedings, to specify clearly the stage reached in the investigation. Trial non-readiness by the OTP was mentioned as one of the main reasons for the lengthy pre-trial phase. The Experts commend the efforts of the Judges to include that element in the Chambers Practice Manual.<sup>321</sup> Furthermore, in its most recent Strategic Plan, the OTP included the aim of being trial-ready ‘as early as possible in

<sup>316</sup> See for example, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Version publique expurgée du Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l’encontre d’Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf, [ICC-01/12-01/18-767-Corr-Red](#) 8 May 2020; *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Corrected version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice –Edouard Ngaïssona’, [ICC-01/14-01/18-403-Red-Corr](#), 14 May 2020.

<sup>317</sup> *The Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, [ICC-02/04-01/15-422-Red](#), 23 March 2016.

<sup>318</sup> [Regulations of the Court](#), Regulation 53.

<sup>319</sup> [Chambers Practice Manual](#), paras. 2, 87-92.

<sup>320</sup> *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision Postponing the Date of the Confirmation Hearing, [ICC-01/12-01/18-94-Red-tENG](#), 20 July 2018; *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the ‘Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines’, [ICC-01/14-01/18-199](#), 15 May 2019.

<sup>321</sup> [Chambers Practice Manual](#), para. 14.

the judicial proceedings and in any event no later than the confirmation of charges hearing'.<sup>322</sup> This approach should ensure better quality evidence during the pre-trial phase, and may lead to the completion of investigations before a DCC is filed.

495. In this context, the need for cooperation between the Chambers and the OTP is evident. It is worth pointing out that from the moment of the first appearance of the accused in court in terms of Rule 121 of the RPE, control of the process should be in the hands of the Chamber and in particular of the Single Judge. The time to impress on the parties that the Court is in control and intent on ensuring the smooth and expeditious progress of the confirmation process is at that hearing or at a hearing held shortly thereafter. If in the view of Chambers the OTP should be trial-ready when the accused appears, then early action is appropriate. Consideration should be given, therefore, to the possibility of the 'early' issuance of an Order for disclosure under Article 61(3) and Rule 121(2) and any other order the Chamber considers appropriate to shorten the proceedings.<sup>323</sup> It is understood that the members of the Pre-Trial Division have been meeting with the OTP at least once a year to discuss matters of mutual interest. Such meetings are ideal as a forum for discussion to try to find ways to speed up the early stages of the process without in any way undermining the fairness of the proceedings.

496. It is important that the pre-trial stage be conducted in the manner that makes it both beneficial for the efficiency of the Court, as well as a safeguard for the rights of the accused. As demonstrated above, the present manner in which these proceedings are being conducted is wanting. The Experts are of the view that the provisions in the Chambers Practice Manual pertaining to conduct of the confirmation of charges hearings and the structure of the decision, as well as the amendments concerning timelines are particularly noteworthy. These address two key problems identified with the pre-trial stage: the length of the confirmation process as a whole, and the need to ensure that the charges are clearly defined. The latter ought to be clear for the Trial Chamber to be able to commence and proceed with its work, as well as to safeguard the rights of the accused. Adhering to the Chambers Practice Manual provisions will enhance one particularly lengthy phase of judicial work, Phase 2, the trial preparation stage. This will allow for the pre-trial stage to maintain its gatekeeping role whilst assisting in the preparation for trial and streamlining the process.

497. While the present model of confirmation is more streamlined than the proceedings in the Lubanga case were, there is still scope for further enhancing the efficacy and expeditiousness of this stage of proceedings. Apart from ensuring that the progress made in this area is documented in the Chambers Practice Manual, the Experts have recommended that this subject be included in the new Induction Programme for new Judges.<sup>324</sup>

498. The Experts note that, as foreseen in the Statute and the Rules, the Court has been designating a Single Judge for a range of decisions, particularly at the pre-trial stage. These include the following: decisions on requests for redactions;<sup>325</sup> on interim release;<sup>326</sup> decisions severing proceedings;<sup>327</sup> decisions relating to victim participation,<sup>328</sup> including decisions 'establishing principles on the victims' application process',<sup>329</sup> 'procedural rights of victims

<sup>322</sup> [OTP Strategic Plan 2019-2021](#), p.13.

<sup>323</sup> [Rome Statute](#), Art. 61(3); [RPE](#), Rule 121(2).

<sup>324</sup> See *supra* Section [IX.A](#). Induction and Continuing Professional Development.

<sup>325</sup> *The Prosecutor v. Bosco Ntaganda*, Redacted Second Decision on the Prosecutor's Requests for Redactions, [ICC-01/04-02/06-145-Red2](#), 3 July 2014; *The Prosecutor v. Germain Katanga*, Fifth Decision on the Prosecution Request for Authorisation to Redact Statements Investigators' Notes, Written Consents and documents relating to Witnesses 157, 161, 268, 279, 280 and 311 and Other Documents, [ICC-01/04-01/07-427](#), 21 April 2008.

<sup>326</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, 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, [ICC-01/05-01/08-475](#), 14 August 2009.

<sup>327</sup> *The Prosecutor v. Joseph Kony et al*, Decision severing the Case Against Dominic Ongwen, [ICC-02/04-01/05-424](#), 6 February 2015.

<sup>328</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Fourth Decision on Victims' Participation, [ICC-01/05-01/08-320](#), 12 December 2008.

<sup>329</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims' Application Process, [ICC-01/04-02/06-67](#), 28 May 2013.

at the pre-trial stage of the case<sup>330</sup> and issues concerning common legal representation,<sup>331</sup> decisions on Defence requests for the amendment of the DCC,<sup>332</sup> and Warrants of Arrest.<sup>333</sup> The Experts are of the view that this practice should be continued, thus freeing up other members of the Chamber for other duties.<sup>334</sup>

#### 4. Chambers Practice Manual and Judicial Case Management

499. Frequent reference has been made to the Chambers Practice Manual in the foregoing findings. It is now appropriate to take a more general look at the language used in the Chambers Practice Manual and the contribution the Chambers Practice Manual can make to the efficiency of proceedings. The adversarial nature of the Court's proceedings is not inconsistent or incompatible with judicial case management and judicial control of the proceedings. That there is general judicial awareness of that is clear from the terms in which the Chambers Practice Manual has been drafted. A brief consideration of some of its provisions relating to the pre-trial stage illustrates well both the nature of the guidance it gives and the form in which it is generally expressed.

500. In paragraph 38, there is a welcome explanation of the role that the Chamber may exercise in ensuring clarity in the terms of the charges, followed by clear directions on how material should be presented to assist the Chamber.<sup>335</sup>

501. Paragraph 43 stops short of providing that the Chamber may direct how the case should be presented. It does not require particular modalities to be followed, e.g. by requiring written arguments/submissions in advance of the hearing, probably on the basis that Rule 121(9)<sup>336</sup> is permissive rather than mandatory in that regard. Yet paragraph 51 provides for time limits on oral submissions at the hearing to be set by the Chamber. The expression 'may lodge' is clearly not intended to detract from the power of the Chamber to manage the proceedings, but is an enabling provision. It is difficult to imagine responsible counsel declining to make written submissions in the knowledge that a time limit may be applied to oral submissions. The language of paragraph 43 is also rather defensive and conversational in tone.

502. Several paragraphs are devoted to the form of the confirmation decision. These are designed to emphasise the need to issue a decision which clearly sets out the Chamber's disposition as to the material facts and circumstances described in the charges and their legal characterisation as confirmed, i.e. the operative part, separately from everything else such as subsidiary facts, other supporting evidence, submissions and reasoning. There is merit in one criticism advanced of paras. 57 and 65, namely that there is a measure of repetition and making the same point in a slightly different way which could be eliminated.

503. A very welcome provision is contained in paragraph 63, declaring that the Chamber should keep the reasoning in the confirmation decision strictly limited to what is necessary

<sup>330</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the set of procedural rights attached to procedural status of victim at the Pre-Trial stage of the case, [ICC-01/04-01/07-474](#), 13 May 2008.

<sup>331</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims, [ICC-01/05-01/08-322](#), 16 December 2008.

<sup>332</sup> *The Prosecutor v. Charles Blé Goudé*, Decision on the 'Defence request to amend the document containing the charges for violation of the rule of speciality', [ICC-02/11-02/11-151](#), 11 September 2014.

<sup>333</sup> *The Prosecutor v. Bemba et al*, Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, [ICC-01/05-01/13-1-t-ENG](#), 20 November 2013.

<sup>334</sup> According to the [Rome Statute](#), Art. 57, Functions and powers of the Pre-Trial Chamber:

'1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.'

<sup>335</sup> [Chambers Practice Manual](#), para. 38.

<sup>336</sup> See [RPE](#), Rule 121(9), according to which: 'The Prosecutor and the person may lodge written submissions with the Pre-Trial Chamber, on points of fact and on law, including grounds for excluding criminal responsibility set forth in article 31, paragraph 1, no later than three days before the date of hearing. A copy of these submissions shall be transmitted immediately to the Prosecutor or the person, as the case may be.'

and sufficient for the Chamber's findings on the charges. It is therefore noted with surprise that that commitment appears not to have been observed in the latest decisions extending to more than 200 and 400 pages respectively. Paragraph 67 provides welcome clarification of the limitations of Regulation 55 of the Regulations of the Court.

504. These paragraphs illustrate features of the Chambers Practice Manual that require to be reviewed. There are two issues: revising the language so that it is more prescriptive and precise; and deciding which provisions should be introduced into the Regulations of the Court or otherwise given binding effect. Inevitably that will lead to reflection on the terms of each provision. Any exercise in redrafting will benefit from the attention of someone with expertise in drafting guidelines and directives, including those with which compliance is expected. The fact that the Chambers Practice Manual is very much the work of Judges would suggest that its review should be undertaken by a small working party of Judges, assisted by a legal officer with the necessary drafting experience, as well as possibly a Defence representative.

505. A more general review of the Chambers Practice Manual confirms that conclusion. The Experts note that the only statutorily imposed timeline for decisions is in relation to the decision on confirmation of charges by the Pre-Trial Chamber, which has to be within 60 days from the end of confirmation hearings<sup>337</sup>. This has been followed consistently by the Pre-Trial Chamber except in the case of Ruto et al., where the Single Judge was of the view that, for reasons involving security, there was 'good cause' within the meaning of Regulation 35 of the Regulations of the Court for the Chamber to deviate from this requirement.<sup>338</sup> The Experts note and commend the adoption of additional timelines by the Judges through the medium of the Chambers Practice Manual at their last retreat in 2019,<sup>339</sup> when deadlines for various proceedings pertaining to all three judicial Divisions were included, e.g. for written decision under Articles 74 and 76 or for written judgment of the Appeals Chamber.

506. The Experts note with concern, however, that the Pre-Trial Division has deviated from these guidelines recently such as in the case of Al Hassan with regard to the time limit of the issuance of the decision - the confirmation hearing took place between 8 and 17 July 2019 and the confirmation decision was issued on 30 September 2019.<sup>340</sup> Moreover, on the latter date, the Chamber indicated that the redacted version of the decision would be made public at a later stage. That happened on 11 May 2020.

507. The Chambers Practice Manual, although drafted with the aim of harmonising the practice of different Chambers, unfortunately is not being applied by all those who agreed on its adoption and amendments. That is because it is not binding. The view was widely expressed that the Manual and the timelines it contains should be made binding.

508. The Experts agree and are of the view that guidelines adopted by the Judges, particularly those that are vital for enhancing the efficiency of proceedings, must be translated into binding regulations. The Experts recommend that this be done by amending the Regulations of the Court and adding to them a graded system with two categories of guidelines. This would include, in Category 1, those that cannot be derogated from except under exceptional circumstances which should be explained in the decision; and those, Category 2, which should be followed unless the Chamber considers that it would be contrary to the objectives of efficiency, expeditiousness or fair trial. The Regulations of the Court should then be amended to set out those categories and identify those which fall into Category 1. These could include all vital timelines as adopted by the Judges, as well as for example the structure and format of certain decisions, such as the confirmation of charges decision. The Experts recommend that additional timelines be added to this category including a timeline for Phases 1 and 2.<sup>341</sup> Category 2 could include templates for decisions and similar

<sup>337</sup> [Regulations of the Court](#), Regulation 53.

<sup>338</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Issuance of the Decision Pursuant to Article 61 (7) of the Rome Statute, [ICC-01/09-01/11-357](#), 26 October 2011.

<sup>339</sup> [Chambers Practice Manual](#), pp. ii-iii.

<sup>340</sup> *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, [ICC-01/12-01/18-461](#), 30 September 2019.

<sup>341</sup> Phase 1 refers to the period between the first appearance hearing and the confirmation of charges while phase 2 refers to stage after the confirmation of charges until the start of the trial. See [Third Court's report on the development of performance indicators for the International Criminal Court](#), 15 November 2017, p.4.

guidelines. The above-mentioned review should address not only the pre-trial stage, but other stages of the proceedings including the trial stage.

### **Recommendations**

**R189.** The Judges should include in the Chambers Practice Manual a provision that Chambers should routinely, at the first appearance of an accused, request the Prosecution to specify the state of the investigation in order to assist the Chamber in the exercise of its powers under Rule 121. The representative of the Prosecutor attending hearings should be in possession of complete, accurate and contemporary information on the situation to enable them to provide a full report to the Chamber.

**R190.** The system of Pre-Trial disclosure of evidence and all related matters, including redaction and other relevant protocols, should be the subject of urgent review by a Review Team which should be chaired by a Judge and should include a senior prosecutor, a senior member of Chambers staff, the Head of OPCD and the President or nominee of the ICCBA with a view to making recommendations to render the system more predictable and expeditious.

**R191.** Throughout the conduct of confirmation proceedings, Judges should have regard to the purpose of the confirmation process as a filter for inadequately supported charges and to ensure the fair trial rights of the accused, including by conducting efficient and expeditious proceedings leading to a clear and unambiguous confirmation of charges decision.

**R192.** Judges should adhere to the provisions set out in the Chambers Practice Manual and other agreed protocols including by applying the timelines and deadlines therein throughout the conduct of all proceedings, unless there are compelling reasons for being unable to do so.

**R193.** The presentation of evidence for the purposes of confirmation of charges, the parties' submissions thereon, the hearing itself and the form, content and structure of the decision confirming the charges should follow the guidance in the Chambers Practice Manual.

**R194.** The Chambers Practice Manual should be revised by a small team of Judges invited by the Presidency to undertake that task, with a view to rendering its language more prescriptive and identifying provisions which could suitably be incorporated into binding Regulations of the Court. The Manual should be amended to provide that its remaining contents should be adhered to unless the Chamber considers that that it would be contrary to the objectives of efficiency, expeditiousness or fair trial.

**R195.** Alternatively, following the review of the language of the Chambers Practice Manual, its provisions could be divided into two categories: those that cannot be derogated from except under exceptional circumstances which should be explained in the Chamber's decision; and those which should be followed unless the Chamber considers that it would be contrary to the objectives of efficiency, expeditiousness or fair trial. The Regulations of the Court should then be amended to set out those categories and identify those which fall into Category 1.

**R196.** Considering that judicial case management is a complex process, it is advisable, as stated in the section 'improving the nomination process of Judges', that for the position of the Presiding Judges of the Pre-Trial and Trial Chambers, Judges with extensive experience in managing and in presiding complex criminal cases be assigned where possible.

**R197.** The Pre-Trial Division Judges should have regular meetings to discuss matters that are the source of inconsistent practices among differently composed Chambers with a view to harmonising procedures as far as possible. The Judges of the Pre-Trial Division are encouraged to continue to meet as necessary with the OTP and the Head of the new Defence Office (currently OPCD) to discuss matters of mutual concern including matters relating to the interface between their respective roles at the start of the confirmation process, with a view to identifying ways of improving and maintaining the efficiency of the pre-trial stage.

**R198.** An occasional symposium among Judges of the Pre-Trial Division, members of the OTP and defence counsel in active and/or previous cases before the Court would provide a suitable forum for discussion of topical matters relating to the work of the Pre-Trial Division.

## B. Trial Stage

509. The first matter to be addressed in this section is the transfer of the case from the Pre-Trial Chamber to the Trial Division. Thereafter, attention is given to matters that affect the efficiency of the trial stage of proceedings. Those dealt with specifically in this section (as some of them are dealt with in other parts of the Report) include: the introduction of practice for which there is no specific authority related to motions of ‘no case to answer’; the issue of written reasons for a decision being produced simultaneously or shortly after the oral decision on the matter; the practice of inviting and authorising amici curiae to appear in proceedings; inconsistent practices such as those pertaining to the submission or admission of evidence and preparing or not preparing witnesses;<sup>342</sup> the proper management of a trial by the Presiding Judge; prior recorded statements and the relaying of evidence by technological means; activities of the Court *in situ* and site visits; the brief absence of a Judge and the use of technology in the judicial process. The Experts note that there does not appear to be consensus on many of these issues amongst the Judges.

### 1. Transfer of the Case to Trial Division

510. Immediately following the issuance of the confirmation decision, the case is transferred to the Trial Division. The trial preparation phase in the Trial Division has lasted between eight and 19 months, with the case of *Al Mahdi* being an exception where it took approximately five months.<sup>343</sup> This was partly attributed to the earlier mentioned absence of clearly specified charges.

511. The transfer of the case from Pre-Trial Chamber to Trial Chamber should be seamless. The assigned Trial Chamber is enjoined to issue the scheduling order for the first status conference within a week of its composition<sup>344</sup> and to hold the conference within a month. In the absence of any need for delay, the Trial Chamber should endeavour to hold the status conference within that period and on the basis of an extensive agenda to facilitate the making of as comprehensive an order as possible regulating the trial preparation phase. To enable that to happen, the order appointing the conference should note as many issues as the Chamber can identify as likely to require direction in accordance with paragraph 73 of the Chambers Practice Manual.<sup>345</sup>

512. Paragraph 74 provides for preliminary directions, which might be issued at or before the conference.<sup>346</sup> There is no reason why the Chamber should delay the issuance of any directions that it knows from the outset are required. A good example is the ‘Requirement of *inter partes* discussions (...) before filings or applications are made’, as is ‘(...) submissions should request a concrete relief and should always be clear as to what the filing purpose is’. The discouragement of unnecessary filings is important. The Chamber should consider whether the *référéndaire* should have the role of moderating the *inter partes* discussions where appropriate and also have a broader role in liaising with the parties to oversee how parties are addressing the various matters that require to be addressed in the lead-up to the conference.<sup>347</sup> The *référéndaire* might usefully also be assigned the role of overseeing on-going disclosure and facilitating *inter partes* discussions in the run up to, and the aftermath of, the status conference.

513. Finally, in noting elements of the Chambers Practice Manual that are important guidance for sound judicial management, it would be remiss not to mention Protocols, which are addressed at paragraphs 77 and 99-101 (redactions), 78 (familiarisation including, where appropriate, witness preparation), 79 (dual status witnesses), 80 (vulnerability assessment and support procedure) and in the Annex (handling of confidential information during investigations and contact). Some Protocols, such as the last-mentioned, are applied by the Pre-Trial Chamber and apply throughout the proceedings, while others are for the Trial

<sup>342</sup> The different approaches of Chambers in this regard has formally been acknowledged in the Court’s third report on performance indicators. *Ibid.*, p. 5.

<sup>343</sup> Report of the Court on Key Performance Indicators (2019), p. 16.

<sup>344</sup> [Chambers Practice Manual](#), para.71.

<sup>345</sup> *Ibid.*, para. 73.

<sup>346</sup> *Ibid.*, para. 74.

<sup>347</sup> *Ibid.*, paras. 73-74.

Chamber to consider. There is also an e-Court Protocol not mentioned in the Chambers Practice Manual. In addition, the provisions of paragraph 76 seem appropriate for inclusion in a Protocol. In the interests of predictability and clarity, it is desirable that all Protocols should be in standard form so far as that is possible and appropriate. In the context of the review of the terms of the Chambers Practice Manual discussed earlier, consideration should also be given to the standardisation of the terms of those Protocols that are a common feature of all cases. The review could also identify other aspects of procedure that could be the subject of further Protocols. Included among the latter might be the content of the Conduct of Proceedings Order under Rule 134 of the RPE made during the trial preparation phase, and how Rule 68(2) and (3) of the RPE will be applied to introduce prior recorded testimony.

514. The review of the Chambers Practice Manual should include updating the provisions dealing with Victim Participation in light of developing experience in that area. A section could also be introduced to address best practices in dealing with the Reparations phase of cases. Indeed, the Judges should be encouraged to expand the Chambers Practice Manual to address all areas of judicial work where they agree on what can now be said to be best practice.

515. There is no reason why the Trial Chamber, once seised of the case, should automatically adjourn trial preparation pending decision on an application to the Pre-Trial Chamber for leave to appeal the confirmation of charges decision, or even pending the appeal, should leave be granted.

516. The Experts' proposals are made with the aim of endeavouring to reduce the length of the trial preparation phase to around six months. It was, therefore, hugely disappointing to learn on July 15 that the start of the trial in the *Yekatom* and *Ngaissona* case was scheduled to start on 9 February 2021, some 14 months after the confirmation decision. One reason referred to by the Chamber for that delay is 'the special circumstances under the Coronavirus Pandemic', while the principal reason appears to be the time necessary for the OTP to comply with its disclosure obligations. It is a cause for concern that both accused will have been in the custody of the Court for in excess of two years before their trial commences, which is likely to last for a number of years.

## 2. No Case to Answer

517. The introduction of the concept of a motion of 'no case to answer' was singled out for criticism as being practised, although neither the Rome Statute, nor the RPE, provide for such a procedure. As was indicated by defence counsel, the existence of that concept, meaning a motion for acquittal after the Prosecution case is closed, would save the Court time and avoid unnecessary delay in the pronouncement of a decision where the Prosecution case is weak.

518. A standard feature of common law criminal jurisdictions and of the ad hoc Tribunals is the opportunity for an accused to move for acquittal at the close of the Prosecution case on the ground that there is no case to answer. The test generally applicable is whether the evidence presented is sufficient to entitle the Court to convict. The question is not whether the evidence convinces the particular Judge or Judges beyond reasonable doubt of the guilt of the accused, but whether a judge acting reasonably could be so convinced by the evidence.<sup>348</sup> If that possibility remains, then the motion must be rejected. If not, and there is no sufficient evidence, the accused must in general be acquitted. The motion usually applies to each charge separately.

519. As practice at the Court shows, notwithstanding the lack of a provision, the Trial Chamber asked the parties in 2013 to submit their observations on whether the 'no case to answer' motion should be a part of the procedure in *Ruto and Sang*.<sup>349</sup> Consequently, in Decision No. 5 on Conduct of Trial Proceedings,<sup>350</sup> permission in principle was given for a

<sup>348</sup> *The Prosecutor v. Slobodan Milosevic*, Decision on Motion for Judgment of Acquittal, [IT-02-54-T](#), 16 June 2004, para. 11.

<sup>349</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Order requesting submissions on the conduct of the proceedings, [ICC-01/09-01/11-778](#), 19 June 2013, p.4.

<sup>350</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), [ICC-01/09-01/11-1334](#), 3 June 2014.

no case to answer motion at the close of the Prosecution case. A motion for acquittal was duly made. The Decision on ‘Defence Application for Judgment of Acquittal’ on a ruling of no case to answer was as follows: ‘The charges against the accused are vacated and the accused discharged without prejudice to their prosecution afresh in future’.<sup>351</sup>

520. In the related trial of *Kenyatta*, when an application for a further adjournment was refused,<sup>352</sup> the Prosecution withdrew the charges in terms of a Notice of Withdrawal of Charges and the Chamber terminated the proceedings in the case,<sup>353</sup> declaring that the principle of *ne bis in idem* would not apply and that the withdrawal was ‘without prejudice to the possibility of bringing new charges against Mr. Kenyatta<sup>354</sup> and his co-accused<sup>355</sup> based on the same or similar circumstances should the Prosecutor obtain sufficient evidence to support such a cause of action’.

521. In the case of *Gbagbo and Blé Goudé*, the Prosecution case closed on 4 June 2018. On 23 July, Mr. Gbagbo filed a Request for acquittal and on 4 July Mr. Blé Goudé filed a No Case to Answer Motion. Responses were filed by the Prosecutor and by the OPCV. Through October and November there were a number of hearings. Then, on 15 January 2019, the Chamber pronounced a majority ruling that ‘there is no need to submit further evidence as the Prosecutor has not satisfied the burden of proof in relation to several core constitutive elements of the crimes as charged’.<sup>356</sup> Four elements were specified. The Chamber ordered the immediate release of the accused and undertook to provide its fully reasoned decision as soon as possible. That turned out to be 16 July 2019. That Decision consisted of the repetition of the oral ruling with the individual opinions of the Judges attached as annexes. One Judge, dissenting, had actually produced her opinion at the delivery of the acquittal ruling on 15 January 2019.

522. As the dissenting Judge pointed out, the procedure followed was not in keeping with the requirement of Rule 144(1) of the RPE and Article 74(5) requiring decisions relating to criminal responsibility to be pronounced in the presence of the parties and to be in writing and to contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions. Why that was not done is not clear. There seems to have been plenty of time from the point of closure of the Prosecution case, and indeed from the end of the hearing, until the delivery of the ruling to enable that to be done.

523. The Appeals Chamber in the case of *Ntaganda* has recognised the procedure as consistent with the Rome Statute framework in spite of the absence of provision therefore in the Statute or Rules.<sup>357</sup> In their ‘Decision on the Conduct of the Proceedings’ of 2 June 2015<sup>358</sup> the Trial Chamber made provision for such procedure. On 25 April 2017, the accused made a request to file a motion for partial judgment of acquittal. That Request was rejected, leave to appeal granted, and on 5 September 2017 the Appeal was refused.

524. Finally, in the case of *Onghwen*, Trial Chamber IX in its ‘Decision on Defence Request for Leave to File a No Case to Answer Motion’ expressed the view that, although ‘the Court’s legal texts do not explicitly provide for a NCTA procedure, nor does international human

<sup>351</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, [ICC-01/09-01/11-2027-Red-Corr](#), 5 April 2016, p. 6.

<sup>352</sup> *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Prosecution’s application for a further adjournment, [ICC-01/09-02/11-981](#), 3 December 2014.

<sup>353</sup> *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Public Redacted Version of the 13 March 2103 ‘Prosecution observations on the impact of the withdrawal of the charges against Mr Muthaura on Mr Kenyatta’, [ICC-01/09-02/11-692-Red](#), 13 March 2013; *The Prosecutor v. Uhuru Muigai Kenyatta*, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, [ICC-01/09-02/11-983](#), 18 March 2015.

<sup>354</sup> [ICC-01/09-02/11-981](#), para 56.

<sup>355</sup> *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, [ICC-01/09-02/11-687](#), 11 March 2013.

<sup>356</sup> *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Transcript of 15 January 2019, [ICC-02/11-01/15-T-232-ENG ET WT](#), p. 3.

<sup>357</sup> *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the ‘Decision on Defence request for leave to file a “no case to answer” motion’, [ICC-01/04-02/06-2026](#), 5 September 2017, p. 19, para. 46.

<sup>358</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on the conduct of proceedings, [ICC-01/04-02/06-619](#), 2 June 2015, p. 8, para. 17.

rights law necessarily require such a procedure in order to protect the rights of the accused’,<sup>359</sup> ‘a trial chamber may decide to conduct such a procedure based on its power to rule on relevant matters pursuant to Article 64(6)(f) of the Statute and Rule 134(3) of the Rules. A decision on whether or not to conduct a NCTA procedure is thus discretionary in nature and must be exercised on a case-by-case basis in a manner that ensures that the trial proceedings are fair and expeditious pursuant to Article 64(2) and (3)(a) of the Statute’.<sup>360</sup>

525. The foregoing history raises a number of issues. The first is whether the practice is beneficial. Bearing in mind that three of the cases considered were terminated at or before half-time, it probably was. However, in the *Gbagbo* case, because the period from the close of the Prosecution case to the ruling was seven and a half months, the trial would have been extended significantly had it been unsuccessful. So it can be said that the procedure does in general serve the interests of judicial economy if the motion is successful. If successful, it also reduces the period of custody to which an innocent person is exposed. In addition, it is viewed as enhancing the fair trial rights of accused, and in particular the right to silence, by not requiring the accused to answer the case presented in the absence of sufficient evidence for conviction.

526. On the other hand, it is a procedure that is capable of taking on major proportions. That was the situation in the early days of the *ad hoc* Tribunals when the procedure involved written submissions, answers, a hearing and a written decision. There the rule was reformulated to provide for an oral ruling after oral submissions to expedite the proceedings. As one Judge said,<sup>361</sup> what is intended is a summary review of the evidence so far to bring a case, which could not possibly result in conviction on the Prosecution evidence, to an end.

527. Accepting, as the Experts must, that this procedure is now established Court procedure, the principal question is how to ensure its consistent application in a way that will not unduly lengthen the trial proceedings. If it takes seven months or more to deal with a no case motion, which is rejected, all that has been achieved is the extension of the trial by that period. So judicial control is essential. A form of control currently exists in the requirement of leave to file a no case to answer motion,<sup>362</sup> as well as the possibility of appellate review.<sup>363</sup> The requirement to obtain leave should remain and form part of a procedural scheme regulating ‘no case to answer’. Leave could be sought by oral submission or written filing outlining briefly the headline submissions proposed and identifying the charges to which the motion would be directed. There might be a number of issues identified to which different considerations apply. The decision on leave should be one for the discretion of the Trial Chambers who are well placed to evaluate the likely impact of an appeal on the fairness and expeditiousness of the trial.

528. Consideration should be given to limiting the circumstances in which such a motion may be made. These ought to be restricted to those that challenge the sufficiency of the evidence on all charges where there is a realistic prospect of a complete acquittal and the trial being brought to a conclusion. It is likely that a motion to acquit addressed only to the some of the counts would mainly contribute to delay in the proceedings.<sup>364</sup> Of course, more effective use of the proceedings at the pre-trial phase should reduce the number of cases in which a motion would be appropriate. If leave is granted, a strict timetable should be applied. What the Experts have in mind is a ‘fast-track appeal’.

<sup>359</sup> *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request for Leave to File a No Case to Answer Motion, [ICC-02/04-01/15-1309](#), 18 July 2018, para. 4.

<sup>360</sup> *Ibid.*, para. 5.

<sup>361</sup> *Situation in the Republic of Kenya*, Dissenting Opinion of Herrera Carbuca, [ICC-01/09-01/11-2027-AnxI](#), 5 April 2016, paras. 16-22.

<sup>362</sup> [ICC-02/04-01/15-1309](#).

<sup>363</sup> [ICC-01/04-02/06-2026](#).

<sup>364</sup> In *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, the Defence for Mr. Gbagbo filed its motion for ‘no case to answer’ on 23 July 2018 and the Defence for Mr. Blé Goudé filed its motion for ‘no case to answer’ on 3 of August 2018. The Trial Chamber granted the motions on 15 January 2019 *via* an oral decision. The written reasons for this decision were then released on 16 July 2019. See for example, Transcript of the Delivery of the Oral Decision, [ICC-02/11-01/15-T-234-ENG](#), 16 January 2019; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu’un jugement d’acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion, [ICC-02/11-01/15-1263](#), 16 July 2019.

529. In the ordinary course, oral submissions by the parties should be sufficient. Provision could be made for a written submission on cause shown. The Chamber's decision should be delivered orally from a prepared script and would thus be recorded in the trial transcript. A decision to grant the motion in relation to any charge, resulting in acquittal on that charge, would be appealable as of right by the Prosecutor. The decision to reject the motion should be appealable only with leave.

530. Provision should be made in the scheme for the courses that may be followed by the Trial Chamber in the event that there is an appeal. The scenarios imaginable are too numerous to mention. Even in the simplest situation with one accused, both the accused and the Prosecutor might be aggrieved by part of the decision and seek to appeal. The variety of possibilities may be compounded by the number of accused in the case. These are factors to be taken into account by the Chamber both at the stage of deciding whether to grant leave to appeal and also when later faced with a motion to stay the proceedings.

531. The provisions regulating 'no case to answer' should be incorporated into one of the texts of the Court. Ideally, they should feature in the Rules, but until the Rules can be amended, it should be incorporated into the Regulations of the Court. In the case of the ICTY, Rule 98 bis directed the Trial Chamber to enter judgment of acquittal on any count if there was 'no evidence capable of supporting a conviction'.<sup>365</sup> More importantly, the initial ICTY Working Group on Speeding Up Trials, in its Report of 2006, indicated that at the end of the Prosecution case 'the Prosecutor is bound to review the evidence to deal with any submission under Rule 98 bis'.<sup>366</sup> That was a message of encouragement and a warning to the Prosecution that they should be prepared to deal with such a motion at short notice to expedite the proceedings.

532. An exceptional feature of the Kenya cases was the reservation to prosecute again on the same charges. In both *Ruto and Kenyatta*, respectively, the discharge of the accused, and the withdrawal of the charges, were both 'without prejudice'. In the former, the accused were discharged 'without prejudice to their prosecution afresh in future',<sup>367</sup> while in *Kenyatta* the charges were withdrawn without prejudice to the possibility of bringing new charges (...) based on the same or similar circumstances.<sup>368</sup> That is inconsistent with the usual consequence of a decision stating that there is no case to answer or the withdrawal mid-trial of the charges by the Prosecutor, which is acquittal.<sup>369</sup> The consequence of a successful motion should also be captured in a Rule. The Judges might also consider whether the whole procedure is one that should be the subject of an entry in the Chambers Practice Manual.

### 3. *Amicus Curiae*

533. According to Rule 103 of the RPE, 'at any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate'. This is the provision relating to the admission of an *amicus* or *amici curiae* (friend or friends of the court or *amici*).

534. From the interviews conducted by the Experts it appears that the use by the Court of *amici* was considered excessive. Observations were made to the effect that it seemed that by resort to Rule 103 the Court was seeking friends at a time when it faces much criticism that due to the intervention of friends of the court, proceedings are delayed and become more

<sup>365</sup> The procedure was described in the Appeals Judgment in the case of *Jelusic* where the test was: 'not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution's evidence, but whether it could'; *The Prosecutor v. Goran Jelusic*, Judgment, [IT-95-10-A](#), 5 July 2001, para. 37.

<sup>366</sup> [ICTY Manual on Developed Practices](#), Prepared in Conjunction with UNICRI, as part of a project to preserve the legacy of the ICTY, 2009, p. 87, para. 44.

<sup>367</sup> In the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, the defence for Mr. Ruto and Mr. Sang filed 'no case to answer' and a 'request for a judgment of acquittal' on 26 October 2015 and 6 November 2015 respectively. The Trial Chamber declared mistrial, the charges were vacated and the accused discharged through a decision dated 5 April 2016. See [ICC-01/09-01/11-2027-Red-Corr](#).

<sup>368</sup> *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the withdrawal of charges against Mr. Kenyatta, [ICC-01/09-02/11-1005](#), 13 March 2015.

<sup>369</sup> See for example [ICTY, Rules of Procedure and Evidence](#), Rule 98 bis.

costly, and more importantly that ‘the judges organise a form of seminar for themselves where *amici* discuss legal sources that are eminently available to the judges’.

535. The case law of the Court shows that practice has not been entirely consistent when it comes to the application of that provision: in some cases, the Court required that the input of a friend of a court would have to be of ‘indispensable assistance’, while on other occasions the ‘desirability’ of the submission was assessed less restrictively. In the case of *Al-Bashir*,<sup>370</sup> the Court issued an order inviting ‘expressions of interest as *amici curiae* in judicial proceedings (...) on the merits of the legal questions presented in the appeal’. Subsequently, the Appeals Chamber was seized with 17 requests for leave to file observations and the Court considering it ‘desirable for the proper determination of the case’ granted leave to all, indicating that each of the submissions could not be longer than 10 pages and invited the parties to submit consolidated responses, of no more than 20 pages, to the written observations of the *amici curiae*, within a month.<sup>371</sup> The *amici curiae* were allowed to present their opinions during the four-day hearing.<sup>372</sup> The situation was similar in the cases relating to Palestine and Afghanistan.<sup>373</sup> The number of the submissions and the procedure followed contributed to delay in the proceedings.

536. Indeed, this approach seems over-indulgent for at least two reasons. Firstly, the assistance of *amicus curiae* should contribute not only to the fairness of the proceedings, but also to the speed and efficiency of the trial, no matter when in the proceedings the observations are being filed. Therefore, resort to amici would be easier to justify if the Chambers were to grant leave to fewer applicants to file their observations and require them rather to present them orally or in a concise form in writing within a certain deadline, taking into consideration the fact that each of the observations is to be addressed in the responses of the parties.<sup>374</sup> Secondly, bearing in mind that the Judges elected to the Court are widely perceived to be, *inter alia*, experts in international law, wide criticism of the approach of the Appeals Chamber described above is seen to be raising justifiable concerns. The requirement of ‘desirability’ of the *amicus curiae* submission for the proper determination of the case should be given very careful consideration.

537. The general approach so far has been to invite a request for an ‘expression of interest’, a notion mirroring a tendering process. An invitation is extended to all interested parties or the wide community of the Court’s stakeholders to demonstrate interest. Consideration could be given to a more effective focusing of invitations, rather than a Court constituency-wide solicitation of *amici curiae*. It should be based on objective criteria and explain the specific issues necessary for the proper determination of the case by the Chambers.

538. One other context in which *amici* have been involved in international criminal tribunals is the investigation and prosecution of offences against the administration of justice. There was provision at the *ad hoc* Tribunals, as well as the SCSL and currently the STL, for the appointment of *amicus curiae* prosecutors in case of a conflict of interest with the OTP. At these institutions, the discretion to investigate such cases rested with Chambers. The Chamber would direct the prosecutor to investigate unless a prosecutor had a conflict of interest with respect to relevant conduct in which case an *amicus* could be appointed to investigate and could be directed to prosecute.<sup>375</sup> There are no analogous guidelines in

<sup>370</sup> *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence), [ICC-02/05-01/09-330](#), 29 March 2018.

<sup>371</sup> *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal, [ICC-02/05-01/09-351](#), 21 May 2018.

<sup>372</sup> See for e.g. *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Order on the conduct of the hearing before the Appeals Chamber in the Jordan Referral re Al-Bashir Appeal, [ICC-02/05-01/09-379](#), 27 August 2018.

<sup>373</sup> *The situation in the Islamic Republic of Afghanistan*, Decision on the participation of *amicus curiae*, the Office of Public Counsel for the Defence and the cross-border victims, [ICC-02/17-97](#), 24 October 2019.

<sup>374</sup> In the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, of the 17 requests received in response to the Chamber’s call for *amicus* briefs, 11 requests by Professors of Law were granted leave to submit observations. See [ICC-02/05-01/09-330](#); [ICC-02/05-01/09-351](#); see also for e.g. *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Prosecution Response to the Observations of Eleven Amici Curiae, [ICC-02/05-01/09-369](#), 16 July 2018.

<sup>375</sup> [ICTY Rules of Procedure and Evidence](#), Rule 77; International Bar Association (IBA), ICC and ICL Programme, Discussion Paper Series, [Offences against the administration of justice and fair trial considerations before the International Criminal Court](#) (2017), p. 27.

relation to conflicts of interest in relation to the investigation and prosecution of allegations of interference with the administration of justice at the Court in terms of Article 70 of the Rome Statute.<sup>376</sup>

539. The issue of interference with the administration of justice has arisen in a number of cases at the Court and in most of those, the issue of the Prosecutor having a conflict of interest that would make it inappropriate for the Prosecutor to investigate has arisen. In *Lubanga*, the Court acknowledged the possibility of the investigation and/or prosecution of Article 70 cases being allocated to an independent investigator in ‘extreme situation[s]’ in case of a conflict of interest with the team prosecuting the case.<sup>377</sup> In the same case, the Prosecutor apparently engaged an ‘independent counsel’ to investigate matters pertaining to ‘possible Article 70 violations’. However, on the basis of both the OTP and independent counsel’s conclusions, the OTP decided that the matter should not be investigated further.<sup>378</sup> In other cases also the OTP have engaged independent counsel to review the circumstances.

540. The question of investigating offences against the administration of justice (Article 70) arose in the *Ruto* case, where the Prosecutor refused to investigate the allegations that certain witnesses of the Prosecution had fabricated their evidence and committed perjury. The Trial Chamber vacated the charges on 5 April 2016.<sup>379</sup> On 2 June 2016, the Trial Chamber also decided that it was inappropriate to exercise jurisdiction on the merits of the Defence request to appoint an amicus prosecutor and rejected it.<sup>380</sup> In the course of the *Kenyatta* trial, serious allegations were made of interference with defence witnesses by prosecution witnesses. Although these were reported by counsel to the OTP, no action was taken.

541. Where circumstances giving rise to allegations of offences against the administration of justice committed by prosecution witnesses arise in the course of the trial, it is possible that the Prosecution will have a conflict of interest that may affect the propriety of the OTP investigating the relevant conduct. A court must have available adequate means to ensure that contempt of court and interference with the administration of justice can be properly investigated and prosecuted in a timely manner. It is clear from the case of *Bemba et al.*<sup>381</sup> that where similar problems arise in relation to the conduct of an accused and defence witnesses, the Prosecution can successfully investigate and prosecute. However, the circumstances in that case and in the case of *Ntaganda* demonstrate that the conduct of such investigations has the potential to undermine the fairness of the ongoing trial.<sup>382</sup>

542. Having regard to the problems of dealing with cases under Article 70 where a potential conflict of interest has arisen, it is important to reinforce the Court’s capacity to address similar situations which will inevitably arise in the future by having a readily available means of avoiding that conflict. The procedure generally followed in the *ad hoc* Tribunals offers a solution.<sup>383</sup> The Chamber, which considers that the Prosecutor has a conflict of interest with respect to the relevant conduct, directs the Registrar to appoint an *amicus curiae* to investigate the matter and report to the Chamber as to whether there are sufficient grounds for launching proceedings. The Chamber may also initiate proceedings itself or direct the *amicus* to prosecute the matter.

543. It is recognised that there have been instances where investigations by amici have been lengthy, inconclusive and expensive. There is however no good reason why that should

<sup>376</sup> See [Rome Statute](#), Art. 70; see also IBA, *ibid.*, p. 27.

<sup>377</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript, [ICC-01/04-01/06-T-350-Red-ENG](#), p. 17, lines 14-19.

<sup>378</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Response to ‘Requête de la Défense de M. Lubanga aux fins de communication d’éléments de preuve recueillis par le Procureur dans le cadre des enquêtes conduites en vertu de l’Article 70’, [ICC-01/04-01/06-3069](#), 25 March 2014, para. 9.

<sup>379</sup> See [ICC-01/09-01/11-2027-Red-Corr](#).

<sup>380</sup> *Situation in the Republic of Kenya*, Decision on the Ruto Counsel’s Request to appoint an Amicus Prosecutor, [ICC-01/09-01/11-2034](#), 2 June 2016.

<sup>381</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute, [ICC-01/05-01/13-1989-Red](#), 19 October 2016.

<sup>382</sup> IBA, [Offences against the administration of justice and fair trial considerations before the International Criminal Court](#), pp. 31-32; see also in relation to possible false testimony by a prosecution witness being ‘likely to create a situation of conflict of interests’, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript, [ICC-01/04-01/07-T-190-Red-ENG](#), 22 September 2010, p. 4, lines 1-5.

<sup>383</sup> [ICTY Rule of Procedure and Evidence](#), Rule 77.

be the case. A significant element in this process is that the Chamber should retain close control over the investigation and prosecution to ensure that they are confined to the essential elements of the allegations and conducted expeditiously. It is also recognised that the power should be deployed sparingly, and will only be appropriate in exceptional circumstances where (a) the Prosecutor either has decided to take no action or has a conflict of interest that renders action inappropriate, and (b) the Chamber determines that investigation is nevertheless appropriate in the interests of justice.

544. It is not suggested that introducing such an independent process simply involves transferring the procedures of other tribunals to the Court. Reference is made to the procedure of other tribunals to illustrate the possibility of making available to the Court an alternative means of addressing allegations of interference with the administration of justice.

545. In the light of the experience of the Court so far, giving power to Chambers, in exceptional circumstances where it is in the interests of justice, to appoint an independent *amicus curiae* prosecutor/investigator, ought to be explored. In that context, the possibility of amending Article 70 should be considered by the Court and the ASP.

#### 4. Evidence Admitted vs Submitted

546. One of two topics concerning which complaints of procedural inconsistency were received by the Experts, was the lack of consensus amongst the Judges on the issue of whether evidence should be admitted or submitted (the other was preparation of witnesses prior to giving evidence). The inconsistent approaches adopted by different Chambers were said to be causing confusion and uncertainty among counsel. The difference is between a Chamber which favours making a positive determination that each document is admitted or rejected, and one which prefers to simply receive documents tendered and make of them what they will in their deliberations. In the latter case, the Court would record in their decision the contribution that the documents have made to it. The suggestion made is that the difference should be resolved in favour of one or the other through a Regulation on the matter.

547. That is not considered necessary. That there are two approaches is now well understood. It is accordingly routine for the Chamber to declare in an Order/Decision on the conduct of the proceedings the approach that will be taken. The Chamber, and the Presiding Judge in particular, have wide-ranging powers to pronounce orders relating to the conduct of the proceedings before and during the proceedings. In the case of *Al Hassan* for example, Trial Chamber X decided recently to adopt the submission approach.<sup>384</sup> The Chamber indicated that it ‘will not issue rulings on admissibility for each item of evidence during the course of proceedings. Rather, the Chamber will recognise the submission of items of evidence without a prior ruling on relevance and/or admissibility and will consider its relevance and probative value as part of the holistic assessment of all evidence when deciding on the guilt or innocence of the accused’ (para.29). A similar approach was taken in the cases of *Ongwen*<sup>385</sup> and *Gbagbo*. On the other hand, in the case of *Ntaganda*, the relevance and admissibility of each item of documentary evidence presented was assessed before it was admitted into the record. Which approach to follow in relation to the bulk of documentary productions has been recognised by the Appeals Chamber as a decision that falls within the discretion of the Trial Chamber Judges. In particular, in an interlocutory appeal in *Bemba*,<sup>386</sup> the Appeals Chamber stated that it has ‘the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber’.<sup>387</sup>

548. The source of the discretion recognised by the Appeals Chamber is Article 69(4) providing that ‘the Court may rule on the relevance or admissibility of any evidence, taking

<sup>384</sup> *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Annex A to the Decision on the conduct of proceedings, [ICC-01/12-01/18-789-AnxA](#), 6 May 2020.

<sup>385</sup> *The Prosecutor v. Dominic Ongwen*, Initial Directions on the Conduct of the Proceedings, [ICC-02/04-01/15-497](#), 13 July 2016, para 24.

<sup>386</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, 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’ [ICC-01/05-01/08-1386](#), 3 May 2011, para. 37.

<sup>387</sup> See also *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment, [ICC-01/05-01/13-2275-Red](#), 8 March 2018, where the evidence submitted by the Prosecution largely consisted of documents.

into account...'. In addition, Rule 63(2) provides that a Chamber shall have the authority, in accordance with the discretion described in Article 64(9), to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with Article 69.

549. There are, of course, circumstances in which a ruling must be made at the time of the presentation of the document. Rule 63(3) requires a Chamber to rule on an application of a party made under Article 64(9)(a) concerning admissibility when it is based on the grounds set out in Article 69(7) (evidence improperly obtained). Where previously recorded audio or video evidence is tendered, admission depends on the Chamber being satisfied that the requirements of Rule 68 are satisfied. Whichever approach is adopted, Rule 64(1) requires an issue relating to relevance or admissibility to be raised at the time when the evidence is submitted to the Chamber, while 64(2) requires Chambers to give reasons for any rulings they make on evidentiary matters.

550. Should this continue to be a problem, which is thought to be unlikely, the matter could be resolved by adopting a presidential directive or incorporating appropriate provisions into the Regulations of the Court, introducing the solution agreed among the Judges.<sup>388</sup>

## 5. Witness Preparation/Proofing

551. Witness 'preparation' is controversial. The practice is generally accepted by Chambers as appropriate, but not by all Chambers. A minority of Judges sees it as having the potential to taint the evidence of the witness. To those holding that view it would be more acceptable to permit the witness to read the original statement made without any preparatory discussion. The decision on this issue is one for the discretion of the Chamber or Presiding Judge in managing the proceedings and not a matter that requires regulation. On the other hand, it could be a matter for regulation if that is the wish of an absolute majority of the Judges.

## 6. Prior Recorded Testimony and Live Testimony by Means of Audio or Video-Link Technology

552. 'Until very recently in order to make criminal trials work it was necessary, inescapable for everything to happen in one room, with all the participants gathered together. Some limited allowance was made for the introduction of hearsay and documentary evidence but the central element of the trial process was live evidence from the witness box'. These are the words of the first Judge to preside over a trial at the Court. He added: 'Not only is this simply no longer necessary, but it is an inefficient and expensive way of going about the business and an inexcusable misuse of scarce resources.' It is now more than 30 years since the use in court of video-recorded evidence was first advocated, in particular for the evidence of children, who would be examined and cross-examined away from the courtroom in more sympathetic surroundings. It was later introduced for other vulnerable witnesses.

553. While the presentation of the prior record of the evidence of a witness is fairly common in domestic proceedings in certain circumstances, the use of live testimony transmitted from a remote location has only slowly been adopted. Both are part of the Court procedure. Rule 68 of the RPE relates to prior recorded testimony which is now used not only for vulnerable witnesses, or where the witness has died or been interfered with, but for other witnesses in order to save them having to travel to The Hague. Some may have been examined and cross-examined, in which case there is no restriction on what their evidence might relate to. In other cases, the evidence must be limited to matters other than the acts and conduct of the accused. In addition, Rule 67 allows for live testimony by means of audio or video-link technology. The information available indicates that the application of those Rules has contributed to the expedition of trial procedures.

554. There is no recommendation to be made on this subject other than to maximise the use of technology in the presentation of evidence insofar as that is consistent with the interests of justice, and to maintain vigilance with respect to taking advantage of any currently

<sup>388</sup> See for e.g. *The Prosecutor v. Jean-Pierre Bemba Gombo*, Concurring Separate Opinion of Judge Chile Eboue-Osuji, [ICC-01/05-01/08-3636-Anx3](#), 14 June 2018.

available technological facilities that can be deployed. Attention should also be directed to developments in this fast-growing technology that might be adapted to further enhance the efficiency of the Court.

555. One thought for the future is offered. As courts come to terms with the range of benefits that increasing use of digital technology may bring to their work, there is now an active debate around the question of when is the best time for evidence to be captured in the interests of producing a reliable account of events. What is more likely to be accurate: (i) a video recording of an event; (ii) a statement made by an eye-witness in the weeks following an event; or (iii) the oral evidence in court of the witness 18 months after the event? It is not far-fetched to envisage, in the not too distant future, the use of digital devices in the conflict area to make high-quality recordings of eye-witness accounts to be played in trial proceedings. The addition to that scenario of the notion of an examining magistrate, accompanied by a clerk and interpreter, carrying the device and being well-enough informed to ask the questions the Defence would expect to be asked, might lead ultimately to recognition that some crucial evidence that has not been subject to cross-examination may be sufficiently reliable to be admitted for consideration by the Court. The world's premier international criminal court should be leading the way in obtaining the most reliable evidence.

## 7. Management of the Trial

556. Proactive judicial case management is as important to the fairness and expeditiousness of trial proceedings as it is to pre-trial proceedings. The Chambers Practice Manual is a helpful and a welcome reference point for Judges in managing their trials. What has already been said above in the pre-trial section about revising the Chambers Practice Manual, and consolidated in Recommendation 194 applies also to the trial stage.<sup>389</sup>

## 8. Court Activities *in situ* and Site Visits

557. Throughout the Experts' consultations, the question of the Court being 'detached' from the situation countries and lacking full appreciation of the reality of those situations was identified as an important issue for many of the stakeholders. The need to have at least part of the proceedings *in situ* (e.g. opening of the trial), as well as the Judges participating in site visits, was underlined already in cases before the Court. The benefits that, it was said, would result from court activities *in situ* include the greater visibility of the Court and better understanding of its role; understanding of the context; and from site visits better understanding of the evidence.

558. Article 3 of the Rome Statute provides that while the seat of the Court shall be established at The Hague, in the Netherlands (para.1), the Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute (para.3). Article 62 additionally indicates that 'unless otherwise decided, the place of the trial shall be the seat of the Court'. Rule 100(1) clarifies further that 'where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part'. In such a case, the Chamber itself *proprio motu*, or upon request of the Prosecutor or of the Defence, may decide to hold the hearing elsewhere than in The Hague. It is obliged to take into account the views of the parties and the victims.<sup>390</sup> An assessment prepared by the Registry is attached to the recommendation and transferred to the Presidency for the decision. After consultation with the State concerned and the Chamber, the decision is taken.

559. Such requests by the Prosecutor and supported by the Defence and Victims have been filed in cases before the Court. In the case of *Ongwen*,<sup>391</sup> the Chamber decided that the trial would take place at the seat of the Court and rejected the request to conduct a judicial site visit, without prejudice to re-considering the matter at a later time. Finally, between 3 and 9

<sup>389</sup> *Supra* R194 (p.164).

<sup>390</sup> [RPE](#), Rule 100(2).

<sup>391</sup> *The Prosecutor v. Dominic Ongwen*, Decision Concerning the Requests to Recommend Holding Proceedings In Situ and to Conduct a Judicial Site Visit in Northern Uganda, [ICC-02/04-01/15-499](#), 18 July 2016.

July 2018, and after having heard the Prosecution case, the members of the Chamber visited four locations in the northern part of Uganda together with the representatives of the OTP, Defence and Legal Representatives of Victims.<sup>392</sup>

560. In the case of *Ntaganda*<sup>393</sup>, the Prosecutor requested the Chamber to conduct a site visit in order ‘to ensure fair trial under Article 64(2) and to enable the Chamber to properly assess evidence pursuant to Article 69(3) and (4), and Article 74(2)’. In the view of the Prosecutor, the site visit ‘would enhance the Chamber’s understanding of the evidence it will hear’ by visiting ‘physically the area where it is alleged the charged crimes occurred’.

561. In the case of *Katanga*,<sup>394</sup> the Trial Chamber explained that, besides providing an opportunity to gain a better understanding of the context of events before it for determination, the main purpose of a site visit was to enable the Chamber to ‘conduct the requisite verifications *in situ* of specific points and to evaluate the environment and geography of locations mentioned by witnesses and the accused persons’.

562. While understanding the concerns that the Registry might raise regarding safety and the ability to safeguard the security of the Judges and staff visiting situation countries in the context of pending cases, as well as being mindful of the economic burden/implications to the budget of the Court that the activity might bring, it is difficult to overestimate the advantages that could be gained as a result of such visits. They allow for the opportunity of getting acquainted with and gaining better understanding of the situation’s environment, cultural, political and social contexts. They provide a means of exposing members of the Bench to local circumstances. They also produce a more complete understanding of the factual situation in which the affected communities are living. All of the foregoing are important aids to interpret and assess the evidence.

563. Therefore, it is of importance that the Registry secures funds in the budget for the purpose of conducting site visits, in appropriate cases on the basis of Articles 64(2) and 69(3) and (4). The same applies to hearings *in situ*.

## 9. Brief Absence of a Judge

564. In the course of long trials, there may be occasions when it is necessary for one of the Judges to be absent from the courtroom for urgent, unexpected reasons for which it has not been possible to plan. The unexpected interruption of a trial can be very disruptive and distressing. It can interfere with the travel and accommodation arrangements made for witnesses to be present at the location of the Court; it can also cause undue and unnecessary distress to a vulnerable witness. To try to minimise the disturbing and distressing impact of such interruptions, provision was made in the *Ad Hoc* Tribunals for the remaining Judges of the Chamber to continue the hearing in the absence of the affected judge for a limited period if satisfied that that was in the interests of justice. The period was ‘not more than five working days’.<sup>395</sup>

565. Around 2014, the Judges of the Court proposed an amendment to the RPE to introduce a similar provision. That turned out to be controversial and remains in limbo. It is opposed by some States Parties on the basis that Articles 74(1) and 39(2)(b)(ii) of the Statute require all Judges to be present throughout all hearings of a trial. Others respond that support for the measure can be found in Article 64(3)(a) authorising a Trial Chamber, upon the assignment of a case for trial, to adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.

566. There is further support for the latter position. In certain circumstances, the accused is not required to be personally present. An accused can be excused attendance or can be

<sup>392</sup> *The Prosecutor v. Dominic Ongwen*, Decision on Judicial Site Visit to the Republic of Uganda, [ICC-02/04-01/15-1020](#), 13 October 2017.

<sup>393</sup> *The Prosecutor v. Bosco Ntaganda*, Prosecutor’s request for the Chamber to conduct a judicial site visit, [ICC-01/04-02/06-1033](#), 24 November 2015.

<sup>394</sup> *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, [ICC-01/04-01/07-3436-ENG](#), 7 March 2014.

<sup>395</sup> [ICTY Rules of Procedure and Evidence](#), Rule 15bis.

‘present’ by video. Witnesses can give live testimony by audio or video technology. There is provision for replacement and alternate Judges.<sup>396</sup> In addition, the procedure envisaged by the proposal had been followed in at least one earlier case in the absence of such a rule.<sup>397</sup>

567. The Rule amendment proposed by the Judges was to add an additional Rule, Rule 140 bis, in the following terms:

‘If a judge is, for illness or other unforeseen urgent personal reasons, unable to be present at any hearing, the remaining Judges of the Chamber may exceptionally order that the hearing of the case continues in the absence of that judge for completion of a specific matter which has already commenced and can be concluded within a short time-frame, provided that:

- i. The Chamber is satisfied or, if it is not practicable to consult the absent judge, the remaining Judges of the Chamber are satisfied that this arrangement is in the interests of justice; and
- ii. The parties consent to this arrangement’.

568. The Rule is drafted in the most limited imaginable terms, requires the Judges to be satisfied that continuing is in the interests of justice, and requires the consent of the parties. The evidence is video-recorded and is available for the absent Judge to view on their return. The *ad hoc* Tribunals worked with a rule with a much wider application which did not require the parties’ consent. A good example of the circumstances in which this Rule might be applied is to conclude the evidence of a sexually abused, vulnerable victim/witness who has already spent an afternoon in the witness box in a highly distressed state.

569. As the Court becomes busier, the need for a flexible approach to unexpected developments will increase, to avoid not only the effects disruption can have on the case in which it occurs, but also the knock-on effects on other business of the Court that can result. A rule which allows a case to continue for a brief period in the absence of one Judge in circumstances which have no adverse impact on the fairness of the proceedings is one way of providing that flexibility. The recommendation below is framed in general terms on the basis that the Judges and the ASP will determine the detail of the approach to this that best suits proceedings before the Court.

## 10. Technology in the Judicial Process

### (1) Case Law Database

570. In its early years, the Court lacked a readily searchable database of its case law. From about 2011, discussions took place internally about working with a private publisher to develop a comprehensive database. These discussions did not progress to a final conclusion, and in the summer of 2016 matters took a different turn. Each of the Organs of the Court combined to commence the Case Law Database (CLD) Project. The project is now nearing completion. The work necessary to develop the CLD has essentially been directed and overseen by a Chambers Working Group coordinated by a legal officer (P-3). There has been technical support from Information Management Services Section and the website has been created by an external developer.

571. The purpose of the Project is to establish an Internet database that allows individuals inside and outside the Court to easily access and retrieve the case law of the Court. Because it is accessible by the public, it does not include non-public material.

572. The CLD provides access to the case law of the Court in the form of legal findings. There are currently in excess of 3,500 legal findings within the database. These legal findings are extracts from the Court’s judgments, decisions and orders containing determinations and interpretations of law. The full decision can then be accessed via a hyperlink, as can other relevant jurisprudence. The CLD thus provides access to the full text of the entire public jurisprudence of the Court, currently comprising around 3,200 judgments, decisions and

<sup>396</sup> Rome Statute, Art. 69; RPE, Rules 38-39; Rule 67, Rule 134 *bis*, Rule 134 *ter*, Rule 134 *quarter*.

<sup>397</sup> Report of the Study Group on Governance [ICC-ASP/13/28](#) (2014), p. 21, para. 11.

orders issued between 2004 and 2018. It also provides further information about the relative level of importance of the legal findings (three levels according to the issuing Chamber) and about related decisions, for instance whether a legal finding has been confirmed or overturned on appeal.

573. The database is searchable by way of a full text search, thus allowing for complex searches using Boolean, proximity and truncation searches. In addition, it allows users to search for legal findings by keywords attached to them. Users can retrieve legal findings by searching and selecting keywords in an expandable tree structure.

574. The CLD is viewed by Chambers as a major contribution to their capacity to enhance the coherence of the Court's jurisprudence. The number of decisions is such that comprehensive case law research for relevant legal findings that may assist the analysis of a problem is only feasible if it can be done digitally. That facility will shortly be rolled out within the Court, and should be available for access by the public within a few weeks thereafter. Hopes are high among the Judiciary that this can make a major contribution to the development of consistent jurisprudence and, as a result, the enhancement of the public image of the Court.

575. The Working Group continues to work towards bringing the database up-to-date and will thereafter strive to keep it so. That requires continuing support and resourcing. Over the four years of the Project, to date around 40 individuals have been involved in the work. They have mostly been visiting professionals working in Chambers as part of a visiting professionals programme, that gave them an opportunity to develop an in-depth understanding of the Court's objectives and functions in order to enhance their professional experience. Two years ago, a total of five P-1s were engaged in compiling the material for the database under the supervision of the coordinator. However, since the end of 2018, there has not been funding to continue their engagement. Reliance has mainly been upon one or two legal professionals, subsidised by funding from the EU. There are currently two, from Botswana and Bangladesh. Pending the commencement of the *Al Hassan* trial, the Working Group coordinator was also able to devote time to the work. Currently the finishing touches are being put to the technical aspects with a view to its imminent public launch.

576. The Court is fortunate to have this resource. It is vital to both the efficiency of the judicial process and the development of consistent and coherent jurisprudence to ensure that it is brought up to date as a matter of urgency, and that thereafter its regular update and on-going development is adequately funded.

## (2) Other Digital Resources and Legal Tools

577. In contrast to the belated development of the digital case law database, in relation to the conduct of judicial proceedings the Court strove from the outset to be an 'electronic court', with as little paper as possible. Several IT systems were put in place, covering different aspects of the judicial proceedings. There are three principal internal digital platforms on which court documents can be accessed:

- (i) HPE Records Manager (RM8): the document management system, where all filings of the parties and participants to the proceedings as well as the decisions of the Court are stored;
- (ii) Ringtail (e-Court): where electronic copies of documentary evidence are stored; and
- (iii) Transcend: which is used for the live transcripts in the courtroom, as well as for the subsequent analysis of transcripts.

578. In the interim, technology has developed significantly. In addition, the existence of three main systems brings its own challenges, e.g. in relation to communications between them and the need for users to log into three different systems. Some functions are more complicated than they should be.

579. For that reason, the Court has engaged in a project called 'Judicial Workflow Platform' (JWP). The aim is to have a single system that integrates all the functions of the current three systems and includes some additional functions. This is the largest project of

the Court Information Technology/Information Management Strategy 2017-2021 and accounts for 40% of the total Strategy budget. Delivery of the first modules is planned for the end of the second quarter of next year with the aim of supporting the main functionalities related to Court hearings. These will be further elaborated prior to completion. There may be a modest delay as a consequence of the impact of the pandemic in delaying some activities.

580. The basis of the JWP will be the electronic system of the STL, 'Legal Workflow', developed some years ago and used successfully by the STL. Since it already includes the majority of the functions that the Court would wish, it was considered sensible not to start from scratch but to use what was already available and develop it further to fully meet the needs of the Court. Legal Workflow is also the basis for the system of the Kosovo Specialist Chambers and it is possible that functions which they have added will be available to the Court.

581. It is also possible that in the future there will be an add-on to the CLD containing the non-public decisions, which would be within the Court information infrastructure and would either be part of, or communicate with, the JWP.

582. In view of the huge volume of material of various kinds that must be 'handled' and managed in the preparation for, and the conduct of, judicial proceedings, the maintenance of up-to-date and reliable digital support systems for the judicial work of the Court and the regular updating or replacement over time of these systems is vital to the efficient and effective functioning of the judicial system. The JWP project is an example of what will be required from time to time as the years pass, perhaps ever more frequently, with the relentless advance of technology.

583. Also available to the Judiciary is the Legal Tools Database (LTD) ([www.legal-tools.org](http://www.legal-tools.org)) which is a public collection of international criminal law resources from the Court and elsewhere.

584. One gap in the ready availability of judicial decisions is the absence of a universal record of oral decisions, which in some trials can be numerous. At present, the only way to keep even a rudimentary record of an oral decision is for the legal officer to highlight it in the Transcend transcript. It is not possible to alter the transcript to enable it to be put on line. However, further development of the CLD to incorporate oral decisions will be explored. Oral decision-making is in principle to be encouraged. In the course of a trial lasting for years, a very large number of decisions of on-going significance to the trial may be made. It is important to have a means of readily accessing oral decisions as a further contribution to the efficiency of proceedings.

### **(3) Effect on the Defence and Legal Representatives of Victims**

585. The efficiency of court proceedings is not achieved by equipping only the Judiciary with the tools that expedite their work. In an adversarial system, the parties require access to compatible equipment in order to play their part in that process. From the perspective of the external Defence teams, the Court digital system was described as fragmented and inefficient. The Defence, like the Judiciary, have to use the three separate platforms referred to above. However, for them the difficulties are compounded by problems gaining access to the relevant digital systems and the necessary use of physical CD discs in their management of case-related material. As described to the Experts, the process is clearly time-consuming especially for any who are not regular and proficient users.

586. The JWP discussed above owes much to the Legal Workflow system of the STL, which is available to the Defence with a significant saving of time. The Registry, through the competent assisting office (Victims' Participating Unit or Defence Office), distributes licenses granting access to the JWP to external counsel. However, the extent to which the work of external legal teams will benefit from the JWP project is not at all clear. There have previously been discussions around challenges that Defence access would present, such as over access to confidential material, but the intent was that the process of registering evidence and making disclosure would be improved.

587. The road ahead involves a Business Analysis phase in which external Defence and Victims' counsel and legal teams will have the opportunity to review the functionalities of

the JWP and raise their ‘preferred end-state’. It is plainly in the interests of judicial efficiency that external legal teams should have access to the maximum possible functionalities of the JWP.

588. A separate data management issue was raised before the Experts. It was claimed that, because the Court has not developed appropriate platforms for managing documents and information on victim participation, victim’s lawyers, the OPCV and the TFV are left attempting to manage complex data relating to hundreds, thousands or even tens of thousands of victims using only Microsoft Excel. It was maintained that that results in considerable inefficiencies and resource wastage.

589. Enquiries indicate that the situation is not as bleak as that submission suggests. Victim information is managed on the VPRS Victims Application Management System (VAMS). There is no complaint about the system. The issue is access for external counsel and on that there appears to be some misunderstanding.

590. VPRS aims to provide all data in VAMS to all clients (i.e. the parties, the legal representatives (including OPCV), the TFV and Chambers) in the data format they find most suitable. Technically, providing access to VAMS to other offices of the Court is generally not a big problem. The VPRS database programmer just needs to know the clients’ requirements for use.

591. More inclusive access to VAMS was offered to the Head of OPCV years ago, but was declined as unnecessary on the basis that they had their own system, Excel. Similarly, more inclusive access to VAMS was also offered to the TFV, but after two meetings in the last year, the TFV has not provided details of their usage requirements. Information can be prepared for the TFV in any format they require, and they appear to have opted for Excel, as it is easiest for them to manage. The only legal team to voice an interest in a more comprehensive IT capacity through VAMS was the *Ongwen* team of external victims’ representatives. They are currently in discussion with the VPRS on their requirements.

## **Recommendations**

**R199.** When a confirmation decision is issued, it should be transmitted immediately to the Presidency with the record of the proceedings, and the Presidency should forthwith transmit both to the Trial Chamber to begin trial preparation.

**R200.** The Trial Chamber should commence trial preparation and issue the scheduling order for the first status conference as soon as possible. There is no reason in principle why preparation cannot begin while the confirmation decision is the subject of an application for leave to appeal or an appeal. Any delay in or postponement of trial preparation should occur only if there is good cause shown therefor.

**R201.** Recognising that a motion for acquittal on the ground that there is no case to answer is now an established feature of the Court’s procedure, the Judges should draft Regulations of the Court to govern the procedure, including specifying the effect of a successful motion, to ensure a consistent approach by Chambers and providing for an appeal in appropriate circumstances.

**R202.** The Judges should consider whether ‘desirability’ is the appropriate standard for representations by an amicus curiae and whether Chambers should be required to give reasons for authorising an amicus curiae to make submissions and, where several apply, for selecting those to whom authority is given.<sup>398</sup>

**R203.** It is recommended that a rule should be drafted to provide for the appointment of an amicus curiae or independent counsel to investigate and/or prosecute where a contravention of Article 70 is alleged, in circumstances where there is a potential conflict of interest for the Prosecution.

**R204.** It is recommended that Chambers make the widest practicable use of the means of presenting evidence provided for by Article 69(2) and Rules 67 and 68 allowing for use of

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<sup>398</sup> [RPE](#), Rule 103(1).

prior recorded testimony and for the presentation of evidence by electronic or other special means.

**R205.** The Court should remain mindful of the authority it has under Article 3 to sit elsewhere than in The Hague whenever it considers it desirable and should make budgetary provision for that to occur when any Chamber decides that sitting elsewhere would be in the interests of justice.

**R206.** The ASP and/or the Judges should make provision, by whichever legislative means they consider appropriate, for proceedings to continue in the absence of one Judge for illness or other urgent personal reasons for such period as they consider appropriate on the basis that the remaining Judges are satisfied that to do so will have no adverse impact on the fairness of the trial.

**R207.** Budgetary provision should be made for the completion and on-going update and development of the Case Law Database.

**R208.** The Court should also be vigilant to take advantage of any currently available technological facilities that can be deployed, and that may be readily adapted, to further enhance the efficiency of the Court.

**R209.** Following delivery of the first modules of the JWP in 2021, the Registry should develop a plan for regular review and evaluation of the current capabilities of the Court digital systems in light of developments in digital technology with a view to taking timely and appropriate steps to update digital support to ensure the efficiency and expedition of proceedings. In order to ensure successful implementation of such plan, a Task Force, comprising staff from both Chambers and the Registry's IT Department should be set up. That Task Force should also be entrusted with the responsibility for identifying working methods and technological tools that could potentially be introduced for use in Chambers and proceedings. The OTP and Defence Office should be consulted as appropriate. The Task Force should issue an annual report and share this with the Judges and all Chambers staff.

**R210.** Chambers and the Registry should develop a consistent practice of recording oral decisions made in judicial proceedings in a digitally searchable database, numbering them and notifying the parties of the details thereof.

**R211.** The JWP Project Board should facilitate the widest possible access to the JWP for external legal teams.

**R212.** The VPRS should intimate to all potential clients their willingness to provide VAMS services more directly through the provision of relevant user accesses.

## **C. Interlocutory Appeals**

592. Another question considered problematic relates to interlocutory appeals. There were accounts suggesting that reluctance among some Judges to grant leave for interlocutory appeals is due to the fact that they contribute to delays in the proceedings. The Experts were told that entertaining a lengthy interlocutory phase between the close of pre-trial proceedings and the opening of a trial affects the length of the preparation of the trial in terms of duration. There is now inconsistency among Chambers with regard to the grant of leave to appeal. Moreover, some interviewed mentioned to the Experts that there is a high perception within and outside the Court that there is a tendency for leave to be granted for interlocutory appeals upon the Prosecutor's request rather than at the instance of the Defence.

593. While it is within the Judges' domain to render procedural decisions, it is important to point out that there are instances when decisions on procedural questions taken by the Appeals Chamber in course of the proceedings may bring clarification and have an impact on unification of practices among the Chambers. It may also contribute to procedural economy and protection of the rights of the accused, as, for example, in case of a decision on a 'no case to answer' motion or decision confirming charges.

594. Therefore, the Judges could consider agreeing on establishing principles and guidelines as to the instances that would require and justify interlocutory appeals to be decided by the Appeals Chamber. It is appreciated that some interlocutory decisions might

well influence the outcome of a trial while others are related more to case management. A common approach by Chambers as to which decisions should be appealable is desirable. Introducing new guidelines into the Chambers Practice Manual would allow the Chambers across Pre-Trial and Trial Divisions to follow the same approach. The Experts commend the recent introduction of the timelines to the Chambers Practice Manual, where the recommendation was agreed that ‘the Appeals Chamber should render decisions in respect of Article 82(1) a), (c) and (d) and Article 82(2) matters within four months from the date of the filing of the response to the appeal brief (...).<sup>399</sup>

### **Recommendation**

**R213.** The Judges should consider introducing into the Chambers Practice Manual guidelines regarding decisions on substantive and procedural issues which may be subject to interlocutory appeal, as well as clarification of the cases in which the proceedings should be stayed for the time necessary to adjudicate the interlocutory appeals.

## **D. Management of Transitions in the Judiciary**

### **Findings**

595. The expression ‘transition’, in the context of the Court’s Judiciary, refers to situations in which the question of replacing a Judge or Judges arises. This section looks at the situations which are problematic as potentially affecting the efficiency and effectiveness of the proceedings.

#### **1. Continuing in Office on Expiry of Term**

596. Because the judicial term of office is nine years without the possibility of re-election and one-third of the complement of 18 Judges have to retire and fall to be replaced every three years, a key challenge for the Court is managing the assignment of Judges. This applies in particular to cases that they are not likely to complete before the expiry of their term. This situation was clearly foreseen, since Article 36(10) requires a Trial or Appeals Chamber Judge to continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber. Since the likely duration of cases falling within the Court’s jurisdiction is notoriously difficult to estimate, it is not surprising that a significant number of Judges have continued in office beyond the expiry of their term to complete trials or appeals. The details of these extensions, ranging from a few months to a period of four years, are set out in a report by the Judges of the Court of 30 January 2020. Since the replacement of an outgoing Judge by an incoming Judge to complete the trial or appeal is ruled out by the mandatory terms of Article 36(10), this situation requires careful management.

597. The January 2020 Report highlights steps taken by the Judiciary to manage the need to rely on Article 36(10), including arranging for one Judge to serve on a non-full-time basis during the overflow period to accommodate a commitment made in anticipation of the Judge’s term expiring at the due date. It also outlines measures recently agreed upon to improve further the efficiency of the triennial transition, such as the introduction into the Chambers Practice Manual in the latter part of 2019 of time limits for issuing decisions and judgments in all Chambers to render the timing of the final stages of proceedings more predictable. At the same time, it highlights aspects of the Rome Statute system that limit the options for managing the situation, such as the prohibition on assigning Judges to sit in a trial if they have already sat on the case in pre-trial and the requirement that the Judges of the Appeals Division are obliged to serve only in that Division. It is clear that considerable attention has been devoted to managing this situation.

#### **2. Designation of an Alternate Judge**

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<sup>399</sup> [Chambers Practice Manual](#), para. 92.

598. The issue of transition can also arise at any time in relation to any individual Judge. There are a number of circumstances in which a Chamber may be reconstituted, such as on excusal or disqualification on account of conflict of interest. However, after the commencement of the hearing a Judge can be replaced only if an alternate Judge has been designated. An ever-present risk in any court dealing with lengthy and complex cases is that of the disabling illness or the death of a judge in the course of the hearing of a case. The problem was clearly foreseen as Article 74(1) and Rule 39 provide for the designation of an alternate judge to be present throughout a trial and the deliberations, and to replace a member of the Trial Chamber if that member is unable to continue attending. In the event of the death or inability of one of the Judges, the alternate can step into that Judge's shoes with potentially minimal disruption to the course of the trial. That is the theory. The situation is different in practice.

599. No alternate has to date been designated. At present, the only candidates for this role are Judges sitting in other Chambers. Only a Judge with little on their plate could conceivably be designated, since the alternate is required to sit from the outset and throughout. The power is unlikely to be used unless the workload of the Court suffers a major reduction. Even then it is difficult to envisage a judge of the calibre sought by the Court being content to pass several years of their prime as a spare judge observing proceedings conducted by others, on the off-chance of possibly being required at some indeterminate stage.

600. Rule 39 envisages an alternate judge sitting through all proceedings and deliberations in the case without participating. That seems an unnecessarily restrictive provision which the Court might consider reviewing in the light of the right of the reserve judge in the *ad hoc* Tribunals and the additional judge at the Lockerbie Trial, relating to the sabotaging of flight PanAm 103 over the United Kingdom, to ask questions and contribute to deliberations, but without the right to vote.

601. In anticipation that the above concerns about the unattractive aspects of the role may be addressed, further consideration was given to identifying a way of making the deployment of the power to designate an alternate judge a more realistic option in an appropriate case. If the identity of the Judge who might be deployed as the alternate were known in advance of the requirement arising, it should be much simpler and speedier to designate that Judge immediately following the decision to do so. That would require the election of an additional Judge or Judges under the provisions allowing for the increase in the complement to be available to serve as alternate judges, if and when that was considered an appropriate precaution to take. Additional Judges elected need not be called to serve unless and until a suitable case arose. That would require the home State of the Judge elected, but not called to serve immediately, accepting that the Judge should continue to serve there on the basis of possibly being required to depart at fairly short notice.

### 3. Appointment of a Substitute Judge

602. Consideration might be given to one other possible solution. At the turn of the century, this problem arose at the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY). At the ICTR, a judge was not re-elected and at the ICTY, a judge was unable to continue as the result of illness. Following the case at the ICTR, the Rules of both Tribunals were amended to allow for the substitution of a judge unable to continue by a judge who, until then, had had nothing to do with the case. At the ICTY, the provisions of Rule 15 bis C-F authorised the remaining Judges to decide, in the face of objection from a party, to continue the case with the substitute judge, if they determined that to do so would serve the interests of justice. That decision was appealable to a full bench of the Appeals Chamber without leave. On refusal of the appeal, the President had authority to assign to the existing bench a substitute judge who could join the bench only after they had certified having familiarised themselves with the record of the proceedings. These provisions remain part of the Rules of the International Residual Mechanism for Criminal Tribunals (IRMCT).

603. Of course, the introduction of a similar scheme at the Court need not be on the basis of the same conditions as applied at the *ad hoc* Tribunals. To ensure the speediest possible substitution, the number of Judges elected could be increased by one as suggested in para. 601 above, with the elected judge continuing to serve in their home jurisdiction until required.

On the other hand, it may suit the Court in the immediate future to proceed as was the case in the *ad hoc* Tribunals and simply make provision for the eventuality and seek a substitute as and when the need arises. That substitute could be a serving Judge of the Court with no prior connection with the case and a current workload that would permit the Judge to take on the role, subject to appropriate adjustment of that current workload. In the event that no serving Judge is able to undertake the commitment, an outside Judge could be enlisted to fill the role.

604. Since the first two options relating to an alternate judge involve the possibility of a Judge being an expensive accessory if assigned but not required, on grounds of cost alone the third option is clearly best.

605. However, that option involving, as it does, a Judge who is not present throughout the proceedings, raises fair-trial issues that do not arise in relation to the designation of an alternate. The effect that the use of a substitute may have on the fairness of the trial has to be assessed in the light of the whole circumstances applying at the time the decision to make the substitution is made. The risk that a Judge will be unable to complete a long and complex trial is ever-present. That in turn carries with it the risk of serious damage to the reputation of the Court through its inability to comply with the obligation to ensure that any trial is both fair and expeditious. In the absence of provision for the appointment of a replacement Judge, the need to start afresh with a new Bench raises the possibility of significant delay and consequential deterioration in the quality of the evidence and extended detention of the accused for a number of years. The availability of a substitute Judge should significantly reduce the delay and ameliorate the consequences of delay.

606. The proceedings so far are presented to the substitute in the form of a full video and audio record. Against the possibility that the ability of the substitute to fully appreciate the nuances of the evidence may be claimed to be impaired by not experiencing the live presentation and full context of that evidence, the particular circumstances of proceedings at the Court must be considered. Oral evidence is often relayed through an interpreter and the terms of documents through the work of a translator. To the extent that aspects of the demeanour of a witness may assist Judges in making determinations as to the reliability of the evidence given, the substitute tasked with becoming familiar with the record of the case has the benefit of a complete video record of the oral evidence and arguments presented. The availability of a full digital record of evidence that can be rechecked, the obligation that the substitute judge cannot sit in the case until familiar with the record, the continuing presence in court of the majority of the original Bench, and the speedier resumption and conclusion of the proceedings provide adequate safeguards to ensure that the substitution does not per se unfairly prejudice the position of the accused and undermine the fairness of the trial.

### **Recommendations**

**R214.** The Rome Statute should be amended to provide for the assignment of a substitute Judge to enable a trial to continue following the substitute Judge certifying that they have familiarised themselves with the record of the proceedings.

**R215.** When the workload of the Court develops to the point where it no longer allows for a substitute Judge to be assigned from the 18 regularly elected, the ASP should consider applying Article 36(2) and electing one or more Judges for such purpose.

## **XI. DEVELOPMENT OF PROCESSES AND PROCEDURES TO PROMOTE COHERENT AND ACCESSIBLE JURISPRUDENCE AND DECISION-MAKING**

### **Findings**

607. The aspects of the work of the Court that led to the criticism that the jurisprudence of the Court lacked coherence and consistency were the following: departure from established practice and jurisprudence; standard of review in appeals; the absence of a deliberation

culture; fractured decisions and the multiplicity of dissenting, separate, partially concurring and other judgments issued. Concern about incoherent jurisprudence was a theme that ran through interviews relating to the work of the Judiciary.

608. Both the form and content of the Appeal Judgment in the case of Bemba have been the subject of widespread debate within the Court, as well as widespread debate and criticism among stakeholders and observers of the Court. Views were expressed that the Appeals Chamber had departed from the Court's established jurisprudence and had introduced a new approach to the application of Articles 81(1)(b)(ii) and 83(2) of the Rome Statute in relation to errors of fact.<sup>400</sup>

## A. Standard of Review in Appeals

609. On 21 March 2016, Trial Chamber III in Bemba unanimously convicted the accused of the charges against him and sentenced him to imprisonment for 18 years. However, on 8 June 2018, the Appeals Chamber issued a simple-majority Judgment reversing the decision at first instance and acquitting him on all counts. The Chamber departed from established jurisprudence and formulated a new basis for appellate review on the ground of error of fact. It held that 'it may interfere with the factual findings of the first-instance Chamber whenever the failure to interfere may occasion a miscarriage of justice, and not "only in the case where [the Appeals Chamber] cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it"', the test set in the case of Lubanga.<sup>401</sup>

610. In the opinion of the Appeals Chamber, the margin of deference towards the factual findings must be approached with 'extreme caution'.<sup>402</sup> It indicated that 'when a reasonable and objective person can articulate serious doubts about the accuracy of a given finding, and is able to support this view with specific arguments, this is a strong indication that the Trial Chamber may not have respected the standard of proof and, accordingly, that an error of fact may have been made'.<sup>403</sup> The position of the Appeals Chamber was that findings that can reasonably be called into doubt must be overturned.<sup>404</sup> Having evaluated part of the evidence and identified errors in the assessment of facts, the Appeals Chamber concluded that they 'materially impacted' on the Trial Chamber's findings.

611. Until the Bemba case, however, the Court had followed the jurisprudence of the ad hoc Tribunals, and had been applying 'a standard of reasonableness in reviewing' a Trial Chamber's factual findings,<sup>405</sup> according to them a margin of deference.<sup>406</sup> The decision to depart from that standard was unexpected. There is no clear explanation why that occurred. The decision has created a void of uncertainty about the applicable standard of review for error of fact. Uncertainty as to the applicable standard is undesirable. It is considered that urgent action is necessary to provide legal certainty and restore confidence in the Rome Statute system among the public at large. The only way to ensure the immediate removal of that uncertainty is by amending the Rome Statute to define the applicable test, but a recommendation to that effect is not considered appropriate.

## B. Departure from Established Practice and Jurisprudence

612. The Appeals Chamber in *Bemba* also concluded that conviction of certain acts should be reversed on the additional ground that they were not specified among the material facts and circumstances described in the charges and the confirmation decision. Although that conclusion did not involve a departure from established practice determined by a judgment

<sup>400</sup> [Rome Statute](#), Art. 81(1)(b)(ii), 83(2).

<sup>401</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', [ICC-01/05-01/08-3636-Red](#), 8 June 2018, p. 13, para. 40.

<sup>402</sup> *Ibid.*, para. 38.

<sup>403</sup> *Ibid.*, para. 45.

<sup>404</sup> *Ibid.*, para. 46.

<sup>405</sup> [ICC-01/04-01/06-3121-Red](#), para. 24.

<sup>406</sup> *Ibid.*, paras. 22, 24; *The Prosecutor v. Kupreškić et al.*, Appeal Judgment, [IT-95-16-A](#), 23 October 2001, para. 32.

of the Appeals Chamber, it did involve a decision that current accepted practice did not meet the standard required for effective charges.

613. The decision on both grounds has had a significant impact on the working practices of the Court. In practical terms, as a result of the Judgment, the OTP may need to consider incorporating all possible factual bases and relevant allegations into the DCC. It also means that the Pre-Trial Chamber may have to undertake a more extensive and detailed examination of the facts alleged with the risk that oral evidence will become the norm, defence counsel will have an expanded role and the confirmation hearing will become a mini-trial.<sup>407</sup> This has in turn led to Judges of the Pre-Trial Division deviating from the agreed practice laid out in the Chambers Practice Manual vis-à-vis confirmation hearings and decisions.<sup>408</sup>

614. It is acknowledged that determining matters of law and practice is generally for the Judges of the Court and not for the Experts, and that there is no established practice of the Appeals Chamber adhering to precedent. However, having regard to the impact a change in practice can have on the workings of the Court and on legal certainty, it is legitimate to address the process by which such far-reaching decisions are made. It is the opinion of the Appeals Chamber, where any matter of law and practice has previously been determined by the Appeals Chamber, any departure from that precedent should require to be the subject of a special procedure involving alerting the parties to the point, so that it is properly addressed on behalf of the parties. An obvious possibility is the process followed in courts of last resort where the bench is increased in size to address particular issues, including the soundness of previous decisions. The Rome Statute system does not appear to allow for a Bench of seven to be formed. Statutory amendment would be necessary. However, one suggestion that the Court could provide for by regulation would be to require the Court, when such an issue arises, to identify precisely what the issue is, give notice of that to the parties and order submissions on that point. The Court could determine the point as a preliminary issue or address it along with the merits of the appeal. That would ensure that such important decisions are made only following full consideration.

### C. Developing a Deliberation Culture

615. There were many accounts of the absence of a genuine process of deliberation in certain Chambers. Lack of communication between the Judges and problematic relationships among the members of some benches were such as to evoke the description of the Chamber as dysfunctional. In one instance, a Judge deliberately chose not to circulate the Judge's opinion before the point of delivery. While disagreement may be unavoidable on account of sincerely held legitimate views that are incompatible, it may also be the result of a failure in judicial responsibility. Consideration of some decisions and judgments, along with accounts of dysfunctional relationships among members of Chambers point to the latter. That is supported by regular apparent failure to observe legislative provisions relating to decision-making and publishing.

616. Two high-profile acquittal decisions and the way in which they were presented gave rise to concern among commentators, the public and within the Court about the manner and extent of deliberations. The process of announcing orally the verdict in the trial of *Gbagbo* and *Blé Goudé* combined with the disjointed issuing of the written opinions, followed by the fractured Judgment in *Bemba*, comprising a number of separate documents including dissenting and separate opinions, added to the debate around the coherence of the Court's jurisprudence and its decision-making. A wider review of the decisions and judgments of the Court shows that separate and dissenting opinions are fairly common.

617. In the case of *Gbagbo*, on 15 January 2019, the Trial Chamber pronounced its majority decision and reasons orally in brief terms,<sup>409</sup> and the written opinion of the dissenting Judge

<sup>407</sup> Until the *Bemba* Appeals Judgment, it had been established that the Pre-Trial Chamber was to include in the confirmation decision the description of the alleged crime, location and time - [ICC-01/04-01/06-3121-Red](#), paras. 114-130.

<sup>408</sup> Contrary to what the Appeals Chamber stated in *Lubanga*, *ibid.*, para. 134.

<sup>409</sup> See *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the *Blé Goudé*

was filed. Full written reasons for the decision were produced by the majority Judges after a lapse of six months. While the decision to acquit was contained in the eight-page, orally-rendered decision, the full reasons for the decision were set out separately by each of the Judges composing the majority (Annex A: 90 pages and Annex B: 960 pages).

618. In the case of *Bemba*, the Judgment delivered was fractured for different reasons. With regard to the standard of review, the decision was taken by 3:2.<sup>410</sup> The main disagreement on the bench was the extent of the margin of deference to factual findings of the Trial Chamber that should be recognised by the Appeals Chamber.<sup>411</sup> However, with regard to the decision as to the outcome on the basis of Article 83(2), the Judges were divided 2:2:1 (one Judge from the majority was initially of the opinion that a new trial should have been ordered, but in the end took a different view). Regarding the substantial assessment of the contextual elements and causation, the Judges again divided 2:2:1. Apart from the Judgment by the majority (80 pages) and the Dissenting Opinion of the two outvoted Judges (269 pages), two of the Judges composing the majority issued a Separate Opinion (34 pages), and the third Judge issued a Concurring Opinion a week later (117 pages).

619. However, those two cases were by no means the only ones where the bench did not take a decision unanimously. Indeed in the life of the Court, there has only been one unanimous guilty verdict.<sup>412</sup> While a proper deliberation process may increase the prospect of reaching a unanimous decision, that will not always happen.

620. Separate opinions are a feature of many national jurisdictions in both common and civil law systems. Within the EU, 20 Member States out of 27 allow Judges to publish their own opinions, if not at all levels, at least at the Constitutional Courts.<sup>413</sup> The practice of the International Court of Justice (ICJ) and the European Court of Human Rights also shows wide use of individual opinions. At the CJEU, the possibility of allowing for the publication of separate opinions was rejected.<sup>414</sup> The arguments against and in favour of allowing the judges to express their views in separate opinions have been discussed in national and international forums.<sup>415</sup> A study commissioned by the European Parliament demonstrates a trend towards allowing at least constitutional judges to issue separate opinions.<sup>416</sup> However, the report stated ‘that these best serve their purpose only if they are limited in number, circulated in advance and drafted in a respectful manner’.<sup>417</sup> In that way, they can foster collegiality, enhance the level and depth of legal debate amongst judges and lead to better reasoned and more coherent judgments.<sup>418</sup>

621. In a similar way, the practice at the Court of drafting separate opinions could contribute to collegiality and the depth of the legal analysis where they are limited in number and address the issues on which the Court was addressed, and are not simply an expression of personal views on issues that do not lie at the heart of a difficult question before the Court. For the sake of collegiality, it is also important that they are expressed respectfully and in

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Defence no case to answer motion, [ICC-02/11-01/15-1263](#), 16 July 2019, stating ‘The Chamber will provide its fully reasoned decision as soon as possible. The Chamber recognises that it would have been preferable to issue the full decision at this time. However, although rule 144(2) of the Rules of Procedure and Evidence states that the Chamber must provide copies of its full decision ‘as soon as possible’ after pronouncing its decision in a public hearing, there is no specific time limit in this regard.’, p. 7.

<sup>410</sup> See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Concurring Separate Opinion of Judge Eboe-Osuji, [ICC-01/05-01/08-3636-Anx3](#), 14 June 2018 - ‘...the majority chose the path of judicial economy: by focusing only on the dispositive issues of the case and on the critical forensic considerations that engaged reasonable doubt in the case (agreeing to discuss anything else in concurring separate opinions)’, para. 7.

<sup>411</sup> ‘...what really separates the majority and the minority is the extent to which the idea of “appellate deference” to factual findings should guide the judgment of the Appeals Chamber’, *ibid.*, para. 8.

<sup>412</sup> *The Prosecutor v. Bosco Ntaganda*, Judgment, [ICC-01/04-02/06-2359](#), 8 July 2019; while the Judgment in the *Bemba et al.* case also appears to have been unanimous, it ought to be noted that this was pursuant to Article 70; see *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute, [ICC-01/05-01/13-1989-Red](#), 19 October 2016. In practice, on many occasions the Chambers have not reached consensus and the decisions have been taken by majority of Judges, often with separate, concurring or dissenting opinions being issued.

<sup>413</sup> European Parliament, Directorate-General for Internal Policies, Policy Department, Citizen’s Rights and Constitutional Affairs, [Dissenting Opinions in the Supreme Courts of the Member States](#) (2012).

<sup>414</sup> *Ibid.*

<sup>415</sup> [Third Judicial Seminar of the International Criminal Court](#), (2020).

<sup>416</sup> [Dissenting Opinions in the Supreme Courts of the Member States](#), *supra* n 413, p. 39.

<sup>417</sup> *Ibid.*, p. 39.

<sup>418</sup> *Ibid.*, pp. 7, 14.

measured terms. The question of the circulation of views of dissenting or concurring Judges among the members of the bench before the publication of those cannot be overestimated. Similarly, it is of utmost importance that both the majority Judgment and all other judgments are issued simultaneously.<sup>419</sup> Apart from being a matter of common sense and courtesy, that is what the Rome Statute requires.

622. Article 74(2) requires that a Trial Chamber's decision shall be based on its evaluation of the evidence and the whole proceedings, and that it may base its decision only on evidence submitted and discussed before it at the trial. The use of the singular pronoun 'it', indicative of a single entity, is then followed by provision in Article 74(3) requiring the Judges to attempt to achieve unanimity in their decision. It is only in the event of failure to succeed that a majority decision is permitted. In terms of Article 74(5), the Chamber is obliged to issue one decision. That decision must be in writing and must contain a full and reasoned statement of the Chamber's findings on the evidence and conclusions and, where there is no unanimity, the views of the majority and the minority. A literal reading of the aforementioned provisions leads to the conclusion that there is to be a single decision, and, in cases where there is no unanimity, that particular decision must contain the views of the majority and the minority. The final requirement is that the decision or a summary thereof must be delivered in open court.

623. All of that points to an obligation on the Chamber to work together with the aim of agreeing on a decision of the whole Chamber and, if the Judges are not agreed on everything, explaining their differences in one written decision.

624. In Article 74(1), the drafters of the Rome Statute clearly intended to foster among the Judges a practice of deliberation that aims for consensus and legal certainty, but also leaves scope for sincerely-held opposing views which the Judges have genuinely endeavoured to reconcile by debate - including the consideration of potential compromise, distinguishing the facts and the wise exercise of judicial restraint.

625. In practice, the Judiciary appear to regard a decision, which has attached to it annexes or appendices containing the dissenting or separate or partially concurring or other related opinions, as one single decision, since that is the only existing format that approximates to the requirements above. That certainly does not have the appearance of being 'one decision' containing 'the views of the majority and the minority'. At the very least, all related judicial expressions of opinion on the outcome of a case should be contained in one document and issued simultaneously.

626. Article 83 relating to appeal judgments is not quite so prescriptive, but does provide that, where there is no unanimity, the judgment of the Appeals Chamber shall contain the views of the majority and the minority. It also permits a Judge to deliver a separate or dissenting opinion on a question of law. While the aim is essentially the same as in the case of Trial Chamber decisions - to foster a practice of deliberation - there is recognition that it is in the Appeals Chamber that important points of law fall to be fully addressed and there may be circumstances where it is appropriate for a Judge to deliver a separate or dissenting opinion on a question of law. However, the inclusion of the views of both the majority and the minority in one judgment envisages one judgment again being the norm. On the face of the language used, that appears to envisage a decision in which the competing views and their supporting arguments and analyses are combined into one narrative, or set out in separate paragraphs, followed by their conclusions. It would be interesting to see what difference it might make to the way Judges deliberate for one Chamber to write a trial decision that set out the arguments both ways and the majority and minority analyses together in context.

627. Reference is made elsewhere in this Report to the development by the Judges over the last five years of the Chambers Practice Manual first introduced as the Pre-Trial Chambers Practice Manual in 2015. The most recent review of the Manual at a judicial retreat in November 2019 resulted on agreement on a Guideline for Judgment Structure and a Guideline for Judgment Drafting. These are a commendable step towards the creation of a practice of deliberation among Judges that should become second nature, if it is not already so on their arrival at the Court. That practice should be reflected at least in part in

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<sup>419</sup> *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Dissenting Opinion, Judge Herrera Carbuccia, [ICC-02/11-01/15-1263-AnxC-Red](#), 16 July 2019.

documentary form. Once good practices, such as proper deliberation, have been identified and applied, it is important that they should be formally recognised as such by the Court to ensure that they survive the replacement of one-third of the judicial complement of the Court every three years. That is also part of the reason for recommending the inclusion in a comprehensive judicial Induction Programme of deliberation as a topic.

#### **D. Judgment Structure and Drafting**

628. While the Judgment Structure Guideline proposes in outline a judgment structure with which all who are elected to the position of Judge at the Court should be familiar, simply reading the Guideline should immediately alert the experienced Judge to the need for early deliberations to agree on the structure to be identified. The initial sections of the Judgment Drafting Guideline produced along with the Structure Guideline provide very focused advice, based on extensive experience, on the planning and organisational decisions that must be made. Preferably, before the trial starts, there should be deliberation on the productive deployment of the Chamber's legal support staff, their working methods and the translation challenges that must be met. The efficiency of the trial process and hence the overall fairness and expeditiousness of the trial may hinge upon getting these early administrative decisions right.

629. Then, in a section entitled 'Regular meeting of Judges', the need for deliberating and drafting throughout the trial is explained. A trial conducted expeditiously is a relentless process which can all too quickly get on top of the Judges and legal support staff if they do not have a work-plan to manage the evidence presented to the Chamber. There should be regular, well-informed deliberations by the Judges, generally in the presence of the legal officer or officers responsible for the drafting of the parts of the case under discussion. The Judges should give directions to the legal officers to ensure that the evidence is fully addressed throughout the trial and that decisions are made by those responsible for them, the Judges. It should ensure the correct calibration of the Chamber to enable legal officers to 'support' the Judges in the best way possible by advising them as requested, implementing the drafting directions given in the meeting, and thereafter working with the Judges to revise the draft. Experience from other tribunals and from the Court shows that there is no set pattern of meetings that must be followed. Some have tended to address evidence when it is fresh and have deliberated, when possible, after each witness. Others have preferred periodic meetings to discuss the evidence of a number of witnesses. Either way, the general experience is that it is of great assistance to the final analysis of the evidence to reach provisional views about its reliability and significance when the evidence is fresh in the mind. These views are, and must remain, provisional until the final deliberation at the conclusion of the case. In addition, on-going discussion of areas of the evidence on which decisions are proving difficult can often bring clarity and promote agreement.

630. The Drafting Guideline discusses in some detail various approaches to compiling the evidence as the trial progresses, all designed to facilitate the on-going and final judicial deliberations. Regular review at legal officer level and by all Judges should ensure consistency in the evolving draft, but more importantly also ensure that each Judge is fully engaged in the drafting process. The volume of material that generally requires to be considered in trials before this Court, and the number of points that have to be addressed and questions answered, are such that a dedicated judicial commitment to regular deliberation by each Judge of the Chamber is essential to achieving the objectives of Article 74. It should also enhance the confidence with which each Judge can address that final question on each charge – has the Prosecution proved its case beyond reasonable doubt.

631. As was mentioned in other parts of this Report, since 2015 the Judges have been developing a Chambers Practice Manual, which has been amended a few times since then. In addition, a Guideline on Judgment Structure as well as one on Judgment Drafting have been incorporated into the Chambers Practice Manual. The Judges of the Court have committed themselves to generally observing the provisions of the Manual. It is important to the development of coherent jurisprudence that they should do so. The Manual is an excellent compilation of recommended practices and solutions to some of the ambiguities at the Court.

#### **E. Conflicts Between Different Legal Systems and Best Practices**

632. Many of the Experts' interlocutors, including Judges themselves, mentioned the extensive 'attachment' of individual Judges to their domestic legal systems, whether common law or civil law, as one of the reasons for inconsistent practices between Chambers. The legal framework of the Court indeed is unique and contains elements from both systems, leaving at the same time a certain level of discretion to a Judge/Chamber to decide on the conduct of the proceedings/hearings. Rules 69, 64(8), 122(1) or 140(1) are examples where the Judge/Chamber is allowed discretion to decide about the procedural aspects of the case. There seems to be a tendency to insist on the application of concepts or practices characteristic of or belonging to the national legal framework known to the Judges. Understanding of the hybrid nature of the legal framework and the selection of solutions it offers to serve best the scope of the proceedings, open-mindedness and readiness to learn are the characteristics that each judge should apply in their service at the Court.

### **Recommendations**

**R216.** Pre-Trial and Trial Chambers should accord respect to the decisions of other Chambers.

**R217.** Recognising the importance of legal certainty and consistency, the Court should depart from established practice or jurisprudence only where that is justified on grounds precisely articulated in the decision/judgment.

**R218.** Before departing from practice or jurisprudence approved by the Appeals Chamber, the Chamber should be required, by procedures stated in a Regulation of the Court, to identify the point precisely in a written notice to parties requesting written submissions thereon. Argument should be heard before deciding the point either as a preliminary issue or in the context of the appeal. In the event that the Chamber is faced with inconsistent decisions of the Appeals Chamber on a point, the same process should apply. In the long term, consideration should be given by the ASP to amending the Rome Statute by increasing the Appeals Chamber to seven Judges in order to address important issues including such as conflicts in previous decisions.

**R219.** The Presidency should encourage the development within Chambers of a genuine deliberation practice.

**R220.** Deliberations and Judgment drafting should begin upon the constitution of the relevant Trial/Appeals Chamber and be a continuous process grounded on the instructions and directions generated through on-going deliberations by the Judges, and should follow the Judgment Structure and Writing Guidelines as set out in the Chambers Practice Manual.

**R221.** Trial Chambers are encouraged to show respect for and pay particular regard to the obligation in Article 74(5) to arrive at a unanimous decision, and make increased efforts to do so, including where appropriate endeavouring to arrive at a compromise on divisive issues, or exercising judicious restraint.

**R222.** The Regulations of the Court should be amended to require all trial decisions and appeal judgments on conviction or acquittal and all related dissenting and concurring opinions to be issued in writing at the same time as the decision or judgment.

**R223.** Chambers should be required to circulate the final draft of the proposed judgment among all the Judges of the Chamber, sufficiently in advance of the judgment being issued, to enable any Judge, who intends to issue an opinion separate from the judgment of the Chamber, to have time to finalise and circulate that judgment to other members of the Chamber before the judgment is finalised.

**R224.** Guidelines as to the length and content of all forms of separate opinions should be introduced into the Chambers Practice Manual.

**R225.** The Judges should keep the Judgment Structure and Drafting Guidelines under constant review and update them regularly in light of their ongoing experience.

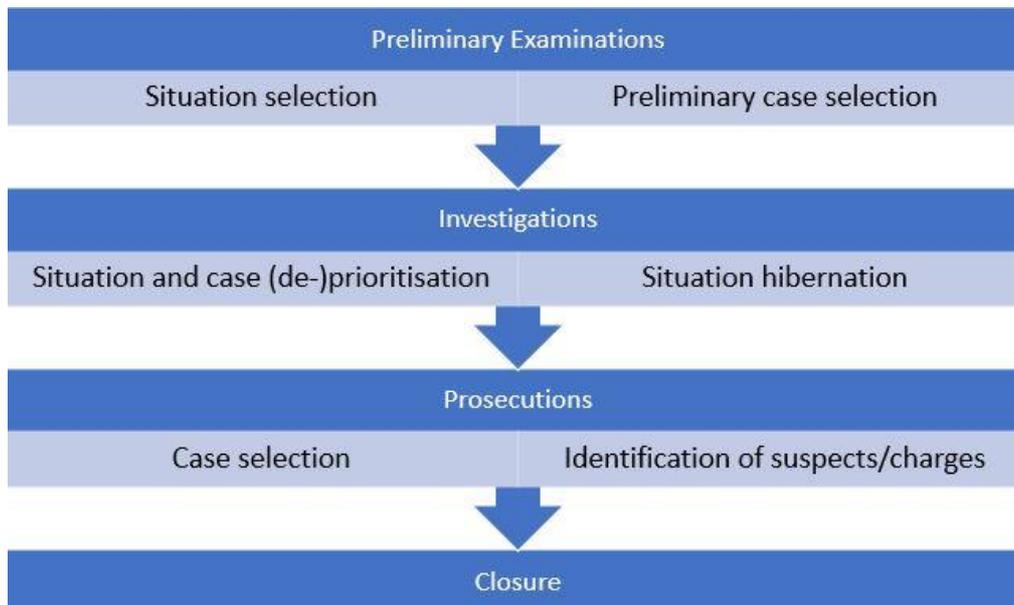
*Organ Specific Matters: Office of the Prosecutor***XII. OTP SITUATIONS AND CASES: PROSECUTORIAL STRATEGIES OF SELECTION, PRIORITISATION, HIBERNATION AND CLOSURE****Findings**

633. The Court is a court of last resort, and thus it cannot, and should not, be expected to prosecute each individual responsible for the commission of Rome Statute crimes. This has been the experience of other tribunals prosecuting international crimes, and is even more important with regard to the complementary mandate of the Court. As a consequence, the Prosecutor has considerable discretion over the selection and prioritisation of both the situations and the cases within situations during Preliminary Examinations (PEs) and investigations.

634. Recently, concern has been rising regarding the way in which the OTP handles the high volume of potential situations and cases, taking into account its limited resources. Some stakeholders observe that with regard to the selection or prioritisation of situations and cases, there is insufficient consideration given to the prospects of investigative and prosecutorial success (referred to in this Report as ‘feasibility’).<sup>420</sup> Likewise, there is concern that the threshold of sufficient gravity is pitched too low. Furthermore, the Experts observed a lack of long-term planning for the life-cycle of PEs and investigations, including their (de-)prioritisation and eventual closure.

635. The processes whereby certain situations and cases are selected, prioritised, de-prioritised, hibernated, or potentially closed, are quite complex. There is also abundant confusion concerning the bases for decision-making at the different stages of a situation’s life-cycle, as well as the outcomes of each phase of PE or investigation. *Figure 3* summarises all the stages of situation and case selection and prioritisation.

**Figure 3 The process of situation and case selection, prioritisation, closure**



<sup>420</sup> The term ‘feasibility’ encompasses operational criteria, such as the amount and quality of evidence available, international cooperation, security situation and ability to protect witnesses. In essence, feasibility considerations relate to whether the OTP ‘can conduct effective and successful investigation leading to a prosecution with a reasonable prospect of conviction’, [OTP Policy paper on case selection and prioritisation](#) (2016), para.51.

## A. Initial Situation and Case Selection: Preliminary Examinations

### 1. Situation Selection During Phase 1

636. The initial selection of situations occurs before the opening of a PE. This stage of proceedings, referred to by the OTP as ‘PE Phase 1’, is not mentioned in the OTP legal framework. It is thus entirely governed by the discretion and approach of the Prosecutor.

637. During the PE Phase 1, the OTP filters a high volume of incoming Article 15 communications.<sup>421</sup> Based upon an initial review of all Article 15 communications, those classified as Warranting Further Analysis (WFA)<sup>422</sup> are further examined in Phases 2 - 4. The findings of this analysis are produced in a ‘Phase 1’ report to the Prosecutor, containing an in-depth factual and legal assessment of the allegations and the situation. The purpose of such analysis is to provide an informed, well-reasoned recommendation to the Prosecutor on whether the alleged crimes in question appear to fall within the Court’s jurisdiction<sup>423</sup> and warrant the OTP proceeding to Phase 2, that is, the formal commencement of a PE.

638. Since mid-2012, the Preliminary Examinations Section (PES) has produced over 50 Phase 1 reports relating to WFA communications.<sup>424</sup> Most of the WFA communications in this period were ultimately dismissed. Five PEs were opened on the basis of Phase 1 analysis, namely those into the situations in Venezuela, the Philippines, Bangladesh, and Burundi, and the reopening of the situation concerning the conduct of the UK forces in Iraq.

639. According to the OTP, prosecutorial discretion is ‘reflected in particular in the selectivity exercised by the OTP in relation to some decisions taken on WFA communications.’<sup>425</sup> The fact that about 90% of PES Phase 1 reports are dismissed by the Prosecutor poses the question as to the criteria applied by the Prosecutor in deciding to open a PE. Apart from the factual assessment of subject-matter jurisdiction and preliminary considerations of the Court’s jurisdiction, any additional considerations are in the Prosecutor’s discretion. Such considerations may be related to policy and to a prospective assessment of the exercise of the Court’s jurisdiction. It appears that these factors are essentially complementarity (‘the existence of national proceedings relating to the relevant conduct’), jurisdiction (‘narrow geographic and/or personal scope of the jurisdiction’), prosecutorial strategy of focusing on those most responsible, and following a ‘conservative’ approach in terms of deciding whether to open a PE.<sup>426</sup>

640. However, it remains difficult to assess the criteria used by the Prosecutor, as they are not transparent. Without detracting from the Prosecutor’s discretion and independence, making these criteria explicit may be beneficial. It could reduce the number of WFA reports that need to be submitted, thus reducing the workload of the PES, and harmonising the approach of the Prosecutor and the JCCD.

### 2. Situation Selection during PEs (Phases 2-4)

641. Once a PE is open, the discretion of the Prosecutor in terms of continuing or closing a PE is more restricted than during Phase 1. Phases 2-4 comprise of the legal and factual

<sup>421</sup> Overall between July 2002 – December 2019, the OTP received 14,167 communications, of which 715 were determined to be Warranting Further Analysis (WFA). Thus, on average, the OTP receives about 41 WFA communications a year (average for the whole period). In the last four years, the average is 38 (based on internal JCCD – International Cooperation Section overview, February 2020)

<sup>422</sup> Communications are classified as concerning (i) matters manifestly outside of the jurisdiction of the Court; (ii) situations already under preliminary examination; (iii) situations already under investigation or forming the basis of a prosecution; or (iv) matters which warrant further factual and legal analysis by the OTP; [Regulations of the Prosecutor](#), Regulation 27; [OTP Policy Paper on Preliminary Examinations](#) (2013), para.75.

<sup>423</sup> The standard in Phase 1 is ‘appears’, which is lower than the standard used at the PE stage, ‘reasonable basis to believe’. The Phase 1 report is not limited to the specific allegations contained in an individual communication received. [OTP Policy Paper on Preliminary Examinations](#), para.79; Amitis Khojasteh, ‘The Pre-Preliminary Examination Stage: Theory and Practice of the OTP’s Phase 1 Activities’, in Morten Bergsmo and Carsten Stahn (eds), [Quality Control in Preliminary Examinations Volume 1](#) (TOAEP 2018), pp. 230-231.

<sup>424</sup> [OTP Report on Preliminary Examinations Activities 2019](#), para.25.

<sup>425</sup> *Ibid.*, para.15.

<sup>426</sup> *Ibid.*

analysis of the elements required to satisfy the criteria of Article 53(1) of the Statute: whether a crime within the jurisdiction of the Court has been or is being committed; admissibility under Article 17 (consisting of complementarity and gravity), and the interests of justice.<sup>427</sup> Phases 2-4 are also described in the public PE activities reports, increasing the scrutiny of decisions taken by the Prosecutor.

642. The greatest concern in terms of selection of situations for PEs, and later, for (requesting authorisation for) investigations relates to the increasing number of situations before the OTP and its insufficiency of resources. A number of PEs might be ready for investigation but with no available resources to proceed with them. The OTP acknowledges that if multiple situations reach the threshold of investigations at the same time, ‘then it is, resource-wise, impossible to properly respond’, and a case selection and prioritisation policy would have to be applied.<sup>428</sup>

643. Multiple stakeholders expressed concerns about the Court being stretched too thin. They also point to situations with limited feasibility. It would appear that nine active investigations mean that the OTP is unable to conduct thorough investigations in each of them; conduct activities in hibernated investigations; and further integrate investigative staff into PEs.<sup>429</sup> In addition, there is the consideration that, within the limited resources of the OTP, more investigations allow for fewer cases per situation,<sup>430</sup> thus reducing the Court’s impact in situation countries.

644. The Experts are of the view that having fewer situations could: impact positively on active investigations; result in a more comprehensive approach regarding the number of cases and accused per situation; lead to a more consistent implementation of Outreach strategies; and increase the potential for achieving a more meaningful impact on the victims.

645. The Experts considered two strategies suggested during internal and external consultations for improving the position in which the OTP finds itself: (i) narrowing the standards for admissibility by applying a higher threshold for gravity, (ii) taking feasibility considerations into account during situation selection.

## (1) Narrower Standards for Admissibility

646. The Experts repeatedly heard concerns that the Court should focus on a narrower range of situations, and limit its interventions to the extent possible, focusing on situations of the highest gravity and on those most responsible for the crimes. While it is a prospect that would be disappointing for many, and further restrict the already limited jurisdiction of the Court, the current situation is unsustainable having regard to the limited resources available.

647. The first suggestion, put forward by many consulted by the Experts, is to consider narrowing the admissibility test (Article 17) by applying a higher gravity threshold.

648. Gravity assessment is an important consideration in the opening of a PE, bearing in mind the potential number of cases that are likely to arise.<sup>431</sup> Currently, the assessment of gravity and interests of justice are carried out only after a PE is opened. Phase 1 filtering is performed with the focus on the subject matter jurisdiction (factual analysis of crime), and a preliminary assessment of the Court’s jurisdiction. If gravity is added as one of the factors to weigh during the assessment in Phase 1, it would allow the Prosecutor to make comparative decisions at that stage, and focus on the gravest instances of criminality. This would assist the OTP in reducing the number of new PEs and, consequently, investigations.

<sup>427</sup> [Rome Statute](#), Art.53(1), read with Art.15,17.

<sup>428</sup> [OTP Strategic Plan 2019-2021](#), p.18, para.22.

<sup>429</sup> See *infra* Section I.C.3(4), paras.162-166.

<sup>430</sup> See *supra* Section I.C.4. [OTP Staffing](#).

<sup>431</sup> Note that any assessments carried out during PEs are preliminary, and thus ‘the Prosecutor’s selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments’, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, [ICC-01/09-19-Corr](#), 31 March 2010, (‘Kenya authorisation decision’), para.50.

649. Currently, in assessing gravity, the OTP evaluates the scale, nature, manner of commission of the crimes, and their impact. This includes both quantitative and qualitative considerations.<sup>432</sup> In line with the OTP policy goals and statutory provisions, the Prosecutor already exercises discretion in determining how the OTP assesses gravity. For example, in order to lay a foundation for proceeding against the most responsible, the OTP now considers investigating mid-level perpetrators.<sup>433</sup> Furthermore, the Prosecutor also includes policy-related considerations in assessing the nature of the crimes, e.g. sexual or gender-based crimes with reference to the Policy Paper on Sexual and Gender-Based Crimes; crimes committed against children; crimes that result in the destruction of cultural property; and large scale environmental damage.<sup>434</sup> There is no formal threshold for gravity assessment,<sup>435</sup> and there is nothing in the legal framework relating to PEs precluding the Prosecutor from exercising discretion at the PE stage with regard to the assessment of gravity.

650. The Prosecutor might well consider the application of a higher gravity threshold in deciding whether to open or continue a PE, with a view to allocating the limited resources of the OTP to the situations that are the most serious, and for those most responsible for the commission of the crimes. It is not in issue that the Court was set up to investigate and prosecute ‘the most serious crimes of concern to the international community as a whole,’<sup>436</sup> with the focus on those most responsible for the commission of such crimes.<sup>437</sup>

## (2) Feasibility Considerations in Situation Selection and Prioritisation

651. Another issue that the Experts have considered is whether feasibility, especially the likelihood of arrests, should be taken into account in the PE analysis. More specifically, should a situation be opened where there is limited feasibility.

652. The stakeholders consulted by the Experts expressed concern with regard to investigations opened with low feasibility, and especially having regard to the limited resources available to the Court. A further issue raised in this context is the inability, in some cases, of the Court to protect witnesses and information providers.

653. However, once a PE is open, the Prosecutor is mandated to determine whether the provisions contained in Article 53(1) have been met, and has no discretionary power to decline to proceed with an investigation<sup>438</sup> because of low feasibility. This was recently confirmed by the Appeals Chamber with regard to the Afghanistan situation.<sup>439</sup> Weighing feasibility as a separate factor ‘could also prejudice the consistent application of the Statute, and might encourage obstructionism to dissuade Court intervention’.<sup>440</sup> It would also weaken

<sup>432</sup> [OTP Policy Paper on Preliminary Examinations](#), paras.60-66.

<sup>433</sup> [OTP Strategic Plan 2019-2021](#), para.5(1): ‘focusing on the most responsible perpetrators, if needed through a building upwards strategy’, also p.19, para.24: ‘it might also imply a strategy of building upwards by focusing on mid-level or notorious perpetrators first, with the aim of reaching the level of the most responsible persons at a later stage’

<sup>434</sup> [OTP Policy paper on case selection and prioritisation](#), para.36: Gravity assessments for the purpose of case selection and prioritisation are similar to gravity as a factor for admissibility under Art.17(1)(d).

<sup>435</sup> The Appeals Chamber has dismissed the setting of an overly restrictive legal bar to the interpretation of gravity that would hamper the deterrent role of the Court; Kenya authorisation decision, [ICC-01/09-19-Corr](#), paras. 50, 188; *Situation in the Republic of Cote d’Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d’Ivoire’, [ICC-02/11-14-Corr](#), 15 November 2011, paras.202-204. However, the Prosecutor declining to request the authorisation of an investigation based on insufficient gravity has been strongly criticised by Pre-Trial Chamber I in relation to the Comoros situation. The Chamber also referred to what it considered to be a lack of clarity (or *conflicting interpretations*) with regard to the appropriate gravity threshold, see *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the ‘Application for Judicial Review by the Government of the Comoros’, [ICC-01/13](#), 16 September 2020.

<sup>436</sup> [Rome Statute](#), Art.5.

<sup>437</sup> *Ibid.*, Art.7 requirement of ‘widespread or systematic attack’ and ‘a State or organisational policy’, Art.8 ‘plan or policy’ or ‘large-scale commission’.

<sup>438</sup> *Ibid.*, Art. 15 provides that ‘the Prosecutor...shall submit to the Pre-Trial Chamber a request for authorization of an investigation’ / ‘shall...initiate an investigation’.

<sup>439</sup> *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, [ICC-02/17-138](#), 5 March 2020, Appeals Chamber, paras.44-50.

<sup>440</sup> [OTP Policy Paper on Preliminary Examinations](#), para.70: ‘the Office notes that feasibility is not a separate factor under the Statute as such when determining whether to open an investigation.’

the ability of the OTP to pursue powerful targets. Furthermore, feasibility ebbs and flows during the course of the examinations and investigations. It is illustrated by the recent experiences of the ICC: Mr. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb') was arrested 13 years after the first Warrant of Arrest against him was issued.<sup>441</sup> In the situation of Uganda, Mr. Ongwen was arrested 10 years after the issuance of the Warrant of Arrest.<sup>442</sup>

654. After an investigation has been formally opened, the Prosecutor has a broader discretion in determining how to proceed. Having regard to operational or strategic considerations, the Prosecutor may decide not to conduct an *active*<sup>443</sup> investigation.<sup>444</sup> Furthermore, once an investigation is open, even if it is not active, the Prosecutor has the mandate to collect evidence for preservation, including conducting witness interviews,<sup>445</sup> requesting time-sensitive evidence to be preserved (e.g. call data records, internet activity records, intercepts), and conducting any other activities they may deem necessary for the case to become viable after a period of hibernation.

655. The Experts acknowledge that this strategy carries both benefits and risks. Combining shorter PEs with a policy of hibernating some of the ensuing investigations might well result in a large number of open investigations with their completion indefinitely deferred. This is not a happy situation for any prosecutor. However, compared with endless PEs, this approach would be more transparent, and more empowering both for the Prosecutor, and for the states concerned.<sup>446</sup>

## **Recommendations**

**R226.** The Prosecutor should develop a policy on the criteria relevant to the opening of a PE based on Article 15 communications (PE Phase 1) and include it in an update to the Policy Paper on Preliminary Examinations.

**R227.** In order to address the disparity between the OTP resources and the high number of PEs resulting in investigations, the Prosecutor should consider adopting a higher threshold for the gravity of the crimes alleged to have been perpetrated. Gravity should also be taken into account at Phase 1 of PEs.

**R228.** Feasibility should not be taken into account with regard to PE assessments.

**R229.** The Prosecutor under this heading should also consider the recommendations made in relation to the OTP communications and outreach.<sup>447</sup>

## **B. Selection and Prioritisation of Cases and Perpetrators**

656. Apart from selection of situations, the OTP conducts selection and prioritisation of cases within situations, generally defined as 'specific incidents during which one or more crimes within the jurisdiction of the Court may have been committed, and whose scope are

<sup>441</sup> *The Prosecutor v. Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Decision on the convening of a hearing for the initial appearance of Mr Ali Kushayb, [ICC-02/05-01/07-82](#), 11 June 2020.

<sup>442</sup> ICC, *The Prosecutor v. Dominic Ongwen*, [Case Information Sheet](#) (2020).

<sup>443</sup> In this context, 'active' means fully staffed with investigative staff.

<sup>444</sup> See e.g. *Situation in the Republic of Kenya*, Decision on the 'Victims' request for review of Prosecution's decision to cease active investigation', [ICC-01/09-159](#), 5 November 2015, para.13: 'Neither article 54 of the Statute nor any other provision provide[s] for judicial oversight of the Prosecutor's compliance with article 54(1) as such. Accordingly, the Chamber is not competent to intervene in the Prosecutor's activities carried out within the ambit of article 54(1) of the Statute.' Paras.27-28: 'temporary suspension of active investigation in the situation [...] does not mean that the investigation [...] is closed or terminated.'

<sup>445</sup> Potentially, before a Single Judge during pre-trial stage. This was done in the situation of Uganda, where testimony of seven vulnerable victim-witnesses was taken before charges were confirmed; Paul Bradfield, '[Preserving Vulnerable Evidence at the International Criminal Court – the Article 56 Milestone in Ongwen](#)' (2019), 19 *International Criminal Law Review*.

<sup>446</sup> The States can challenge the OTP's jurisdiction ('Admissibility challenge') once an investigation is open, but not during a PE. See *infra* n 511.

<sup>447</sup> See *supra* Section [VII.F. Outreach Strategy](#).

defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.<sup>448</sup>

657. As discussed above, case selection begins during the PEs, where it constitutes an important part of the OTP's assessment of admissibility. Bearing in mind the limited information-collection capacity of the OTP during PEs, any cases identified at that stage are not binding on the Prosecutor once an investigation is opened.<sup>449</sup> However, the OTP acknowledges that initial case selection during an investigation is based on the analytical products and the outcomes of the PE.<sup>450</sup> Furthermore, in line with the strategy of open-ended and in-depth investigations, the case selection process is gradual, and based on the ongoing analysis of the criminal incidents and potential suspects.

658. The Experts received a number of criticisms and suggestions related to the manner in which the OTP selects and prioritises cases. The lack of recent success in court was seen by some as a consequence of poor case selection. Stakeholders expressed concern at the apparently *ad hoc* and unpredictable choice of cases by the OTP. Some highlighted the issues regarding unequal investigations into all sides of the conflict (e.g. DRC, Uganda); the time lag between investigating different parties to the conflict (e.g. Cote d'Ivoire (CIV)); the choice of charges which insufficiently represent the underlying crime patterns (e.g. *Lubanga*), suspects of low hierarchical position (e.g. *Al Werfalli*), or situations/cases with low feasibility. The need for more transparency regarding the OTP's strategic planning of case selection was also suggested.

659. As discussed more fully below, the most commonly shared concerns relate to: (i) the criteria applied during case selection and prioritisation, and (ii) the (lack of) strategic planning during the process of case selection and prioritisation.

## 1. The Criteria for Case Selection and Prioritisation

### Findings

660. Case selection and prioritisation are not governed by the statutory documents of the OTP and thus fall within the discretion of the Prosecutor. For some years, there was criticism of the OTP for the absence of transparency regarding the exercise of that discretion.<sup>451</sup> In response, in 2016, the OTP produced a Policy Paper on Case Selection and Prioritisation.<sup>452</sup>

661. Apart from the general principles and legal criteria guiding the OTP's selection of situations and cases from the PE stage onwards, the Policy Paper provides a broad range of factual criteria for case selection and prioritisation. Based on the Policy, case selection depends on the assessment of the gravity of crimes, degree of responsibility of the alleged perpetrators and the charges, with gravity being the predominant criterion.<sup>453</sup> Hence, case selection appears to be focused on the factual analysis of the criminal incidents and the potential suspects. Prioritisation of cases encompasses additional strategic and operational concerns, the latter focusing, for the most part, on the feasibility of the potential investigations and prosecutions.<sup>454</sup>

662. The most common concerns were expressed in relation to the choice of alleged perpetrators, charging practices, and the lack of consideration given to the feasibility of cases.

### (1) The Policy in Relation to Selecting and Charging Suspects

<sup>448</sup> [OTP Policy paper on case selection and prioritisation](#), para.2

<sup>449</sup> Kenya authorisation decision, [ICC-01/09-19](#), para.50.

<sup>450</sup> [OTP Policy paper on case selection and prioritisation](#), para.10.

<sup>451</sup> See e.g. John Galvin, 'The ICC Prosecutor, Collateral Damage, and NGOs: Evaluating the risk of a politicized prosecution' (2005) 13 U. Miami Int'l & Comp. Law Review, 48; William A. Schabas, 'Victor's Justice: Selecting 'Situations' at the International Criminal Court' (2010) 43 J. MARSHALL L. Rev. 535, 549.

<sup>452</sup> [OTP Policy paper on case selection and prioritisation](#).

<sup>453</sup> *Ibid.*, para.6

<sup>454</sup> The OTP notes that 'at the case prioritisation stage, by contrast, feasibility does become a relevant factor when exercising discretion regarding the timing of the roll-out of selected cases', see [OTP Policy paper on case selection and prioritisation](#), para.51, n 48.

663. While gravity assessments have drawn some criticism for being set at too low a threshold,<sup>455</sup> the more problematic case selection criterion appears to be the degree of responsibility of alleged perpetrators.

664. Regulation 34(1) of the Regulations of the OTP provides that the OTP is obliged to conduct its investigations in respect of ‘those persons who appear to be the most responsible for the identified crimes.’ The Experts agree with the Prosecutor that ‘the most responsible’ does not refer only to those occupying the highest positions, whether armed forces or political.

665. Whether to include mid-level or even low-level perpetrators amongst those ‘most responsible’ is a well-known dilemma for prosecutors of international courts, and especially so where the temporal and geographical mandates are broad, and potential suspects numerous.<sup>456</sup>

666. Until recently, the OTP focused its limited resources primarily on investigation and prosecution of a small number of high-ranking government and military officials, including sitting and former presidents.<sup>457</sup> This approach has contributed to some of the serious challenges facing the Court, including difficulties regarding obtaining evidence, enforcement of arrests, and witness interference.<sup>458</sup>

667. While the current strategic plan recognises that the focus will remain on ‘the most responsible,’ it elaborates an increased focus on ‘notorious or mid-level perpetrators who are directly involved in the commission of crimes’.<sup>459</sup> Instead of relying solely on the hierarchical position of the suspect, the OTP gives itself more flexibility in the assessment of those who might be included amongst those ‘most responsible’. This allows lower-ranking, but more notorious/directly involved suspects to be investigated and prosecuted at the Court.<sup>460</sup>

668. This policy appears to have been implemented. During the last five years, only one suspect occupying a senior leadership position was publicly sought for arrest by the Court, namely Mr. Ngaïssona (2018).<sup>461</sup> In the same period, the Court issued public warrants of arrest against four individuals, who held mid-level positions, for core international crimes:<sup>462</sup> Mr. Yekatom (2018),<sup>463</sup> Mr. Al Mahdi (2015),<sup>464</sup> Mr. Al Hassan (2018),<sup>465</sup> and Mr. Al

<sup>455</sup> See *supra* Section [XII.A.2](#). Narrower Standards for Admissibility.

<sup>456</sup> See e.g. Claudia Angermaier, ‘Case selection and prioritization criteria in the work of the International Criminal Tribunal for the Former Yugoslavia’; Alex Obote-Odora, ‘Case selection and prioritization criteria for the international criminal tribunal for Rwanda’; Paul Seils ‘The selection and prioritization of cases by the Office of the Prosecutor of the International Criminal Court’ in Morten Bergsmo (ed) [Criteria for Prioritizing and Selecting Core International Crimes Cases](#) (TOAEP, 2010) 27-78.

<sup>457</sup> E.g. Messrs. Ruto and Kenyatta in the Kenya situation (although they did not occupy those high offices when they were indicted); Mr. Gbagbo in Ivory Coast situation; and Mr. Bashir in the Sudan situation.

<sup>458</sup> E.g. witness interference led to withdrawal of charges Kenya, see [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta](#), 5 December 2014; Sudan’s President Al Bashir [was indicted in 2009](#) and has not been transferred to the Court’s custody to date; the Trial Chamber’s decision on a no case to answer motion in *Gbagbo and Blé Goudé* is currently on appeal, Reasons for oral decision of 15 January 2019, [ICC-02/11-01/15-1263](#), 16 July 2019.

<sup>459</sup> [OTP Strategic Plan 2019-2021](#), p.20.

<sup>460</sup> *Ibid.*, p.20: the OTP ‘will first focus on the crime base in order to identify the organisations (including their structures) and individuals allegedly responsible for the commission of the crimes. That may entail the need to consider the investigation and prosecution of a limited number of mid- and high-level perpetrators in order to ultimately build the evidentiary foundations for case(s) against those most responsible. The Office may also decide to prosecute lower level-perpetrators where their conduct has been particularly grave or notorious.’

<sup>461</sup> Public Redacted Version of ‘Warrant of Arrest for Patrice-Edouard Ngaïssona’, [ICC-01/14-02/18-2-Red](#), 13 December 2018. Mr. Ngaïssona was also charged with superior mode of liability, Art.28 of the Statute. He is an alleged former *senior leader* and the ‘National General Coordinator’ of the Anti-Balaka movement. See *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* [case information sheet](#).

<sup>462</sup> Not including Art.70 cases.

<sup>463</sup> Public Redacted Version of ‘Warrant of Arrest for Alfred Yekatom’, [ICC 01/14-01/18-1-Red](#), 11 November 2018.

<sup>464</sup> Mandat d’arrêt à l’encontre d’Ahmad AL FAQI AL MAHDI, [ICC-01/12-01/15-1-Red](#), 28 September 2015.

<sup>465</sup> Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, [ICC-01/12-01/18-2-tENG](#), 27 March 2018.

Werfalli (2017, 2018).<sup>466</sup> These developments demonstrate the Prosecutor's current approach with regard to bringing cases against those 'most responsible'.<sup>467</sup>

669. To support the new policy, the Prosecutor lists a number of potential benefits, including to 'ultimately have a better prospect of conviction in potential subsequent cases against higher-level accused'.<sup>468</sup> Concern has been expressed as to whether the Prosecutor's focus on 'the most notorious' or 'mid-level' perpetrators is consistent with the statutory requirement of prosecuting those most responsible.

670. If this policy of targeting mid-level perpetrators is to be pursued, it is crucial that their participation in the overall criminal conduct constitutes part of a strategic plan that is designed to facilitate the subsequent prosecution of those in leadership positions. The strategic plan should include the prospects of prosecuting leaders and having them arrested. It might also take into account the prospect of guilty pleas being proffered by mid-level perpetrators.

## (2) Defining a Case: Charging Practices

671. Several concerns were raised in relation to the OTP's approach to charging, especially the number of charges and the modes of liability decided by the Prosecutor. Stakeholders expressed criticism of the perceived overcharging by the OTP, presenting multiple case theories, modes of liability, and the high volume of counts even in relation to suspects who appear to be rather low-ranking and involved in a limited number of incidents. This, say the critics, has led to unnecessarily complex and lengthy pre-trial proceedings.

672. The selection and definition of charges and modes of liability are criteria guiding the selection of cases.<sup>469</sup> The Judges have repeatedly stated that there is no hierarchy among the modes of liability, i.e. none of them are more or less serious than others. However, the OTP appears to consider 'that the responsibility of commanders and other superiors under Article 28 of the Statute is a key form of liability'.<sup>470</sup> This approach has been rejected in the cases of *Bemba*<sup>471</sup> and *Gbagbo and Blé Goudé*,<sup>472</sup> as well as the recent confirmation of charges proceedings against *Yekatom and Ngaissona*.<sup>473</sup> Liability under Article 28 is proving to be a very difficult mode of liability to prove relying on indirect/circumstantial evidence. Its prominence in charging should be reconsidered.

673. Apart from modes of liability, the OTP 'aims to represent as much as possible the true extent of the criminality which has occurred in a given situation, preferring charges that offer a representative sample of the main types of victimisation and the communities affected by the crimes in a situation'.<sup>474</sup> While this goal is not problematic in theory, the OTP has faced challenges in proving complicated cases with representative charges of victimisation (*Gbagbo and Blé Goudé; Bemba*).

674. One of the common recommendations suggested by some stakeholders is that the OTP might concentrate on narrower charges and more focused cases. Narrower cases, focusing on a portion of the suspect's overall culpability, would detract from the Prosecutor's approach

<sup>466</sup> Warrant of Arrest for Mahmoud Mustafa Busayf Al-Werfalli, [ICC-01/11-01/17-2](#), 15 August 2017.

<sup>467</sup> The four last-mentioned individuals appear to be low- to mid- ranking: Mr. Al Hassan is an alleged former member of Ansar Eddine, *de facto* chief of the Islamic police; see [Al Hassan case](#). Mr. Al Mahdi is an alleged former member of Ansar Eddine, head of the 'Hisbah' for a period until 2012, and associated with the work of the Islamic Court of Timbuktu, see [Al Mahdi case](#); Mr. Al-Werfalli is an alleged major in the Al-Saiqa Brigade, see *The Prosecutor v. Al Werfalli*, [case information sheet](#), and Mr. Yekatom is an alleged former commander in the Anti-Balaka movement, see *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, [Case information sheet](#).

<sup>468</sup> [OTP Strategic Plan 2019-2021](#), p.20.

<sup>469</sup> [OTP Policy paper on case selection and prioritisation](#), paras.44-45.

<sup>470</sup> *Ibid.*, para.44.

<sup>471</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', [ICC-01/05-01/08-3636-Red](#), 8 June 2018, paras.189-194.

<sup>472</sup> *The Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, [ICC-02/11-01/11-656](#), para.265; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [ICC-02/11-01/15-1263](#), 16 July 2019, Reasons of Judge Geoffrey Henderson, paras. 2028-2034.

<sup>473</sup> *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaissona, [ICC-01/14-01/18-403-Red-Corr](#), 14 May 2020, para.58.

<sup>474</sup> [OTP Policy paper on case selection and prioritisation](#), para.45.

to represent as broadly as possible the types and extent of victimisation suffered. However, such an approach might well be more successful and require less time to present in court.

675. The Experts consider that the main consideration, whether in relation to selection and prioritisation of cases, selection of charges, or defining the modes of liability, should be the quality and the quantity of available evidence. The OTP would benefit from focusing on the factual allegations that are supported by the strongest, and the most diverse evidentiary basis, and should refrain from relying on weaker allegations. Whether this approach would result in broad or narrow charges, or Article 25 or Article 28 modes of liability, is best not considered in the abstract, but rather considered in relation to specific cases and the available evidence.

### (3) Case Prioritisation: Feasibility Issues

676. As mentioned above, apart from the principles and criteria guiding case selection, the OTP considers additional strategic and operational criteria for case prioritisation.<sup>475</sup> The concerns relayed to the Experts in this regard appear to be contradictory: while some stakeholders consider that the OTP does not assess the feasibility of their investigations with sufficient rigour, others criticise the prioritisation of cases solely or primarily with regard to feasibility.

677. The Experts consider that the operational criteria listed in the Policy Paper for Case Selection and Prioritisation are comprehensive. The Policy Paper encompasses the quality of evidence, cooperation, security assessments, and prospects of arrests.<sup>476</sup> The majority of the arrest warrants issued since the adoption of the Policy Paper (2016) have been enforced within one year, with only one presently outstanding. In contrast, 14 out of the 15 outstanding Court warrants were filed before 2015.<sup>477</sup> Since all the recent cases were, at least partially, confirmed by the Pre-Trial Chambers, it appears that evidentiary considerations were also more strictly adhered to in recent years.

678. There is an element of risk inherent in focusing too strongly on feasibility issues: the operational criteria identified to guide prioritisation may actually be influenced by the prioritisation itself. Some OTP staff expressed concern that, if situations or cases are not given priority, there will be insufficient resources to enable efficient evidence collection and analysis. That might well permanently delay the progress of such situations or cases. In this context, it is important to consider whether situations or cases have time-sensitive elements, such as the current availability of evidence, including evidence that might be time-sensitive, e.g. telecommunications or financial records. There are also considerations relating to the security of potential witnesses, and prospects of cooperation.

### **Recommendations**

**R230.** The OTP should consider establishing a hierarchy among the criteria for case selection. The criteria of highest importance might be considered to be: (i) the gravity of the crimes (in line with the Policy Paper); (ii) the strength and diversity of the evidence (currently included only in relation to case prioritisation); and (iii) the degree of responsibility of potential suspects.

**R231.** The OTP would benefit from focusing on evidential strength, giving priority to the cases with the strongest evidence, in particular non-testimonial evidence, such as intercepts, contemporaneous video and forensic records.

**R232.** The OTP should consider more transparency with regard to its approach to assessing the degree of responsibility for crimes ('those most responsible') and the hierarchical rank of the accused ('mid- and high-level perpetrators').

**R233.** As part of a larger situation strategy, prosecuting mid-level perpetrators might be appropriate in terms of effectiveness, fighting impunity, and developing solid jurisprudence.

<sup>475</sup> *Ibid.*, paras.48-52.

<sup>476</sup> *Ibid.*, paras.51-52.

<sup>477</sup> For an overview, see Report of the International Criminal Court on its activities in 2018/19, [A/74/324](#) (2019), p.2.

Where notorious or mid-level suspects are prosecuted, consideration should be given to their role in the overall strategic planning for the situation.

**R234.** In line with the evidence-led approach, the OTP should make it clear that the focus is on those most responsible for the crimes charged, even if they do not occupy senior ranks in organisations allegedly responsible for the commission of the crimes, especially where such cases may lead to investigating and/or prosecuting cases against those occupying high level positions.

**R235.** Charges should be concise and well-grounded on the available evidence. They should be limited to those charges in respect of which the evidence is the strongest.

**R236.** The OTP should consider limiting the scope of the cases temporally, geographically, and with regard to modes of liability.

**R237.** In line with the Court jurisprudence, the OTP should consider all modes of liability to be of equal seriousness and importance.

**R238.** The OTP should abandon policy considerations when determining the modes of liability, and focus on the mode of liability best supported by the evidence available.

**R239.** The OTP should develop guidelines concerning guilty pleas. Such guidelines should govern the situations in which guilty pleas would be acceptable having regard, in particular, to the seriousness of the crimes and any moral or ethical issues involved.

## 2. The Process of Case Selection and Prioritisation

### Findings

679. The Experts are concerned about the process of case selection and the apparent lack of strategic considerations during decision-making. Based on the information provided to the Experts, it would appear that case selection is oftentimes made on the basis of *ad hoc* proposals from teams, rather than pursuant to a considered strategic plan.

680. In September 2016, the OTP indicated its intent to follow a comprehensive process in selecting and prioritising cases: the Policy Paper on Case Selection and Prioritisation introduced the concept of utilising a ‘case selection document,’ to map all the potential cases in each situation and designed to facilitate decision-making regarding case selection and prioritisation.<sup>478</sup> The Policy Paper states that the OTP will select cases for investigation and prosecution from the provisional case hypotheses contained in the case selection document. The Experts were informed, however, that to date the ‘case selection document’ as envisioned in the Policy Paper has not been produced.

681. Instead, the Prosecutor is provided with an annual overview of potential cases and summary recommendations that makes scant reference to decisions made in the previous years, or to prospective planning beyond one year. This overview document also does not include case theories. Further, it lacks detail relating to the criteria upon which case selection might be made. It does not provide sufficient information on the strength of the evidence or its diversity, lacks comprehensive assessments of gravity, potential perpetrators, and appears to be focused on the availability of suspects for arrest.

682. It follows that prior to the selection and prioritisation of cases, there is no comprehensive mapping of all potential cases within each situation. Moreover, there is no institutionalised process for the integrated teams to provide their input to the case selection process. This leads to some teams feeling ignored, and their investigations *de facto* deprioritised. They question whether the decision-makers are sufficiently informed of the facts in each situation. This policy hinders a comparative assessment of the selected or prioritised cases.

683. There is consequently no comprehensive assessment of the OTP’s progress in each situation, including the determination of the appropriate number of cases per situation. In several situations to date only one case has been prosecuted and thereafter *de facto* closed. It

<sup>478</sup> [OTP Policy paper on case selection and prioritisation](#), paras.11-12.

is questionable whether a single prosecution is sufficient to address the justice needs of a whole situation. Consideration should be given to the pursuit of multiple cases, especially if mid-level perpetrators are to be prosecuted.

### **Recommendations**

**R240.** In order to improve the process of case selection and prioritisation, the OTP should:

- (i) Complete the development of Case Selection Documents;
- (ii) Institute an annual cycle of input collection from integrated teams regarding the status of their investigations, and their recommendations for case selection and prioritisation;
- (iii) Ensure that team leadership (ID Team leader and PD Senior trial lawyer) are able to submit their views directly to the Prosecutor.

**R241.** In order to be more strategic in its case selection, the OTP requires situation-specific strategic plans, which should include the goals of the OTP in relation to discrete investigations and prosecutions. In other words, the goals may be provisional at the outset of the investigation and develop as further evidence collection and analyses are conducted.

**R242.** The OTP should consider developing a situation-specific case overview document, so that case selection or prioritisation decisions are made in the context of strategies developed for each discrete situation. In this regard, the analysis of crime patterns and structures are an important starting point, providing an overview of the incidents based on their gravity, temporal and geographical scope, as well as the structures of all the groups potentially responsible for the incidents.

## **C. Situation Prioritisation, Hibernation And Closure**

### **Findings**

684. The prioritisation of situations is necessary to ensure that the limited resources of the OTP are being used in the most efficient and effective way. As discussed earlier,<sup>479</sup> the ID has sufficient resources to conduct a maximum of eight simultaneous investigations, and cannot undertake additional investigation activities without a commensurate increase in staff and other related resources. Therefore, the strategic planning of the OTP involves deciding upon which situations will be given sufficient resources (prioritised); remain active, but with lower levels of resources (de-prioritised); and whether any investigations should be temporarily suspended (hibernated).

685. As of June 2020, the OTP had 12 situations under investigation: Afghanistan, Burundi, Central African Republic (CAR) I and II, CIV, Darfur, DRC, Georgia, Kenya, Mali, Myanmar and Uganda. To date, no investigation has been closed, though some are hibernated. The current priorities of the ID are the investigations in Burundi, CARII, CIVII, Darfur, DRC, Georgia, Libya (two investigations), and Mali.<sup>480</sup>

686. The Experts heard concerns regarding the prioritisation of situations, the difficulties in maintaining hibernated investigations viable, and the inability of the OTP to close/complete investigations.

687. To date, decisions involving prioritisation were made according to the OTP Policy Paper on Case Selection and Prioritisation. No policy for hibernation or closure of investigations has been adopted. However, the OTP is currently developing a policy paper on completion strategies<sup>481</sup> and guidelines for the hibernation of cases, on which there will

<sup>479</sup> See *supra* Section I.C.3. Quantity of Staff.

<sup>480</sup> [ICC-ASP/18/10](#), p.10, para.21.

<sup>481</sup> As identified in the [OTP Strategic Plan 2019-2021](#), p.5, Strategic goal 2 includes 'developing a clear completion strategy for situations under investigation;' para.23: 'During 2019-2021, the Office will prioritise the development of a policy on the completion of situations under investigation.'

be a consultation with States Parties. Both of these are welcome developments, especially important at a time of an increasing OTP workload and increasingly scarce resources.

688. The Experts would encourage the OTP to work on further developing clear criteria on de-prioritisation and hibernation of investigations. It is understandable that there are serious problems encountered in maintaining an evidence collection regime with regard to de-prioritised or hibernated investigations.

689. The scarcity of resources makes it necessary for the Prosecutor to hibernate some investigations. If the Prosecutor adopts an approach of conducting shorter PEs, and more proactively hibernating open investigations, such a policy should be implemented with transparency and in a manner that is consistent with the OTP policies and strategic goals. Such policies should be accompanied by appropriate guidelines to ensure that there is consistency in the application thereof. They should also outline the steps to be taken in the event of the hibernation of an investigation and, if relevant, its re-activation or closure. The potential consequences of hibernating investigations would also need to be considered. It should be borne in mind that hibernated investigations require a minimum level of staff and other resources to carry out evidence preservation activities and to maintain the investigation at a level required to maintain its viability should it be reactivated at a later time.

690. Closure of an incomplete investigation raises obvious problems, especially for victims. And, while no investigation has been closed to date, there is a growing number of open investigations.

691. The Experts consider completion strategies to be a crucial part of the OTP's strategic planning. However, to date, completion appears to be absent from the planning of the OTP operations. Completion strategies should be anticipated as early as possible and be on the agenda throughout the duration of an investigation. The OTP should anticipate the required procedures relating to closure, including coordination with the Registry and the Trust Fund for Victims (TFV).

692. The forthcoming OTP completion policy appears from the OTP Strategic Plan 2019-2021. It has a focus on achieving collaboration and partnership with the situation country as well as other partners. The goal is to improve the efficiency of the OTP's work, and help build national capacity to investigate and prosecute.<sup>482</sup> The importance of consultation with situation and neighbouring countries, States Parties, and other potential partners was also highlighted during several interviews with the Experts. Affected communities especially should be consulted in the design of completion strategies, and should be provided with relevant and sufficient information on the process.

693. The OTP policy on completion strategies should include the modalities for establishing coordination between the OTP and other jurisdictions. It should seek support from States Parties and the ASP in supporting the implementation of completion strategies. The OTP should initiate the sharing of information and evidence with the relevant national jurisdictions and assist local investigations and prosecutions. A precedent for this was set in the situations of Uganda and CAR. Should that not take place, the wealth of evidence collected by the OTP will be wasted.

694. Some stakeholders suggested that completion strategies should focus on mapping the impact of the Court's intervention. The importance of measuring positive impact in both situation and non-situation States is also recognised by the OTP, as it plans to include the assessment of that impact in the Key Performance Indicators. The forthcoming OTP policy on completion strategies should consider how best the positive impact in situation countries can be achieved, and how it might be measured.<sup>483</sup>

## **Recommendations**

<sup>482</sup> [OTP Strategic Plan 2019-2021](#), p.19: Completion policy to cover: 1) defining prosecutorial goals, if possible together with the situation country; 2) coordinating work, if possible with the situation country, to increase the speed and efficiency of investigations; 3) having partners assist (...) the situation country in building up its capacity to genuinely investigate and prosecute.

<sup>483</sup> See *supra* Section [VI.B. Effectiveness](#).

**R243.** The OTP should devise a policy for the prioritisation, de-prioritisation and hibernation of situations. It should contain the criteria and benchmarks to guide the strategic planning in each situation. Such plans should also include the activities that are necessary during the de-prioritisation or hibernation of a situation in order to ensure that the situation remains viable and capable of re-activation.

**R244.** Feasibility-related factors should be seriously considered after the opening of an investigation. Should more situations reach the investigation stage without sufficient resources available to conduct serious investigations, the OTP should hibernate de-prioritised investigations.

**R245.** If the strategy in respect of a situation is not succeeding for factors considered to be temporary, the investigation should be hibernated/de-prioritised. If lack of success is due to factors assessed to be permanent, e.g. death of the accused or building up of national prosecuting capacity so that cases can be deferred, the investigation should be closed.

**R246.** The OTP should determine and communicate to the ASP the resources required to de-prioritise or hibernate and/or reactivate a situation.

**R247.** The following elements should be incorporated into the forthcoming OTP policy paper on completion:

- (i) Coordination between the OTP, Registry, and TFV in devising and implementing completion strategies;
- (ii) Strategies to address the avoidance of impunity and support for local justice processes. The ASP should consider establishing a working group to assist and support the Court in addressing impunity gaps and facilitating partnerships to develop domestic justice processes and maintenance of the rule of law;
- (iii) Strategies to facilitate evidence- and information- sharing with domestic courts and authorities;
- (iv) Consider developing a joint Outreach strategy for completion of situations by the OTP, in line with the Court-wide Outreach strategy.<sup>484</sup>

**R248.** Following the development of the OTP Policy Paper on Completion, the Office should consider integrating it into a wider and more comprehensive strategy for the ‘life-cycle’ of the OTP’s involvement in a given situation. It should reference all stages of the Court’s engagement, including PEs, investigations, prosecutions, and engagements with victims. This comprehensive strategy should also be translated into the Operations Manual for the OTP, with clear responsibilities assigned for devising and implementing the situation-specific strategies, and for monitoring compliance therewith.

**R249.** The OTP should ensure that when an investigation is opened, an implementation and completion strategy is in place.

**R250.** The implementation and strategy plans should be included in the Key Performance Indicators.

### **XIII. PRELIMINARY EXAMINATIONS**

#### **Findings**

695. Conducting preliminary examinations (PEs) is one of the three core tasks of the OTP, alongside investigations and prosecutions. During PEs, the OTP carries out its duty to assess whether the communications and situations submitted to it meet the statutory criteria to initiate investigations.<sup>485</sup>

<sup>484</sup> See *supra* Section VII.F Outreach Strategy.

<sup>485</sup> [Rome Statute](#), Art.53(1), read with Art.15 and 17.

696. As mentioned earlier, whether to open a PE and the procedure to be applied in so doing are not regulated by the Rome Statute or the Rules of Procedure and Evidence. This is left to the discretion of the Prosecutor.

697. In order to provide transparency with regard to the process and the procedures in conducting PEs, the Prosecutor issued the Policy Paper on Preliminary Examinations (2013), and publishes an annual Report on Preliminary Examination Activities. In addition, the OTP publicly announces each opening or closing of a PE, and provides updates at other key moments of a PE.

698. As of June 2020, the OTP was conducting eight PEs.<sup>486</sup> One other is awaiting a decision on jurisdiction from a Pre-Trial Chamber<sup>487</sup> and another just received a final consideration from the Pre-Trial Chamber in relation to an application for judicial review, and is now considered closed.<sup>488</sup>

699. The Experts received a number of criticisms relating to PEs. The absence of a regulatory framework in the Rome Statute has led some to suggest that the Court appears to have established its own form of procedure, one not envisaged by the drafters of the Statute. Criticism was also levelled at the OTP for using PEs for purposes other than the determination of whether to initiate an investigation.

700. As discussed more fully below, the main concerns regarding the PE process appear to be (i) the working methods of the Preliminary Examination Section (PES); (ii) the length of the PEs; (iii) the Prosecutor's approach to complementarity; and (iv) transparency.

#### A. Concerns Related to Preliminary Examinations Section (PES)

701. Structurally, all PE activities are the task of the PES located in the Jurisdiction, Complementarity and Cooperation Division (JCCD). PES is responsible for processing and analysing all incoming Article 15 communications,<sup>489</sup> assessing jurisdiction and admissibility of the situations, as well as the interests of justice. The PES reports its findings directly to the Prosecutor.

702. The Experts received a range of suggestions concerning the PES. One is the relocation of the PES from the JCCD to the ID. The Experts considered the advantages and disadvantages of such a change.

703. The main benefit of locating PES in the ID, whether as a separate Section or as part of the Investigative Analysis Section (IAS), would be the likely harmonisation of working methods and products. It might also avoid the transition from JCCD to ID in cases where a PE results in an investigation. It appears that some of those transitions are cumbersome and time consuming. In addition, the work products developed in the PES are not always consistent with those of the IAS. This results in duplication as IAS has to rework the analytical products.

704. Another advantage relates to the inability of the OTP, during a PE, to carry out investigative work away from the seat of the Court. The Experts heard concerns that JCCD staff may not be as able to identify and make use of remote evidence collection opportunities as their ID colleagues, or may collect such evidence without adhering to the requisite procedures. Hence, having PES located in the ID might increase the opportunities for recognising and acting upon opportunities for evidence collection and preservation.

705. Notwithstanding those benefits, the Experts are of the view that the PES functions efficiently and effectively as a separate Section within the JCCD. Furthermore, the benefits referred to above could be achieved by routinely embedding staff from the PD and ID into

<sup>486</sup> Colombia, Guinea, Iraq/UK, Nigeria, Philippines, Ukraine, Venezuela I & II.

<sup>487</sup> See [Situation in Palestine](#).

<sup>488</sup> *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the 'Application for Judicial Review by the Government of the Comoros', [ICC-01/13](#), 16 September 2020.

<sup>489</sup> On average 500 new communications are filed each year. In reporting period of 1 November 2018 – 31 October 2019, the OTP received 795 communications: [OTP Report on Preliminary Examination Activities](#) (2019), para.23.

the integrated teams that are established from PE Phase 2. As mentioned earlier, the OTP has already employed this model for the most recent PEs and the Experts advise that this procedure should be continued.<sup>490</sup>

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<sup>490</sup>See *infra* Section I.C.3(4), paras. [162-166](#).

## **Recommendations**

**R251.** In order to increase the efficiency of the handover process from the PES to IAS at the conclusion of a PE, the OTP should institutionalise the practice of appointing an integrated team from Phase 2 of PEs to include a member from each of the ID, PD, and JCCD.

**R252.** The OTP should harmonise the working methods of PES and IAS. It should also consider adopting cross-divisional analysis guidelines.

**R253.** The OTP should encourage staff exchanges between PES and IAS to further familiarise those Sections with their respective working methods, and to facilitate the smooth and efficient start-up of an investigation at the conclusion of a PE.

## **B. Length of PE Activities, Time Limits**

### **Findings**

706. The long duration of many PEs has drawn wide criticism from States Parties and civil society. They are concerned about the negative effects that the delays have on victims and witnesses, the deterioration of evidence, the dwindling potential for future cooperation, and the limited resources of the Court.

707. The Experts were informed of the Prosecutor's intention to reach finality in respect of all the outstanding PEs during the remainder of her term that ends in the middle of 2021. That notwithstanding, a more systematic approach and institutionalised changes in policy need to be put in place in order for the situation to improve.

708. The PE activities carried out by the OTP are both extensive and complex. The Prosecutor has a duty to thoroughly assess whether the legal criteria justifying an investigation are met, based on a 'reasonable basis' standard. Where a PE is sought to be opened on the basis of Article 15 communications, the Prosecutor is required to seek authorisation from a Pre-Trial Chamber. Such requests must be accompanied by a detailed analysis of the elements of the alleged crimes.<sup>491</sup> Some requests have required more than one hearing by a Pre-Trial Chamber. The table below contains a broad overview of the activities undertaken during each PE phase, and, where applicable, the time limits the OTP has established for some of these phases.

**Table 1 Overview of PE activities**

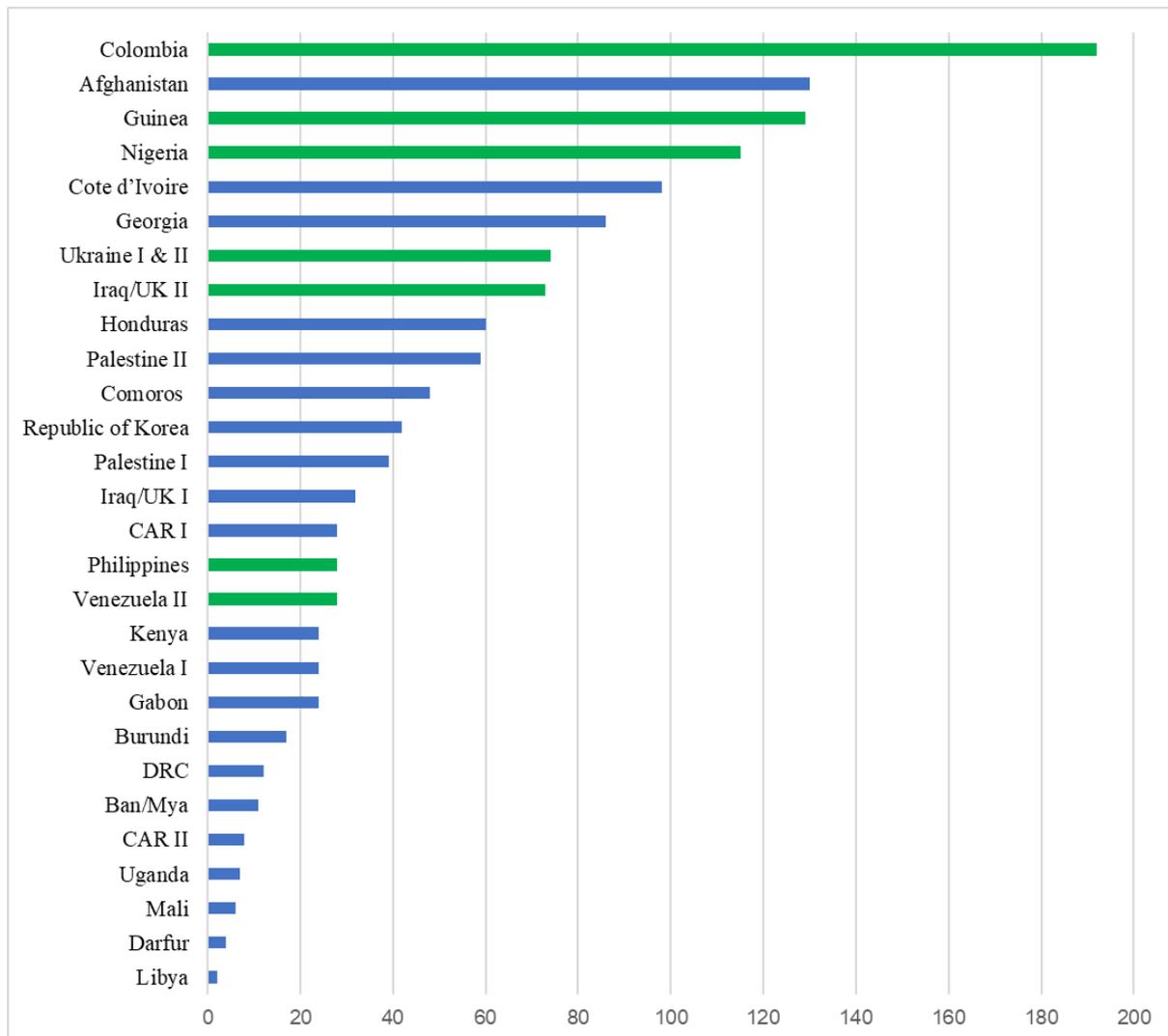
	<b>Activity</b>	<b>Timeline</b>	<b>Unit</b>	<b>Output</b>
<b>Phase 1</b>	Pre-preliminary examination assessment	1 year (includes the 1.1, 1.2, 1.3 steps below)	JCCD PES	Decision on opening PEs based on Art.15 communications
<b>1.1.</b>	Filtering Art.15 communications for information WFA	2 months	IEU / JCCD PES	Report to the prosecutor on WFA communications
<b>1.2.</b>	Further analysis into communications WFA (jurisdiction, crimes)	Bi-annual basis	JCCD PES	Phase 1 report
<b>1.3</b>	ExCom approval and decision on Phase 1 reports	Within a year from receipt of Art.15 communication	ExCom / Prosecutor	Opening a PE / Dismissing the situation

<sup>491</sup> See, e.g. *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Request for authorisation of an investigation pursuant to article 15, [ICC-01/19-7](#), 4 July 2019.

<b>Phase 2</b>	Analysis of subject matter jurisdiction	None [holistic approach]	JCCD PES	Article 5 report
<b>Phase 3</b>	Analysis of complementarity and gravity	None [holistic approach]	JCCD PES	Article 17 report
<b>Phase 4</b>	Art. 53(1) report	None [holistic approach]	JCCD PES	Article 53(1) report
<b>‘Judicial’ phase</b>	Art.15(3) application	None	PD	Article 15(3) application to Pre-Trial Chamber

709. The PEs to date have ranged in length from two months (Libya), to 192 months (Colombia). The figure below (*Figure 4*) presents all PEs carried out by the OTP to date, listing them by length. Ongoing PEs are marked in green. Those completed are marked in blue

**Figure 4 Length of Preliminary Examinations 2003-2020, in months<sup>492</sup>**



<sup>492</sup> PEs listed from the most recently opened. Duration in months was averaged to include the month in which the PE was opened and closed. The calculation is based on the period from the month in which the PE was announced and June 2020.

710. As seen in the graph, the majority of PEs are opened and closed in under five years (20 out of 28 situations).<sup>493</sup> On average, it takes the OTP about four years from the opening of a PE to the decision on whether or not to request authorisation to open an investigation. This period does not take into account the length of Phase 1 (up to one year).

711. In the Experts' opinion, having PEs run for multiple years is untenable, damaging to potential evidence and other investigative opportunities, frustrating for the victims and civil society, and unsatisfactory to the States Parties.

712. Prolonged PEs, during which the Prosecutor is not permitted to carry out investigative activities away from the Court,<sup>494</sup> may delay the collection of evidence. Many forms of evidence are time-sensitive: e.g. banking records; telecommunications records; logs of internet activity and flight records are often deleted within a few years by the service providers. The average length of PEs generally exceeds these timeframes. Testimonial evidence also deteriorates with the passage of time: the witnesses' memories, as well as their willingness to cooperate with judicial mechanisms may decline.

713. Furthermore, keeping PEs open for lengthy periods of time may be perceived as unfair to the states concerned and might well reduce their willingness to cooperate with the OTP.

714. The Experts were informed during interviews with some members of the OTP staff that the lengthy PEs are justified by the complexity and scope of the situations, especially where national proceedings are ongoing. However, while complexity is certainly a factor to be taken into account, it does not justify the duration of some of the lengthy PEs such as Guinea (over 10 years, and still ongoing) or Georgia (eight years). The scope of the two situations is relatively limited,<sup>495</sup> as compared to the others. Likewise, the lengthiest examinations: Colombia, Afghanistan, Nigeria, Guinea, Cote d'Ivoire and Georgia, vary substantially in complexity and the potential problems with regard to determining the respective legal elements of the alleged crimes.

715. The extensive duration of some PEs led certain Pre-Trial Chambers to request explanations from or impose deadlines on the Prosecutor. In the CAR I situation, the Pre-Trial Chamber sought to obtain from the OTP 'information on the current status of the preliminary examination of the CAR situation, including an estimate of when [it] will be concluded and when a decision pursuant to Article 53(1) of the Statute will be taken.'<sup>496</sup> The OTP rejected the legal obligation to comply with the Pre-Trial Chamber request, stressing that 'no provision in the Statute or the Rules establishes a definitive time period for the purposes of the completion of the preliminary examination.'<sup>497</sup>

716. More recently, in the context of the Bangladesh-Myanmar situation, the Pre-Trial Chamber repeated its previous concern.<sup>498</sup> Subsequently, in *Comoros*, the same Pre-Trial Chamber also sought to impose a deadline on the Prosecutor in conducting a further reconsideration which it purported to 'request' under Article 53(3)(a). It stressed that 'preliminary examinations must be concluded within a reasonable time'.<sup>499</sup>

717. The Experts have given consideration to the suggestion made by a number of stakeholders that time limits for the duration of PEs should be imposed on the OTP. Having regard to all of the views received from both internal and external stakeholders, the Experts consider that imposing binding time limits is likely to be counterproductive. They could be misused by governments and other parties hostile to the Court's intervention. Their

<sup>493</sup> Average duration of a PE overall is 50 months, range: 2 to 192 months.

<sup>494</sup> The OTP does not possess investigative powers at the PE stage; [Rome Statute](#), Art.15(2); [OTP Policy Paper on Preliminary Examinations](#), para.85.

<sup>495</sup> Georgia: temporal scope of the situation 1 July – 10 October 2008, see <https://www.icc-cpi.int/georgia>; Guinea: 28 September 2009 events in one location, see <https://www.icc-cpi.int/guinea>.

<sup>496</sup> *Situation in the Central African Republic*, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, [ICC-01/05-6](#), 30 November 2006, Disposition.

<sup>497</sup> *Situation in the Central African Republic*, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, [ICC-01/05-07](#), 16 December 2006, paras. 10-11.

<sup>498</sup> Request under regulation 46(3) of the Regulations of the Court, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', [ICC-RoC46\(3\)-01/18-37](#), 6 September 2018, paras. 84-88.

<sup>499</sup> *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros', [ICC-01/13-68](#), 15 November 2018, paras. 119-121.

cooperation with the OTP could be intentionally delayed in order for the time limit to be reached without allowing the OTP to adequately assess the situation at hand.

718. The Experts suggest that a more productive approach would be to establish an overall plan for each PE, including meaningful benchmarks for the progress in each situation, each phase of the PE, and target deadlines. The plan should contain transparent criteria for when a PE should move from one phase to the next, when it should be closed, and, if needed, re-opened. The benchmarks should be flexible in order to discourage intentional delays by anyone wishing to frustrate the work of the OTP.

719. Furthermore, based on the Experts' assessment, some PEs have been prolonged due to the Prosecutor's current approach to complementarity and positive complementarity, analysed below, as well as the limited resources of the PES. These issues need to be addressed together with the establishment of situation-specific PE planning.

## **Recommendations**

**R254.** The OTP should consider carrying out the PE activities more holistically. There is little benefit to a phased approach (Phases 2-4). The OTP should consider reducing the number of separate reports produced by the PES, and combining the Phase 2-4 reports into one PE report comprised of the assessment of subject matter jurisdiction, complementarity, gravity, and the interests of justice.

**R255.** The OTP should consider adopting an overall strategy plan for each PE, with benchmarks and provisional timelines for all its phases and activities, including closure, and, if relevant, re-opening.

**R256.** The strategy plan should include, at minimum: (i) the timeline of the PE, with an estimate of the dates for delivery of the analytical reports to the Prosecutor; (ii) benchmarks and timelines for the assessment of complementarity; (iii) benchmarks and time limits for any responses requested from the state concerned; (iv) any missions (visits) or other activities apart from the analysis conducted at the seat of the Court, together with an estimate of the time and resources required for each of them (including unique investigative opportunities). It should be made apparent that such a plan retains flexibility and be subject to change in the event of supervening material and substantial changed circumstances.

**R257.** The strategy plan should be prepared on the basis that the PE will last no longer than two years. Extensions could be granted by the Prosecutor, but only in exceptional and justified circumstances.

**R258.** The strategy plan should be a living document, updated regularly throughout the course of the PE. Upon authorisation of an investigation, this plan should provide the foundation on which to build the OTP's targets and strategies for the investigation.

**R259.** If a PE, or a phase of a PE lasts longer than the provisional timeline provided in the strategy plan, the causes of any such delays should be reported by the Prosecutor in the Annual Report on Preliminary Examination Activities.

**R260.** If the two-year limit suggested for a PE is exceeded, care should be taken to assess the need for activities directed at the need for preservation of evidence. The ID member of the integrated team should be tasked with finding any unique investigative opportunities and, where possible, to initiate steps to preserve such evidence.

**R261.** Compliance with the PE strategy plan should be included in the Key Performance Indicators of the OTP, and reported upon to the ASP.

## **C. Complementarity and Positive Complementarity**

### **Findings**

720. Based on the information assessed by the Experts, the Prosecutor's current approach to complementarity and positive complementarity is one of the main reasons for some of the

lengthy PEs. Complementarity questions arise in relation to two aspects of the OTP's approach to PEs: the legal and factual analysis of complementarity for the assessment of jurisdiction; and the engagement by the OTP in positive complementarity activities. Both have proven to be problematic in practice, and have significantly extended the length of some of the PEs.

## 1. Complementarity Assessments for Admissibility (Article 17)

721. Complementarity assessments involve the examination of the relevant national proceedings in relation to the potential cases being considered by the OTP. If there are such investigations or prosecutions, the OTP assesses their genuineness.<sup>500</sup>

722. Complementarity will oust the jurisdiction of the Court if the domestic investigation or proceedings cover the same individual and substantially the same conduct as alleged in the proceedings before the Court (same conduct test).<sup>501</sup> The OTP is required to determine with clarity the conduct it is investigating as well as the potential targets.<sup>502</sup> Furthermore, it is of the utmost importance for the OTP to communicate, as clearly and as transparently as possible, what it expects of the State in terms of pursuing justice for the same criminal conduct.

723. The test is not a theoretical one. Rather, in order to show that a state is willing and able to investigate and prosecute, it needs to demonstrate that 'concrete, tangible, and progressive' steps were or are being taken in the national investigation.<sup>503</sup> However, when the OTP conducts its admissibility assessment during the PE stage, it appears to do so also prospectively or on a continuing basis, in some instances waiting for years for national authorities to demonstrate their 'willingness and ability.'<sup>504</sup>

724. There is a widespread concern among many external stakeholders that by applying the admissibility test prospectively, the OTP is exceeding its mandate. It is accused of conducting what amounts to 'human rights monitoring', or playing a 'watchdog role'. For instance it appears that in the cases of Afghanistan and Nigeria, where crimes continue to be committed after the opening of a PE, the OTP has undertaken continuing assessments of the

<sup>500</sup> [OTP Report on Preliminary Examinations 2019](#), para.6. An assessment as to whether a State's proceedings are genuine can be very complex. In the case of Darfur, for example, the Sudanese national authorities presented information to the effect that special tribunals had been established and had prosecuted a number of cases. A number of them might have been considered relatively serious in the local context, but they did not relate to the allegations of large scale war crimes, crimes against humanity, and genocide. Such domestic prosecutions have no relevance to the admissibility of cases before the Court; see further Paul Seils, [Handbook on Complementarity](#) (ICTJ 2016), p.56.

<sup>501</sup> [OTP Policy Paper on Preliminary Examinations](#), para.43, referring to: *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, [ICC-01/09-3](#), 26 November 2009, paras. 55, 78; *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, [ICC-01/09-19-Corr](#), 31 March 2010, para. 50.

<sup>502</sup> Generally, the OTP cannot be expected to investigate all types of criminality and all the incidents during the PE phase and before any actual investigative activity is undertaken. In some previous PEs, the OTP has chosen to select incidents demonstrating a pattern of a course of conduct (DRC), or a pattern of events (Libya).

<sup>503</sup> See e.g. *Simone Gbagbo* admissibility ruling, where the Appeals Chamber found that the information provided by the State did not indicate that the authorities were taking 'tangible, concrete and progressive steps', *The Prosecutor v. Simone Gbagbo*, Judgment on Jurisdiction, [ICC-02/11-1/12-75-Red](#), 27 May 2015; see also *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Judgment on Jurisdiction, [ICC-01/09-01/11-307](#), 30 August 2011. These steps also have to be established with sufficient clarity and through sufficiently reliable and authoritative information, see *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on Jurisdiction, [ICC-01/11-01/11-547-Red](#), 21 May 2014; see Paul Seils, [Handbook on Complementarity](#) (ICTJ 2016), p.77.

Note that in [Rome Statute](#) Art.17(1), the basis of the admissibility assessment, is stated in the present tense: Art.17(1)(a): 'the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; Art.17(1)(b): the case has been investigated (...); 17(1)(c): the person concerned has already been tried for conduct which is the subject of the complaint; 17(d): the case is not of sufficient gravity.

<sup>504</sup> E.g. The OTP has conducted eighteen missions to Guinea since the PE was opened in 2009. So far, no trials of those the OTP considers the most responsible have taken place in Guinea; [OTP Report on Preliminary Examinations](#) (2019), pp.39-40. The PE into the situation in Nigeria was announced on 18 November 2010; the conclusions of the OTP in 2019 were: 'it does not appear that the authorities are investigating and/or prosecuting cases concerning substantially the same conduct or cases that are otherwise similar to those identified by the OTP. To date, the repeated commitment of the Nigerian authorities to provide the OTP with relevant information in this respect has not materialised.'; [OTP Report on Preliminary Examinations](#) (2019), para.199. The Prosecutor's assessment is still pending, awaiting such outcomes.

domestic proceedings thereby extending the duration of the PE for a number of years.<sup>505</sup> In others, e.g. Guinea or Colombia, the OTP has been monitoring the national proceedings for many years, without being able to come to a conclusion on their genuineness or sufficiency.

725. Another area of concern is the lack of time limits for states to produce evidence of concrete, tangible, and progressive steps being taken by them during the PE stage. There are no benchmarks or criteria for the states to satisfy in order to convince the OTP to close a PE.<sup>506</sup>

726. To an extent, the absence of time limits imposed by the OTP is understandable. Some members of the OTP staff informed the Experts that certain states, even if acting in good faith, face significant financial and personnel constraints, making compliance with OTP requests for information a lengthy process.

727. However, the complete lack of timelines or benchmarks for states makes it difficult for the OTP to predict, let alone determine, the duration of admissibility assessments. It has been reported to the Experts that this lack of clarity enables some states intentionally to delay assisting the OTP with regard to its assessment of complementarity. This may be manifested by the provision of minimal cooperation, and inconsistent, insufficient, irrelevant, or delayed information. This leaves the OTP unable to progress in situations where the domestic proceedings might be sufficient to persuade a Pre-Trial Chamber to deny the authorisation of an investigation, but too little to justify the closure of the PE.

728. The Experts consider that a change in approach towards the complementarity test, in combination with meaningful benchmarks, and a tailor-made strategy for each situation, might remedy what has become an untenable situation for the OTP.

## 2. Positive Complementarity

729. Another area of concern, especially for many of the States Parties, is the Prosecutor's approach to positive complementarity. There is a prevailing view that during PEs, the OTP engages in activities that are beyond the Prosecutor's mandate, and that this is inconsistent with the purpose of PEs.

730. The Experts are of the opinion that PEs should be undertaken solely with a view to determining whether to proceed with an investigation. Positive complementarity activities by the OTP ought not to serve as a basis for opening or prolonging a PE.

731. The Prosecutor considers positive complementarity to be a welcome by-product of the PE process, rather than a result of a preconceived policy of the OTP.<sup>507</sup> However, positive complementarity is referred to in every Strategic Plan and is referenced in the Policy Paper on PEs.<sup>508</sup>

732. Based on the OTP Policy Paper on PEs, during Phase 3, the OTP may engage with the domestic authorities in order to promote domestic proceedings. In this case the *complementarity assessment takes place in parallel to other types of engagements with*

<sup>505</sup> E.g. Situations in Afghanistan, Nigeria. See: Amnesty International, [Willingly Unable. ICC Preliminary Examination and Nigeria's failure to address impunity for international crimes](#) (2018), p.10.

<sup>506</sup> In contrast to the ability at the investigation stage for challenges based on the provisions of Art.18 and Art.19 of the [Rome Statute](#).

<sup>507</sup> See [OTP Strategic Plan 2019-2021](#), para.50: 'While the main aim of a preliminary examination remains always to determine in a timely manner whether the legal conditions are met that require the Office to start an investigation, *the mere fact of engaging with national authorities can sometimes result in them taking further steps...*' (emph. added).

<sup>508</sup> One of the OTP Policy Goals is 'ending impunity through positive complementarity'; 'a significant part of the OTP's efforts at the preliminary examination stage is directed towards encouraging States to carry out their primary responsibility to investigate and prosecute international crimes,' [OTP Policy Paper on Preliminary Examinations](#), para.100; [OTP Strategic Plan 2019-2021](#), paras.49-51.

*domestic stakeholders*<sup>509</sup>. Such activities include, amongst others, in-country missions, consultations with domestic authorities and civil society, as well as monitoring activities.

733. The institutional approach to it, as well as the practice in situations such as Guinea, Colombia, and Nigeria, demonstrate that positive complementarity efforts are not incidental. For instance, in the situations of Colombia and Guinea, the OTP engages closely with the authorities of the state concerned, visiting each 15-17 times during the PE process.<sup>510</sup> While certain positive developments in terms of accountability efforts have occurred during this period in situations under examination, these PEs are also among the lengthiest ones (see *Figure 3* above).

734. The OTP appears to consider that positive complementarity is exclusive to the PE stage (based on the Strategic Plan and Policy). However, nothing precludes the OTP from engaging states in the same manner during the investigation stage.<sup>511</sup> Once an investigation is opened, the OTP conducts a case selection and prioritisation exercise in relation to the situation. At this time, closer dialogue with situation and/or neighbouring states would be beneficial in developing a strategy with clear prosecutorial goals. The setting of prosecutorial priorities would benefit from collaboration with the relevant states and other competent authorities.

735. Furthermore, once the OTP reaches an advanced stage of investigation, and begins preparing for prosecutions, the OTP could and should find ways to engage with other jurisdictions, including, if possible and appropriate, the situation country. Sharing information and evidence could be used to catalyse additional prosecutions, beyond the limited scope of the OTP. In fact, such activities have been undertaken in terms of evidence sharing with several jurisdictions during investigations, on an *ad hoc* basis.

736. Here, a division of labour between the OTP and the ASP appears to be of potential importance. While the OTP is clearly responsible for determining the scope of its investigations and prosecutions, as well as determining which parties may be supported by sharing information or evidence, the ASP could play an important role in facilitating partnerships between the OTP and the States Parties, non-States Parties, and other organisations. It could, for instance, facilitate judicial requests from States Parties to the OTP; act as a forum for dialogue between the States Parties (especially the situation states) and other regional or international bodies. The ASP could also assist in relation to developing national and regional responses to criminal incidents and the development of the rule of law and assist in monitoring the implementation of completion strategies.

## **Recommendations**

**R262.** The OTP should not have regard to prospective national proceedings and focus solely on whether national proceedings are or were ongoing (Article 17). This would further align the admissibility criteria on complementarity with Article 17 of the Rome Statute ('is', 'has been' conducted), and the requirements set out by the Appeals Chambers ('tangible' steps).

**R263.** Time limits should be considered for states to comply with OTP requests during complementarity assessments, in combination with providing clear criteria of what the OTP requires in order to make an Article 17 determination.

**R264.** Positive complementarity activities should not delay the opening of an investigation or closure of a PE. The OTP should consider positive complementarity in the context of the strategy for the situations at all stages of proceedings, and not restricted to PEs. The OTP should consider whether positive complementarity activities would be more appropriate after an investigation is authorised.

**R265.** Positive complementarity should be considered in the design of completion strategies.

<sup>509</sup> [OTP Policy Paper on Preliminary Examinations](#), paras.100-103, Examples of this approach can be found, for example, in the situations of Colombia, Guinea, and Nigeria.

<sup>510</sup> Human Rights Watch, 'Pressure Point' (2018), [Appendix II](#), p.165.

<sup>511</sup> In fact, States are arguably more empowered once the Prosecutor has determined that there is a reasonable basis to commence an investigation, with the ability to formally lodge admissibility challenges on the basis of [Rome Statute](#), Art.18(2),19.

## D. Transparency of Preliminary Examinations

### Findings

737. The Experts heard concerns about the lack of transparency with regard to the PE process. It was suggested that more transparency would improve the prospects of cooperation from States Parties and non-States Parties and assist in mobilising the civil society organisations in situation countries.

738. Transparency during PEs is one of the OTP's policy objectives.<sup>512</sup> The OTP makes the commencement of a PE public, and provides situation-specific reports whether on closing a PE or seeking authorisation to proceed with an investigation. While a PE is ongoing, the OTP publishes reports addressing issues of jurisdiction and/or admissibility, on an ad hoc basis. The OTP annually reports its PE activities to the ASP, as well as to the UN General Assembly.<sup>513</sup>

739. On the other hand, this level of transparency is criticised by some stakeholders. The Experts heard concerns that the annual reporting process is a 'naming and shaming' exercise, or that having public PEs may encourage a state to leave the Court.<sup>514</sup>

740. While those are valid concerns, the Experts are of the view that it is impractical to keep PEs confidential. Considering the high profile of PE activities, leaks and speculation would be an inevitable consequence. Leaks would likely be more damaging for the OTP than making its activities public. Furthermore, civil society organisations, victims' groups, and other stakeholders would not be able to organise in support of the PE and provide information to the OTP.

### Recommendations

**R266.** The OTP should continue with its current level of transparency in relation to PE activities: announcements of opening and closing each PE, annual report to the ASP, situation-specific updates and statements.

**R267.** The Prosecutor should consider appointing an OTP focal point to be in charge of responding to queries and otherwise communicating with the civil society and other stakeholders during the Pes.<sup>515</sup>

## XIV. INVESTIGATIONS

### Findings

741. The Investigations Division (ID) provides investigative and analytical components to the integrated teams, and is responsible for the forensic and scientific aspects of investigations, as well as the provision of operational support.<sup>516</sup> The ID is led by the Division Director, supported by the Investigations Coordinator (P-5). The ID comprises four Sections: the Investigations Section (IS), the Investigative Analysis Section (IAS), the Forensic Science Section (FSS), and the Planning and Operations Section (POS).

742. As of the end of June 2020, the ID had a total of 181 staff (128 established posts, and 53 recurrent GTA positions). Table 2 presents the breakdown of staff per Section:

<sup>512</sup> [OTP Policy Paper on Preliminary Examinations](#), paras.94-99.

<sup>513</sup> E.g. [A/74/324](#).

<sup>514</sup> As demonstrated in the situations of [Burundi](#) and [Philippines](#).

<sup>515</sup> See *supra* Section [VII.D. Relations with Civil Society and Media Organisations](#).

<sup>516</sup> [ICC-ASP/18/10](#), p.69, para.278.

**Table 2 Investigation Division staff numbers**

<b>Investigations Division</b>	<b>P-level and GTA</b>	<b>G-level and GTA</b>
Investigations Section (IS)	75	6
Investigative Analysis Section (IAS)	22	13
Forensic Sciences Section (FSS)	11	1
Planning and Operations Section (POS)	27	26
<b>Total:</b>	<b>135</b>	<b>46</b>

743. The Experts heard a number of concerns, from both internal and external stakeholders, relating to OTP investigations. Recent disappointing outcomes in Court proceedings led some to suggest that the ID needs to thoroughly review their investigative strategies and techniques, and re-assess the quality and types of evidence they are collecting. Criticism was also directed towards the apparent lack of situation country knowledge on the part of analysts and investigators, and the lack of OTP field presence during investigations. Furthermore, some critique related to the lack of legal knowledge, or familiarity with the elements of Rome Statute crimes, on the part of some ID staff. Concerns were also expressed about a lack of an investigative strategy, and a corresponding reactive approach towards evidence collection. Finally, it was suggested that there appears to be too much distance between the senior ID management and the substantive work of the Division.

744. Since hearing those concerns, the Experts have been updated with regard to a number of important positive developments being considered by the ID. This is the so-called ‘Investigations 3.0’ approach.<sup>517</sup> It aims to refine the OTP investigations and to improve their effectiveness, quality, and expeditiousness, within the available resources. Investigations 3.0 remains a draft document and the Experts are proceeding on the basis that it remains a work in progress to be approved and implemented by the OTP. Many of the recommendations of the Experts referred to below are in line with some of the provisions of Investigations 3.0.

## **A. Investigative Strategy**

745. Currently, the OTP pursues a strategy of open-ended, in-depth investigations, with the aim of being trial-ready as early as possible in the judicial proceedings.<sup>518</sup> This approach was adopted in 2012 in place of a closed-ended, target-driven approach to investigations. The Experts regard this as an important and positive development that should be firmly implemented.

746. However, as mentioned previously, the Experts are concerned about the lack of situation-specific planning from the earliest stage of the OTP’s engagement in a situation. Currently, integrated teams draft the first investigation plan after an investigation is opened. They typically cover a period of one year, and are regularly reviewed by ExCom. There appears to be an absence of long-term strategic planning, as investigation plans focus on the investigative and analytical priorities for the upcoming months.

747. The absence of effective strategic planning makes it difficult to assess the progress of investigations and to make strategic decisions in relation to different stages thereof. While the identification of all the relevant incidents, structures, and suspects is not to be expected

<sup>517</sup> Investigations 1.0 refer to investigations conducted under the first Prosecutor, Mr. Ocampo; investigations 2.0 refer to investigations conducted during majority of the term of Ms. Bensouda, 2012- onwards.

<sup>518</sup> [OTP Strategic Plan 2019-2021](#), p.4, para.4.

at an early stage of an investigation, there should be a prospective vision of what the OTP intends to achieve in each situation. Currently, the OTP has no benchmarks to assess progress and adherence to strategic goals within each situation. The Experts were also informed that the absence of an overall understanding of the Prosecutor's plans and vision for each situation leaves the teams with a lack of focus and a reactive decision-making process.

748. Apart from the absence of long-term strategic planning for each situation, the Experts heard concerns about the lack of an inclusive policy of the OTP investigative strategy. While prosecutorial strategies are included in the OTP Strategic Plans, there is no equivalent attention given to investigations. The ID has accumulated a wealth of best practices and lessons learned, as well as reflections on the implementation of the legal framework of the Court in relation to investigations. As will be further explored below, raising awareness of the legal mandate of the ID is also important in order to secure stronger partnerships and acquire greater cooperation for evidence collection activities.<sup>519</sup> All of this knowledge could be synthesised in the OTP Investigative Strategy, incorporating the findings and recommendations from the ongoing Investigations 3.0 project.

### **Recommendations**

**R268.** The ID should consider drafting a policy paper on OTP Investigations, combining the best practices and lessons learnt from its 18 years of practice. It should include its vision for the way forward. The policy paper should cover the principles, practices, standards, and strategies that should be applied in OTP investigations.

**R269.** The ID should develop long-term situation-specific investigative strategies that cover all stages of investigations from the opening of an investigation to possible de-prioritisation, hibernation and closure of an investigation. These plans should have flexible benchmarks to monitor the implementation of the strategy.

**R270.** The strategy should include, at minimum: (i) the goals of the investigation; (ii) the main incidents identified, and discrete investigative strategies for each incident; (iii) a matrix of the incidents identified, together with potential suspects, to form part of the case selection and prioritisation document; (iv) types and volume of evidence available, including evidence that might be obtained through financial, cyber and other investigations; (v) analysis requirements in terms of software and resources; (vi) planning for an ID field presence; (vii) cooperation prospects, partners and stakeholders; (viii) prospects of arrests, assessment of tracking capabilities in relation to the situation; (ix) resources necessary to comply with the goals of the strategic plan; (x) closure and hibernation benchmarks and strategies.

**R271.** Situation-specific strategic plans should be treated in a flexible manner, and adapted in the light of developments as the investigation proceeds. Annual investigation plans should be incorporated into a long-term investigative strategy, and aligned with it, to ensure that ongoing activities contribute to the overall goals of each investigation.

## **B. Investigative Techniques and Tools**

### **Findings**

749. Some stakeholders interviewed by the Experts expressed concern with regard to the ability of the OTP to make use of specialised investigative techniques, especially concerning financial investigations and the tracking and arrest of fugitives.

750. These concerns require a combination of increased in-house capacity, and increased cooperation with national authorities, intergovernmental organisations, and other stakeholders with the capacity to assist the OTP with specialised collection of evidence.

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<sup>519</sup> See *supra* Section [VII.F Outreach Strategy](#).

## 1. Cooperation for Evidence Collection

751. Most of the OTP investigative steps require cooperation from States Parties, national governmental authorities, intergovernmental bodies, civil society organisations, commercial, and other entities. The need for this cooperation is only increasing with the growing number of situations, more suspects at large, the need to obtain evidence from witnesses located abroad, and increased use of digital evidence (e.g. online banking, messaging, social media, email platforms).<sup>520</sup>

752. In this context, in order for the OTP to conduct effective and efficient investigations, within its limited resources and broad mandate, it will need to rely on the assistance of outside entities. The OTP staff interviewed by the Experts stressed the need to have stronger cooperation agreements with national authorities, including the armed forces and national law enforcement agencies, international and intergovernmental organisations, and private companies. This need for increased cooperation is recognised in the latest OTP Strategic Plan.<sup>521</sup>

753. Requests for judicial cooperation are of particular importance. In many cases the necessary information to enable the OTP to conduct an investigation is located in a foreign jurisdiction. The domestic agencies will likely have the capacity and legal framework to allow them to collect the information that would enable successful investigations. This would include intercepting communications, telephone records, satellite imagery, bank records, and immigration records. Private companies are the custodians of the contents of social media or email accounts; private banking companies would be able to provide information on money transfers. Intergovernmental and international organisations (e.g. INTERPOL, EUROPOL, UN and UN Agencies) often have access to immigration records, are active in situation countries, act as first responders, and collect medical and forensic records. Such types of evidence have been successfully obtained and presented in court in relation to several Court cases.<sup>522</sup>

754. Apart from specialised types of information, another area where a stronger cooperation framework is required relates to witnesses. They remain the most important sources of evidence. The Experts were informed of the increasingly burdensome requirements placed by some states on the OTP to enable it to carry out witness interviews. Regrettably, this also applies to some States Parties. Delayed interviews not infrequently result in the loss or dilution of investigative opportunities.

755. The ID is presently cooperating with a number of partners, including some States Parties and intergovernmental bodies, and is actively working on strengthening such cooperation. However, the Experts heard serious concerns from some OTP staff to the effect that there remain troubling situations in which there is a serious lack of cooperation and inordinate delays in responding to requests for information. In other cases, responses to requests for information lack relevant detail or might be so heavily redacted as to be of no practical utility.

756. The Experts recognise that some of these problems might be a consequence of requests that are too complex or imprecise to enable states or other stakeholders to adequately respond to them. The responders might not have an awareness of the OTP's legal mandate.<sup>523</sup> As further discussed below, the OTP needs to be deliberate and strategic in securing the

<sup>520</sup> See *supra* Section [VII.C. Relations with UN Agencies and Other International and Regional Organisations](#).

<sup>521</sup> 'The Office can expedite its core activities through more strategic cooperation and coordination with partners, including first and early responders. (...) For instance, the OTP intends to continue to work cooperatively with UN mechanisms that have an investigative mandate for situations in which the ICC also has jurisdiction', [OTP Strategic Plan 2019-2021](#), p.21, para.27

<sup>522</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute, [ICC-01/05-01/13-1989-Red](#), 19 October 2016, para.214 refers to records from Western Union and Call Data Records (CDR); *The Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges, [ICC-02/04-01/15-422-Red](#), 23 March 2016, para.55 refers to intercepted radio communications.

<sup>523</sup> See e.g. [Report on cooperation challenges faced by the Court with respect to financial investigations](#), Workshop 26-27 October 2015, p.4: 'States Parties' law enforcement agencies and central authorities in charge of international judicial cooperation often have only limited awareness of the mandate of the Court in relation to financial investigations and asset recovery.'

necessary cooperation by developing in-house technical expertise to ensure that any requests for assistance are sound and include all the relevant information to enable the requested bodies to respond meaningfully to them. Stronger professional capacity within the OTP is also important to ensure that information received is treated in an appropriate manner, and so inspires more confidence on the part of the authorities, organisations, or businesses receiving requests for assistance.

### **Recommendations**

**R272.** The OTP should continue to develop strong partnerships and enter into Memoranda of Understanding with States Parties, international and intergovernmental organisations, and private companies.

**R273.** The OTP should consider requesting assistance from the ASP in raising the awareness of States Parties to the needs of the OTP. Best practices and lessons learnt could be shared.

**R274.** The OTP and the ASP should consider improvements in cooperation. Consideration might be given to the development of a uniform cooperation framework for all States Parties, or for regional groups of states. <sup>524</sup>

**R275.** The OTP and the ASP could consider revisiting agreements with international and intergovernmental agencies with which the OTP engages frequently, such as the UNHCR and International Organisation for Migration.

**R276.** The OTP should consider a review of relevant domestic cooperation laws, procedures, and policies for the purpose of enabling cooperation with States Parties for evidence collection.

**R277.** The OTP should consider establishing joint training with Court staff and investigators from States Parties, not only to improve capacity, but also to strengthen an informal network of contacts.

**R278.** The OTP should consider strategic secondment of national law enforcement agents to assist in achieving the same goals.

## **2. Cooperation Requests – JCCD International Cooperation Section**

### **Findings**

757. Within the OTP, cooperation activities are in the hands of the JCCD. Within JCCD, the International Cooperation Section (ICS) is responsible for facilitating investigations and prosecutions by seeking domestic cooperation and judicial assistance. The ICS provides the International Cooperation Advisors to the integrated teams to work on situation-specific cooperation needs.

758. The Experts recognise the essential role the ICS plays in facilitating cooperation and opening doors to assist the work of investigators and prosecutors. Cooperation issues are complex and situation specific. This requires work relating to different countries, each with its own distinctive political systems, legislative framework and bureaucracies. However, despite the importance of its work, the Experts received much criticism of the JCCD. Many in the PD and ID perceive the JCCD as approaching its task as a diplomatic one and not geared to respond to the requests for assistance from prosecutors and investigators. It is regarded by some members of staff as a hindrance rather than as a help to them.

759. There appear to be serious delays in the complicated system of drafting and filing Requests for Assistance (RFAs). Currently, the RFAs are drafted by the International Cooperation Advisors, in consultation with the Senior Trial Lawyer and Investigations Team Leader. Upon drafting, the RFAs are reviewed for consistency by a Judicial Cooperation Adviser and two assistants (GS-OL). This additional review layer reportedly creates a

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<sup>524</sup> See R152 (p.121).

bottleneck in the process, and leads to frustration on the part of the PD/ID integrated team members.

760. Apart from the reportedly slow process in producing and communicating the RFAs, the Experts heard concerns that the RFA system overall is not fit-for-purpose for OTP investigations. In order not to lose investigative opportunities, the ID requires a facility for direct operational communication with relevant domestic authorities and other agencies. The investigators would prefer direct contact with the domestic officials and so avoid the cumbersome and time-consuming system of RFAs.

### **Recommendations**

**R279.** The efficiency of the RFA process should be improved. Many delays could be averted by eliminating the additional review process, leaving the ICAs responsible for the consistency and reliability of judicial cooperation practices. The Senior Trial Lawyers should provide the ICAs with the content of the RFAs. The ICAs should then be able more speedily to facilitate compliance with the requests.

**R280.** A framework for informal operational contacts should be established in all situation countries. Investigators could then make informal enquiries to law enforcement or national authorities to ascertain whether the information sought actually exists/and is available. RFAs should, if necessary, then follow.

**R281.** Consideration should be given to the RFA database being made more accessible to appropriate leadership of PD and ID.

**R282.** The recommendations made in the section on staff quantity<sup>525</sup> should be taken into account with regard to requests for cooperation.

## **3. Developing Technical Expertise within the ID**

### **Findings**

761. There is a close link between the OTP's ability to obtain cooperation, and having the requisite technical capacity in-house. In-house technical experts are key in determining precisely what information is required for an investigation to advance, and where this information might be located. Technical experts also play an important role in assessing the quality of the information received, analysing it, and preparing analytical products that can be used in Court.

762. The OTP has already demonstrated that where the ID has staff with technical skills, they can both acquire the necessary evidence, and be able to use it subject to the highest standards of proof. For example, the OTP has placed some focus on using call data records (CDR) by hiring an analyst with specific telecommunications analysis skills and developing more training in-house. As a result, in *Bemba et al.* the Prosecution relied heavily on CDR analysis. The analyst's evidence was accepted by the Court.<sup>526</sup> Similarly, in *Ongwen*,<sup>527</sup> a military analyst provided the Trial Chamber with testimony on the collection of intercepted materials. Unfortunately, as mentioned earlier, the OTP's capacity is currently low with regard to two key investigative avenues: financial investigations, and the tracking of fugitives.

<sup>525</sup> See *supra* Section [I.C.3Quantity of Staff](#).

<sup>526</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute, [ICC-01/05-01/13-1989-Red](#), 19 October 2016, para.221.

<sup>527</sup> *The Prosecutor v. Dominic Ongwen*, Transcript of Witness UGA-OTP-P-040318, [ICC-02/04-01/15-T-30-Red-ENG](#), 18 January 2017.

## 1. Financial Investigations

763. Stronger Court financial investigations and asset recovery are ‘vital to the effective execution of its mandate and the delivery of justice.’<sup>528</sup> The tracing, freezing, seizure and recovery of assets is a joint effort of all Organs of the Court.<sup>529</sup> In the institutional context, the OTP is expected to carry out its mandate in relation to conducting financial investigations and analyses as part of its investigative activities.<sup>530</sup> The Registry carries out financial investigations for the assessment of legal aid and indigence of defendants. The two Organs coordinate their efforts through an inter-Organ working group, and share information on matters appropriate to their disparate mandates.<sup>531</sup>

764. A number of stakeholders highlighted the need for more efficient OTP financial investigations. It is also expected by the States Parties.<sup>532</sup> Two years after the adoption of the Paris Declaration (2017), financial investigations and asset recovery became a priority for the Court.<sup>533</sup> During interviews, the ID leadership maintained that ideally the OTP should proceed to trial with all the assets of the main suspects mapped for future seizure and recovery. There should, in addition, be available financially based evidence that might be relevant to core crimes. A Chamber has ruled that the tracing of assets need not be linked to crimes charged.<sup>534</sup>

765. Currently there is no analyst or investigator in the OTP dedicated to financial investigations. Though some ID staff members have the requisite skills, they are carrying out the tasks of general investigators and analysts as the teams are overstretched with core investigative and analytical activities.<sup>535</sup> The need is clearly recognised within the OTP. In its request for a new position of a P-4 Senior Investigator for the 2020 budget, the OTP argues that by acquiring a professional with extensive expertise and experience in financial investigations they will be able to provide ‘strategic guidance, planning and coordination of activities related to the required financial investigations, including asset tracing activities,’ apart from supporting other goals of the Court.<sup>536</sup> Making progress in this area without having a single member of staff dedicated to the task within the OTP cannot be expected.<sup>537</sup>

766. The Experts were also informed that some stakeholders do not appreciate the importance of the distinction between the mandate of the financial investigator employed by the Registry, on the one hand, and a financial investigator employed in the OTP, on the other. They assume, incorrectly, that the Registry’s financial investigator is able to carry out all aspects of financial investigations. The different mandates are enshrined in the legal framework of the Court.<sup>538</sup>

<sup>528</sup> ICC, [Financial investigations and recovery of assets](#), (2017), pp.9-10. For more information, see [Report on Cooperation Challenges faced by the Court with respect to financial investigations](#); Workshop 26-27 October 2015, The Hague, Netherlands.

<sup>529</sup> [Financial investigations and recovery of assets](#), pp.9-10.

<sup>530</sup> In addition, the OTP conducts financial investigations to identify assets and transmit relevant information to the Chambers to form the basis for possible future forfeiture orders and reparation awards to victims.

<sup>531</sup> On Registry’s financial investigations, see *infra* [para.833](#).

<sup>532</sup> [ICC-ASP/18/10](#), para.284: ‘States Parties have highlighted the need for the Office and the Court to strengthen financial investigations activities for multiple purposes.’

<sup>533</sup> Report of the Bureau on Cooperation, [ICC-ASP/18/17](#) (2019), para.9.

<sup>534</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on the ‘Requête de la défense aux fins de levée du gel des avoirs de Monsieur Aimé Kilolo Musamba’, [ICC-01/05-01/13-1485-Red](#), 17 November 2015, para.17.

<sup>535</sup> See *supra* Section [I.C.3Quantity of Staff](#).

<sup>536</sup> [ICC-ASP/18/10](#), para.284.

<sup>537</sup> See *supra* Section [II.J.3. Secondments](#).

<sup>538</sup> OTP: [Rome Statute](#), Art.54, 93(1)(k); Registry: [Rome Statute](#), Art.67(1)(d), [RPE](#), Rule 21(5), [Regulations of the Court](#), Regulation 85; [Regulations of the Registry](#), Regulations 130(2), 132(2).

### (3) Tracking and Arrests of Fugitives

767. The inability to secure arrests of fugitives is an inherent problem with the Rome Statute system. In spite of some recent positive developments,<sup>539</sup> as of June 2020, warrants of arrest against 14 individuals in six situations are outstanding.<sup>540</sup> Furthermore, in respect of the two Security Council referrals of Sudan and Libya, there have been 15 findings of non-cooperation by States Parties. These were communicated by the OTP to the UN Security Council without any response.<sup>541</sup>

768. The Court and the ASP appear to have been coordinating the development of a stronger framework for the tracking and arrest of Court fugitives. In 2013, the ASP appointed a Rapporteur on arrest strategies,<sup>542</sup> who delivered a comprehensive action plan for the ASP and the Court that was based on the lessons learnt from national and international jurisdictions.<sup>543</sup> The ASP has taken note of the Rapporteur's reports,<sup>544</sup> and held a number of consultations, as well as information sharing and awareness raising activities.<sup>545</sup> Unfortunately, these efforts do not appear to have had significant positive consequences.<sup>546</sup> Work in this area continues, as the OTP Strategic Plan 2019-2021 includes 'developing with States enhanced strategies and methodologies to increase the arrest rate of persons subject to outstanding Court arrest warrants.'<sup>547</sup>

769. However, cooperation from states is only one part of the problem in the enforcement struggle. The internal and external stakeholders consulted by the Experts expressed support for a stronger internal capacity within the Court, and specifically within the OTP, to track fugitives, and provide states with timely information on their whereabouts. This is in line with the ASP Rapporteur's recommendation in 2014 to establish a Tracking Unit 'as a matter of priority within the Office of the Prosecutor.'<sup>548</sup>

770. The OTP set up a Suspects-At-Large Tracking Team (SALTT) in 2018.<sup>549</sup> At the time of writing it has two full-time members of staff, both from the Investigations Section (IS) of the ID.<sup>550</sup> Two JCCD cooperation advisers are affiliated with the SALTT on a part-time basis, aside their main tasks at the JCCD. Based on interviews carried out by the Experts,<sup>551</sup> the Unit is under-resourced and cannot fulfil all the tasks required for sufficient tracking, analysis, and coordination of cooperation. In this context, the Experts take note of the OTP's

<sup>539</sup> See *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, [Case information sheet: The Prosecutor v. Ahmad Muhammad Harun \('Ahmad Harun'\) and Ali Muhammad Ali Abd-Al-Rahman \('Ali Kushayb'\)](#), [ICC-02/05-01/07-82](#), Decision on the convening of a hearing for the initial appearance of Mr. Ali Kushayb, 11 June 2020.

<sup>540</sup> The actual number might well be higher, considering the practice of issuing sealed warrants of arrest. For a list of outstanding warrants of arrest, see [A/74/324](#), p.3.

<sup>541</sup> *Ibid.*, p.16, para.75.

<sup>542</sup> Report of the Bureau on cooperation, Annex IV, Report on the draft Action Plan on arrest strategies, submitted by the Rapporteur, [ICC-ASP/14/26/Add.1](#) (2015), para.2.

<sup>543</sup> Report of the Bureau on cooperation, Addendum, Annex VII, Report on arrest strategies by the Rapporteur, [ICC-ASP/13/29/Add.1](#) (2014).

<sup>544</sup> Report of the Bureau on Cooperation, [ICC-ASP/18/17](#) (2019), para.14.

<sup>545</sup> See e.g. Report of the Court on cooperation, [ICC-ASP/18/16](#) (2019), para. 46; Report of the Court on cooperation, [ICC-ASP/17/16](#) (2018), para. 41; Report of the Bureau on Cooperation, [ICC-ASP/18/17](#) (2019), paras. 15-18.

<sup>546</sup> In 2019, the Court reported that in order to galvanise arrest efforts, different types of actions are needed for each warrant at different stages: (a) tracking efforts, (b) identification of potential leverage and partners; (c) operational support; see further Report of the Court on cooperation, [ICC-ASP/18/16](#) (2019), paras.43-49.

<sup>547</sup> [OTP Strategic Plan 2019-2021](#), p.22.

<sup>548</sup> Report of the Bureau on cooperation, Addendum, Annex VII, Report on arrest strategies by the Rapporteur, [ICC-ASP/13/29/Add.1](#) (2014), p.56, paras. 42-44.

<sup>549</sup> Tracking activities were carried out prior to 2018, by various members of the OTP, without being formed into a specialised unit.

<sup>550</sup> The Experts were informed that, due to the high workload of the Tracking Unit, a third staff member will likely be assigned to it in the near future.

<sup>551</sup> The Experts appreciate the initiative of the OTP SALTT for providing an extensive briefing on the recent surrender.

statement that its limited resources rule out ‘some of the more ambitious means employed by the tracking units of other international criminal tribunals’.<sup>552</sup>

771. The Registry also holds certain responsibilities in this field.<sup>553</sup> Efforts have been made over the years to improve cooperation between the OTP and the Registry on suspects-at-large matters. An example of this is the establishment, in March 2016, of an inter-Organ working group on arrest strategies (Suspects at Large Working Group (SALWG)). The working group collects and shares information on the travel of persons subject to arrest warrants.<sup>554</sup> The Working Group is composed of the SALTT and two staff members from the Registry. One of them has been recruited specifically for this purpose. Based on the information shared with the Experts, significant improvements can be made in the manner in which cooperation currently takes place, so as to minimise duplication, avoid inter-Organ rivalries and reap the rewards of a truly unified approach between the two Organs.<sup>555</sup>

772. Importantly, the tracking and arrest team has no budget assigned to it within the Court. Therefore, all their expenditures, including those directly related to arrests of suspects, have to be covered by the Contingency Fund, whether of the OTP or of the Registry. Having little certainty on whether the resources will be available hampers the planning of operations and creates delays.

773. Furthermore, the Court has little to offer for providing information on the fugitives. While the ICTY or the ICTR benefitted from having rewards programmes, the Court can only offer to cover the costs incurred by the intermediaries in providing the information, but cannot otherwise incentivise them.

774. Building capacity not only to track the movements of fugitives, but to anticipate their movements in the future and request cooperation prospectively, is critical for the Court. Otherwise, resources that were put into investigating these cases up to the stage of an Application for Warrant of Arrest (AWA), and maintaining the evidence basis while the cases are in hibernation, are wasted. The OTP must prioritise and concentrate their efforts on this task, and enhance cooperation with the Registry.

### (3) Remote Investigations

775. The ongoing COVID-19 pandemic has had a considerable impact on the operations of the OTP, especially as it regards the collection of evidence. With travel restrictions in place, field missions to collect evidence or conduct witness management tasks have essentially come to a halt. In this context, the ability to rely on remote investigation techniques, as well as having flexibility in tasking staff, became of great importance.

776. Remote investigation techniques have been under development by the ID for several years. Well before the pandemic, investigative staff frequently encountered difficulties in collecting evidence due to lack of cooperation, security concerns for staff or witnesses, and locations that are difficult to access. As a response, the ID has focused on cyber and online investigations, including the development of several internal SOPs and guidelines. Internal training sessions have been held.

777. In the context of continuing restrictions and the uncertainty of their duration, the ID has fast tracked several related projects, including remote interviewing. The investigative staff is increasingly contributing to evidence review and evidence collection planning activities. This demonstrates the importance of maintaining a flexible allocation of resources.<sup>556</sup> These developments are positive not only in relation to the problems created by the pandemic, but may well increase the efficiency of the investigations more generally.

778. At the same time, the pandemic has exposed the weakness of the current ID lack of an embedded field presence in situation countries. Having permanent staff in the field would

<sup>552</sup> [OTP Strategic Plan 2019-2021](#), 17 July 2019, para.30.

<sup>553</sup> See for example [Rome Statute](#), Art. 89, and [RPE](#), Rule 13, 176, 184.

<sup>554</sup> Report of the Court on Cooperation, [ICC-ASP/16/16](#), (2017), para.41.

<sup>555</sup> See *supra* Section [I.A.1\(2\) ICC/IO Governance](#), paras.49-50.

<sup>556</sup> See *supra* Section [II.J. Flexibility, Scalability and Mobility in Staffing](#).

have enabled the ID to continue at least some of the evidence collection and witness management activities even in the face of travel restrictions.

### **Recommendations**

**R283.** In the absence of additional funds, the OTP should consider assigning one of its present staff members, with financial investigations skills, to work exclusively on financial investigations. Similar to Recommendation 103, the position could also be filled through secondment.

**R284.** The ASP should consider appointing a focal point for arrests.

**R285.** In order to improve the tracking of suspects, the OTP should continue to develop mechanisms for coordination and cooperation at the technical level (national law enforcement), and focus on informal cooperation networks.

**R286.** The OTP should strengthen the SALT by appointing an additional analyst/investigator.

**R287.** The OTP should strengthen coordination with the Registry's financial investigator. One of the initial steps to facilitate this coordination could be the creation of an inter-Organ working group on asset-tracing and financial investigations.

**R288.** Arrest prospects and activities should be included in investigative planning for each situation.

**R289.** The Court needs a rewards program in order to facilitate access to information from the general public for the location and arrest of fugitives. The ASP should consider setting up a working group to consider the possible ways such a program could be set up and funded.

**R290.** There is a need for a special operations fund for the OTP. It would enable the teams carrying out the tracking and arrests of suspects to plan for and cover expenses in the field without delays.

**R291.** The OTP should consider further developing remote investigation techniques, including remote witness screening and the online collection of evidence.

**R292.** Once the COVID-19 pandemic-related restrictions are lifted, the OTP should conduct a lessons learnt exercise in relation to the (i) techniques for remote investigations; (ii) flexible use of staff during the time of travel restrictions; (iii) the role that a field-based team could have played; (iv) possible future restrictions for reasons such as a local epidemics and budget restrictions; (v) possible requirements for cooperation in relation to remote investigation techniques such as partnerships with internet service providers.

## **C. ID Field Presence in Situation Countries**

### **Findings**

779. The Experts received a number of criticisms regarding the ID field presence during investigations, and the related lack of knowledge of situation countries. This hampers the efficient collection and evaluation of evidence. These shortcomings have also been expressed in their judgments by some members of the Court Chambers.<sup>557</sup>

780. Under the current model, the OTP investigators are deployed in the field on a rotational basis, for two-three weeks at a time. The ID attempts to ensure an OTP presence on the ground at all times, even if small in number. In most cases the investigators work in

<sup>557</sup> *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, [ICC-01/04-01/07-3436-ENG](#), 7 March 2014, paras.66-67: 'In-court testimonies allowed the Chamber to measure the very specific significance of local customs and the role of family relationships in Ituri. (...) Most probably, the Prosecution's investigation would have benefitted from pursuing these issues'; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Opinion of Judge Tarfusser, [ICC-02/11-01/15-1263-AnxA](#), 16 July 2019, para.93: 'Even more troubling, it seems that staff with limited mastery of French was selected as responsible for carrying out interviews of critical importance for the case.', para.54 on apparent misinterpretation of election slogans.

pairs. Where the OTP uses interpreters, they are typically recruited locally, and join the teams during interviews only. The OTP does not have a dedicated field office in any of the situation countries, and has limited access to the field offices that are, in any event, only established by the Registry after investigations have been opened.

781. The Experts consider this model to be inefficient and ineffective. It requires fundamental review. Field presence may bring many advantages, such as increased ability to collect and assess evidence in a more-timely manner; increased access to witnesses and the local community, including civil society organisations; stronger OTP-driven outreach; and reduced costs. Understandably, this cannot be the case in every situation having due regard to security and other operational concerns. This should, however, be explored in every investigation.

782. Apart from the paucity of OTP field presence, the Experts heard concerns about the lack of understanding of and familiarity with the situation countries. This lack of knowledge relates not only to complex political, social, and cultural matters, but also to more basic aspects, such as language. These shortcomings reportedly impede investigators from identifying and assessing lines of inquiry, and reduce the trust of the Court by victim communities.

783. The ID is aware of this issue, and is currently working on determining the future model of field presence. This includes considerations of the required changes to human resources policies to allow for more field-based staff. The Experts appreciate the difficulties in placing Headquarters staff in the field, having regard especially to the high costs that this would entail.

784. Some progress has already been made in this area, as evidenced by the recruitment of six Situation Specific Investigative Assistants. The ID also renewed the position of a P-3 Country Expert, with one already employed for the Myanmar/Bangladesh situation. This is significant progress, but it does not suffice to remedy the insufficient time that OTP investigators spend in the field, and the lack of situation country knowledge on the part of OTP staff. At the time of writing, the ID appears to be collecting information on the staff members' ability and preference for possible long-term deployment to the field, and planning for increased local recruitment.

## **Recommendations**

**R293.** The OTP should continue to consider the different models available in order to maintain more investigative staff in the field on a longer-term basis. The Experts support the strategy of more local, field-based recruitment on the GTA or STA basis, as well as international recruitment with a duty station based in the field.

**R294.** The OTP should consider increasing the number of Situation Specific Investigative Assistants and Country Experts.

**R295.** The OTP should consider the recruitment in situation countries of local investigative staff who could be active in the field for the duration of an investigation, and who would support the integrated teams, as well as liaise with local contacts.

**R296.** Where local recruitment is not an option, the OTP should consider ways in which some of the investigators and/or analysts on the team could acquire greater familiarity with the context of the investigation. Long-term missions are one option. Another might be the recruitment of suitable staff from neighbouring countries.

**R297.** The OTP should consider increasing their cooperation with the Registry regarding the use of field offices. Field offices should include OTP staff, including analysts, and local contractual staff. A permanent arrangement should be investigated jointly by the OTP and the Registry. In particular, consideration should be given to the OTP using field offices for outreach and cooperation, increased ID contact with local officials, victims and witnesses, with appropriate advice from PD and JCCD.

**R298.** The OTP should continue its ongoing consultations with staff in relation to possible long-term deployment to the field. They should also consult with the Court's Human Resources Section regarding development of contracts with flexible duty stations.

## D. Evidence Assessment and Analysis

### Findings

785. Many of the concerns heard by the Experts relate to the quality and the assessment of evidence by the OTP. This is regarded as a crucial issue in light of the difficulties the OTP have experienced in successfully proving the factual allegations it has placed before the Judges. Some of the criticisms expressed in recent years by the Chambers include unsupported case theories;<sup>558</sup> questionable modes of liability;<sup>559</sup> unsuccessful use of patterns of conduct to prove a policy or course of conduct,<sup>560</sup> circumstantial or otherwise insufficiently specific/indirect evidence;<sup>561</sup> and failing to support linkage allegations.<sup>562</sup> In addition, the OTP has been unsuccessful in obtaining confirmation of a number of charges in confirmation proceedings. This is concerning having regard to the lower threshold of proof required of the OTP at that stage of the proceedings.<sup>563</sup>

786. These findings suggest a lack of comprehensive analysis, quality of the assessment of the evidence and case theories. The Experts were informed during interviews with some members of the OTP staff that analysts are undervalued and under-utilised, while many of the criticisms expressed by the Judges point to the lack of effective analysis and evaluation of the evidence.

787. It appears that in the OTP, analysts are sometimes perceived as ‘facilitators’ of operations, which downgrades their work to a level that is inconsistent with the relevance of their potential contribution. The Experts received reports that, within some of the integrated teams, investigation is driven predominantly by the available evidence rather than by evidence analysis. This is an inappropriate policy in the context of the complexity of situations investigated by the OTP. This is especially so having regard to limited resources, disclosure obligations, and some of the negative comments from Judges. Evidence collection needs to be carefully planned and built upon systematically and regularly reviewed.

788. Some of the problems stem from the comparatively small number of analysts in the ID and their junior rank in the integrated teams. All but one of the senior analysts are at the P-3 grade. They are effectively excluded from the ranks of team leadership and hence strategic discussions. They are invited to express their opinions on an ad hoc basis, depending on the policy of the team leadership. Analysts are also insufficiently engaged in developing the evidence collection plans. Their expertise should be called upon in this regard, especially with regard to the identification of gaps in the evidence.<sup>564</sup> There also appears to be a widespread concern that the ID does not have sufficient analysts to provide thorough and timely analytical products. In the context of the growing need for alternative types of evidence, the OTP will find itself having to hire analysts with the necessary specialised technical expertise in the fields of cyber, financial, and intelligence analysis.<sup>565</sup>

789. Some concern was also raised regarding the little use the OTP makes of analysis in areas other than investigations. For instance, during trial proceedings integrated teams have

<sup>558</sup> E.g. *The Prosecutor v. Laurent Gbagbo and Charles Ble Goude*, Opinion of Judge Cuno Tarfusser, [ICC-02/11-01/15-1263-AnxA](#), 16 July 2019, para.13: ‘witnesses from all walks of life have contributed to provide the Chamber with a picture of Ivory Coast simply irreconcilable with the one presented by the Prosecutor’; para.75: ‘the evidence on the record not only fails to convince me that any of the charged incidents did indeed occur pursuant to the Prosecutor’s narrative, but is rather suitable to point to one or more alternative readings which are equally, if not more, plausible.’

<sup>559</sup> *The Prosecutor v. Alfred Yekatom and Patrice Edouard Ngaïssona*, Decision on the Confirmation of Charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, [ICC-01/14-01/18-403-Red-Corr](#), 11 December 2019, paras.108, 158.

<sup>560</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Separate Opinion by Judge Van den Wyngaert and Judge Howard Morrison, [ICC-01/05-01/08-3636-Anx2](#), 8 June 2018, paras. 69-72.

<sup>561</sup> *Ibid.*, paras.11-14.

<sup>562</sup> [ICC-01/14-01/18-403-Red-Corr](#), paras.103, 157-158.

<sup>563</sup> Based on information provided to the Experts, on average only about 38% of OTP charges have been confirmed during pre-trial proceedings.

<sup>564</sup> This was also the experience of the ICTY and ICTR, where in many of the cases there would appear to have been over- or under- collection of evidence, see Peter Nicholson, ‘The Function of Analysis and Analysts’, in Morten Bergsmo et al. (eds), [Historical Origins of International Criminal Law: Volume 5](#) (2017), p.132.

<sup>565</sup> As of June 2020, the OTP ID has one military and one data analyst.

less than one full time analyst assigned to them. Apart from case-specific analysis requirements, the IAS should be able to provide an empirical basis to inform strategic decision-making by the OTP, e.g. situation and case selection and prioritisation, identification of potential leads and selection of witnesses for trial.

790. The Experts were also informed that advice offered by analysts that is critical or inconsistent with the views expressed by team members tends to be ignored. Some of the staff interviewed by the Experts expressed the view that this practice has been a source of some negative outcomes in court. It is expected of the analysts to identify gaps and other weaknesses in the hypotheses and the available information. Such input should be encouraged.

### **Recommendations**

**R299.** The important role of analysis should be recognised and valued by the OTP. Collection of evidence should be analysis-driven to avoid over- and under-collection. It would also support evidence-led, rather than target-led, investigations.

**R300.** Analysts should draft and manage collection plans (with team leadership's approval). Their input should also be sought during the drafting of strategic situation and case specific plans.

**R301.** Analysts should form a critical component of evidence review at all stages. In particular, AWA reviews and internal evidence reviews should be analysis-driven and informed by the senior analyst on each team.

**R302.** Analysts should play a key role in the preparation of cases. They should assist in the formation of factual hypotheses and theories, and help guide the collection of evidence.

**R303.** The OTP should make additional resources available for the IAS. More analysts, especially at P-1, P-2 levels, are necessary to realise the analysis requirements of the OTP.

**R304.** Consideration should be given to the recruitment or secondment of analysts with specialised skills to ensure efficient exploitation of a more diverse evidence base.

## **XV. OTP INTERNAL QUALITY CONTROL MECHANISMS**

### **Findings**

791. In order to improve and monitor team performance, the OTP has developed several internal mechanisms aimed at ensuring adequate quality control as the cases are prepared for warrants of arrest, pre-trial, and trial proceedings. These mechanisms include peer evidence reviews, reviews of critical submissions, testing of critical oral submissions, the development of internal guidelines standardising the work of each Division, and a lessons learnt policy.

792. However, the Experts were informed by a number of members of the OTP that the implementation of these mechanisms is inadequate. The criticisms relayed to the Experts mainly focus on (i) ineffective evidence reviews; (ii) lack of monitoring of trial progress; and (iii) absence of sufficient lessons learnt procedures. The Experts consider this information to be reliable. Improving these areas is crucial in order to ensure that any potential problems are identified and addressed in a timely manner.

#### **A. Evidence Reviews: Internal and Peer Review**

793. Regarding internal quality control, the Experts were informed that the teams perform regular internal evidence reviews. Each team is expected to assess what has been collected in the preceding period, and decide on a further collection plan. However, this process is not formally regulated and proceeds on an ad hoc basis, depending on the team leadership. The Experts were informed that in some cases evidence collection continues without the benefit

of analysis and integration of the previously collected evidence into the case hypotheses and strategies.

794. While compliance with the implementation of internal evidence reviews appears not to be formally monitored, the ID performance indicators' dashboard includes source evaluation of key witnesses.<sup>566</sup> The recent assessments indicate that ID performance on this measure was poor in 2016, 2017, and 2019. This is a serious issue for the OTP: the Judges have repeatedly found that a high number of OTP insiders were not credible or reliable witnesses.<sup>567</sup> Apart from low compliance, not everyone in the teams receives training in source evaluation,<sup>568</sup> which may lead to divergent approaches to evidence assessments.

795. Apart from regular within-team evidence reviews, the Experts were informed that all cases, prior to the application for a Warrant of Arrest (AWA) or a draft document containing the charges (DCC), have to be subject to a mandatory evidence review by a panel of reviewers, external to the team (but internal to the OTP). The exercise is led by the Senior Trial Lawyer of the integrated team, and governed by the recently issued internal guidelines.

796. A number of concerns were raised with regard to the procedures presently in place for peer evidence reviews. There are criticisms of the quality of cases and evidence presented to the Judges. These are also issues that have been raised by the Chambers. In this regard reference is made to the serious critiques of the evidence presented by the Prosecutor in the Bemba appeal Judgment and in the recent Gbagbo and Blé Goudé 'no case to answer' decision.<sup>569</sup>

797. Furthermore, it is of serious concern that the OTP has not always been successful in persuading the Chambers that it has presented sufficient evidence at the significantly lower threshold for confirmation proceedings.<sup>570</sup> Even though most cases have succeeded at the confirmation stage, multiple charges have been dismissed due to insufficiency of evidence. Rigorous peer review procedures would be calculated to enable the OTP to eliminate factually or legally questionable charges before an AWA or a DCC is filed.

798. Based on the information provided to the Experts, the most prevalent problems of the current system of peer reviews appear to be (i) insufficient time for review panels to consider the case documentation; (ii) insufficient knowledge of situations to enable non-team members to fully appreciate and understand the issues; (iii) questionable composition of review panels; and (iv) questionable reporting of the review outcomes.

799. First, regarding the time made available, the Experts were informed that, in the absence of sufficient time for preparation, panel members have little option but to rely upon the views presented by the team. The PD guidelines state that the team shall provide the review panel with all the necessary materials at least one week prior to holding the review. Considering that the majority of the OTP cases encompass multiple incidents with a large number of victims, and rely on high volumes of witness testimony, the materials made available to the reviewers usually comprise of some thousands of pages.<sup>571</sup> One week to review the documents and the underlying evidence is clearly inadequate for the exercise to be conducted thoroughly. This creates a situation where the team, with an interest in creating a good impression, is assessed by a panel that has little knowledge of the situation and the surrounding circumstances of the case.

800. Another problematic area is the composition of the review panels. The Experts were informed that currently the panels consist almost exclusively of senior lawyers, with few analysts and investigators. This results in the perception and fact that members of the OTP with relevant expertise are excluded from review panels. In addition, the panels consist

<sup>566</sup> Based on internal OTP performance indicators' overview of 2019.

<sup>567</sup> See e.g. *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, [ICC-01/04-01/06-2842](#), 14 March 2012, paras.247, 288, 404; *The Prosecutor v. Germain Katanga*, Judgment Pursuant to Article 74 of the Statute, [ICC-01/04-01/07-3436-t-ENG](#), 7 March 2014, paras.141, 189; *The Prosecutor v. Bosco Ntaganda*, Judgment Pursuant to Article 74 of the Statute, [ICC-01/04-02/06-2359](#), 8 July 2019, para.235; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment Pursuant to Article 74 of the Statute, [ICC-01/05-01/08-3343](#), 21 March 2016, paras.537-538.

<sup>568</sup> The Experts were informed that only the IAS analysts have mandatory source evaluation training.

<sup>569</sup> See *supra* Section [XIV.Evidence Assessment and Analysis](#).

<sup>570</sup> The Pre-Trial Chambers have confirmed the charges against the majority of individuals (17 out of 21).

<sup>571</sup> Including the evidence used in the applications for the warrant of arrest/document containing charges. The teams are provided with summaries of selected evidence.

mainly of senior managers (P-5 and above), which exacerbates the issue of allowing for sufficient time for review of the documentation and evidence. It was suggested to the Experts that in appointing members of review panels, consideration should be given to the expertise of the members of the teams rather than their seniority.

801. Finally, criticism was directed at the manner in which the outcome of the review process is communicated and reported. Currently, outcomes of reviews are communicated by email from the PD Director to ExCom. This process may result in less diverse views and exclusion of dissenting voices.

### **Recommendations**

**R305.** The OTP should consider increased monitoring of internal evidence reviews. They should be obligatory in every investigation and trial preparation, and appropriately regulated.

**R306.** The OTP should assess the reasons for poor compliance with source evaluation. It should ensure that source evaluation guidelines comply with the relevant jurisprudence of the Chambers.

**R307.** Reporting on compliance with source evaluation of witnesses should be included in the OTP report on Key Performance Indicators.

**R308.** Peer evidence reviews should be made more efficient and meaningful by:

(i) Allowing more time for the panels to prepare for the reviews. The minimum preparation time for review should be two weeks;

(ii) Consider the tasking of review panel members solely with the review of the case file for an appropriate number of days, i.e. suspending all other tasks of the staff member assigned to a panel for that period of time. In this context, it might be more convenient to include in the review panel more of the junior members of staff;

(iii) Appointing a senior member of the review panel to draft the report of the panel and provide it simultaneously to the PD Director and to all the members of the team whose document is under review. The reports should include sufficient detail and argumentation in favour of and against accepting the factual allegations contained in the draft document under review;

(iv) Considering the greater use of ‘red-teaming’, or simulated opposition, in reviews. That would represent a more realistic preview of what is likely to happen during a hearing.

**R309.** Peer review panels’ composition requires the following improvements:

(i) Including analysts and investigators in the preparation and consideration of reviews. The ID staff should lead the discussions on evidentiary/fact-finding questions, while the PD staff should lead on the legal analysis;

(ii) Considering inviting more P-2/P-3/P-4 staff onto the panels, in order to optimise the time available for preparation of the review. Allowing more junior grade staff to participate would also be a positive recognition of their work;

(iii) In appointing members of review panels, consideration should be given to the situation or regional expertise of possible panel members.

**R310.** The OTP should institute a process of rigorous testing of the trial readiness of cases between the confirmation of charges and the commencement of the trial.<sup>572</sup>

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<sup>572</sup> Currently, the peer evidence reviews are mandatory at the stages before filing an Application for Warrant of Arrest (AWA), and before filing the Document Containing Charges (DCC).

## B. Trial Monitoring

### Findings

802. Currently, the PD does not have a standardised process to monitor trial proceedings. Therefore, it depends on the PD Director and the Senior Trial Lawyer in charge of the proceedings to determine the progress of a case, and to decide whether there are any issues that need to be communicated to the whole team or to the Prosecutor. In this regard, the Experts heard concerns that the Prosecutor does not always have up-to-date and sufficient information on the progress of trials. There is no direct line of communication between the integrated team leadership and the Prosecutor/Deputy Prosecutor.

803. There are several possible approaches for achieving more systematic trial monitoring. First, as mentioned before,<sup>573</sup> weekly meetings between all the team senior managers, and the Prosecutor or Deputy Prosecutor would provide an appropriate forum to provide updates on each case. Secondly, as has already been implemented in several cases, consideration should be given to the universal requirement of compiling a ‘trial diary,’ i.e. a daily or weekly email from the Senior Trial Lawyer on the progress in Court. This would provide a regular communication flow from the team to management.

804. Regarding preparation for court advocacy, each opening and closing statement is assessed by a group of senior OTP staff. This exercise involves the Senior Trial Lawyer presenting their oral arguments for comment and approval. Some teams also conduct mock oral examinations of witnesses, prior to their questioning in court. However, the latter approach is not universal, and depends on the Senior Trial Lawyer.

805. Overall, it appears that integrated teams have developed different approaches to maintaining the quality of work during the trial proceedings. There is little uniformity across the teams. It would be helpful for the OTP to consider the best practices from the trial teams to date, and develop a comprehensive uniform approach that would ensure increased availability of information for senior management.

### Recommendations

**R311.** The OTP should consider surveying the practices employed by the trial teams to date, to develop a comprehensive and consistent approach to the manner in which trial teams prepare for witness examinations, presentations of complex evidence, and oral arguments.

**R312.** The OTP should record all the findings of the above in the lessons learnt portal.

## C. Lessons Learnt

### Findings

806. Incorporating lessons learnt from prior investigations and prosecutions into the planning and preparation of cases is another key aspect for improving their quality. The OTP formally initiated the lessons learnt program in 2014. In order to capture all the lessons learnt in one place, the OTP created a lessons learnt portal on the intranet, where they are made available to all the OTP staff. The policy designated a number of events that should trigger a lessons learnt exercise (‘trigger events’), e.g. a confirmation decision, a trial judgment, an appeal judgment, with designated responsibility for initiating the exercise.

807. However, the policy has been poorly implemented. Since 2014, during which time there have been at least forty ‘trigger events’, the lessons learnt portal records only six lessons learnt proceedings. Furthermore, the external lessons learnt exercise carried out in respect of the Kenya situation has not been recorded on the portal, and is thus unavailable to the OTP

<sup>573</sup> See *supra* Section [I.C.OTP Management and Leadership Structures](#).

staff. It appears that the OTP has not sought to initiate a formal lessons learnt exercise with regard to the Bemba or the Gbagbo and Blé Goudé cases.

808. The Experts were informed and find that the lessons learnt process was not institutionalised as had initially been envisioned. Most staff members consulted by the Experts stated that they had never participated in a lessons learnt exercise, had never used the lessons learnt portal, and did not know who was responsible for initiating such processes. The current senior management considers 'lessons learnt' to be carried out in more informal ways: presentations during Division management retreats, in discussions during meetings with Directors, PD Legal Meetings, or in email exchanges with management.

809. The Experts consider the current approach to be wholly inadequate. Restricting access to discussions of past successes and failures, or best practices, to divisional meetings, or discussions among senior management is not consistent with the OTP being 'a learning institution'.<sup>574</sup> Excluding staff members from the discussions, sometimes directly relating to the cases on which they have been working, is counter-productive. Moreover, most of such 'lessons learnt discussions' exclude the members of the ID staff, as well as members from other teams, thus precluding institutional learning and the development of best practices. This also inhibits the building and maintenance of an institutional memory. It is important to keep a record of best practices as they develop and thereby assist future investigators and prosecutors to make informed decisions concerning their work.

810. The Experts were also informed that lessons learnt exercises do not take place because the staff are too busy, and thus unable to spend time reflecting on the key events in the cases. It is important for the OTP to determine how best to include lessons learned exercises in the workflow of the teams.

811. A related, important project regarding internal quality control is the investigations jurisprudence report of the ID. This is the Court case law collation for the purposes of keeping up to date with the developments in the Chambers. This project currently has no resources assigned to it in the ID budget. While the Experts understand the resource constraints of the ID, keeping up to date with the jurisprudence is crucial in order to ensure that each investigation and evaluation of evidence complies with the standards and requirements of the Chambers. Inconsistent jurisprudence in no way diminishes, but rather enhances, the importance of this process.

## **Recommendations**

**R313.** The OTP should review the guidelines relating to lessons learnt, and consider making adherence to the process either mandatory and/or part of the performance appraisal of managers.

**R314.** Appoint a senior staff member of the OTP management to be responsible for monitoring compliance with lessons learnt.

**R315.** Incorporate lessons learnt into the workflow of the teams.

**R316.** Reconsider the present practice which requires team members, at the end of a case, being immediately reassigned to other tasks and consequently not being available to consider lessons learnt.

**R317.** Consider the incorporation of lessons learnt into OTP Key Performance Indicators, and report on them publicly.

**R318.** Consider ways to maintain the investigations jurisprudence report. Consider assigning a junior qualified staff member to maintain this project.

**R319.** Adherence to the jurisprudence should be integrated as lessons learned and new staff should be introduced to the relevant jurisprudence.

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<sup>574</sup> [OTP Strategic Plan 2019-2021](#), p.11, para.6.

## Organ Specific Matters: Registry

### XVI. DEFENCE AND LEGAL AID<sup>575</sup>

#### A. Institutional Representation

##### Findings

812. ‘The requirements of independent and impartial justice are universal and are rooted in both natural and positive law. At the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law.’<sup>576</sup>

813. The principle of ‘equality of arms’ is intrinsically linked to fair trial rights. Within the human rights framework, equality of arms is ensured as part of the right to equality before courts and tribunals, and ‘means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant’.<sup>577</sup>

814. The rights of the accused,<sup>578</sup> including the rights to legal representation<sup>579</sup> and legal aid,<sup>580</sup> are included in the legal framework of the Court, which largely follows Article 14 of the International Covenant on Civil and Political Rights.

815. Trial Chamber I explained that the requirement of ‘in full equality’ in Article 67 of the Rome Statute encompasses the principle of equality of arms, and that appropriate facilities must be provided to the Defence in accordance with Article 67(1)(b). Although the Chamber recognised that it will be impossible to create a situation of absolute equality of arms, ‘[a]n assessment of the adequacy of the facilities for the Defence will clearly be influenced by the extent of those at the disposal of the Prosecution, since it will in general be necessary and desirable to rectify significant disparities.’<sup>581</sup>

816. Lawyers provide access to justice, assist in the exercise of the right to justice, and work towards the realisation of the right to a fair trial. These rights are universally recognised human rights to which all human beings are entitled. The legal profession plays a vital role in ensuring the fair administration of justice.<sup>582</sup>

817. Notwithstanding the above provisions, which reflect the universality of fair trial standards, Article 34 of the Rome Statute does not mention an Organ for the Defence among the Organs of the Court - the Presidency, the Chambers, the OTP and the Registry.

818. In the great majority of the cases dealt with by the Court so far, those in charge of the Defence have been private, external counsel whose names are included in the ‘List of Counsel’ approved by the Court.

819. The Office of Public Counsel for Defence (OPCD) was established in 2006 to promote, represent and protect the rights of the defence and persons entitled to legal

<sup>575</sup> This section deals with organisational matters regarding Defence and legal aid. Aspects regarding proceedings are covered in Section [X. EFFICIENCY OF THE JUDICIAL PROCESS AND FAIR TRIAL RIGHTS](#).

<sup>576</sup> UN Economic and Social Council, [E/CN.4/1995/39](#) (1995), para.32.

<sup>577</sup> UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, [CCPR/C/GC/32](#) (2007), para.13.

<sup>578</sup> [Rome Statute](#), Art.55, 66, 67.

<sup>579</sup> [RPE](#), Rules 20-22.

<sup>580</sup> [Rome Statute](#), Art. 43, 55, 67.

<sup>581</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on defence’s request to obtain simultaneous French transcripts, [ICC-01/04-01/06-1091](#), 14 December 2007, paras.18-19.

<sup>582</sup> UN Human Rights Council, Report of the Special rapporteur on the independence of judges and lawyers, [A/HRC/32/34/Add.1](#) (2016), para.55.

assistance, raising the profile of defence issues<sup>583</sup> and representing general defence interests in the proceedings.<sup>584</sup> It also acts as a standby defence team, acting as duty counsel if requested.<sup>585</sup> It is an independent office in terms of its substantive functions, but falls within the remit of the Registry for administrative purposes. While the OPCD provides important support and representation of defence teams before the Court, its representation role is not formalised through participation in any Court-wide coordination mechanisms or processes.

820. There is a Bar association for the Defence and Victims' counsel accepted on the Court's List of Counsel (ICCBA). There are 340 members in the ICCBA, less than 100 involved in cases, including support staff who are more numerous than counsel. There are also ICCBA members who are not members of the bars in their national systems. The Independent Bar is not a part of the Court, but it was recognised by the ASP as the bar association in December 2019.<sup>586</sup> This situation should put representatives of the Defence in a better position to raise their concerns within the Court or at the Assembly of States Parties (ASP).

## **Recommendations**

**R320.** Although accused have mainly been represented by private, external Defence Counsel, appointed from the List of Counsel maintained by the Court, the possibility for the OPCD to be appointed as public Defence Counsel (duty counsel) should be maintained.

**R321.** In light of ICCBA's recognition as the Bar of the Court, its role in the annual training for counsel ought to be formally recognised. Further, consideration could be given to having an elected ICCBA representative as a member of the Advisory Committee on Legal Texts (ACLT).

**R322.** Regarding internal organic structures, reshaping the current office for the Defence (OPCD) by entrusting it with additional responsibilities would improve efficiency of governance and of administration, increase budgetary transparency, provide a strategy for Defence Services, enhance accountability, and ensure appropriate representation of the Defence in the ACLT.

**R323.** These objectives may be achieved by bringing under the OPCD's management and governance the Counsel Support Section (CSS)'s Defence services, as well as legal aid. This new Defence Office would retain functional independence, as the OPCD currently has, and represent Defence interests within the Court, as for example through attendance in CoCo+ meetings<sup>587</sup> and representing the Defence in the ACLT. This would also resolve the difficult position the Registry is in, in having to represent the Defence while maintaining its neutrality.

<sup>583</sup> Regulation 77 of the Regulations of the Court sets forth the full mandate of the OPCD, summarised in three main functions: (1) to provide assistance to defence teams, (2) to represent and protect the rights of the defence and act as a defence voice, and (3) to serve as a 'standby' defence team ready to take specific court assignments. An IBA Report noted that '[The OPCD] was established to remedy an imbalance between the prosecution and defence consistent with the principle of equality of arms by ensuring that defence teams were provided with legal assistance and support during trials. The Office is also seen as the institutional voice of the defence' – IBA Report, [Fairness at the International Criminal Court](#) (2011), p.29.

<sup>584</sup> See for example *Situation in CAR I*, Information to the TFV on the 'Notification by the Board of Directors in accordance with regulation 50(a) of the Regulations of the TFV of its conclusion to undertake specified activities in the CAR', [ICC-01/05-100](#), 8 April 2020; *Situation in the State of Palestine*, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the RPE, [ICC-01/18-63](#), 20 February 2020; *Situation in [Redacted]*, *The Prosecutor v. [Redacted]*, Order to Registrar to transmit clarification to the Office of Public Counsel for the defence, [ICC-ACRed-02/16](#), Redacted; *Situation in the DRC*, Decision authorizing the filing of observations on applications for participation in the proceedings, [ICC-01/04-329-tEN](#), 23 May 2007.

<sup>585</sup> See [Regulations of the Court](#), Regulation 77(4) for the specific responsibilities of the OPCD. For examples of instances in which OPCD has been appointed as duty counsel, see e.g. *Situation in Uganda*, Decision requesting observations, [ICC-02/04-230](#), 24 December 2018, para.4; *The Prosecutor v. Alfred Yekatom*, Decision concerning the legal representation of Alfred Yekatom, [ICC-01/14-01/18-16](#), 20 November 2018; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, [ICC-01/11-01/11-39-Red](#), 6 December 2011.

<sup>586</sup> Strengthening the ICC and the ASP, [ICC-ASP/18/Res.6](#) (2019), para.80.

<sup>587</sup> See R11 (p.22).

R324. The Defence Office would further be responsible for oversight, capacity building and strategic development for defence representatives before the Court.

**R325.** It is further recommended that the PIOS enables Defence-generated press releases on the Court's website, in the spirit of institutional equality of arms.

**R326.** Finally, in developing the Court's public information and outreach strategies, the Defence Office should also be consulted, to ensure such communication efforts respect the principles of fair trials and presumption of innocence.

**R327.** The Experts believe the new Defence Office, offering a strengthened voice to the Defence on an institutional level, together with the ICCBA's recognition by the ASP and its reporting to the Assembly,<sup>588</sup> redress what could have been perceived as an institutional imbalance regarding the Defence.

## **B. Legal Aid**

### **Findings**

821. Beyond the structural matters covered above, further matters need to be urgently addressed before it can truly be said that the Defence is accorded the respect and fair treatment that its important role in the Court merits. That can be seen most clearly in the way legal aid has been dealt with.

822. Legal aid is an 'essential element of a functioning criminal justice system that is based on the rule of law.' UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems require that effective legal aid is provided promptly at all stages of the criminal justice process and that every person charged with a criminal offence has adequate time, facilities, and technical and financial support, in case they do not have sufficient means, to prepare their defence. It is one of the duties States Parties have undertaken when becoming bound by the Rome Statute.

823. Defence representatives and civil society told the Experts that Court Defence teams are underfunded and have limited support and facilities that impair their ability to prepare and conduct an effective defence. They submit that they have to contend with a legal aid system that is not fit for purpose, ineffective administration by the Registry, and inadequate cooperation by States Parties. They receive important support from the OPCD, but it is also underfunded.

824. Management of the Court's legal aid scheme falls within the ambit of the Registrar with the beneficiaries of the Court's legal aid system having recourse to review by the Presidency of administrative decisions of the Registrar concerning legal aid (Article 43(1) Rome Statute).

825. Articles 55(2)(c) and 67(1)(d) of the Rome Statute establish the legal grounds for entitlement, for persons about to be questioned by the Prosecutor or by national authorities under Part 9 of the Statute, and accused persons respectively, to legal assistance. If the person does not have legal assistance, there is an entitlement for legal assistance to be assigned to them, in any case where the interests of justice so require, and without payment by the person in any such case if they do not have sufficient means to pay for it.

826. Rule 21(1) of the RPE stipulates that the criteria and procedures for assignment of legal assistance shall be established in the Regulations, based on a proposal by the Registrar, following consultations with any independent representative body of counsel or legal associations, as referred to in Rule 20(3) of the RPE. The principles and criteria for the determination of indigence are defined in the 'Report on the principles and criteria for the determination of indigence for the purposes of legal aid (pursuant to para.116 of the Report of the CBF of 13 August 2004)' complemented by the Amendment to principles governing

<sup>588</sup> [ICC-ASP/18/Res.6](#), para.81: The ASP 'invite[d] the International Criminal Court Bar Association to report to the Assembly, through the Bureau, on its activities in advance of the nineteenth session'.

the determination of indigence contained in annex I of the ‘Report on the operation of the Court’s legal aid system and proposals for its amendment’.

827. The Legal Aid Policy has been under review since 2012, and it is still ongoing. In April 2012, a ‘revised remuneration policy’ adopted by the ASP Bureau a year prior took effect. At its Eleventh Session, in 2012, the ASP requested the Court to conduct a comprehensive review of the legal aid scheme and submit a single policy document on the legal aid policy of the Court. The current legal aid policy,<sup>589</sup> dating from 2013, is said to reflect prior ASP resolutions, relevant legal provisions of the Court and standard operating procedures. The remuneration rates foreseen, and applicable today, are those established by the 2012 revised remuneration policy, which itself reflected a substantial reduction from the previous remuneration provisions.

828. Having acknowledged there was room for increased efficiency and improvement in the system, the ASP commissioned the International Criminal Justice Consortium to assess the Court’s legal aid system,<sup>590</sup> based on which it required the Court to reassess the legal aid policy and propose adjustments as necessary. For this purpose, the Registry commissioned an independent expert’s report,<sup>591</sup> submitted to the ASP in 2017. The same year, the CBF suggested the Court should try to propose a reform to the policy ‘within existing resources, by exploring opportunities to contain the administrative burden without jeopardising the need for accountability and by setting priorities accordingly’.

829. The report of the ASP Facilitator for Legal Aid<sup>592</sup> followed consultations held with a wide range of stakeholders on amendments to the existing policy. It was concluded that the draft revised policy was not yet ready for the ASP’s consideration, and recommended a working group on legal aid to continue its work. It also indicated specific issues requiring substantive discussion by States Parties, before the cost implications could be submitted to the CBF for its consideration. Among these latter issues were (a) problems relating to a recent change in the Host State’s policy towards taxation of legal payments to counsel and support staff, devaluing the net income received and with the additional threat of retrospective application; (ii) the lack of provision for support staff of employment and social security (e.g. maternity leave) and other benefits enjoyed by Court employees; and (iii) the potential for the flexibility awarded to counsel in fixing remuneration rates for support staff to affect the income and security of junior staff disproportionately. The resolution of these and other remuneration issues that remain unresolved have potential to result in an increase in the budget for legal aid.

830. At the time of writing, no facilitator for legal aid had yet been appointed. The Experts understand the issue of taxation is being dealt with bilaterally by the ASP Vice-President in The Hague and the Government of the Netherlands.

831. Legal aid for the Defence accounted for only 2.2% of the total budget request of the Court for 2020, compared to 32% of resources allocated to the OTP. Even when the size of the respective units may be different, there should be some sort of balance in the remuneration of Defence counsel and staff of Defence teams, as well as in the access to resources with a view to conducting investigations that are essential to preparing and conducting an effective defence. The Experts believe Defence teams ought to be provided with the resources required to ensure a fair trial.

832. External legal representatives of victims should also be adequately resourced, to enable them to represent victims in a way that will facilitate their meaningful participation in the proceedings, including during the reparations stage.

833. The Registry is responsible not only for the governance of legal aid, but also for assessing legal aid requests. It disposes for this of only one Financial Investigator. Closer scrutiny in the assessment of such requests should be developed before granting legal aid to an individual, so that the Court does not find itself in the need to advance or pay unnecessary payments. For this purpose, better and more data is necessary, both from States Parties and

<sup>589</sup> ‘Registry’s single policy document on the Court’s Legal Aid System’ (2013).

<sup>590</sup> International Criminal Justice Consortium, Report on the assessment of the functioning of the ICC’s Legal Aid System (2015).

<sup>591</sup> Richard J. Rogers, [Assessment of the ICC’s Legal Aid System](#) (2017).

<sup>592</sup> Report of the Bureau on legal aid, [ICC-ASP/18/11](#) (2019), Annex.

units within the Court that collect information that might be relevant, as well as strengthened capacity within the Registry. The Court has proceeded with the unification of all the functions regarding Financial Investigations of Suspects and Accused Persons, so that the identification, tracing, freezing and seizure of assets and their proper use to finance reparations, could be managed efficiently while paying due respect to the rights of the accused. The Experts understood the framework, decision-making processes, cooperation between the different units/offices involved could be reviewed to ensure increased efficiency.

### **Recommendations**

**R328.** Renewed efforts, taking into account past assessments and consultations already carried out, should take place to finalise the reform of the legal aid policy. It should be accessible, effective, sustainable, and credible, including ensuring equality of arms with the Prosecution and adequate facilities to Defence teams to prepare and conduct an effective defence. A full reform of the Policy is recommended, rather than only updating numbers. Otherwise, the topic will return to the ASP agenda in the coming years. The reform should be carried out and finalised with the help of a working group composed of individuals with specific experience working with defence and victims and legal aid policies before international courts, nominated by the Registrar, OPCD, OPCV and ICCBA. The working group should not begin its work within confined limits (e.g. budgetary limitations).

**R329.** Decisions on interpretations and application of legal aid should be made accessible to other Defence and Victims' teams, with any needed redactions that might be necessary, to ensure uniform application of the policy.

**R330.** The current framework and operation of the functions regarding financial investigations on suspects and accused persons should be reviewed, to ensure increased efficiency. It should also be brought in closer working relation to other units within the Court that collect information that might be relevant.

**R331.** Additional resources are needed in the Registry to strengthen and complement the sole Financial Investigator position, as well as the Registry's capacity to support States Parties in implementing cooperation requests in this field. For this, the Experts recommend that the Court makes use of seconded personnel with specific expertise. The Experts note that strengthened Registry capacity in this area would contribute to lowering legal aid costs.

**R332.** States Parties to the Rome Statute have a role to play in ensuring that declarations of indigence by prosecuted persons are honest and that assets, including property of the prosecuted persons are secured pending the result of the trial.

**R333.** The Court should consider elaborating scales of professional fees for legal staff working in external victims' teams, especially young professionals and women. Alongside the maximum rate indicated in the legal aid policy per role, a minimum rate should also be foreseen. The use of the money provided by the Court in terms of legal aid should respect different functions, while not being discriminatory.

**R334.** The relationship between the Court and support staff assisting external counsel for Defence and Victims should be formalised by granting them SSA contracts or consultant status.

**R335.** As recommended elsewhere, in line with the One Court principle, the Court wellbeing framework (including for example the system foreseen by the Administrative Instruction on harassment, access to OHU) and disciplinary procedures should be extended to support staff.<sup>593</sup>

<sup>593</sup> See *supra* Section [I.A.1\(2\) ICC/IO Governance](#) and R4 (p.18); see also *supra* Section [IV.B.4. Judicial Council of the Court](#), R115 (p.102).

## XVII. VICTIM PARTICIPATION

### Findings

#### A. Outline of the System

834. In a major departure from the essentially retributive model of international criminal justice embodied in the initial ad hoc Tribunals, the Rome Statute ‘not only granted victims a right to reparations, but they also introduced a totally novel participatory regime’ for victims.<sup>594</sup> This was inspired by the 1955 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Powers.<sup>595</sup> That Declaration was followed by the 2005 Resolution of the UN Commission on Human Rights containing guidelines. Victim participation in a variety of forms has since become a feature of other international or internationalised criminal institutions such as the Special Tribunal for Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia.

835. It is striking just how simply such a major innovation can be made. It is dealt with very briefly in the Statute. The main provision is Article 68(3) in these terms:

‘Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.’<sup>596</sup>

836. While containing a clear statement of the right of victims to participate in proceedings, that provision says nothing about how effect should be given to that right, other than to acknowledge that there could be some role for counsel. ‘Proceedings’ includes an investigation.<sup>597</sup> Article 15(3) permits victims to make ‘representations’ on a request by the Prosecutor for authorisation to commence an investigation. Article 19(3) provides that victims may submit ‘observations’ to the Court in proceedings with respect to jurisdiction or admissibility.

837. More detail is given in Rules 89 to 92 which deal with the application procedure for admission as a participant; selection of legal representatives; the modalities for the participation of legal representatives; and the obligation of the Court to notify victims and their legal representatives, including those who have communicated with the Court in respect of the situation, of certain decisions, including a decision of the Prosecutor not to initiate an investigation, or not to prosecute; and a decision of the Court to hold a hearing to confirm charges.

838. These notification requirements underline just how early on in the developments in a situation the right to participate can take effect by acknowledging the Court’s awareness of the interest and identity of victims even where there are no active court proceedings.<sup>598</sup> It seems strange, therefore, that Rule 92 notification requirements do not apply to ‘proceedings provided for in Part 2’ of the Statute, which include proceedings to which the right in Article

<sup>594</sup> Christine Van den Wyngaert, *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge* (2011) 44(1) *Case Western Reserve Journal of International Law*, 475-496, p. 477.

<sup>595</sup> UN GA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, [A/RES/40/34](#) (1985).

<sup>596</sup> [Rome Statute](#), Art. 68(3).

<sup>597</sup> *Situation in the State of Palestine*, Decision on Information and Outreach for the Victims of the Situation, [ICC-01/18-2](#), 13 July 2018.

<sup>598</sup> Further the use of the term ‘proceedings’ has been said to reflect the approach at Rome not to limit the rights of the victims to participate to the ‘Trial’. See David Donat-Cattin, ‘Article 68: Protection of Victims and Witnesses’, in Otto Trifflerer and Kai Ambos (eds) *Rome Statute of the International Criminal Court, A Commentary, Third Edition* (Beck:Hart:Nomos, 2016), pp. 1686-87; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, [ICC-01/04-101-tEN-Corr](#), 17 January 2006, paras. 36-76.

19(3), referred to in the previous paragraph, applies. However, Rule 92 relates only to notification and does not limit the ability of the victims to participate in the proceedings referred to under sub Rules 2 and 3. Thus, victims play a significant role in a broad range of aspects of the work of the Court. Their views and concerns have informed decisions to open investigations, they have contributed legal argument on both substantive and procedural issues at all stages of proceedings and they have played a central role in reparation proceedings.<sup>599</sup>

839. Although the Rules referred to above do give direction to the Court on the issues which they actually cover, a great deal is left to the discretion of the Judges. That, combined with the very general terms of Article 68(3) leaves considerable scope for experiment and judicial flexibility in the quest for a satisfactory regime for victim participation.<sup>600</sup> Article 68(3) has been described as an example of ‘constructive ambiguity’ or ‘obscurity’, a legislative drafting technique designed to produce a text that all who are debating or arguing over the point can live with.<sup>601</sup> While the agreed terms no doubt served that purpose, they may also be a reflection of the feeling of uncertainty that there must have been about the impact that this novel departure might have on the ability of the Court to deliver justice fairly and expeditiously.

## B. The System in Operation

840. While judicial procedural direction lies at the heart of the system, implementation of the orders made and directions given is dependent on the work of a number of offices within the Registry, the OTP, and legal representatives of victims. Three entities from the Registry have roles which may overlap, viz the Public Information and Outreach Section (PIOS), the Victim Participation and Reparations Section (VPRS) and the Victims and Witnesses Section (VWS). The mandates of these Sections however, seemingly provide a clear division of labour and tasks amongst the three. The PIOS is a Section within the Registry that is instrumental in conducting outreach for the Court and ensuring that the ‘trials are indeed made public and accessible’, particularly amongst communities affected by the crimes that are the subject of these trials.<sup>602</sup> The VPRS is the Section within the Registry that is responsible for facilitating the victim application process and is also responsible for the Victims Application Management System (victims database). They inform the victims of their rights and receive applications. They also assist victims to organise their legal representation.<sup>603</sup> The VWS on the other hand assists with the protection and safety of witnesses and victims who actually appear before the Court.<sup>604</sup> The VWS ‘may also assist others, such as family members, who are in danger as a result of a witness’s testimony. When victims testify as witnesses, the VWS provides administrative and logistical support to enable them to appear before the Court.’<sup>605</sup>

841. In addition, the Office of Public Counsel for Victims (OPCV) functions as an independent body in terms of Regulations of the Court 81(2) but falls under the umbrella of the Registry for administrative purposes. The responsibilities of the OPCV are set out in Regulation 81(4) and include (i) providing general assistance and support to the legal

<sup>599</sup> See for example [Victims’ Rights Working Group Bulletin](#), Winter-Spring 2014-2015, Issue 25, pp. 7-8.

<sup>600</sup> On the ambiguity or broad wording of the victim participation related provisions implying suggesting that the drafters ‘intended to leave wide discretion to the judges’ in shaping and moulding the actual participation process, see for example Elisabeth Baumgartner, ‘Aspects of victim participation in the proceedings of the International Criminal Court’ (2008) 90(870) *International Review of the Red Cross*, p. 411, citing Emily Haslam, ‘Victim participation at the International Criminal Court: a triumph of hope over experience?’ in Dominic McGoldrick et al. (eds), *The Permanent Criminal Court: Legal and Policy Issues*, (Hart Publishing: Oxford: 2004), p. 315, n 324.

<sup>601</sup> See for example Jovana Davidovic, ‘International Criminal Court, the Trust Fund for Victims and Victim Participation’, Larry May and Elizabeth Edenberg (eds) *Jus Post Bellum and Transitional Justice* (Cambridge University Press: 2013), p. 236; see also Sergey Vasiliev, ‘Victim Participation Revisited- What the ICC is Learning about Itself’, Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: 2015), pp. 1143-44.

<sup>602</sup> See for example ICC, [The Registry](#) (PIOS publication). The Court has also referred to the PIOS as ‘the neutral communication facilitator and promoter of the Court’; see [ICC-01/18-2](#).

<sup>603</sup> ICC, [Victims before the International Criminal Court. A guide for the participation of victims in the proceedings of the ICC \(Victim’s booklet\)](#), p. 14.

<sup>604</sup> *Ibid.*, p. 14.

<sup>605</sup> *Ibid.*, pp. 14-15.

representative of victims and victims; (ii) on the instruction or with the leave of the Chamber (iii) appearing in specific issues, (iv) advancing submissions before a legal representative has been appointed, (v) representing a victim or victims throughout the proceedings when this is in the interests of justice; and (vi) acting when appointed under Regulation 73 or 80. Each of these entities is home to extensive experience of the system and addressing the challenges it regularly presents.

842. Chambers of the Court have repeatedly recognised that the purpose of the scheme is to give victims a ‘meaningful’ role in proceedings. That has been further qualified as ‘so that they can have a substantial impact in the proceedings’.<sup>606</sup> According to the Court ‘...opportunities for participation by victims must be given meaningful effect by applying the plain language of the relevant provisions, but always ensuring that the implementation of this objective does not result in an unfair trial’.<sup>607</sup>

843. The impact of the involvement of participating victims on the length of trial proceedings and on the work required of defence counsel, particularly by filing documents, was raised. It was submitted that their involvement should not commence until sentencing. It was also submitted that tying the right to reparations to conviction increased the prospect that lawyers representing victims become a second prosecutor. However, in the absence of concrete examples of these impacts and in the face of anecdotal accounts to the contrary in respect of each, there is no basis for suggesting any curb on the right of victims to participate in proceedings of the Court.

### C. Recognition of Victims as Participants

844. Rule 89 allows victims to present their ‘views and concerns’ by submitting written applications to the Registry. The Registry is required to transmit these applications to the Chamber whilst providing copies to the Defence and the Prosecutor subject to the Statute and Article 68(1) in particular. The Chamber then decides the manner in which the victims shall participate in the proceedings and has the power to reject applications where in its view the person does not meet the criteria of a ‘victim’ under Article 68(3).<sup>608</sup> The early decisions of Chambers gave the impression of a Court wrestling with the challenge of creating a manageable working scheme to address the applications that would give effect to the object of giving victims a meaningful voice in the proceedings, with some Judges being influenced by their own experience of systems with which they were familiar.<sup>609</sup> The initial application process was cumbersome. Lengthy and detailed application forms were subjected to an intensely bureaucratic approach to verification and adjudication which involved close individual scrutiny by the Judges. A process that needed to be smooth and efficient was not, resulting in lengthy backlogs of applications remaining undecided while the proceedings to which they related were continuing.

845. When faced with victims running into many thousands, the Trial Chamber in *Muthaura and Kenyatta* decided upon a procedure under which only victims who sought to make representations personally were required to submit an application under Rule 89(1).<sup>610</sup> All others could, if they wanted, register with the Registry which would compile a database of registered victims. Far less time-consuming scrutiny was required. The Chamber’s decision provided that the interests of all victims, including those who were unable to register on time, would be represented by the common legal representative. That registration approach was also followed in the case of *Ruto and Sang*.<sup>611</sup> In *Gbagbo*<sup>612</sup> the victims wishing

<sup>606</sup> [ICC-01/04-01/07-474](#), para. 157.

<sup>607</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims’ participation, [ICC-01/04-01/06-1119](#), 18 January 2008, para. 85.

<sup>608</sup> [RPE](#), Rule 89.

<sup>609</sup> In relation to early decisions by the Court, see for example [ICC-01/04-101-tEN-Corr](#); see also [ICC-01/04-01/06-1119](#).

<sup>610</sup> *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on victims’ representation and participation, [ICC-01/09-02/11-498](#), 3 October 2012.

<sup>611</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on victims’ representation and participation, [ICC-01/09-01/11-460](#), 3 October 2012. This and *supra* n 610 are referred to as ‘the Kenya cases’.

<sup>612</sup> *The Prosecutor v. Laurent Gbagbo*, Decision on victim participation, [ICC-02/11-01/11-800](#), 6 March 2015.

to make submissions individually completed applications, whereas for others group applications were submitted.

846. In subsequent cases, the use of a single-page application form containing only the information strictly required to determine whether an applicant satisfied the requirements set forth in Rule 85 became routine.<sup>613</sup> Provision was made for additional information, including contact details, level of language proficiency, preferences as to legal representation, views on reparations, security and protection concerns and any redacted information, to be collected separately and stored by VPRS in a ‘secure database’ accessible by the Chamber as necessary.<sup>614</sup> The database contains information received from victims across all cases and is used throughout all proceedings before the Court.<sup>615</sup>

847. The single-page form used in *Ntaganda* and *Ongwen* is the form referred to in the ‘Procedure for the admission of victims to participate in the proceedings’ elaborated by the Judges of the Court in 2015 in what was then the Pre-Trial Chambers Practice Manual and is now the Chambers Practice Manual.<sup>616</sup> The procedural steps are supplemented by a relevant timeframe. That procedural guidance laid out an efficient process for scrutinising and determining the applications. The Registry separates them into three groups according to whether they are complete and fall within the scope of the case, plainly incomplete or manifestly fall outside the scope of the case or the position is unclear. The task for the Judiciary is greatly simplified and expedited. The Judiciary in turn have streamlined the process categorising the applicants as ‘those who clearly qualify as victims (Group A)’, ‘those who clearly do not qualify as victims (Group B)’ and ‘those for whom the Registry could not make a clear determination (Group C)’. Groups A and C are to be remitted to the Judiciary with Group B being the only ones about which it is anticipated that there will be any issues for the Court to resolve. The aim is to have the applications determined before the commencement of the proceedings. The same procedure applies so far as necessary at each stage of the case. A good example of the application of this process can be seen in ‘Decision on victims’ participation in trial proceedings’ in *Ntaganda*.<sup>617</sup> The single judge of the Pre-Trial Chamber invited VPRS to make observations on the approach that had been adopted in the *Gbagbo* case before pronouncing her ‘Decision Establishing Principles on the Victims’ Application Process’ in which she opted for the use of the single-page form.<sup>618</sup>

848. However, the development of the application process does not end there. While the procedural guidance continues to apply, the form has changed and includes not only the basic information required for admission as a participant but also includes the other important information gathered separately from the single-page form. The new form has been and continues to be used to good effect in the two most recent cases in which charges have been confirmed, *viz Al Hassan* and *Yekatom and Ngaïssona*, and is also currently in use in *Ali Kushayb*. The view from VPRS is that this form makes processing of victim applications much more efficient than any previous form.

849. There is some concern that the basic procedure for recognition of victims before the Court may not yet have been finally settled. On the other hand, it is not surprising that developing an efficient and effective process from scratch for such a major innovation without any really comparable pattern to follow should take time and involve trying different possibilities along the way. There are grounds for optimism that the procedure now followed holds the answer. It appears to be working well and has reduced the burden of dealing with

<sup>613</sup> [ICC-01/04-02/06-67](#), paras. 17-25; *The Prosecutor v. Dominic Ongwen*, Decision Establishing Principles on the Victims’ Application Process, [ICC-02/04-01/15-205](#), 4 March 2015, paras. 14-21. In *Al Mahdi*, the Court refers to the use of ‘standard forms’ - these appear to be the same used in *Ongwen* and in *Ntaganda*; see *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted version of ‘Decision on Victim Participation at Trial and on Common Legal Representation of Victims’, [ICC-01/12-01/15-97-Red](#), 8 June 2016, para. 15.

<sup>614</sup> All the information received from application forms is stored here and the database is available only to authorised Court staff; see *supra* n 603 [Victims’ Rights Working Group Bulletin](#), Winter-Spring 2014-2015, Issue 25, p. 22.

<sup>615</sup> The VPRS is said to be working on ‘expanding the functionalities of its Victims Applications Management System (VAMS) database’, with a view towards enhancing its efficiency and working methods; see Report on activities and programme performance of the International Criminal Court for the year 2018, [ICC-ASP/18/3](#) (2019), previously issued as CBF/32/14, p. 23, para. 148.

<sup>616</sup> See [Chambers Practice Manual](#), p. 20.

<sup>617</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on victims’ participation in trial proceedings, [ICC-01/04-02/06-449](#), 6 February 2015.

<sup>618</sup> *The Prosecutor v. Bosco Ntaganda*, Decision requesting the victims participation and reparations section to submit observations, [ICC-01/04-02/06-54](#), 26 April 2013; [ICC-01/04-02/06-67](#); [ICC-02/11-01/11-800](#).

applications to manageable proportions. Critics may point to the fact that, as with all procedures tried, only a proportion of the total victims are reached by it. That is not the result of the application procedure, but depends on other factors, including the steps taken to reach out to victim communities to alert them to the interest of the Court and ensure that they are fully informed of their rights as victims, and the extent to which these steps are successful in the face of various obstacles and communication difficulties referred to below. An efficient application and admission process is an essential starting-point for the further development of a comprehensive system. There is no point in creating for more and more victims the opportunity to engage with the Court only to frustrate them by failing to facilitate their engagement with the Court. It is also vital that the application process, which involves intimation of applications to defence counsel for their interest, does not place such a burden of scrutiny on them as to distract them unduly from their principal role of representing the accused in the most serious cases imaginable. That is essential to securing the fair trial rights of the accused.

850. The alternative procedure commended in some submissions by lawyers familiar with working in the field is the model developed in ‘the Kenya cases’. It was described as a serious attempt ‘to address the problem of how best to create a workable model of victim participation where there are thousands of victims dispersed over a wide geographical area, each with an equal right to participate in Court proceedings’. One suggestion is that Chambers and the Registry, presumably through VPRS, should collaborate with them to develop a system capable of registering large numbers of victims simply and affordably but also retaining an application process for victims who wish to make representations in person.

851. The problem with this idea is that it does not appear to be what victims wish and that is because it does not provide for the official acknowledgment by the Court of the status, dignity and suffering of individual victims.<sup>619</sup> The procedure currently in use does that. This proposal was linked to the exploration of the possibility of technological options such as mobile applications. That seems appropriate whatever procedure is adopted. It was also suggested that ‘Overviews of the general composition and experiences of the victim group could be produced by victims’ counsel to ensure that basic information is provided to the parties, but in a way that reflects the collective way in which most victims participate’. It is to be expected that submissions made will always be the product of consultation between counsel and victim clients. This issue has been addressed on the assumption that the obligation to take proper instructions will always apply.

852. On the subject of participation two suggestions, which could readily be implemented, fall to be noted. The first is this. Because of the volume of applications that must be dealt with, there will always be a race against time to complete the admission process by the date of commencement of the proceedings. One way of alleviating that pressure would be to start the whole application process earlier. A proposal for this is that provision should be made for applications to be considered from the point of the issue of an arrest warrant rather than from the submission of the Document Containing the Charges (DCC). Since the DCC normally expands the events and crimes originally included in the warrant, the only additional burden

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<sup>619</sup> Acknowledgment by the Court of their status as victims and the harm suffered by them is a vital component of the victim participation process. See e.g. *The Participation of Victims in the International Criminal Court Proceedings, A Review of the Practice and Consideration of Options for the Future* (2012), Redress Trust, p. 10; see also Rosemary Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court* (CUP: 2019), p. 255, in relation to it being important for victims that it be recognised that they had been subject to certain crimes and the manner in which their story is told.

on the Court is likely to be verifying whether more applicants qualify to be admitted as participating victims.

853. It also ought to be noted that victims can participate at the preliminary examination stage by submitting representations, such as in the situation in Afghanistan.<sup>620</sup>

854. The second is to automatically allow victims already admitted to participate in a case to also participate in another case opened within the same situation against another suspect for the same event.<sup>621</sup>

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<sup>620</sup> *Situation in the Islamic Republic of Afghanistan*, Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017, [ICC-02/17-29](#), 20 February 2018; see also, *Situation in the Islamic Republic of Afghanistan*, Order to the Victims Participation and reparation Section Concerning Victims' Representations, [ICC-02/17-6](#), 9 November 2017, paras. 12-16.

<sup>621</sup> See e.g. [Victim's rights before the International Criminal Court, Victim's Rights Working Group Bulletin](#) (2014-2015), p. 9; see also for e.g. in *Ntaganda*, where the Single Judge asked the Registry to 'carry out an assessment of how many of the victims eligible for reparations as direct victim beneficiaries in the case of The Prosecutor v. Lubanga Dyilo ('Lubanga case') are also potentially eligible for reparations in the Ntaganda case', *The Prosecutor v. Bosco Ntaganda*, Order setting deadlines in relation to reparations, [ICC-01/04-02/06-2447](#), 5 December 2019, p. 4, para. 9.

## D. Concerns about the System as a Whole

855. While the developments in the application process over a period of years have led to a procedure which should increasingly result in the timely admission of qualified victims to participate, a number of other concerns about the efficacy of the system as a whole have been submitted to the Experts and must be addressed. These come from a variety of sources, including many from NGOs active in this field; a number from lawyers and bodies representing lawyers practising before the Court; and a few from States Parties and commentators concerned about the effectiveness and the cost of the overall scheme. The concerns expressed range from inadequate engagement of the Court with victim communities in the early stages of the recognition of a situation to the danger that victims may have inappropriate influence on proceedings as a potential ‘Prosecutor bis,’ and many in between, including facilitating the engagement with the Court of the maximum possible number of victims.

856. The most fundamental concern relates to the overall cost of the system when compared to the benefits realised. There is also some concern that the way in which it has evolved may have resulted in the diversion of resources from the prosecution of accused. Some have shared with the Experts that a proper audit may be advisable to assess the real cost of victim participation and its contribution to the pursuit of justice. A cost/benefit analysis has also been proposed. These proposals are only understandable in the context of the limited current availability of funds for reparations. Regard must be had to the different contexts of (i) the above analysis of the improvement in the efficiency of the application and admission process which it is hoped will enhance the victim participation experience; (ii) the ongoing case of *Ntaganda*, where the Chamber hopes to be able to develop universally applicable procedures for the reparations stage; and (iii) changes and improvements in the structure and operations of the TFV which should result from this exercise. In the result, now is not the time to implement the above-mentioned proposals. Furthermore, it should be recalled that the Rome Statute innovated when it decided to put victims at the heart of the Court. With that aim, the rights of victims were woven directly into the fabric of the Rome Statute.

857. Other concerns are many and various. In relation to the Situation in Afghanistan it was claimed that outreach to victims began too late, i.e. only when the Prosecutor filed a request for authority to open an investigation.<sup>622</sup> It was suggested that steps ought to have been taken at some stage during the preliminary examination which had by then lasted in excess of ten years. In the event, the Chamber allowed only two months during the harshest winter months for representations ‘resulting in extremely low victim turnout’.<sup>623</sup> Further criticisms relate to the reliance by VPRS on local civil society organisations without providing support in terms of security, the use of an online form in spite of the widespread lack of access to the internet and illiteracy, and the absence of special arrangements for women and children. There is said to be an impression of confusion within the Registry about the point at which outreach is appropriate and which of PIOS, VPRS and OPCV is responsible for what in light of ‘mixed signals’ coming from each.<sup>624</sup> Similar criticisms of the time-scale and reliance on local activists were made about the position in Georgia, where it was only possible to submit 69 representations on behalf of 6,335 victims in the 30 days allowed. It is said that the total number of victims there is in the region of 28,000. In other submissions there were calls for clarification of the legal framework and practical consequences of victim participation and in particular for clarification by the Judiciary of the role of the VPRS at the pre-authorisation stage. There are claims of victims being disappointed by the limited opportunities for participation, and questions have been raised as to whether participation is in general ‘meaningful’ given the difficulty faced by victims’ counsel interacting with the large numbers of victims they may be required to represent. At

<sup>622</sup> *Situation in the Islamic Republic of Afghanistan*, Public redacted version of ‘Request for authorisation of an investigation pursuant to article 15’, 20 November 2017, ICC-02/17-7-Conf-Exp, [ICC-02/17-7-Red](#), 20 November 2017.

<sup>623</sup> See for example, *Situation in the Islamic Republic of Afghanistan*, Annex A, Notice of Authorities for Oral Submissions, Afghanistan Human Rights Organizations, [ICC-02/17-122-AnxA](#), 27 November 2019, p.16.

<sup>624</sup> See *supra* Section [VII.A. Relations with the United Nations](#).

the same time it is acknowledged that victims have made significant contributions in a number of proceedings.

858. There are calls for the Court to develop consistent approaches to witness participation and overall reduce the obstacles and challenges that prevent more victims from benefitting from the Court. In one submission based on comments from a number of experienced sources it was said that ‘victim participation was characterised as overly complex, bureaucratic, inconsistent, and far removed from the reality many victims find themselves in’. Reference was made to misconceptions about the scheme and its contribution to the criminal justice process. Criticism was levelled at staff mandated to work with and for victims as lacking the basic skills required. Complicated and inconsistent application processes are said to have undermined meaningful victim participation before the Court and that is said still to be the situation in spite of the developments in that area narrated above. One experienced counsel recognised the efforts being made by Chambers to move towards a model that would be workable for all cases, particularly those with very large interested victim numbers, and reserved their harshest comments for the Registry where, he said, ‘effective victim participation encounters its greatest inefficiencies and obstacles’.

859. It is a simple fact of life that formality, bureaucracy (in its literal sense) and procedure are essential features of the working methods of any public institution comparable to the Court. Of course, excess of any of these elements is to be condemned but it has to be recognised that the interaction between victims and those seeking to facilitate their recognition as participants in proceedings will likely feel quite different from the reality of the victims’ everyday lives. The same is inevitably true of the language in which pronouncements are made by and on behalf of the Organs of the Court. That applies to decisions of Chambers. However, in this area of its work it is important that the Court through its Chambers has particular regard to the need to communicate effectively with the victim communities who are the most important constituency when the legal framework and practical consequences of victim participation are being addressed. Decisions of Chambers do generally display judicial awareness of these requirements. An instructive example is the ‘Decision Establishing Principles on the Victims’ Application Process’ in *Ntaganda* dated 28 May 2013 issued just over two months after the accused surrendered to the Court.<sup>625</sup>

860. It might be said that it should be possible for a decision of this kind to be issued a bit more speedily. However, the contents are a comprehensive and clear statement of the legal framework. This includes the procedure to be followed from outreach through the application process, consideration with applicants of legal representation possibilities and other elements, to the transmission and handling of the applications. The outreach work expected of the then Public Information and Documentation Service is detailed as ‘providing potential victims, in a timely manner, with accurate, concise, accessible and complete information both on the Court’s overall mandate and, more specifically, on the various roles which the victims are statutorily called to play in the proceedings’.<sup>626</sup> This leads to the involvement of VPRS and the Victims and Witnesses Unit now VWS. It prescribes advising of the possibility of access to immediate and meaningful assistance and the unique role of the TFV. It addresses the role of VPRS in terms of Regulation 86(9) to assist applicants to complete the form; and provides that, where that cannot be done on account of shortage of resources, security concerns, tensions in the community or other reasons, they should engage and train suitable local individuals, trusted in their communities, to act as intermediaries between the applicants and the Court. It also deals with the need for lead counsel to be assisted by a local assistant to counsel in the field.

861. The most recent decision giving direction on information and outreach is that of Pre-Trial Chamber I relating to the situation in the State of Palestine of 13 July 2018 following the opening of a preliminary examination into that situation on 16 January 2015 and the referral of the situation by Palestine to the Prosecutor on 22 May 2018.<sup>627</sup> The Decision recognises the need for public information and outreach to foster support, public understanding and confidence in the work of the Court and enable the Court better to understand the concerns and expectations of victims. It also refers to a number of humanitarian legal instruments, emphasises the rights of victims before the Court and

<sup>625</sup> [ICC-01/04-02/06-67](#).

<sup>626</sup> *Ibid.*, p. 6, para. 13.

<sup>627</sup> [ICC-01/18-2](#).

prescribes the establishment, as soon as practicable, by the Registry of public information and outreach activities among the affected communities. It goes on to mention PIOS and VPRS and their roles, and specifies what should be communicated and what means should be employed. Engagement in outreach is in keeping with the regular inclusion in the annual omnibus resolution of the ASP of a clause to the effect that the Court should, where appropriate, undertake early outreach from the outset of the Court's involvement including during the preliminary examination.<sup>628</sup> What is not clear from the two-monthly reports to the Chamber is the nature and extent of the engagement undertaken thus far.

862. It has been recognised that usually only a fraction of the victim groups from the area of conflict become victim participants. While this is attributed, at least in part, to the charges to which the proceedings are confined, it is reckoned, for example, that out of around 20,000 potential participating victims in *Ongwen* only 4,107 are participating.<sup>629</sup> It is clear that a number of features of communications between the Court and victims play a major part. Many victims reside in remote areas without internet access. The relevant victim group may be spread over a wide area. Intermediaries familiar with the language spoken may be required. It is easy to see why the periods allowed by Chambers for the submission of applications may be unreasonably short, albeit selected with the best of intentions to ensure the efficient conduct of the proceedings. The demands upon VPRS to meet the application deadline set may prove insurmountable in respect of the number of eligible victims. In the current context of a large number of situations their resources are modest. They can of course supplement their resources by engaging additional staff locally. How quickly that can be done depends on how much training is required and how much is already known by the victims of the work of the Court and their rights. The amount of outreach undertaken after a situation comes to the attention of the Prosecutor varies from situation to situation.

863. Although 'the right to victim participation has yet to crystallise into a consolidated and clear practice' there is no reason to doubt that the Judiciary and those in the Registry with responsibilities in this area are well aware of the challenges of providing an effective system for the meaningful participation of victims in Court proceedings. Some of these challenges are the subject of critical submissions to the Experts who have indeed addressed some of them. However, actually determining whether and the extent to which the criticisms advanced are warranted, and the extent to which any may be systemic, is an exercise that is beyond the capacity of this Review in the time available. The same can be said of finding achievable solutions. Many of the comments depend upon the particular circumstances of individual cases.

864. Having regard to the range of issues that giving effect to the Court scheme for victim participation gives rise, many of which are identified above; the huge number of potential participant victims whose interests and applications must be accommodated; the variety of situations and circumstances in which they are located and live; the number of cases involved and the very large number of decisions made; the way in which the scheme has evolved over the life of the Court; and the resources that can reasonably be expected to be committed to it; this is an appropriate time for a full appraisal of the effectiveness of the scheme to be undertaken in light of the submissions made to the Experts. Such a review could be carried out by the standing coordination group as suggested in R359 (p.311). The aim of the appraisal would be to identify ways in which the system can be made more efficient with the objective of ensuring the meaningful participation of the maximum possible number of victims in proceedings before the Court.

## **E. Legal Representation of Victims**

865. Some points were made about the inconsistencies in procedure adopted by different Chambers creating confusion and uncertainty. Two particularly affect victims. The first concerns control of examination of witnesses by victims' counsel. One Chamber requires notice of the questions legal representatives proposes to put to witnesses, while another leaves counsel free to decide on the scope of examination subject to the Chamber intervening if any

<sup>628</sup> Strengthening the International Criminal Court and the Assembly of States Parties, [ICC-ASP/17/Res.5](#) (2018).

<sup>629</sup> *The Prosecutor v. Dominic Ongwen*, Questions and Answers, [ICC-PIDS-Q&A-UGA-02-01/16 Eng](#) (2016).

questioning is considered inappropriate.<sup>630</sup> Both approaches are in principle simply different examples of judicial case management. However, where notice is required, that may be up to 14 days before the examination takes place and long before the OTP have indicated what documents are likely to be referred to. The notice requirement does seem unnecessarily demanding.

866. The second relates to deadlines. Very short deadlines are often set for the submission of observations on issues, such as requests for the interim release of a suspect or accused and jurisdiction and admissibility issues, which significantly affect the personal interests of victims.<sup>631</sup> This can render contact with victims in remote areas in order to obtain their views and concerns impossible. It seems that this is an inevitable consequence of the Court's drive to proceed fairly and expeditiously. In some instances, the issues referred to will have been foreseeable at the time of taking initial instructions from victims. In those which arise unexpectedly and could have a significant impact on the personal interests of victims, it should be possible to persuade the Chamber to allow a reasonable amount of time to obtain instructions. This is a matter for judicial case management and not formal regulation. However, these deadlines that the Court sets have to reflect the circumstances to ensure that meeting the deadline is not unduly demanding for the victim community.

867. A discrete issue arises in relation to the funding of legal representation during the early stages of the involvement of the Court in a situation. The limitation of legal aid to court-appointed counsel by the Court's legal aid policy was criticised because of the impact it has on victims who wish to become involved at the pre-investigation stage. Although involvement at that stage is envisaged by the Statute, there is no provision for the Court to appoint a common legal representative. That is said to fail to take into account the extent of the representation of victims undertaken in judicial pre-authorisation proceedings, and the important work done by lawyers at that stage to facilitate victim participation and the completion and collection of application forms. Whether there should be provision of funding for work at that point is itself controversial. Yet when the Prosecutor plans to initiate an investigation *ex proprio motu*, the VPRS is expected to sound out the views of victims on the opening of a situation.

868. While it is true to say that there is no provision for funding of external counsel in the circumstances envisaged, Regulation 84(1) provides that one of the tasks of the OPCV is to provide general support and assistance to victims and indeed to the legal representatives of victims. That has occurred on occasion with counsel of the OPCV being instructed by powers of attorney. The workload of the Court increasingly includes cases at the early stages in which issues of fact and law of concern to victims do arise, such as the territorial and temporal scope of an investigation. Accordingly, consideration should be given to extending the range of circumstances in which the Court can appoint counsel for victims to include preliminary examinations and requests for authorisation to open an investigation.

869. Fortification for this view was found in the information gathered, and the impression formed, from submissions and interviews about the work of lawyers acting regularly for victims. It is important to take note of the right of victims to choose counsel<sup>632</sup> and to have the opportunity to engage directly with counsel to convey instructions. However, in the context of situations with large numbers of victims, the only realistic way in which legal representation can be funded by the Court is where counsel represent groups of victims, on occasion very large groups of victims. The views of victims on their choice of counsel should be, and do appear to be, taken into account. It is important that this right is recognised by all who deal with the Court, including human rights activists and others who work with victims in a number of contexts. The cases which come before the Court require specialist representation. Some of them, such as those involving child soldiers, are a source of potential conflicts of interest which have to be addressed by the appointment of separate common legal representatives. There was the inevitable grumble about the insufficiency of funding<sup>633</sup> for which there is some justification. The impression left is of the wise deployment of resources

<sup>630</sup> RPE, Rule 91(3).

<sup>631</sup> In relation to short deadlines for victim outreach in Afghanistan, see *Situation in the Islamic Republic of Afghanistan*, Request seeking leave to file Amicus Curiae submissions on behalf of human rights organisations in Afghanistan, ICC-02/17-55, 25 June 2019, p.10, para. 19.

<sup>632</sup> RPE, Rule 90(1).

<sup>633</sup> See *supra* Section XVI.B. Legal Aid.

by counsel, including devising ways of dividing responsibilities between Court-based and field-based counsel and engaging field-based assistants to support their victim-contact work. One team recounted undertaking 60 such meetings with groups of victims over two years. No complaints were made about the service provided by counsel for victims.

870. The OPCV has a role in virtually every case before the Court, and counsel from the Office have been Court-appointed counsel for groups of victims in each of the cases which have gone, and are about to go, to trial in recent years.<sup>634</sup> Their independence as counsel is identical to that of external counsel. Since its establishment in 2005 the OPCV has represented 60,000 victims at all stages of proceedings. Currently 9,000 victims residing in 22 countries are represented by counsel of the OPCV. There are 12 established posts, Principal Counsel (P-5), two Counsel (P-4), three legal officers (P-3), three associate legal officers (P-2), two case managers (P-1), one administrative assistant (G-5), and one GTA (P-2). In addition, seven field counsel integrated in the legal teams representing victims in The Hague are based in relevant situation countries. Additional assistants are engaged as required in the field. As is the case with external counsel, they make regular contact with those they represent where that is possible. Often group meetings are facilitated by family contacts.

## F. Tracing Victims in the Reparations Phase

871. The search for victims with an interest continues beyond the completion of the criminal proceedings into the Reparations phase, and that has added a complication which ought to be resolved before it becomes embedded and leads to general confusion. The Chamber in Lubanga, recognising that the victims already admitted are only a sample of the total, ordered the TFV to undertake the task of identifying more victims with claims for reparation.<sup>635</sup> The TFV was initially resistant to undertaking this task on the basis that their responsibility is implementation of any order for reparations and not the identification of the victims, but had in the end to accept it.<sup>636</sup> A similar order was made in Al Mahdi where only 139 victims had been admitted. The VPRS view is that the responsibility should lie with VPRS and that they could liaise with the TFV. Key major data assessment activities in Lubanga and Al Mahdi have already been delegated to the VPRS. Since the tasks involved are an extension of the routine work of VPRS, they should be assigned to that service rather than the TFV.

872. The circumstances in Al Mahdi indicate a further reason for assigning VPRS rather than the TFV. The Chamber ordered the TFV to identify beneficiaries/victims with legal representatives in 2018.<sup>637</sup> Another example of an apparent lack of urgency in the activities of the TFV can be found in Bemba. Although Mr. Bemba was acquitted and no question of reparations arises, the Fund can provide ‘assistance’ to the communities affected by the conflict. In mid-2018 the TFV announced its intention to do so, and yet only at the beginning of this year was the required authority to do so sought.<sup>638</sup> These circumstances indicate that the TFV is neither equipped to trace and locate victims nor to act expeditiously at a stage in a case where there is a need for urgent action to avoid the unnecessary passage of further time before the justice process is completed.

873. In Ntaganda the VPRS seized the initiative and made a submission to the Chamber in October 2019 to order the Registry to start the process of identifying further

<sup>634</sup> This appears to be true for all cases except that of *Al Mahdi* in the situation of Mali. Until 15 September 2017, the OPCV had represented victims in *Lubanga*, *Katanga*, *Ntaganda*, *Bemba*, *Gbagbo and Blé Goudé*, *Ongwen* and *Al Mahdi*. See *supra* 341, [Third Court’s report on the development of performance indicators for the ICC](#) (2017), p. 53. Since then, the OPCV has also been involved in the case of *Yekatom and Ngaïssona*; see *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Legal Representation of Victims, [ICC-01/14-01/18-205](#), 23 May 2019, p. 9.

<sup>635</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, [ICC-01/04-01/06-2904](#), 7 August 2012, paras. 283-289.

<sup>636</sup> See e.g. *The Prosecutor v. Thomas Lubanga Dyilo*, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, [ICC-01/04-01/06-2872](#), 25 April 2012.

<sup>637</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment on the appeal of the victims against the ‘Reparations Order’, [ICC-01/12-01/15-259-Red2](#), 8 March 2018.

<sup>638</sup> ICC, Press Release [Trust Fund for Victims decides to launch assistance programme in Côte d’Ivoire](#), 17 May 2017.

beneficiaries/victims while the case is at appeal awaiting judgment, with the aim of having a list available should the appeal be refused. The application was opposed by the OPCV on the ground that undertaking the task at this stage runs the risk of raising victims' expectations unduly in the event that the appeal succeeds. On 26 June 2020, the Chamber issued its decision on the matter stating that '[f]or the purpose of enhancing the efficiency and effectiveness of the reparations proceedings taken as a whole, the Chamber considers it desirable for the identification of the victims potentially eligible for reparations to advance as much as possible before the issuance of the reparations order'.<sup>639</sup> The Chamber then decided that it considered the Registry, through its VPRS, was the appropriate entity 'to lead the identification of potential beneficiaries and other tasks set out below'.<sup>640</sup> According to the Chamber this was in accordance with Regulation 86(9) of the Regulations.<sup>641</sup>

### **Recommendations**

**R336.** The VPRS should be recognised as the lead entity charged with tracing and identifying further victims with claims for reparation during the reparations phase.

**R337.** It is recommended that arrangements for facilitating and collecting applications for victim participation should commence earlier than at present. In particular, in a case where normally applications would be collected from the time of the submission of the DCC, the date of commencement should be advanced to the point of issue of an arrest warrant or a summons to appear.

**R338.** Victims admitted to participate in proceedings should be automatically admitted to participate in any other case opened within the same situation for the same events.

**R339.** The standing coordination body<sup>642</sup> should carry out a full appraisal of the effectiveness of the scheme with the aim of facilitating the meaningful participation of the maximum possible number of victims in proceedings.

**R340.** Where a Chamber requires notice of the line of examination a legal representative of victims proposes to follow, the deadline set, if any, should be no more than 48 hours before the relevant hearing.

**R341.** Consideration should be given by the Registry to extending the range of proceedings in which the Court can appoint counsel for victims to include preliminary examinations and requests for authorisation to open an investigation.

## **XVIII. VICTIMS: REPARATIONS AND ASSISTANCE**

### **A. Current Framework for Victims Participation in the Rome Statute System, and its Functioning**

#### **Findings**

874. As noted above, States assembled in Rome in 1998 innovated when they decided to put victims at the heart of the Court. One of the most distinctive features of the Rome Statute system is having rights of victims woven directly into its fabric, by according them the right not only to participate in judicial proceedings but also to request reparations. There was broad

<sup>639</sup> [ICC-01/04-02/06-2547](#), p. 11, para. 26.

<sup>640</sup> *Ibid.*, para. 27.

<sup>641</sup> *Ibid.*

<sup>642</sup> See R359 (p.311).

agreement at the Rome Conference for authorising the Court to award reparations, in an effort to repair the shortcomings in this regard of the UN *ad hoc* Tribunals.<sup>643</sup>

875. The Statute includes provisions on the protection and participation of victims and witnesses in the proceedings.<sup>644</sup> The ‘interests of the victims’ are often referred to and established as an important criterion in a Chamber’s decision-making.<sup>645</sup> Besides establishing the possibility and procedure for reparations to victims in Article 75, the Statute otherwise only describes how the Court can make contributions (through fines and forfeitures<sup>646</sup> it would collect from penalties) to a trust fund established by the ASP ‘for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims’.<sup>647</sup>

876. While foreseen in the Statute only as a trust fund, the TFV has developed into an entity of its own. It was established by the ASP in 2002,<sup>648</sup> and its Secretariat in 2004.<sup>649</sup> Regulations for the TFV followed a year later.<sup>650</sup> Oversight of the TFV is the responsibility of a Board of Directors. The Secretariat is the ‘executive’ arm of the TFV. It employs several staff members (at both the headquarters and in field offices), and has its expenses covered through the Court’s regular budget.

877. The TFV has a two-fold mandate: implementing awards for reparations ordered by the Court against a convicted person (reparations mandate),<sup>651</sup> and providing victims under the Court’s jurisdiction with physical or psychological rehabilitation and/or material support (assistance mandate).<sup>652</sup> While the former is to be done in compliance with reparation orders issued by Chambers, the assistance mandate is outside judicial control and oversight.

878. Aside from the TFV and its Secretariat, several other bodies within the Court have victim matters within their mandate – the Chambers, the OTP, and within the Registry – VPRS, VWS, and OPCV.

879. The Court’s conceptual and procedural processes for reparations are laden with complexity and uncertainty, which gravely affects the victims’ rights to meaningful participation and reparations.<sup>653</sup> The implementation plans and execution of reparations projects have taken and are taking an extensive time to develop, commission and realise. Overall, profound delays exhibit the whole process. Victims, it was asserted to the Experts, wait a lifetime.

880. In the *Lubanga* case,<sup>654</sup> the Trial Chamber entered a conviction against the accused on 14 March 2012. The date of approval by the Chamber of the TFV’s implementation plan for symbolic collective reparations was 21 October 2016, over four years post-conviction. That of the corresponding plan for collective service-based reparations was on 6 April 2017, five years after. What is distinguishing, is that while the accused completed a 14 years sentence of imprisonment and was released on 15 March 2020, the implementation of reparations is still ongoing. Although, some accounting for the lapse of time could justifiably be discounted

<sup>643</sup> William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (Oxford University Press: 2010) p. 880.

<sup>644</sup> [Rome Statute](#), Art. 68.

<sup>645</sup> *Ibid.*, Art. 65(4), ‘[w]here the Trial Chamber is of the opinion 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 (...)’.

<sup>646</sup> Thordis Ingadottir, ‘The Trust Fund for Victims (Article 79 of the Rome Statute)’, in *The International Criminal Court: Recommendations on Policy and Practice, Financing, Victims, Judges, and Immunities*, Thordis Ingadottir (ed), (Transnational Publishers for PICT/Center on International Cooperation: 2003), pp.111-144 at p.115.

<sup>647</sup> [Rome Statute](#), Art. 79.

<sup>648</sup> Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, [ICC-ASP/1/Res.6](#) (2002).

<sup>649</sup> Establishment of the Secretariat of the Trust Fund for Victims, [ICC-ASP/3/Res.7](#) (2004).

<sup>650</sup> Regulations of the Trust Fund for Victims, [ICC-ASP/4/Res.3](#) (2005).

<sup>651</sup> [RPE](#), Rule 98(1)-(4).

<sup>652</sup> Derived from *ibid.*, Rule 98(5).

<sup>653</sup> See Alina Balta, Manon Bax, Rianne Letschert, Trial and (Potential) Error: Conflicting Visions on Reparations within the ICC System (2019) 29(3) *International Criminal Justice Review*, 221-248.

<sup>654</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, [ICC-01/04-01/06-2842](#), 14 March 2012.

(*Lubanga* was the Court's first reparations case, the security situation was at times inhibiting and the local institutions fragile), the length of the entire process is plainly excessive.

881. In the *Katanga* case,<sup>655</sup> while the accused was convicted on 7 March 2014, the Chamber's first reparations order was issued on 24 March 2017, three years post-conviction. The order was subsequently amended by the Appeals Chamber almost a year later, on 8 March 2018. Also in this case, implementation is still enduring.

882. In the *Al Mahdi* case,<sup>656</sup> following conviction on an admission of guilt for war crimes on 27 September 2016, the reparations order was issued on 17 August 2017 and the TFV's updated implementation plan approved on 4 March 2019, over two and a half years following the verdict.

883. The challenge in delay is also noticeable in relation to the TFV's assistance mandate in the situation in CAR I. Following Mr. Bemba's acquittal by the Appeals Chamber on 8 June 2018, the TFV promptly announced on 13 June 2018 its intention to launch an assistance programme in situation. However, it only notified the Pre-Trial Chamber<sup>657</sup> on 25 February 2020, about 20 months later, of a pilot project involving physical and psychological rehabilitation and material support to around 200 Bangui-based vulnerable persons, survivors of sexual and gender based violence and who suffer, in particular, from HIV/AIDS.<sup>658</sup> That such a delay was allowed to intervene in the development of the proposed project, and even more so in CAR where the Court has had a presence for over a decade, is also reflective of weaknesses in the TFV's institutional capacity.

884. The length of reparations has not only a potential impact on the victims' expectations and consequently, significant impact on the reputation of the Court, but also non-negligent financial implications, mainly in terms of human resources in the Judiciary and Registry, resources needed for legal aid for Defence and Victims and the TFV.<sup>659</sup>

885. While only a minority of victims decide to take part in the proceedings, the great majority wants justice to be done. For victims, so far, the Court is not functioning and delivering as envisioned. Conceptually, the reparations process was regarded as seriously deficient also in that it (potentially) leads to inequality between victims, by anchoring Court-ordered reparations only on the crimes for which conviction against an accused person has been entered, and not on the totality of the crimes charged or perpetrated in a situation. Moreover, victims and victim groups entitled to reparations are often only a fraction of the totality of those who suffered harm as a result of all the crimes committed in a situation. Further, in the context of the Court, victims before it are a diverse group of persons and affected communities, which only share the commonality of having suffered harm in consequence of the most serious crimes of international concern. For example, direct victims in the *Lubanga* case are former child soldiers; in the *Katanga* case individuals who lived in the Bogoro village at the time of the attack; while in *Al Mahdi* – descendants of the Saints related to mausoleums and having suffered direct personal moral and economic harm from their destruction, members of the Timbuktu community at the time of the crime, the people of Mali and the international community that also benefited from the world heritage sites. Each category of victim has specific needs and different means of reparations or assistance

<sup>655</sup> [ICC-01/04-01/07-3436-tENG](#).

<sup>656</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, [ICC-10/12-01/15-171](#), 27 September 2016.

<sup>657</sup> Pursuant to [Regulations of the Trust Fund for Victims](#), Regulation 50(1)(ii).

<sup>658</sup> *Situation in the Central African Republic I*, Information to the Trust Fund for Victims on the 'Notification by the Board of Directors in accordance with regulation 50 (a) of the Regulations of the Trust Fund for Victims of its conclusion to undertake specified activities in the Central African Republic', [ICC-01/05-100](#), 8 April 2020.

<sup>659</sup> [ICC-ASP/18/15](#), para. 125.

would be appropriate. This feature is telling about the difficulties to conceive and apply the same formulae to different groups of victims with the same results.

886. The system had ushered in high, but unfulfilled expectations among victims, and in turn dented their confidence in the credibility of the Court. In the words of a former Judge of the Court, ‘the state of reparations is in disarray’.<sup>660</sup>

887. The Experts’ assessment of the effectiveness, functioning and operation of the reparations scheme leads to the conclusion that it has not delivered fair, adequate, effective and prompt reparations to victims of crimes under the jurisdiction of the Court.

888. The delays in the judicial process on the one hand, and the TFV’s work, on the other, are complemented, and in part due, to a lack of financial resources. While the drafters of the Rome Statute might have foreseen the reparations framework being financed by wealthy individuals found guilty by the Court, to date all individuals convicted of core crimes were declared indigent.<sup>661</sup> While recognised as indigent, the Court placed monetary liability for the reparations awards on Mr. Lubanga,<sup>662</sup> Mr. Katanga<sup>663</sup> and Mr. Al Mahdi<sup>664</sup> at \$10 million USD, \$1 million USD and €2.7 million respectively. To date, there has been only one instance of collection of fines in the *Bemba* case, in 2020. The Court’s consistent jurisprudence establishes that the indigence of an accused is neither of relevance, nor an obstacle to the imposition of liability for reparations.<sup>665</sup> The resources of the TFV are irrelevant to the convicted person’s liability or financial ability.<sup>666</sup>

889. In terms of voluntary contributions, the TFV received – between 2010 and 2018 - €28 502 000 in public donations and €218 000 in private donations,<sup>667</sup> amounting to approximately €3.6 million a year. Some of the donations were earmarked for specific projects. Although generous, the contributions and donations have been insufficient for the TFV to fully carry out its mission. The TFV Secretariat noted ‘it was facing two grave challenges: implementation capacity and financial resources in order to fully complement reparations awards in the *Lubanga* and *Al Mahdi* cases, to fund five-year assistance programmes in northern Uganda, and the DRC, and to expand assistance programmes to an additional four countries’.<sup>668</sup> The TFV’s goal for 2021 is to raise €40 million in voluntary contributions and private donations to implement and complement the payment of reparations orders and to expand the implementation of assistance programs.<sup>669</sup>

890. In the Experts’ view, that the TFV has not been successful in attracting more donations is partly due to systemic challenges referring to how the TFV and its Secretariat have been construed, governance and management issues within the Secretariat, ineffective oversight, and the absence of a fundraising strategy. Such factors contributed to significant budgetary

<sup>660</sup> Judge Elizabeth Odio Benito, Forward, in Carla Ferstman and Mariana Goetz, *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, Second Edition, (Brill/Nijhoff: 2020).

<sup>661</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, [Case Information Sheet](#); *The Prosecutor v. Germain Katanga*, [Case Information Sheet](#); *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, [Case Information Sheet](#). See also *infra* n 662, 664.

<sup>662</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Corrected version of the ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’, [ICC-01/04-01/06-3379-Red-Corr-tENG](#), 21 December 2017, p.111.

<sup>663</sup> *The Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, [ICC-01/04-01/07-3728-tENG](#), 24 March 2017, p.120.

<sup>664</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, [ICC-01/12-01/15-236](#), 17 August 2017, p.60.

<sup>665</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal against the Decision establishing the principles and procedures to be applied to reparations of 7 August 2012, with Amended Order for reparations, (Annex A), [ICC-01/04-01/06-3129](#), 3 March 2015, para.105; See also *The Prosecutor v. Germain Katanga*, Judgment on the appeals against the orders of Trial Chamber II of 24 March 2017 entitled Order for reparations pursuant to Article 75 of the Statute, [ICC-01/04-01/07-3778-Red](#), 8 March 2018, para. 189; [ICC-01/12-01/15-236](#), para.114.

<sup>666</sup> [ICC-01/12-01/15-236](#), paras.112-114.

<sup>667</sup> [ICC-ASP/18/15](#), para.149.

<sup>668</sup> Report to the ASP on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2018 to 30 June 2019, [ICC-ASP/18/14](#) (2019), para.120.

<sup>669</sup> See *ibid.*, para.5; see also Report to the ASP on the projects and the activities of the Board of Directors of the TFV for the period 1 July 2017 to 30 June 2018, [ICC-ASP/17/14](#) (2018), para.107.

underperformance,<sup>670</sup> which combined with delays in the judicial process, eroded (potential) donors' confidence in the TFV.

891. The Court's reparations and assistance scheme can hardly succeed without adequate financial resources and stability of its reserves. Court orders for reparations cannot just be numbers on paper.<sup>671</sup> Without clear progress and renewed efforts to address governance-related deficiencies, increased coordination among the different bodies working with victims, and improvements in the judicial process, there will be no change in the efficiency and effectiveness of the current reparations and assistance scheme.

892. Prompt action is needed not only in the light of previous and current problems, but also considering the likely increase of the number of victims requesting reparations in ongoing or future cases. For example, in the Myanmar situation currently before the Pre-Trial Chamber, representations have already been introduced on behalf of 470,000 individual victims. The Chamber also found that as a result of the 2017 violence, an estimated 600,000 to 1,000,000 Rohingya had been forcibly displaced from Myanmar to Bangladesh, acts which constituted deportation or forcible transfer of a population under article 71(1)(d) of the Statute and other crimes within the jurisdiction of the Court.<sup>672</sup>

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<sup>670</sup> The CBF 'noted with concern the constant under-implementation rate' of the TFV Secretariat, see [ICC-ASP/18/15](#), para.122.

<sup>671</sup> *The Prosecutor v Ahmad Al Faqi Al Mahdi*, Decision on the Updated Implementation Plan for Trust Fund for Victims, [ICC-01/12-01/15-324-Red](#), 4 March 2019, para.102.

<sup>672</sup> *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, [ICC-01/19-27](#), 14 November 2019, paras. 22, 105, 108, 210.

## B. Judicial Matters Related to Reparations

### Findings

#### 1. General (Judicial) Principles on Reparations

893. Article 75(1) of the Rome Statute requires the Court to establish principles relating to reparations to, or in respect of victims, including restitution, compensation and rehabilitation.<sup>673</sup> A set of general principles on reparations was established by the Appeals Chamber in the Lubanga case.<sup>674</sup> Full account was taken of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>675</sup> and the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>676</sup> The Court furthermore held that the ‘principles should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers.’<sup>677</sup> Guided by that decision, Trial Chambers have applied and developed these principles in the context and circumstances relevant to each specific case.

894. Censure has been levied on the Court, in the past and during the Experts’ consultations, for developing general principles and procedures on reparations for case to case application by Trial Chambers, instead of establishing ‘Court-wide principles’<sup>678</sup> or promulgating an ‘independent’ instrument on principles of reparations. It was also submitted that the Court’s general principles create uncertainty, inconsistency and unpredictability to the reparations process, as well as unfairness to the convicted person.

895. The Rome Statute had purposely left it to the Court to establish principles concerning reparations for victims, one of the areas of ‘constructive ambiguity’.<sup>679</sup> The general principles on reparations and the jurisprudence currently developed by the Court offers standards of guidance on a number of subjects central to reparations.<sup>680</sup> Furthermore, the five principal elements of reparations orders have been firmly established.<sup>681</sup> Additionally, a clear identification of the three decisional stages by Chambers involved in the reparations phase of the proceedings have also been affirmatively set, namely: (i) the Chamber’s issuance of a reparations order, (ii) its authorisation of the implementation plan and finally, and (iii) the approval of the reparation projects.<sup>682</sup>

896. From the reparations orders and other relevant decisions rendered in the Lubanga, *Katanga* and *Al Mahdi* cases and the corresponding judicial approvals of the TFV’s implementation plans on reparations, it would appear that the general principles on reparations established by the Appeals Chamber in the *Lubanga* case have offered

<sup>673</sup> The Appeals Chamber considers that the requirement to establish principles relating to reparations is mandatory (‘shall’). See [ICC-01/04-01/06-3129](#), para.52.

<sup>674</sup> [ICC-01/04-01/06-3129](#); see also Annex A, Order for Reparations [ICC-01/04-01/06-3129-AnxA](#).

<sup>675</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted by the General Assembly, [A/RES/60/147](#), 21 March 2006.

<sup>676</sup> UNGA, [A/RES/40/34](#) (1985).

<sup>677</sup> [ICC-01/04-01/06-3129](#), para. 55.

<sup>678</sup> See REDRESS, *Justice for Victims: The ICC’s Reparations Mandate* (2011), p. 24.

<sup>679</sup> Christine Van den Wyngaert, *Victims before International Criminal Courts: Some Views and Concerns of the ICC Trial Judge*, (2011) 44(1) *Case Western Reserve Journal of International Law*, p.486.

<sup>680</sup> These include principles on the beneficiaries of reparations; accessibility and consultations victims; the determination of harm and causation; liability of the convicted person; standard and burden of proof; rights of the defence; proportionality and adequacy of reparations and modalities of reparations.

<sup>681</sup> See [ICC-01/04-01/06-3129](#), para. 32.

<sup>682</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Decision on the Updated Implementation Plan from the Trust Fund for Victims, [ICC-01/12-01/15-324-Red](#), 4 March 2019, para 14.

guidelines.<sup>683</sup> The Chambers have adopted and adjusted them according to the dictates and specificities of each case. In the *Al Mahdi* case, the Trial Chamber specifically addressed reparation principles concerning protected cultural property and heritage. In the *Ntaganda case*, for which reparations proceedings are ongoing and subject to the outcome of the appeal against conviction, the Trial Chamber may complement and enhance reparation principles applicable to sexual and gender based violence (SGBV), in particular whether children born out of rape shall be presumed as having suffered harm as a result of the commission of rape and sexual slavery; and if a lower burden of proof should be retained at the reparations phase in cases of sexual violence.<sup>684</sup> Jurisprudence is being built,<sup>685</sup> and surely will continue to evolve. Even with reference to the Inter-American human rights system and its court, which has a more extensive history and record on reparations than the Court, it has been asserted that jurisprudence there cannot remain static.<sup>686</sup>

897. One of the major issues affecting the efficiency and effectiveness of the reparations phase is its procedure. Given that there is no requirement for reparation proceedings to constitute a stage of ‘trial’ *stricto sensu*,<sup>687</sup> and a less exacting standard than that at trial applies,<sup>688</sup> a multiplication of procedural hurdles need setting aside or avoiding at all costs. A simplification of and consistency in the application of procedures by Chambers is vital.

## 2. Specialised Reparations Chamber

898. The Experts have given due consideration to the proposal to establish a specialised Chamber for the reparations phase. This in itself is no guarantee in the delivery of an adequate, fair, and prompt reparations process. Moreover, there are advantages for reparations to be determined by the Trial Chamber that determined the case, given its institutional memory and full knowledge of its voluminous proceedings. The relevant Trial Chamber also has discretion in enlisting the assistance of experts on reparations in determining the scope or extent of any damage, loss or injury, or in respect of victims.

## 3. Non-Stay of Reparation Proceedings

899. The Court’s 2019 Report on KPIs contains an indication that reparations and appellate proceedings, where applicable, will proceed simultaneously.<sup>689</sup> In the *Ntaganda* case, the Trial Chamber’s reparation phase is proceeding that way. The Report also indicates that the sentencing and reparations proceedings may also proceed in parallel.<sup>690</sup> Judicial economy

<sup>683</sup> The ASP has also called on the Court to ‘continue’ to establish principles relating to reparations in accordance with Article 75, para 1 as a priority in the context of judicial proceedings. See, [ICC-ASP/18/Res.6](#) (2019), Annex I, Mandate of the ASP for the intercession period, para 12 (a).

<sup>684</sup> [ICC-01/04-02/06-2547](#), para.46.

<sup>685</sup> ‘With regard to victims and affected communities, reparations and the Trust Fund for Victims, (a) requests the Court to continue to establish principles relating to reparations in accordance with article 75, paragraph 1, of the Rome Statute as a priority in the context of its judicial proceedings’, [ICC-ASP/18/Res.6](#) para.12. See also Mariam Cohen, *Realizing Reparative Justice for International Crimes: From Theory to Practice*, (Cambridge University Press, UK: 2020), p.97: ‘Through its evolving jurisprudence the Chambers are painting the contours of the reparations system at the ICC.’

<sup>686</sup> C Grossman, A Del Campo, MA Trudeau, *International Law and Reparations. The Inter-American System*, Clarity Press, 2018, C Grossman, Preface: ‘Jurisprudence cannot remain static, new circumstances and different set of facts could lead the Inter American Court to develop in a direction that have not yet been addressed or even envisaged’. See also Clement Julius Mashamba, *Reparations in the African Human Rights System: Analysis of the Evolving Jurisprudence* (2018), *Zanzibar YearBook of Law* (ZYBL), p. 65: ‘However, the AfCHPR (African Court on Human and Peoples’ Rights) has consistently applied international law on reparations to building its own case law, which is a very commendable approach that finds basis in the principle of drawing inspiration from the international law underlying the African Human Rights System.’

<sup>687</sup> *The Prosecutor v Germain Katanga*, Decision replacing two judges in Trial Chamber II, Annex I, [ICC-01/04-01/07-3468-AnxI](#), 16 April 2014, para 8.

<sup>688</sup> [ICC-01/04-01/07-3778-Red](#), para 74.

<sup>689</sup> Report of the Court on Key Performance Indicators (2019), para.10.

<sup>690</sup> *Ibid.*

and expeditiousness are to be gained by such steps. The running contemporaneously of reparation and appellate proceedings could lead to at least a year in time saved.

900. The conduct of concurrent appellate and reparations proceedings are not an indication of a reconfirmation of a guilty verdict. If anything, they are a part of advancing a fair judicial process, conducted within a reasonable time and in the interest of the accused and justice.<sup>691</sup> In the Experts' opinion, the approach of continuing reparations proceedings, while the appeal against conviction is being determined by the Appeals Chamber, is appropriate, as currently evidenced in the ongoing *Ntaganda* reparation proceedings.

#### 4. Individual Requests for Reparations

901. Individual reparations awards primarily follow from an application (request).<sup>692</sup> One of the major challenges currently faced by the reparations scheme is the individual written application (request) process under Rule 94 RPE. In what should be considered as a marked improvement in assisting victim applications for participation under Rule 89 and if desired by a victim, at the subsequent reparations phase, under Rule 94, the Registry's latest standard application form for individual victims (2019<sup>693</sup>) combines the information required for participation and/or for requesting reparations. In the early years of the Court, the processes required the completion of two separate forms, of 17 pages each.<sup>694</sup> The most recent combined form for participation and reparations totals four pages and is also available electronically. This is a significant improvement.

902. The Experts were informed that this 'new' combined application form for participation and reparations is currently being used in the *Yekatom/Ngaissona*<sup>695</sup> and *Al Hassan*<sup>696</sup> cases. It contains information by victims claiming reparations with related information in questions 6 (types of personal harm suffered) and 7 (forms of reparations, e.g. financial compensation, restitution, rehabilitation). They are to be used at the reparations phase, should a conviction ensue.<sup>697</sup> It is envisaged by the Registrar that the form will also be used in the *Ali Kushayb* case<sup>698</sup> and in all future cases.

#### 5. Registry-Led Victim Application Process

903. In terms of responsibility for identification of victims and managing applications, diverging approaches have been taken by different Chambers. The Chambers in *Lubanga* and *Al Mahdi* tasked the TFV with identifying victims.<sup>699</sup> In *Ntaganda*, the task was delegated to the VPRS.<sup>700</sup>

904. In the Experts' consideration, in order to reinforce the proper delivery of Court-ordered reparations, the whole reparations scheme should fundamentally aim at, and be steered towards, the relevant Chamber having available for its consideration, at the

<sup>691</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', ICC-01/04-01/06-3466-Red, 18 July 2019 - '[i]t is also important, and in the interests of both the victims and the convicted person, that the trial chamber conducts the reparations proceedings as expeditiously as possible', para. 108.

<sup>692</sup> RPE, Rules 94-95; see ICC-01/04-01/06-3129, para. 149.

<sup>693</sup> The Standard application form was developed by the Registry under Regulation 88 of the [Regulations of the Court](#), and approved by the Presidency under Regulation 23 sub-regulation 2.

<sup>694</sup> *Supra* n 678, [Justice for Victims: The ICC's Reparations Mandate](#), p.36.

<sup>695</sup> *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Case No. ICC-01/14-01/18](#).

<sup>696</sup> *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Case No. ICC-01/12-01/18](#).

<sup>697</sup> *Al Hassan - Application form for individuals; Yekatom/ Ngaïssona - Application form for individuals*.

<sup>698</sup> See *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb)*, Decision severing the case against Mr Ali Kushayb, ICC-02/05-01/07-87, 12 June 2020.

<sup>699</sup> See ICC-ASP/17/14, paras.42 and 51. Prior to the Chamber's decision in the *Lubanga* case, the TFV had noted the difficulties it would encounter in such a process - see *The Prosecutor v. Thomas Lubanga Dyilo* 'Observations on Reparations in Response to the Scheduling Order of 14 March 2012', ICC-01/04-01/06-2872, 25 April 2012, for e.g. para.135.

<sup>700</sup> *The Prosecutor v. Bosco Ntaganda*, Order setting deadlines in relation to reparations, ICC-01/04-02/06-2447, 5 December 2019; *The Prosecutor v. Bosco Ntaganda*, First Decision on Reparations Process, ICC-01/04-02/06-2547, 26 June 2020. A somewhat similar procedure was chosen in *Katanga* - see *The Prosecutor v. Germain Katanga*, Order instructing the Registry to report on applications for reparations, ICC-01/04-01/07-3508, 27 August 2014.

commencement of the reparations proceedings, all applications (requests) for reparations and their supporting documentation. The applications should be as complete and concrete as possible, from: (i) ‘participating victims’ who have already been admitted at the trial, and who expressed an intention to request reparations, and fall within the scope of the case following the judgment; (ii) any other new potential beneficiaries who may be eligible for reparations and intend to join the judicial process only at the reparations phase.<sup>701</sup> All the above, should be complemented by the Registry’s (VPRS) legal assessment of the applications. As a strategic direction and policy objective, this is achievable.

905. Simultaneously with that, in the Experts’ view, the reparation phase would also be remarkably enhanced by conferring on the Registry (VPRS) the principal responsibility, prior to the issuance by the relevant Chamber of the reparations order, for identifying, facilitating, collecting, assessing and processing all applications by ‘participating victims’; and those by new potential beneficiaries who may be eligible for reparations. This measure would also introduce procedural certainty and coherency.

906. A number of reasons render that finding compelling. The Registry is the Organ that plays the main role in outreaching, identifying, facilitating, collecting and analysing the applications by victims, both at the pre-trial and trial stage of proceedings.<sup>702</sup> In 2019, it did so in respect of the courtroom participation of 10,685 victims.<sup>703</sup> Many of the victims admitted at trial and subsequently requesting reparations would already have had their information with the Registry. Should any specific supplementary information for reparations still be needed from these victims, the Registry would be better placed to facilitate its production. The opportunity is one of comparative advantage.

907. Moreover, the identification and screening of victims, including any new potential beneficiaries eligible for reparations, involves many duties and actions that cut across all stages of the proceedings, pre-trial, trial and reparations. The process of victim identification and facilitation does not change from pre-trial through trial to reparations. Many of the relevant steps involved in interacting with victims apply to all stages, including those on safety and security, protection of witnesses and victims, special care of SGBV victims and appropriate engagement with vulnerable individuals and communities. Prior contacts, working relationships with and sound knowledge of local organisations, networks and intermediaries would also have already been developed by the Registry during the early phases of the judicial proceedings. Its staff in the field offices also would have acquired extensive knowledge of the local situation, experience and expertise relating to all these relevant steps. Any identification of new potential beneficiaries eligible for reparations who did not participate in the trial, should also be carried out by that same Organ, applying its acquired knowledge, skills and expertise.

908. Furthermore, the fact that the Registry’s victim database (Victims Applications Management System or VAMS) is used throughout all proceedings, including reparations, is an additional reason for keeping the victim information and record collection and database services united in the same organisational unit (VPRS). The right to privacy and the confidential nature of some of the records makes it imperative that the information should be in the same archival holding.

909. It is further relevant that the database also holds all information that is submitted by victims in all cases across the Court. The crucial added value of VAMS is that the VPRS can easily cross-reference between the various stages of a case (i.e. from pre-trial through trial to appeal) and, most significantly, across cases. A number of cases, before the Court have overlapping victims and potentially overlapping new potential beneficiaries who may be

<sup>701</sup> Cf. ‘Early identification of potential beneficiaries is thus important for two main reasons: it allows the Trial Chamber and the Trust Fund to adequately take into account victims’ views and perspectives when issuing a reparation order or developing an implementation plan respectively. At the same time, it allows victims who wish to do so, to participate in the process’, REDRESS, [Moving Reparation Forward at the ICC: Recommendations](#) (2016), p.13.

<sup>702</sup> The Registry’s role is, therefore, essential in ensuring victims’ effective access to the Court; under Rules 92(8) and 96(2) of the RPE, it is the Registry above all that is responsible for taking all necessary measures to inform the victims of the different stages of the proceedings to enable them to participate. *The Prosecutor v. Thomas Lubanga Dyilo*, Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations, [ICC-01/04-01/06-3218-tENG](#), 15 July 2016, para. 7.

<sup>703</sup> Report of the Court on Key Performance Indicators (2019).

eligible to apply for reparations. The management of the database is of essential assistance in the identification of duplicate applications by individuals or groups or of any overlap of victim groups across cases (e.g. DRC situations (*Ntaganda/Lubanga*) and Mali (*Al Hassan /Al Mahdi* cases), where it would be feasible to promptly ascertain the number of victims participating in both the trial and reparation proceedings for the same harm/crimes, which may be pertinent to the Chamber and to the TFV in the implementation of the reparations order.

910. Judicial economy is yet another factor in favour of conferring this responsibility to the Registry. In a context where the Court's resources are not unlimited, duplication of efforts and savings is a significant factor. With the arrangement proposed above, there would be less need for the TFV to expend additional resources or invest in setting up parallel structures. That the TFV is an independent body, or that it also has staff in the field is, on its own, no justification for it to reinvent or build an analogous and competing capacity with the Registry.

911. In sum, as a strategy, framework and procedure, the Experts propose that the Registry, and VPRS specifically, be conferred with the lead responsibility for all functions related to the processing of (i) victim applications for participation at the trial, who as a result thereof, may potentially be eligible for reparations and fall within the scope of the case following the judgment, and (ii) of all new potential beneficiaries eligible for reparations, who intend to use the process only at the reparations phase, before the issuance by the relevant Chamber of a reparations order.

912. Given the particular circumstances of each case, it is foreseeable that a number of potential new unidentified victims may come forward and request reparations at the implementation stage.<sup>704</sup> This may arise in the event of individual or collective reparations awards.<sup>705</sup> The Chamber in the exercise of its discretion on reparation proceedings is well placed to control and regulate this on a case by case basis. However, if the proposed lead responsibility of the Registry is timely, exhaustive, and competently and cooperatively managed, fewer completely unknown beneficiaries are likely to emerge for the first time at the implementation stage. Moreover, it would also meaningfully mitigate against the identification of new potential beneficiaries deep into the implementation phase, as is the situation in the Lubanga case, where throughout the course of 2019, the TFV was still carrying out victim identification,<sup>706</sup> over seven years after the issuance on 7 August 2012 by the Trial Chamber I of the Reparations order.

913. In regard to all the above, the Experts consider the First Decision on Reparations in the *Ntaganda* case,<sup>707</sup> reassuring and forward looking. It emphasises the appropriate steps to be taken in the proceedings up to the issuance of the reparations order. It constitutes a holistic and integrated process. It envisages that all reparations proceedings, including the post-reparations order implementation stage, should be combined. It also recognises the desirability that the same framework and processes should be followed in the various stages of the reparations proceedings.<sup>708</sup> Furthermore, in purposefully designating the Registry, through its VPRS, as the appropriate entity to lead the identification of potential beneficiaries, the Chamber positively took into account its significant role in outreach, vast experience with victims in the field, and particularly in assisting victims in participating in the different phases of the proceedings, including at the reparations stage.<sup>709</sup>

## 6. New Potential Beneficiary Requests and Information

<sup>704</sup> 'It would be incorrect to assume that the number of victims may only be established based on individual requests for reparations received by the Court. It would be undesirable for the trial chamber to be restrained in that determination simply because not all victims had presented themselves to the Court by making a request under rule 94 of the Rules of Procedure and Evidence.', [ICC-01/04-01/06-3466-Red](#), para.2.

<sup>705</sup> *Ibid.*, para.224: 'One of the factors that a trial chamber must consider in deciding what reparations are "appropriate" for the purposes of article 75(2) of the Statute is how many victims are likely to come forward and benefit from collective reparations programs during the implementation phase. In its inquiry, a trial chamber must endeavour to obtain an estimate that is as concrete as possible'.

<sup>706</sup> *The Prosecutor v. Bosco Ntaganda*, Trust Fund for Victims' response to the Registry's Preliminary Observations pursuant to the Order for Preliminary Information on Reparations, [ICC-01/04-02/06-2428](#), 3 October 2019, para.15.

<sup>707</sup> *The Prosecutor v. Bosco Ntaganda*, First Decision on Reparations Process, [ICC-01/04-02/06-2547](#), 26 June 2020.

<sup>708</sup> *Ibid.*, para.23.

<sup>709</sup> *Ibid.*, paras. 27, 39, 93.

914. Another substantial procedural cause of delay in the reparations scheme is the bar in the Chambers Practice Manual on the collection of individual victim application forms sufficiently before the commencement of the trial hearings.<sup>710</sup> This has been interpreted and effectively understood as prohibiting the Registry from any continued collection of information from new potential beneficiaries who have not applied for admission to participate at the trial, but who might only intend to subsequently request reparations, should a conviction follow. A delinking by the Registry in the continued identification and collection of any new requests for participation at trial and/or reparations, immediately before the commencement of and during the trial is also attributed to this bar.

915. This situation should be re-examined.<sup>711</sup> Fair trial rights and due process guarantees dictate that there should be continued identification and collection of applications from victims who may request to apply for admission to participate at the reparations phase, even after the time limit set by the Trial Chambers has expired. It is significant that the COVID-19 pandemic, and ensuing difficulties in reaching out to victims, led the Trial Chamber in *Yekatom* and *Ngaïssona* case, currently at the trial phase, to extend the cut-off date for the collection and transmission of victim applications for the trial to the end of the Prosecution's presentation of evidence.<sup>712</sup> There is no reason to treat differently requests for reparations and which do not seek admission to participate in the trial proceedings.

916. A freeze during the trial period, which could last a number of years, in the collection of requests for reparations and accompanying information from victims, intended for the reparations phase, causes a substantial bottleneck in the quest for the expeditious determination of reparations. A major saving in time and resources, and increased efficiency could be gained by lifting the bar.

917. To avoid any doubt on the intended use of the new applications which are not meant to be introduced at the trial, and to effectively manage victim expectations, given that reparations are only legally grounded on a conviction, the above should be plainly explained. And, such victims should be required to fill in only those parts of the combined standard form relating to reparations. If need be, the VPRS, with the Presidency's approval, could redesign the relevant parts of the application form for increased emphasis. In effectively managing expectations and avoiding re-traumatisation, the Registry's standard operating procedures now involve more direct contacts with individual victims and communities. Chambers have also given specific guidelines to the Registry (VPRS) for that very purpose.<sup>713</sup>

## 7. Reparations Experts

918. Chambers have the discretion to avail themselves of experts that could assist them in determining the scope and extent of any damage, loss or injury to, or in respect of victims, or in its consideration of various options on the appropriate type or modalities of reparations.<sup>714</sup> The early calling and commissioning of experts by Chambers would save time for the reparations phase. This is evidenced in the current *Ntaganda* reparations proceedings, where experts have already been expeditiously committed. While reparations is an emerging discipline in its own right, and the types and modalities of reparations are context and case specific, it should be possible for the Registry to find more proactive ways of identifying

<sup>710</sup> [Chambers Practice Manual](#), para. 98 (iv), 'The Trial Chamber sets a final time limit, sufficiently before the commencement of the trial, for the transmission of any further application by victims of the crimes charged'.

<sup>711</sup> Cf. 'For the purpose of enhancing the efficiency and effectiveness of the reparations proceedings taken as a whole, the Chamber considers it desirable for the identification of the victims potentially eligible for reparations to advance as much as possible before the issuance of the reparations order. Several benefits may flow from adopting this approach: (i) the information collected during the identification process may inform the approach to be taken in the Chamber's reparations order; (ii) it will facilitate the effective and timely implementation of the order; and (iii) it may assist the TFV in its preparation of the draft implementation plan of the reparations order.', [ICC-01/04-02/06-2547](#), para. 26.

<sup>712</sup> *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision Setting the Commencement Date of the Trial, [ICC-01/14-01/18-589](#), 16 July 2020.

<sup>713</sup> *Ibid.*

<sup>714</sup> [RPE](#), Rule 97(2); [Regulations of the Registry](#), Regulation 110(2).

relevant experts and thus enriching the list of experts it maintains pursuant to Regulation 44 of the Regulations of the Court.

## 8. Mutually Agreed Protocols

919. Much as it has been cogently submitted that at the reparations phase, the Defence has the right and incentive to robustly contest any claim for reparations, a fair and expeditious trial is also in its interest. Where possible, the reparations process could indeed be facilitated, as it is at the pre-trial and trial phases, by advance mutually agreed protocols between the parties, participants and the VPRS/TFV. Indeed, in a number of instances before the Chambers in the reparations phases, the Defence has extended a measure of appreciable cooperation. If this and other progressive practices at pre-trial and trial stages could be mirrored at the reparations phase, the process would be additionally enabled.

## 9. Chambers Oversight Role in Implementation

920. It is a part of the judicial mandate of Chambers to monitor and oversee the reparations implementation stage.<sup>715</sup> A question raised with the Experts is when exactly does judicial oversight and monitoring of TFV's implementation end. Is it midway or at the very end of say a five years project implementation period? Is it appropriate for the Chambers to supervise implementation up to its end, where issues of the project sustainability, transfer or handing over of the projects and exit accounting and audit occur? Should the Chamber intervene at project conclusion, if fraud or misappropriation of funds by an implementing partner were to emerge?

921. It is highly meaningful that the Chambers have clearly laid out the three decision-making processes at the reparations phase, beginning with the issuance of the reparation order, then authorisation of the implementation plan and ending with the approval of the reparations projects.<sup>716</sup> Continuous judicial monitoring and oversight, including over implementing Organs<sup>717</sup> and throughout the life of the project implementation has consequence for the overall length of the reparation proceedings, and the responsibilities of the oversight authority. There is a danger that at the end of the procedure, many years after the issuance of the reparations order, and the approval of the respective implementation plan, the Chambers would find themselves still overseeing or adjudicating on reparations.

922. Considering the above, in the Experts' view it is essential that a common understanding and agreement is reached by the ASP, the Court and the TFV of an appropriate cut-off point during the implementation phase, when it can safely and confidently be held that the stage has been reached when the project management is solely for the oversight authority. Absent that, there is a high risk that the Chambers would be transformed into perpetual boards of psychological and physical rehabilitation, socio-economic or income-generating reparations projects.

923. This demarcation too, would assist the Court and the implementing entity in effectively resolving the issue as to who among them bears a continuing or transferred responsibility to bear the cost burden of defence legal representation – towards the end of or at the final stage of project implementation. For consistency and coherence, this point of severance needs to be agreed to as a matter of principle and policy, taking into account the judicial responsibilities of the Chambers in the implementation of Court-ordered reparations. Along the long-drawn-out course of the execution of reparations projects by the TFV, legitimately and painfully perceived as endless by victims, a point and time must come when judicial oversight and monitoring of project implementation, must come to an end. It should then be transferred to and fully assumed by the implementing agency.

## **Recommendations**

<sup>715</sup> [ICC-01/04-01/06-3129-AnxA](#), para. 76.

<sup>716</sup> [ICC-01/12-01/15-324-Red](#), para. 14.

<sup>717</sup> [Regulations of the Trust Fund for Victims](#), Regulation 75.

**R342.** The Court should, in the context of its judicial proceedings, and as a priority, further the development of consistent and coherent principles relating to reparations in accordance with Article 75(1) of the Rome Statute.

**R343.** The Presidency should incorporate in the Chambers Practice Manual standardised, streamlined and consistent procedures and best practices applicable in the reparations phase of proceedings.

**R344.** The Court and the ASP should incorporate in the RPE or any other statutory text that reparations proceedings under Article 75 (Reparations to victims) and subsection 4 (Reparations to victims) of section III, Chapter 4 of the RPE, shall not be stayed pending an appeal against conviction and/or sentence, with proper safeguards for the fundamental rights of the accused or appellant.

**R345.** Increased investment should be made in, and more value drawn from, an early and proper completion, collection and processing of the combined standard application form for victim participation and reparations. The more complete the information gathered on the form, particularly on questions 6 and 7, including the collection of proper supporting documentation, the more facilitative it would be for subsequent use, in the eventuality of a conviction, in the reparations phase and in expediting the implementation of reparations.

**R346.** Measures should be taken by the Court, in particular by the Registry, the OTP, OPCV, LRV and TFV in their outreach, public information and in general in their interactions with victims and victim communities, to avoid creating any expectations on reparations, before the final outcome of appellate criminal proceedings against a conviction. Further, the Court's communication and outreach strategies should aim to express to victims and victim communities the limitations in circumstances and situations in which the Court may or cannot provide timely and effective assistance to victims in its assistance and/or reparations mandates.

**R347.** The Court should confer on the Registry (VPRS) the principal responsibility for identifying, facilitating, collecting, registering and processing, including the legal assessment of all (i) applications by victims for participation at the trial, who intend to request reparations, and may fall within the scope of the case following the judgment, and (ii) of all new potential beneficiaries eligible for reparations, and who intend to join the judicial process at the reparations phase, prior to the issuance by the Chamber of the Reparations order.

**R348.** There should be continued identification and collection of applications from victims who wish to join the proceedings, but request participation only in the reparations phase, even after the final time limit before the commencement of trial, as set by the Trial Chamber, has expired.

**R349.** The competent Chamber should have available for its consideration, at the commencement of the reparations proceedings, all applications (requests) for reparations and their supporting documentation, complemented by the VPRS' legal assessment of applications.

**R350.** The Registry should intensify efforts to identify and register reparations experts on its list of experts under Regulation 44 of the Regulations of the Court.

**R351.** The Judiciary should encourage the Registry, TFV, LRV, OPCV, OTP and the Defence to appropriately enter into Protocols that would enhance the efficiency and effectiveness of reparations proceedings in all its phases.

**R352.** The ASP, the Court and the TFV should consider a more clearly defined demarcation of the respective roles and responsibilities between the Chambers, as the judicial oversight and monitoring authority for the implementation of reparations plans and projects, and the TFV as an independent implementing agency, and a subsidiary body of the ASP, in particular during the final stages of the execution of reparations projects.

**R353.** More determined and resolute efforts should be made to solicit partnerships, cooperation and learning from the experiences of other competent and experienced organisations in the implementation of reparations projects similar to those being or likely to be realised within the framework of the Court's reparations scheme. To improve the implementation of reparations and assistance projects, more advantage should be taken of the

presence in situation countries of UN entities, as well as other international, regional or national organisations. Consideration should be given to the potentiality of Court-ordered reparations to feed into and reinforce national reparative justice and reparations efforts.

## C. The TFV and its Secretariat: Governance and Functioning

### Findings

#### 1. Delivery of Mandate

924. As noted above, the Rome Statute only makes reference of the TFV as a trust fund – to be replenished through funds and other property collected through fines or forfeiture collected in terms of the Court’s order, and to be managed based on criteria determined by the ASP.<sup>718</sup> Throughout time, the Trust Fund has evolved into the lead agency within the Rome Statute system for implementation of reparations and assistance. Out of the two mandates, the TFV has more experience in the latter than the former. Recently, the Trial Chamber noted in the *Al Mahdi* case that the TFV ‘has not yet gained command of its own mandate when operating within the judicial process’.<sup>719</sup>

925. The assistance mandate is not Court-ordered and is entirely within the authority of the TFV. However, it has direct linkage with the Court in that it is possible once a situation is under investigation that the Fund notifies the Pre-Trial Chamber<sup>720</sup> of its decision to undertake special assistance or projects. Given its limited capacity and resources, issues of prioritisation between the two mandates are bound to emerge. A call was made during the review for the TFV to re-calibrate its financial and other resources from assistance to reparations. Both mandates operate to reinforce the principle of reparative complementarity.<sup>721</sup>

926. Of recent, the acquittal of Mr. Bemba on 8 June 2018<sup>722</sup> prompted the initiation of assistance in the CAR, as a way to aid vulnerable victims, but also to mitigate the victim community’s negative reactions to the verdict.<sup>723</sup> This may also have created a precedent for future cases of acquittal.<sup>724</sup> The more penetrating issue arising, however, is the need for a coherent and sustainable strategy or policy to govern such eventualities, so that its assistance responsibility does not always end up as mere default following acquittals.

927. The Experts note in this regard that there is currently no strategy document or guidelines on principles to be followed in deciding on reparations or assistance projects. There are also no compilations of best practices and lessons learnt from implementation of the two mandates. The CBF recently invited the Court to start working, as soon as possible, on the policy and framework on the reparation process.<sup>725</sup>

928. Among other important areas of challenge to the fair, effective and prompt realisation of reparations awards are implementation plans and reparations projects. Both of these two inescapable and demanding responsibilities<sup>726</sup> of the TFV have complexities. They also require decision-making by the relevant Chamber. In Lubanga, following the Reparations Order, the drawing of the implementation plan by the TFV took over eight months. In *Al Mahdi*, the very reason for a delay of over eight months for the submission of a draft implementation plan, and out of time, was attributed to the TFV.<sup>727</sup> The Experts were informed that on average, at least fifteen months are required to properly contract a reparations project implementing partner. A huge new industry, it was further contended, has

<sup>718</sup> [Rome Statute](#), Art. 79.

<sup>719</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ‘Public redacted version of Decision on Trust Fund for Victims’ Draft Implementation Plan for Reparations’, [ICC-01/12-01/15-273-Red](#), 12 July 2018, para. 14.

<sup>720</sup> Under [Regulations of the Trust Fund for Victims](#), Regulation 50(a)(ii).

<sup>721</sup> ICC Press Release, ‘[Following Mr Bemba’s acquittal, TFV at the ICC decides to accelerate launch of assistance programme in Central African Republic](#)’ (2018); IOM, Evaluation of the Administration of the Secretariat of the Trust Fund for Victims (2019) (hereafter ‘IOM Evaluation of the TFV Secretariat’), p. 55.

<sup>722</sup> [ICC-01/05-01/08-3636-Red](#).

<sup>723</sup> IOM Evaluation of the TFV Secretariat, p.22.

<sup>724</sup> *Ibid.*, p.22.

<sup>725</sup> Report of the CBF on the work of its 33<sup>rd</sup> session, [ICC-ASP/18/15](#) (2019), para.127.

<sup>726</sup> [Regulations of the Trust Fund for Victims](#), Regulations 54, 57.

<sup>727</sup> [ICC-01/12-01/15-273-Red](#), paras. 11-15.

developed out of Court-ordered reparations. Furthermore, it was asserted that the TFV operated like an NGO and not as an independent and subsidiary body of the ASP.

929. Views were also expressed to the Experts that the Chambers were micro-managing the TFV's implementation plans, by engaging in project details. The Chambers, it was submitted, should only set out the general framework for individual and collective reparations based on the Court's legal texts and jurisprudence, and allow the TFV, as an independent body, to manage the reparations implementation.

930. In rendering the reparations scheme more effective, it was submitted to the Experts that one of the essential aspects often overlooked in TFV's implementation is the potentiality of Court-ordered reparations to feed into and reinforce national reparative justice and reparations efforts. In a number of countries such as the DRC and Mali, relevant national commissions endeavour to operate in tandem with the TFV's reparations projects. This is an area that requires reinforcement of collaboration with relevant States Parties.

931. The TFV recognises that the two gravest challenges it faces are lack of institutional capacity and financial resources.<sup>728</sup> It acknowledges that the actual implementation of reparations is materialising on the back of a steep learning curve.<sup>729</sup> Given the TFV's own admission that its concurrent engagement in three reparations proceedings and implementation (*Lubanga*, *Katanga* and *Al Mahdi*) constituted a severe strain on its modest capacity,<sup>730</sup> serious doubt remains on its capacity, as it currently stands, to effectively implement reparations in the event of foreseeable additional and simultaneous awards of reparations.

932. Sufficient experience and knowledge exists outside the Court on the implementation of reparation projects of the types designed by and implemented by the TFV or its partners. A physical and psychological rehabilitation project, a socio-economic scheme, income generating project or a vocational training programme may be new to the TFV, but known to and successfully implemented by other local or international organisations. More determined and resolute efforts are required in inviting and soliciting cooperation from other credible and competent partners.

933. While Chambers have recognised that the TFV has gained operational experience in implementation of reparations and assistance projects, in the Experts' assessment this has not yet translated into marked gains in their effective and prompt delivery. Signs of effective reparations must be visible, in-country, in the field, and ultimately by concrete realisation. Challenges and operational constraints remain in the design of project frameworks; the formulation of suitable projects; the identification of and the building of partnerships with local and other implementing agencies; procurement and contracts processes; the commissioning of projects, and their monitoring, supervision and evaluation.

## 2. Governance, Oversight and Management

934. When the ASP created the TFV, States Parties conceived a Board of Directors to 'establish and direct the activities and projects of the Trust Fund and the allocation of the property and money available to it, bearing in mind available resources and subject to the decisions taken by the Court'.<sup>731</sup> The Board of Directors, responsible for oversight of the TFV, consists of five members elected for a three year term, renewable once.<sup>732</sup> None of the provisions in the applicable Regulations provide any guidance as to how oversight of the TFV Secretariat should be achieved. Wide interpretation was reported to result in some roles being subsumed by the Secretariat that may be considered to be within the purview of the Board or overlap with activities of its Secretariat. It was suggested that without guidance from the Secretariat, the Board is somewhat powerless as to what its perceived roles should

<sup>728</sup> [ICC-ASP/18/14](#), p. 3.

<sup>729</sup> ASP, Statement of the Trust Fund for Victims Executive Director on the Evaluation Report of the Internal Oversight Mechanism (2019).

<sup>730</sup> [ICC-ASP/18/14](#), para. 99.

<sup>731</sup> [ICC-ASP/1/Res.6](#), Annex, para.7.

<sup>732</sup> *Ibid.*, para.2.

be.<sup>733</sup> Clear and formal delineation of roles and responsibilities need to be established. The ASP should also review the level of involvement and oversight it wishes the Board of Directors to apply, and resource it accordingly.

935. There seems to be an imbalance in the dynamic between the Board of Directors and the Head of the Secretariat. While the latter works full-time and is based in The Hague, Board members are scattered around the world, serving *pro bono* and working mostly remotely.<sup>734</sup> Combined with an absence of necessary resources, for example to assist Board members who are not fluent in English, as well as delayed receipt of documentation, the Experts were told that effective oversight over all operations and activities of the Secretariat was impossible.

936. Aside from the delays in implementing its mandate, further examples point to challenges in the functioning and effective oversight of the Secretariat under the current model of governance.

937. In 2018, the External Auditor found, in auditing TFV's financial statements for 2017, that the TFV's structure could not ensure the required level of rigour in terms of legal expertise, traceability and documentation, especially given the number of potential victims, depending on the case, when implementing individual reparations awards.<sup>735</sup> 'There was a risk of uncertainties as to the completeness, reality, and accuracy of the commitments, which, unless dealt with, could lead to significant difficulties in terms of certification'.<sup>736</sup> While progress seems to have been achieved in remedying this situation, its occurrence points to insufficient oversight.

938. At the end of 2019, the CBF 'noted with concern the constant under-implementation rate' of the TFV on budget, as well as the lack of a new strategic plan for 2019-2022.<sup>737</sup> It further noted that the implementation of reparations to victims required a more strengthened organisational structure.<sup>738</sup>

939. While fundraising was identified as a critical area in 2016, to date no fundraising strategy has been developed. A Fundraising and Visibility Officer joined the Secretariat in May 2019.<sup>739</sup> Work on defining the approach to private fundraising, begun at the CBF's recommendation, was still in its incipient stage one and a half years after the recommendation.<sup>740</sup>

940. The former Strategic Plan of the TFV 2014-2017 (extended until a new one is approved) outlined some areas for improvement in the management of its Secretariat, such as lack of clear internal communications, a lack of clarity between roles and responsibilities, and an outdated human resources structure and allocation of tasks. The IOM found in its 2019 evaluation of the Secretariat that these matters remained unresolved, and pointed to additional challenges stemming from the management of the Secretariat and the difficulty in ensuring effective oversight.<sup>741</sup>

941. Input shared with the Experts by all stakeholders - States Parties, Court staff and officials, and CSO was consistent in questioning whether the TFV was fit for purpose.

942. In conclusion, the Experts consider the TFV – in its current set-up – to be overstretched<sup>742</sup> and unable to effectively and meaningfully carry out its reparations and

<sup>733</sup> IOM Evaluation of the TFV Secretariat, p.44.

<sup>734</sup> 'Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims', [ICC-ASP/1/Res.6](#) (2002), Annex to the resolution, para.2.

<sup>735</sup> [ICC-ASP/18/15](#), para.135.

<sup>736</sup> *Ibid.*

<sup>737</sup> *Ibid.*, para.122. In response to their request to see the (draft) Strategic Plan of the TFV, the Experts were told in April and August 2020 that such a document was in the final stages. The Plan was eventually shared with the Experts on 21 August, when the Report was already in the final stages of editing. The Introduction to the Plan mentions that the TFV's Strategic Plan for 2020 – 2021 was adopted by the Board of Directors in March 2020 and an updated version in July 2020.

<sup>738</sup> *Ibid.*, para.126.

<sup>739</sup> *Ibid.*, para.147.

<sup>740</sup> *Ibid.*, paras.145-146.

<sup>741</sup> IOM Evaluation of the TFV Secretariat, p.22.

<sup>742</sup> The TFV Secretariat itself indicated in its most recent report to the ASP that it had been stretched to a maximum extent in order to cope with a radically increasing workload both in The Hague and in the field – Report to the ASP

assistance mandates. While they note that the Board of Directors, TFV Secretariat and the Court have made efforts to address the above shortcomings, including in response to the IOM evaluation, clear and systemic change is needed for the Court and the Rome Statute system to regain credibility with potential donors, civil society and victims in this regard.

943. The Experts suggest that increased efficiency and effectiveness could be gained if the TFV is focused on its original mission as a trust fund, with functions restricted to fundraising, administration of the funds, and release of the funds and property as ordered by the Court and complementing reparations awards.

944. In focusing on its core original mission as a fund, the TFV should develop as soon as possible a comprehensive and effective fundraising strategy that includes as targets private donors (e.g. corporations and large foundations and non-governmental organisations).<sup>743</sup> As part of this process, the advantages and disadvantages of different legal statuses for the TFV could be examined, with the purpose of identifying the ideal model from the point of view of fundraising, within the framework set by the Rome Statute. The strategy should further anticipate engagement with civil society organisations, aiming to benefit from their position as multipliers for the purpose of obtaining additional funds for the TFV.

945. Responsibilities and resources related to implementation of reparations and assistance mandates could be moved under the Registry's authority, namely to the VPRS. In so recommending, the Experts note the following. Firstly, a role for the Registry in the successful implementation of the Board's mandate was foreseen by the ASP already in 2002. Even before indicating the role of the Board, the ASP resolution indicates that 'The Registrar of the Court shall be responsible for providing such assistance as is necessary for the proper functioning of the Board in carrying out its tasks (...)'.<sup>744</sup> Further, the Secretariat (already) leverages essential administrative functions from within the Registry, including legal services; reporting to the CBF; human resource management and development; procurement; finance; budget development, monitoring and reporting; SAP; security; communication and outreach; field office support; external relations; fundraising; reparations; information management; counsel support; language support. The CBF recently requested the Court to report on division of responsibilities between Registry and TFV Secretariat, including possible synergies and duplications.<sup>745</sup> Finally, a significant part of delivery of projects is also outsourced to implementing partners.

946. The existing expertise in victim matters within the Registry should be complemented by transferring to the VPRS Secretariat staff with experience in reparations and assistance. Further input and expertise should be sought from field offices, as well as through cooperation with other international/regional organisations and external partners, such as civil society organisations.

947. The Experts realise that such a change in structure and requiring amendments to a number of the Court's and TFV's legal texts would need to be gradual, to ensure it does not overwhelm the Registry or affect ongoing reparations and assistance projects.

## **Recommendations**

**R354.** Increased efficiency and effectiveness could be gained if the TFV is focused on its original mission as a trust fund, with functions restricted to fundraising, administration of the funds, and release of the funds as ordered by the Court.

**R355.** The TFV should promptly finalise and publish a Strategy Document, aligned with the Court's and with relevant KPIs.<sup>746</sup>

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on the projects and the activities of the Board of Directors of the TFV for the period 1 July 2018 to 30 June 2019, [ICC-ASP/18/14](#) (2019), para.6.

<sup>743</sup> Social bonds were suggested by a civil society organisation as one possible novel way of funding the TFV. See OpinioJuris, David Scheffer, [Reducing the Funding Gaps for Atrocity Victims](#) (2020).

<sup>744</sup> [ICC-ASP/1/Res.6](#) (2002), Annex, para.5.

<sup>745</sup> [ICC-ASP/18/15](#), para.126. See also 'The Court provides various services free of charge to the Trust Fund, including office space, equipment and administrative services' – Financial statements of the TFV for the year ended 31 December 2018, [ICC-ASP/18/13](#) (2019), para.9.1. See further *ibid.*, paras.103-104.

<sup>746</sup> See also R5 (p.19) and R144 (p.117).

**R356.** The TFV should develop as soon as possible a comprehensive and effective fundraising strategy that includes as targets private donors (e.g. large foundations and non-governmental organisations). The strategy should further anticipate engagement with civil society organisations, aiming to benefit from their position as multipliers for the purpose of obtaining additional funds for the TFV.

**R357.** The ASP should also review the level of involvement and oversight it wishes the Board of Directors to provide the TFV, and resource it accordingly.

**R358.** Responsibilities and resources related to implementation of reparations and assistance mandates should be gradually moved under the Registry's authority, to the VPRS. The existing expertise in victim matters within the Registry should be complemented by transferring to the VPRS Secretariat staff with experience in reparations and assistance. Further input and expertise should be sought from field offices, as well as through cooperation with other international/regional organisations and external partners, such as civil society organisations.

**R359.** To facilitate and enhance cooperation of all actors within the Court with a victim-related mandate, including for the successful implementation of the above recommendations, a standing coordination body should be established, chaired by the Deputy Registrar.

**R360.** The standing coordination body should also facilitate the drafting and adoption of Manuals and Standard Operating Procedures on Reparations to Victims and on Assistance to Victims. These instruments should aim to assist Chambers in conducting efficient reparations proceedings through consistent application of judicial principles; bring clarity as to division of responsibilities between relevant actors; set out principles and guidelines for decisions on reparations and assistance projects; include best practices and lessons learnt from past TFV activities, as well as from the experience of other similar projects carried out by third parties. In this process, and especially on the latter point, the Court is also encouraged to consult with local CSOs working with victims.

## External Governance

### XIX. OVERSIGHT BODIES

#### A. ASP – Court Relations

##### Findings

948. There is widespread distrust of the ASP within all Organs of the Court. There is a sense in the Court that States Parties do not recognise that the Court was created by the Rome Statute and that its role is to administer justice, not to achieve policy ends. To many in the Court, States Parties seem to be more interested in reducing the budget than in providing the resources needed for the Court to function fully. Moreover, the ASP is seen as intent on micro-managing the operation of the Court, inter alia, through the Study Group on Governance (SGG) and The Hague and New York Working Groups, which make frequent and time-consuming requests for more information on its programs and management decisions. The Experts heard from certain staff that the requests for reporting leave little time for them to work on their regular tasks, as opposed to reporting on them.

949. For their part, many States Parties are frustrated with the Court, which they consider does not deliver full value for the funding their taxpayers provide, in terms of reducing the incidence of the crimes set out in the Rome Statute, through convictions and deterrence. Moreover when the ASP does seek to influence the Court to be more efficient and effective, they consider that the latter often resists, citing its independence from state control and its need for confidentiality. In these circumstances, the ASP has wielded what instruments it can to try to direct the Court, notably its power to approve/reject the budget, and broadly its authority to question the Court's administration.

950. The above mutual distrust and suspicion derives in part from the nature of the Court as a unique example of an international criminal justice ecosystem, containing not just a court, but an office of the Prosecutor, an investigating authority, defence counsel, an office catering to the needs of victims and witnesses, an administration, and representative offices in a range of relevant countries - in short, a highly complex and unusual organism where confidentiality and independence of decision-making are central to the proper functioning of the institution. At the same time though, under its Statute, the Court is an international organisation, similar to the UN and its specialised agencies, which operate under the close supervision and oversight of their member states. Thus States Parties that interact with the Court through the ASP and its subsidiary bodies have expectations of cooperation and responsiveness similar to those found at the UN, which are often not satisfied for the reasons mentioned above.

951. Overcoming distrust and rebuilding confidence in institutions takes time and effort. A good start would be made by the progressive implementation of the recommendations in this Report, particularly those related to the leadership and management of the Court, as well as more specific recommendations directed at improving the operations of the Court. Confidence would also grow with improved cooperation between States Parties and the Court, as well as stronger political support from the former when the Court is attacked by non-States Parties.

952. The leadership of the Court should recognise and respect the legitimate oversight and guidance role of the ASP, in accordance with the Three-Layered Governance Model, including its responsibility to approve the Court's budget. Just as national courts need to accept budgetary constraints imposed by the national government, so the Court must accept that States Parties which fund it have the authority to decide its budget. Questioning expenditure and priorities is not, *prima facie*, an attack on the judicial or prosecutorial independence of the Court.

953. There also seem to be different views between States Parties, on the one hand, and the Prosecutor, on the other, as to the concrete expectations on the Court's mandate. Beyond the mission entrusted to the Court in its Statute, bringing all stakeholders on the same page on

issues such as the type of cases the Court would look into, the level of cooperation States Parties understand and are able to offer, the Court's approach to positive complementarity, and preliminary examinations, would be beneficial. Such discussions would naturally be held in the context of the statutory framework laid down in the Rome Statute. The discussion could crystallise into a strategic plan for the Court for the next ten years. It could include agreeing on the level of activity that the Court is expected and desired to reach by that time, and the steps (resources, cooperation, and institutional development) that are required gradually to reach that point.

### **Recommendations**

**R361.** Cooperation between the Court and the ASP needs to be encouraged by the implementation of the recommendations in this Report and by stronger political support for the Court by States Parties.

**R362.** The Court should accept the legitimate authority of the ASP to decide its budget and should tailor its activities to match the resources available.

**R363.** A discussion among stakeholders (Court, States Parties and civil society) should be convened on the strategic vision for the Court for the next ten years, which will enable the Court and the ASP to focus their efforts of implementing the Rome Statute in the same direction. An outcome of the discussion should be agreeing on the level of activity that the Court is expected and desired to reach in ten years' time and the steps (resources, cooperation and institutional development) that need to gradually occur for the organisation to reach that point.

## **B. Internal and External Oversight Mechanisms**

### **Findings**

954. A number of internal and external mechanisms have been established to monitor aspects of the Court's management and operation, including the Office of Internal Audit (OIA), the Independent Oversight Mechanism (IOM), the Committee on Budget and Finance (CBF), the Audit Committee and the External Auditor. These seem to operate largely independent of each other and in the case of the internal bodies, are not given the resources – or it seems, not always the respect and authority – they need to carry out their mandates as well as they should. If the creation of the IOM took several years due to principled objections from the OTP, various degrees of resistance to any form of oversight persist. Specifically, the Experts were told that concepts of independence and confidentiality are often and widely used by the OTP and the Chambers as obstacles to effective oversight from existing mechanisms.

955. In light of the similar functions and memberships, as well as the size of the Court, the Audit Committee and the CBF could be merged into one Organ of budgetary control and audit.

956. The CBF members have a renewable mandate of three years. In practice, the Experts understood that the average real mandate is well over six years. A non-renewable longer mandate of five-six years for the CBF – Audit Committee would enable a more regular renewal of members, bringing in new ideas and approaches, while ensuring some stability.

957. As a work unit located in the Registry, the OIA would more properly report to the Principals rather than to the Audit Committee, a subsidiary of the ASP. This would not prevent the OIA from appearing before the new budgetary control and audit body as required, and responding to its requests. The new body's role towards the OIA would be overseeing the process rather than substance of the OIA's work.

## **Recommendations**

**R364.** The IOM and the OIA should be given enhanced authority and resources to be able to better carry out their functions.

**R365.** Heads of Organs and the next Prosecutor should commit to ensuring effective and full cooperation with oversight and disciplinary mechanisms. Additional confidentiality agreements could be envisaged for individuals in the relevant oversight bodies.

**R366.** The Audit Committee and the CBF could be merged into one Organ of budgetary control and audit. The mandate of CBF – Audit Committee members should be extended to a five-six years, non-renewable term.

**R367.** As a work unit located in the Registry, the OIA would more properly report to the Principals rather than to the Audit Committee, a subsidiary of the ASP. This would not prevent the OIA from appearing before the new budgetary control and audit body as required, and responding to its requests. The new body's role towards the OIA would be overseeing the adequacy of the framework set up for the Court's internal audit function, rather than oversight of the substance of the OIA's work.

**R368.** The ASP is recommended to make use of the upcoming recommendations of the External Auditor, tasked with assessing the Court's oversight bodies, to find ways to streamline and render more efficient its oversight structures.

## **C. Secretariat of the ASP**

### **Findings**

958. The ASP has its own secretariat that, while notionally part of the Registry, effectively operates independently of the Court management and answers only to the President of the ASP and other ASP bodies. This is a highly unusual arrangement, not replicated in the UN nor, as far as the Experts can determine, in any specialised agency (in those agencies, member states' assemblies and councils are supported administratively by the central administration – what in the Court's case would be the Registry). The Experts find the existing structure, justified as an effort to distance the Court from undue influence on the part of individual States Parties, actually undermines the capacity of the Assembly to understand the full range of Court operations; interferes with the Court's ability to explain its operations to States Parties, and actually duplicates functions already existing in the Registry. In short, the Secretariat is inefficient and duplicative.

959. The Experts note that some States Parties recently reaffirmed the importance of maintaining an independent Secretariat.<sup>747</sup> The two main reasons advanced for such independence are (i) 'the perceived need to shield the judicial institution and process from political influence from (individual) States Parties', and (ii) for the Secretariat 'to provide neutral information and advice to the ASP, not influenced by any of the Court's Organs, on legal, substantive and financial/administrative matters. It was felt that without such role, the ASP would not be able to determine the true budgetary and administrative issues and its response to them'.<sup>748</sup> In practice however, the ASP engages directly with the Court for information on budgetary and administrative issues, and is advised by a number of committees (e.g. CBF, Audit Committee). Based on the practice of other international organisations, and the UN specifically, the Experts find that the ASP's interests would best be served by direct support from the Court, and that there is no need for a separate body performing such services. In practice, this already seems to be the case, as for example the ASP interacts with the Court through its oversight bodies (the Audit Committee and CBF).

960. An office and focal point should be appointed within the Registry to coordinate with the different services of the Court to provide all necessary support for the ASP, which would

<sup>747</sup> Report of the Bureau on the assessment of the Secretariat, [ICC-ASP/17/39](#) (2018), para.15.

<sup>748</sup> ReVision Report: Secretariat of the Assembly of States Parties [ICC-ASP/16.INF.3](#) (2017), para.25.

reduce the Assembly's reliance on the Secretariat, and enable resources to be eventually deployed elsewhere. In the long-term, the Secretariat of the ASP, as an independent unit, should be wound up and its functions absorbed into the Registry.

### **Recommendations**

**R369.** An office and focal point should be appointed within the Registry to coordinate with the different services of the Court to provide all necessary support for the ASP. In the long-term, the functions of the Secretariat of the ASP should be taken over by the Registry, and the Secretariat of the ASP, in its current form, dismantled.

**R370.** In line with the Experts' recommendation for the ASP Secretariat to be absorbed into the Registry, it is envisaged that the Executive Secretary of the CBF and Audit Committee position, currently located in the ASP Secretariat, also be transferred to the Registry, where it would maintain its functional independence.

## **XX. IMPROVEMENT OF THE SYSTEM OF NOMINATION OF JUDGES**

### **Findings**

961. While the process for nomination of candidates for judicial office and the election process were not included among the topics remitted to the Experts, it has been impossible to ignore the comments made that suggest that the Court's problems may be in part the result of the standard of some of the Judges, in particular that the ability and experience of some of the Judges who have been elected has not marked them out as Judges or jurists of the highest calibre sought by the Court. The belief persists that some Judges have owed their success in the ballot more to electoral horse-trading than competence. That is consistent with the personal experience of some of the Experts of the campaigning and voting practices surrounding the UN elections that they have been involved in. It is remarkable just how prominent in international court circles is the assertion of the importance of judicial independence by both those responsible for the election process and the judges themselves. It is as if those involved constantly feel the need to dispel doubt.

962. Faced with the suggestion that the quality of the Judiciary may be part of the problem, and having regard to the fundamental importance of the calibre of the Judiciary to the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole, it was considered impossible to say that the Experts' review was complete without looking at the method by which the Judges are appointed, to see whether measures to improve the process could be identified with a view to ensuring the appointment of the best candidates.

963. It was not necessary for the Experts to look very far to find evidence of just how significant is the role that politics can play in the election of Judges. At their Assembly in December 2019, the States Parties passed Resolution ICC-ASP/18/Res.4 on the review of the procedure for the nomination and election of Judges, including at paragraph 10 the phrase: '[e]ncourages States Parties to refrain from the trading of votes'.<sup>749</sup> Sadly, the recognition of the existence of the practice was not accompanied by a decision or undertaking to refrain from the practice, but by that rather weak phrase which bears the appearance of an aspirational statement made by some well-meaning outside observer. It would be surprising if there were not States Parties which sought a statement of a clear commitment to the outlawing of the practice. Nevertheless, it is disturbing to discover that the practice of trading votes out of political self-interest, unrelated to the calibre of the candidate for election to a leading, international judicial post, is so well-entrenched that some States Parties still to this day find it politically expedient and acceptable to adhere to it. The remainder appear to

<sup>749</sup> Resolution on the review of the procedure for the nomination and election of judges, [ICC-ASP/18/Res.4](#) (2019), para. 10.

tolerate it at a time of widespread, grave concern that the Court is proving to be less effective and efficient in the global fight against impunity than was hoped by its many supporters.<sup>750</sup>

964. In the face of the indication that there is currently no appetite to abandon this practice and elect Judges solely on merit, and in the absence of confidence in the integrity of the election process, it was considered appropriate to concentrate on the nomination procedure. The Experts were ever mindful that the ASP had identified the Working Group on Nomination and Election of Judges as the body with principal responsibility for these aspects of a review of the Court. However, having regard to the provisions of the above-mentioned Resolution relating to the nomination of candidates and the range of possible actions listed in the Matrix, extending even to the consideration of the formation of a Judicial Appointments Commission, the Experts did consider that there were observations that could be made relating to the provisions of the Resolution and around the topic of nominations in general that the ASP might find helpful.

965. The nomination process is addressed in ICC-ASP/3/Res.6 and ICC-ASP/10/36, the latter containing the Terms of Reference of the Advisory Committee on Nominations of Judges (ACN), both as amended by ICC-ASP/18/Res.4.<sup>751</sup> At the last two judicial elections, States Parties have had the assistance of a report by the ACN when voting. The ACN has been given additional powers by ICC-ASP/18/Res.4; these will be available for the first time at this year's election.<sup>752</sup> It is clear that at past elections, candidates who were not fluent in one of the official languages of the Court to the degree required to preside in Court have been elected. So, too have Judges who fall short of the description in paragraph 1 of the above-referenced Resolution: 'qualified, competent and experienced persons of the highest quality'. However, if the result of changes made to the nomination process were to ensure that all candidates who reach the ballot are judges or jurists of the highest calibre, then the election process would be of less significance than the nomination process. On one view, from the perspective of experience and ability, it would not matter which candidates were elected.

966. The basic requirements for nomination are set out in the Statute, at Article 36(3)(a)-(c). In many legal systems, large number of lawyers will possess the necessary qualifications. The real question is whether any is a judge or jurist of the highest calibre with the experience, ability and skills necessary to conduct a mass atrocities trial of a complex nature over a number of years, both fairly and expeditiously. The genuine List A candidate will not just have the qualities and possess the qualifications set out in Article 36(3)(a)-(c), but they would be a genuine contender for one of the highest judicial offices of their State, most likely as the result of judicial experience, but possibly also because of experience as leading counsel or prosecutor in comparable cases. Such person would not simply be a candidate who holds the eligibility requirements, but one who would be perceived in their domestic jurisdiction as likely to be appointed to one of the highest judicial offices. The genuine List B candidate may be an academic or diplomat or an experienced legal professional in some other field of law. The qualification in Article 36(3)(b)(ii), namely 'extensive experience in a professional legal capacity which is relevant to judicial work of the Court', would appear to have constituted an opening for the consideration and listing of candidates from the wider pool of legal professionals. However, a candidate who relies on experience in such areas should, other than in an exceptional case, be required to demonstrate the skills necessary to conduct a war crimes trial. That is because no Judge can know in advance in which Division they will serve, and in all Divisions, but especially the Trial Division, particular practical skills are likely to be required.<sup>753</sup> It is clear from both interviews and written submissions that the view is held by some familiar with the Court that not every Judge who has served on the Court

<sup>750</sup> The fact that politics influence the outcome of the judicial appointment process of other international courts is no justification for that to be the case at the ICC, see Ruth Mackenzie *et al* (eds) *Selecting International Judges: Principle, Process, and Politics*, (Oxford University Press, Oxford: 2010) p. 179, stating '...urgent steps need to be taken to limit the growing and pervasive role of extraneous political factors in order to ensure that politics does not overwhelm the prospects for selecting the very best judges for the international courts'.

<sup>751</sup> Resolution on the procedure for the nomination and election of judges of the International Criminal Court, [ICC-ASP/3/Res.6](#) (2004); Report of the Bureau on the establishment of an Advisory Committee on nomination of judges of the International Criminal Court, [ICC-ASP/10/36](#) (2011); [ICC-ASP/18/Res.4](#) (2019).

<sup>752</sup> [ICC-ASP/18/Res.4](#).

<sup>753</sup> See [Rome Statute](#), Art. 39(1), stating that, '[t]he Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.'

could be described as a judge or jurist of the highest calibre with the experience, ability and skills required.

967. While the amendments to the nomination procedure in ICC-ASP/18/Res.4 give cause for optimism, they do not in and of themselves provide cause to anticipate a significant improvement in the calibre of candidates proposed by States Parties. They could, however, be revised to do so. The first one of significance in Annex I, B simply requires an indication whether the nomination is made by the procedure for nomination of candidates to the highest offices in that State or the procedure for nomination of candidates for the International Court of Justice (ICJ) according to the ICJ Statute and specifying the elements of the procedure. The shortcomings of the latter, particularly the lack of transparency, are well-known and the use thereof should be discouraged. That should be done in conjunction with the initiation of a process leading to the harmonisation of the nomination procedures followed by States Parties as discussed below.

968. Part of these harmonised nomination procedures should be the distribution to candidates of a clear statement, compiled by the Registry, of the Conditions of Service and of the support available to Judges which makes clear that that support relates exclusively to the performance of their professional duties and that there is no, or inadequate, provision for personal staff or assistance. It should also be made clear to them what pension and other social security entitlements, if any, they would have. Other matters for which there is no provision and which were drawn to our attention by Judges affected include medical insurance cover, repatriation costs and home leave entitlements.

969. Paragraph C provides for candidates to be available for interview before the ACN but requires States Parties merely to 'endeavour' to ensure that candidates make themselves available for interview. There is provision for the interview to be by 'videoconference or similar means'. Since that interview process is probably the most important part of the nomination process, the State obligation should be to 'ensure' the attendance of the candidate. The ACN should also be authorised to insist on personal attendance. Failure to attend should disqualify the candidate. The importance of the interview lies in the opportunity for the members of the ACN not only to make a full assessment of the experience, knowledge and ability of the candidate, but also to judge the personal qualities of the candidate. It is a chance to make an informed judgment on how well-equipped the candidate is to be part of the Court and how likely it is that the candidate will establish good working relationships with judicial and other colleagues and with parties in the Court.

970. Paragraph D provides for public roundtable discussions with all candidates after the ACN has completed its assessments of the candidates and shortly before the election. The New York Working Group (NYWG) has authority to determine additional modalities. The interaction with other candidates and with the representatives of States Parties and other stakeholders involved in that format provides a further and different opportunity, this time for the States Parties directly, to assess the calibre of the candidates. In determining the modalities for the roundtable discussions, the NYWG should have particular regard to aspects of the candidate assessments highlighted in the ACN report. It would be helpful to include in the agenda topics that would help shine further light on these aspects with a view to supplementing the report and thus the information available to States Parties' representatives viewing the discussions either live or on the website of the ACN.

971. In addition to these amendments to the nomination procedure, ICC-ASP/18/Res.4 also amended the terms of reference of the ACN by adding a number of additional duties. They are required by a new paragraph 5 bis to:

- (i) develop a common questionnaire for all nominees that asks them to explain: (a) their experience in managing complex criminal proceedings; (b) their experience in international public law; (c) specific experience in gender and children matters; (iv)

track record of impartiality and integrity; and fluency in one of the working languages of the Court;

(ii) ask nominees to demonstrate their legal knowledge by presenting relevant evidence;

(iii) check candidates' references and any other information publicly available;

(iv) create a standard declaration for all candidates to sign that clarifies whether they are aware of any allegations of misconduct, including sexual harassment, made against them;

(v) assess practical skills such as the ability to work collegially; knowledge of different legal systems; and exposure to and understanding of regional and sub-regional political, social, and cultural environments;

(vi) document the national-level nomination processes in the nominating State Parties;

(vii) report on the above aspects.

972. It is assumed that the ACN will explore items (i), (ii) and (v) in the interview, and will carry out such checks as they consider appropriate to vouch the information provided in the questionnaire. It would provide further reassurance if the questionnaire was countersigned by a senior member of the Judiciary or of the relevant judicial nominations/appointments body confirming the accuracy of the information provided. Among the practical skills that should be assessed in the interview is the ability of the candidate to manage and conduct complex criminal trials fairly and expeditiously and their suitability to act as a Presiding Judge.

973. Acquiring details of the nomination procedures followed in States Parties under (vi) above, or as the result of States Parties responding positively to paragraph 6 of the Resolution, is designed to lead to the ACN holding a database from which it should soon be possible to compile a set of universally applicable criteria. It could thereafter devise guidelines for States Parties to follow in reviewing and, in some cases, framing, their nomination procedures. In an ideal world that would happen before the next election in three years' time. In order to ensure that it does, the States Parties should be 'required', rather than 'encouraged' as they were by paragraph 6 of the Resolution, to submit details of their nomination procedures within a year and thereafter to intimate any changes when they occur. In keeping with that, a nominating State should be required to submit along with the nomination of their candidate a certificate setting out the procedure followed leading to the nomination of the candidate, completed and signed by the senior official responsible for that process. The Working Group on Nomination and Election of Judges will no doubt have in mind the importance to international recognition and acceptance of the legitimacy of the Court of publicly-advertised, open, transparent, merit-based selection processes for candidates at State level.<sup>754</sup> These guidelines would ideally include the commitment of the State to retain the candidate as a member of the national Judiciary if unsuccessful and to restore the candidate, if successful, to the ranks of the national Judiciary or other appropriate post on the expiry of the Judge's Court term of office.

974. Of course the true worth of an advisory committee lies in its membership and how they interpret and implement their mandate. The ACN was initially required by paragraph 10 of its Terms of Reference to prepare information and analysis, of a technical character, strictly on the suitability of the candidates to be available to States Parties before the election. At the outset, and even following the December 2019 amendments, the role of the States Parties alone as the electorate was always stressed. However, the December 2019 amendments

<sup>754</sup> On the issue that most States Parties do not have a framework in place that governs nominations of judicial candidates to the Court, see OSJI, [Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court](#) (2019), p.4; the lack of transparent nomination processes at the national level including through interviews, hearings and examination with an independent authority appears to persist vis-à-vis the most recent nominations as studied by the Open Society Justice Initiative; see for example Yassir Al-Khudayri, [Through the Looking Glass: The 2020 ICC Judicial Nomination Processes Up Close](#) (2020).

include a change to the reporting requirement which is now set out in a new paragraph 10 bis inserted into the Terms of Reference as follows:

‘Once the Committee has completed its work, it shall prepare a thorough and detailed report, of a technical character, that will include for each candidate:

- (i) information collected in accordance with paragraph 5 bis;
- (ii) qualitative evaluation, information, and analysis, strictly on the suitability or unsuitability of each candidate for a judicial role in light of the requirements of Article 36, including detailed reasons for the Committee’s evaluation; and
- (iii) indication of the national nomination procedure used, including if it was followed in each specific case.’

975. High in the mind of the committee members when drafting the report should be their impression of the capacity of the candidates to conduct fairly and with expedition a lengthy and complex international criminal trial. The potential significance of the report cannot be over-estimated. However, to enable the report to achieve the objective of providing highly relevant information to the electorate, it should be available to States Parties at an earlier date, and States Parties should be committed to accepting and proceeding upon the determinations the Committee makes. For example, it should not be appropriate for any State to vote for a candidate assessed by the Committee as ‘unsuitable’ for a judicial role at the Court.

976. It is clear that a much more detailed assessment of the relative suitability of the candidates is now expected than in the past. For the last election, the Committee confined themselves to distinguishing the candidates as ‘formally qualified’ or ‘particularly well qualified’, a distinction that could leave no fair-minded reader in doubt about which candidates fulfilled the ASP’s stated aim of nominating and selecting the most highly qualified judges in accordance with Article 36 of the Rome Statute. In spite of that, at the last election, where six of the candidates were described as ‘formally qualified’ and six as ‘particularly well qualified’, two of the ‘formally qualified’ candidates were elected. The specific inclusion in the mandate of the Committee of the responsibility to report an unsuitable candidate as such should play a major role in enhancing the calibre of the Court Bench. The possible actions listed under the topic ‘Election of Judges’ in the Matrix, from additional requirements to the creation of a Judicial Appointments Commission, indicate further measures that could be taken to enhance the calibre of the Bench should those now recommended prove insufficient.

977. Two further thoughts are offered on this topic. They are related to each other and are prompted by realising just how important to the fair and expeditious conduct of pre-trial and trial proceedings are Judges with substantial experience of conducting serious, lengthy and complex criminal trials, and particularly experience of presiding in such trials. Those whom the Experts met frequently expressed doubts about the value of List B. The Court is no different from courts in general in finding that the daily dose of contentious issues generally relate to matters of fact and procedure. While important matters of law also arise, they tend to do so less frequently. Experience shows that Judges elected from List B are mainly assigned to the Pre-Trial and Trial Divisions. It is there that practical judicial skills are important. The word ‘Judge’ does not appear among the List B criteria. The time has come to assess the extent to which the particular experience and skills of Judges elected from List B have added value to the work of the Court. The other thought relates to the composition of the Committee. At present, it comprises nine State Party nationals ‘drawn from eminent interested and willing persons of high moral character, who have established competence and experience in criminal or international law’. The Committee has to date comprised a particularly distinguished group, including a number of international judges. Nevertheless, it may be appropriate to consider whether the presence of distinguished international judges should be a requirement, possibly by adding to the requirements: ‘(...) and of whom at least five members have established experience and competence as a judge of an international criminal court or tribunal’.

## **Recommendations**

**R371.** The procedure for the nomination and election of Judges should be amended as follows: (i) States Parties should be required to ensure the attendance of candidates in person for interview by the ACN; (ii) the Interview should be an essential element of the process and any candidate not attending should be disqualified barring exceptional circumstances; (iii) Similarly, participation in the roundtable discussions before the election should also be mandatory with failure to participate also resulting in disqualification barring exceptional circumstances.

**R372.** In designing the modalities of the roundtable discussions, the NYWG should have particular regard to aspects of the candidate assessments highlighted in the ACN report and include on the agenda topics aimed at supplementing the report in relation to these aspects.

**R373.** The ACN should include in the common questionnaire to be completed by all nominees provision for its accuracy to be certified by a senior member of the national-level Judiciary or of the nominations/appointments body which oversaw the nomination process.

**R374.** The ACN at the candidate interview should endeavour to assess the ability of the candidate to manage and conduct complex international criminal trials fairly and expeditiously and their suitability as a Presiding judge.

**R375.** The ACN should require the nominating state to submit along with the nomination a certificate setting the procedure followed leading to the nomination.

**R376.** The ASP should initiate a process leading to the harmonisation of the nomination procedures followed by States Parties. That should include requiring States Parties providing in the course of 2021 information and commentary on their own existing or prospective procedures for nomination of candidates to the Court.

**R377.** In time for the election of Judges in 2023, the Working Group on Nomination and election of Judges should compile a set of criteria which should be applied in national-level nomination processes along with guidelines on the conduct of the nomination process.

**R378.** States Parties should accord utmost respect to the assessments in the ACN report and should not cast their votes in a way that is inconsistent with any aspect of an assessment.

**R379.** The Working Group on Nomination and Election of Judges should consider whether it is now appropriate to review the criteria applicable to and the profiles of candidates from List B, having regard to the significance of criminal trial experience to the work of the Court.

**R380.** The Working Group on Nomination and Election of Judges should consider whether it is now appropriate to review the qualifications for membership of the ACN.

## **XXI. DEVELOPMENT OF THE RULES OF PROCEDURE AND EVIDENCE**

### **Findings**

978. One element of functional agility which was highly prized by the Judges of the ad hoc Tribunals, and which contributed greatly to their ability to apply the lessons learnt from problems encountered to overcome procedural obstructions and expedite proceedings, was the provision which placed authority over the Rules of Procedure and Evidence (RPE) in their hands.<sup>755</sup> Next to the legislative provisions establishing international criminal courts and tribunals, laying out their structure and authority, and addressing a range of other matters, including stating many of the rules applicable to court proceedings, the most important legal provisions governing their working practices are to be found in the RPE. At the Court, in addition to the RPE, there are Regulations and a Chambers Practice Manual which also

<sup>755</sup> [Statute of the International Criminal Tribunal for the Former Yugoslavia](#), Art. 15; [ICTY, Rules of Procedure and Evidence](#), Rule 6; [Statute of the International Criminal Tribunal for Rwanda](#), Art. 14; [ICTR, Rules of Procedure and Evidence](#), Rule 6.

address procedural matters, the former being binding, but the latter purely advisory. The provisions of both are important elements in the ‘legislative’ scheme of the Court with the stated aim of ensuring that proceedings are fair and expeditious. As these instruments refer to court proceedings, they fall in Layer 2, Administration of justice, under the Three-Layered Governance Model.

979. Creation and amendment of Regulations and elements of the Chambers Practice Manual rest in the hands of the Judges. The issue with the Practice Manual is ensuring that the Judges adhere to its provisions in practice, which is addressed elsewhere in this Report.<sup>756</sup> Article 52 of the Rome Statute provides that the Judges ‘shall (...) adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning’.<sup>757</sup> They are obliged to consult the Prosecutor and the Registrar in the elaboration and the amendment of the Regulations. However, the important point is that the Regulations and any amendment take effect upon adoption, unless the Judges decide on a different time-scale. On adoption, they must also be circulated to States Parties for comments. Unless there is objection from a majority of States Parties within six months, they remain in force. Those provisions do not appear to have given rise to any problems in practice.

980. The same cannot be said for the RPE. They were originally adopted by consensus of the States Parties. Amendments may be proposed by any State Party, the Prosecutor or the Judges, acting by an absolute majority. Article 51(2) provides that such an amendment ‘shall enter into force upon adoption by a two-thirds majority of the members’ of the ASP.<sup>758</sup> However, that is not what happens in practice; they enter into force only by consensus. Therein lies a problem for the Court. A number of proposed amendments lie in limbo in the absence of consensus, even where there is a two-thirds majority in favour.<sup>759</sup> Effectively one State’s consensus is another State’s veto. The ASP was described by one contributor as having taken Rule-making hostage.

981. Currently a proposal which has the support of at least five Judges on the Working Group on Lessons Learnt (WGLL) is transferred to the Advisory Committee on Legal Texts (ACLT) for consideration. It is then passed to the Study Group on Governance and, if they endorse the proposal, then to the Working Group on Amendments (WGA) in New York.<sup>760</sup>

982. Two particularly challenging aspects of the current procedure are ‘a high resource intensity and a high threshold for adoption’. The time consumed by Court-internal preparations is estimated at 100 hours, and that spent in separate discussions in the working groups at 50 hours per working group per proposal. It is concerning that so much time should be spent considering Rule amendments. Duplication of work is inevitable. In spite of Article 51 giving the green light to an amendment favoured by a two-thirds majority of States Parties, the consensus approach has produced stalemate and has resulted in the Judges deciding not to put forward amendments for the time being.

983. No clear way forward to resolve the deadlock disabling the Court from steadily introducing measures to improve the multifarious aspects of its procedures seems to have been identified so far. There is an urgent need for the Court to consider and adopt practices enhancing the efficiency, effectiveness, considerateness, courtesy, and fairness of proceedings. These are all matters that, on their face, fall under Layer 2 of the Court’s Governance and would thus better be dealt with by the Judges, whose experience and daily workload are a rich source of progressive ideas.

984. While any suggestion to break the deadlock, and provide for the rule amendment proposals to be determined one way or the other, is to be welcomed, the fact remains that the

<sup>756</sup> See *supra* Section X.A.4. Chambers Practice Manual and Judicial Case Management.

<sup>757</sup> Rome Statute, Art. 52.

<sup>758</sup> *Ibid.*, Art. 51(2).

<sup>759</sup> Three amendment proposals by the Court have not been adopted by the ASP of which one is a proposed amendment to Rule 140 *bis*. The ASP has also neither adopted nor rejected the provisional amendment to Rule 165 adopted by the Court in relation to Article 70 cases. See [Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence](#) (2016); see also Report of the Working Group on Amendments, [ICC-ASP/13/31](#) (2014) and [ICC-ASP/18/32](#) (2019).

<sup>760</sup> [ICC-ASP/13/31](#).

foregoing history has demonstrated that driving progressive development of the RPE is not one of the strengths of the ASP.

985. In their work over the past few years in developing the Chambers Practice Manual and Judgment Drafting and Structure Guidelines, the Judges have displayed awareness of areas of their work which would benefit from more regulation aimed at building greater consistency, clarity and predictability into proceedings.<sup>761</sup> No complaint was made to the Experts about the steps taken by the Judges through the media of the Regulations and the Manual. The only complaint of significance was of the failure of some Judges to adhere to the terms of the Manual. The Judges themselves recognise that there is scope for improved adherence which they appear intent on achieving. It has been suggested that some provisions of the Manual, such as time limits, might be better observed if they were incorporated into the Regulations. The provisions most frequently identified in this connection were those relating to the appropriate form in which a confirmation of charges decision should be expressed. The provisions could not be clearer and examples of their implementation demonstrate the resultant clarity that brings to the decision which should set out discretely, on the one hand, the charges which include the material facts described therein, and on the other, the evidence on which they are based.

986. Bearing in mind the need for a reliable and readily accessible mechanism for amending the RPE to ensure the efficient, effective and fair conduct of Court proceedings, it is now appropriate for the power to amend the RPE to be transferred to the plenary of Judges, the body best-placed and best-qualified to know what amendments should be made in keeping with the aim of guaranteeing fair and expeditious proceedings. It would be appropriate to apply to RPE amendments an obligation on the Judges to ensure, and certify to that effect, that any amendment is not inconsistent with the provisions of the Rome Statute and the right of accused appearing before the Court to a fair and expeditious trial. Until an amendment in this regard is made to the Rome Statute, the ASP should apply the provisions of Article 51(2) of the Statute and decide on proposals of RPE amendments by two thirds majority, rather than consensus.

### **Recommendations**

**R381.** Article 51(2) of the Rome Statute should be amended to provide that amendments to the RPE may be proposed by a Judge, the Prosecutor, the Defence Office<sup>762</sup> or any State Party, and that any amendment will enter into force if agreed to by an absolute majority of the Judges at a plenary meeting convened with notice of the proposal.<sup>763</sup> It would have immediate effect. Until such an amendment enters into force, the ASP should vote on RPE amendments by two thirds majority, rather than consensus, in line with the provisions of Article 51(2).

**R382.** Any proposal should be intimated to the Prosecutor and the Registrar a reasonable time before the plenary meeting for their comments.

**R383.** In adopting any proposal, the Judges should be required to ensure, and to certify to that effect, that the amendment is not inconsistent with the provisions of the Rome Statute and the right of accused persons appearing before the Court to a fair and expeditious trial.

**R384.** On adoption the amendment should be circulated to States Parties for comment and would remain in force in the absence of objection from a majority of States Parties within six months.

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<sup>761</sup> See [Chambers Practice Manual](#).

<sup>762</sup> See *supra* Section [XVI.A. Institutional Representation](#).

<sup>763</sup> [Rome Statute](#), Art. 51(2).

## CONCLUDING REMARKS

987. This Experts' Review of the Court and of the Rome Statute system is part of a wider trend in the field of international organisations. After the proliferation of multilateral institutions in the 1990s and 2000s, the focus is now on consolidating existing ones.

988. Parties are pushing to improve institutions' efficiency and cost-effectiveness, so as to enhance their impact. The recommendations included in the Report are aimed at assisting the ASP and the Court in achieving these goals.

989. Reinforcing the efficiency and effectiveness of the Court is necessary both to address current deficiencies, and – even more so – to enable it to be prepared for future challenges and thus stand the test of time.

990. There are many calls for international justice to respond to global threats, whether it is threats to our planet (ecocide), large industrial catastrophes or kleptocracy. Recent significant events of global concern are nowadays almost always accompanied by calls for global justice to be served.

991. For enhanced impact in affected communities, there might also be calls to widen the scope of international criminal responsibility, whether it is to include criminal responsibility for legal persons (mercenaries, financial institutions or companies that support regimes that commit international crimes), for dangerous behaviours (expanding the *dolus eventualis* to take into consideration those who put their own population at risk) or for those designing artificial intelligence to be used in the commission of crimes.

992. Whatever direction the debate will go on such issues, it will always be important for international justice, and the Court specifically, to consider and engage with local communities and victims. Consequently, a more decentralised system might be contemplated in the future, whether it is through enhanced use of digital tools to enable closer involvement of a wider number of stakeholders, or establishing continental hubs of the Court to bring justice closer to affected communities.

993. In order to address these global challenges through innovative ways, the Court's efficiency and effectiveness must be enhanced. The recommendations in this Report will hopefully assist in this regard.

994. The Experts are grateful to have had the opportunity to make a contribution to strengthening the Court and the Rome Statute system. The deficiencies and shortcomings observed in the Court and the Rome Statute system do not in any way call into question the necessity and value of the Court. The Experts are firm believers in the role the Court plays in alleviating the suffering of victims of atrocities, by holding perpetrators accountable and by delivering reparations. The Court helps protect humankind from harm through the deterrent effect of international justice. By rallying around the Court, the international community can act together, in solidarity, to foster peace.

## ACKNOWLEDGEMENTS

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## APPENDIX

### ANNEX I. SUMMARY OF PRIORITISED RECOMMENDATIONS

1. This Annex presents a summarised version of those recommendations the Experts advise should be prioritised for implementation.<sup>764</sup> A cross-reference is made at the end of each paragraph to the recommendation(s) contained in this Report to which it refers. The findings and context to which the recommendations refer are to be found in the Report. Every effort has been made to avoid any discrepancies between this summary and the essence of the recommendations. In case of any discrepancy between the two, the text of the full recommendations is to be considered as authoritative.

#### Court-wide matters

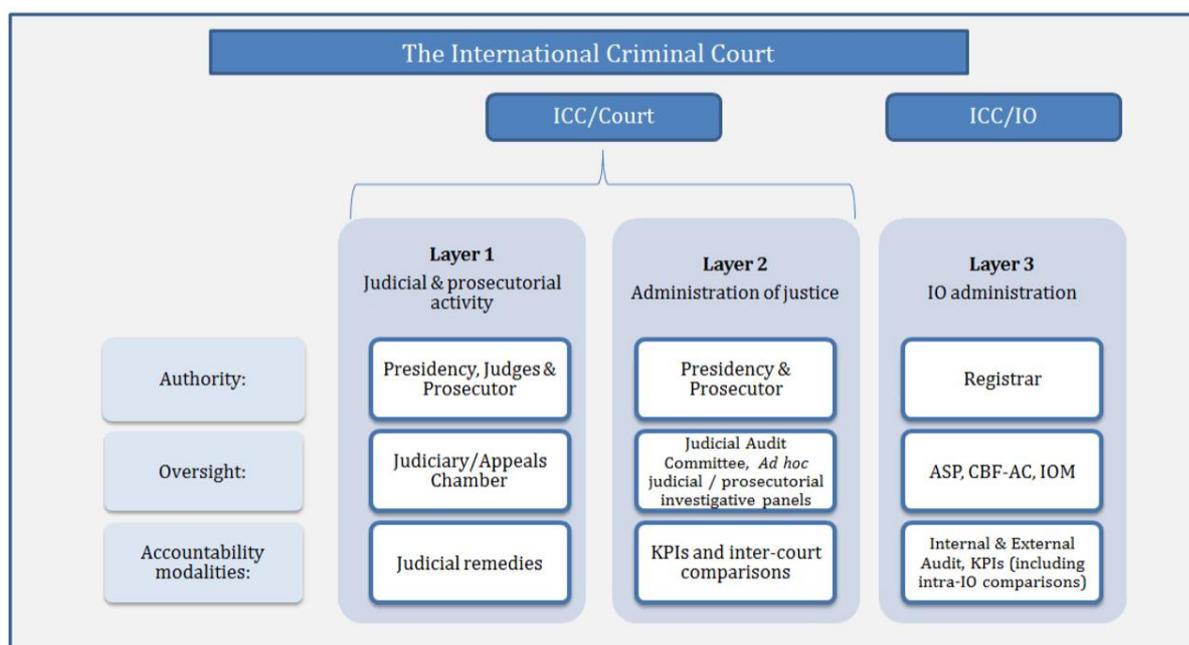
#### Section I GOVERNANCE

##### I.A. Unified Governance

##### 1. Structure of the Court

2. The Three-Layered Governance Model should be used as a tool to ensure effective and efficient governance, clarify reporting lines, and improve cooperation between stakeholders. [R1]

*Figure 1: The International Criminal Court – Three-Layered Governance Model*



3. A Judicial Audit Committee should be called on to carry out audits of the administration of justice activities (Layer 2) of Chambers and of the Office of the Prosecutor (OTP), on a needs-basis. [R3]

4. The incoming Prosecutor is encouraged to delegate to the Registry, as much as possible, the services/activities within the OTP that pertain to administrative matters (Layer 3). [R6]

<sup>764</sup> See *supra* para.24.

## **2. Decision-Making Process and Internal Legal Framework**

5. Each Organ should aim to focus on their core business, as prescribed by the Rome Statute and interpreted with reference to the Three-Layered Governance Model. [R8]

6. An extended Coordination Council (CoCo+) should regularly bring together the Principals and the Heads of (functionally) independent offices within the Court to enable it as a whole to work in harmony and with unity of purpose. [R11]

## **3. Content of Internal Legal Framework**

7. UN administrative procedures should be followed as a starting base in developing new internal policies. The Court and the ASP should review their decision to make use of the International Labour Organisation Administrative Tribunal (ILOAT) rather than the UN Appeals Tribunal. [R13, R120]

## **4. Working Culture at the Court**

8. The Court, and senior management specifically, need to make efforts to rebuild and strengthen internal trust and re-shape the working culture at the Court. The leadership of the Court should adopt and demonstrate a clear commitment to a multi-pronged strategy to deal with predatory behaviour in the workplace, namely bullying, harassment and especially sexual harassment. [R14, R87]

9. Decisive action needs to follow the ASP's and the Court's commitment to achieving gender equality and ensuring the dignity, wellbeing, safety and inclusion of all individuals affiliated with the Court, regardless of gender or sexual orientation. Targeted interventions for gender equality should be complemented by gender mainstreaming. [R15]

## **I.B. Chambers Governance (Working Environment and Culture, Structure, Management and Organisation)**

10. Chambers should be organised following an integrated case team structure that foresees specialised static teams in the Pre-Trial and Appeals Division, with additional dynamic case teams that would follow the case from pre-trial to trial. Teams will be coordinated by *référéndaires* specifically recruited for the role, at a P-4 level, and subjected to a nine-year tenure. [R21-24, R26]

11. The Head of Chambers Staff should report to the Presidency on all matters relating to Layers 1 and 2, and to the Registrar on issues relating to Layer 3. The Presidency should strengthen the authority of the Head of Chambers Staff, including through further delegation of some of their responsibilities. [R30-31]

12. The job descriptions of Divisions' legal advisers, Chef de Cabinet and Head of Chambers Staff should be updated. A job reclassification of the position of Divisions' Legal Advisers should be commissioned. [R27-28, R30]

13. The Court should adopt a policy or an appropriate directive specifying that Judges should neither be involved with the recruitment of Chambers legal support staff, nor in their performance appraisal. Judges should be consulted as appropriate in these matters by the Head of Chambers Staff. [R32]

14. The position of Administrative Coordinator of Chambers should immediately be filled. The job description of administrative assistants to Judges should be updated, and include explicit mention that they are not personal assistants. Appropriate reporting officers should be designated for supervision and performance appraisals. [R35-36]

## I.C. OTP Governance

### 2. The OTP Regulatory Framework

15. The Prosecutor should constitute an OTP-wide working group on the Regulatory Framework, tasked with considering the most efficient way to update, consolidate, and clarify the status of the OTP regulatory documents. A mechanism for monitoring compliance with the Regulatory Framework should be established. [R38-40]

### **3.The OTP Management and Leadership Structures**

#### *Prosecutor and Deputy Prosecutor: Issue of two Deputy Prosecutors*

16. Rather than reinstating the structure of two deputy prosecutors, a more efficient and effective use of the single Deputy Prosecutor role can be achieved by assigning them the following functions: (i) ultimate responsibility for the three Divisions and their work; (ii) overseeing and coordinating the work of the Directors; (iii) reviewing and approving internal team work products - these should only concern the Executive Committee (ExCom) in exceptional circumstances; (iv) human resources and administrative matters; (v) regularly updating the Prosecutor on the work of the Divisions. [R48]

#### (2) *Executive Committee (ExCom)*

17. ExCom should be regarded solely as an advisory body with the responsibility of advising the Prosecutor. This should be consistently reflected in the OTP's regulatory framework. Decision-making within OTP rests with the Prosecutor. [R49]

#### *Immediate Office of the Prosecutor (IOP): Public Information Unit (PIU)*

18. The OTP should recruit a senior media officer (P-4) to head the Public Information Unit (PIU) and act as the OTP spokesperson. [R55]

#### (4) *Integrated Teams*

19. The practice of constituting core or 'advance' integrated teams during Phase 2 of Preliminary Examinations (PEs) should be institutionalised. Each such team should be headed by a Senior Trial Lawyer (PD P-5), and include at a minimum a member from each of the Investigation Division (ID), Prosecution Division (PD) and Jurisdiction, Complementarity and Cooperation Division (JCCD). [R60, R251]

## I.D. Registry Governance

### 1. Election of the Registrar and Deputy Registrar

20. For a more thorough election process for the Registrar and Deputy Registrar, an expert committee should assist the ASP in reaching a shortlist of candidates that would then be transmitted to the Judges for their decision. In the long-term, the ASP is recommended to limit the Registrar's term to a seven-nine year non-renewable mandate. [R76, R78]

21. A Deputy Registrar should be instated, to enable the Registrar to focus on administration of the ICC/IO (Layer 3). The role would coincide with the position of Chief of Judicial Services (D-2). The ASP should consider having candidates for Registrar and Deputy Registrar apply jointly, as a pair, and electing them as such. A similar approach should be considered for the election of the Prosecutor and Deputy Prosecutor. [R77]

## Section II. HUMAN RESOURCES

### II.D. Management of Human Resources

22. Measures should be taken to transfer general responsibility for human resources in the Court to the Registry. Consequently, the incoming Prosecutor should delegate responsibility for management of human resources in the OTP. [R89-90]

### II.E. Adequacy of Human Resources - Recruitment

23. For increased flexibility, a major effort is needed to re-classify all positions in the Court in terms of their core responsibilities and generic skills, with the aim of allowing officers from different Organs to apply for positions anywhere in the Court that they have the skills and experience to occupy. [R92]

### II.J. Flexibility, Scalability and Mobility in Staffing

24. To enhance the motivation, self-development and overall productivity of individuals working at the Court, increased internal and external mobility is needed. [R101-103]

### 4. Tenure

25. To encourage fresh thinking and bring more dynamism to the Court, a system of tenure should be adopted, applicable to all those who will be newly appointed in positions of P-5 and above. [R105]

## Section III ETHICS AND PREVENTION OF CONFLICTS OF INTERESTS

### III.B. Prevention of Conflict of Interest

26. As preventive mechanisms, the Court's Financial Disclosure Programme (ICC-FDP) should be extended to also cover Judges, and be supplemented by an additional declaration of interests to be completed by all elected officials and staff members at D-1 level and above. [R110]

27. To implement policies and instruments on ethics and prevention of conflict of interests, an independent Ethics Committee should be established, working on a needs-basis and remotely. It would serve a preventive and advisory role, through the following functions: (i) dialogue with Judges and senior staff when they take office; (ii) issuance of guidelines to raise awareness on ethical issues and ensure a coherent approach within the Court; (iii) issuance of advisory opinions to Court Principals and individuals working with the Court, as well as to the ASP when there are differing views among the Court and States Parties as to the applicable standards; (iv) deciding in case of disagreement between the Independent Oversight Mechanism (IOM) and a Head of Organ as to whether, e.g. confidentiality and independence in a specific case would bar IOM oversight. [R112-113]

28. In the long-term, a joint Ethics Committee servicing several international courts and tribunals is recommended, to ensure coherence in standards and rationalise expenses. [R114]

## Section IV. INTERNAL GRIEVANCE PROCEDURES

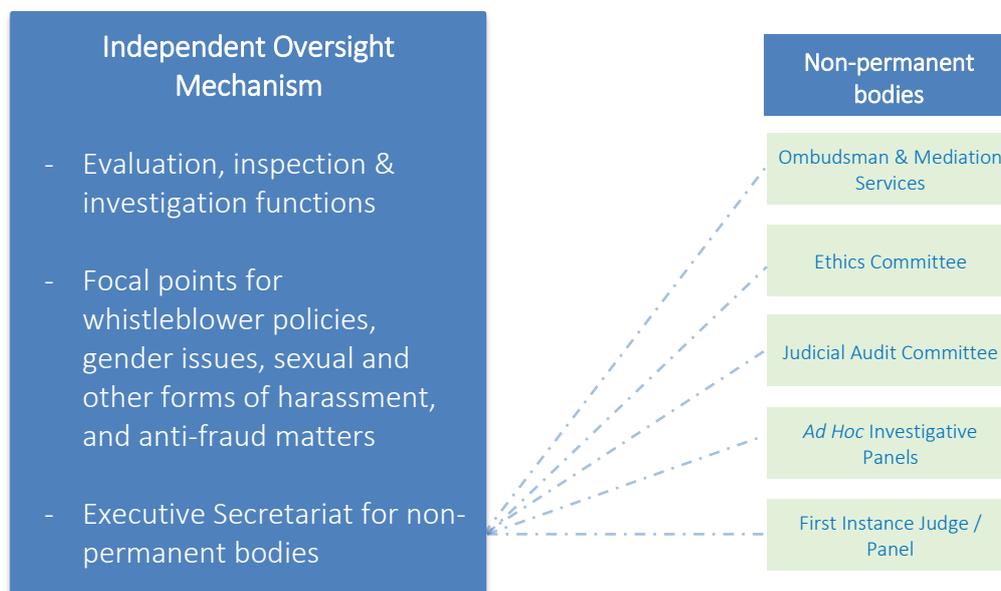
29. The Court should make use of one internal justice system for all individuals affiliated with the Court, complemented by an Ombudsperson and Mediation Services. The internal justice system should be serviced by professionals, meaning the Disciplinary Advisory Board, the Appeals Board and the *ad hoc* mediation operated by staff should be dissolved. [R115-R119]

30. The Court-wide internal justice system and process recommended is as follows:

- Misconduct: 1. Complaint submitted to IOM; in case of complaint concerning Judges, the Prosecutor or Deputy Prosecutor, investigation is delegated to an *ad hoc* judicial/prosecutorial investigative panel; 2. First Instance Judge (for staff) / First Instance Panel (for Judges, the Prosecutor or Deputy Prosecutor); 3. UN Appeals Tribunal.
- Administrative disputes: 1. Mandatory Mediation Services; 2. First Instance Judge; 3. UN Appeals Tribunal;
- Disputes related to underperformance: 1. Mandatory review by a human resources analyst and, if necessary, by independent reviewer appointed by the Head of the HRS; 2. First Instance Judge; 3. UN Appeals Tribunal. [R131]

31. An Ethics and Business Conduct Office (EBCO) should be created as an umbrella body, as shown in *Figure 2*. Focal points on whistleblower policies, gender issues, sexual and other forms of harassment, and anti-fraud matters should be established within the IOM. Beyond its inspection, evaluation and investigation functions, the IOM would further act as an executive, permanent secretariat, supporting the non-permanent bodies within the EBCO. [R122-123, R125]

*Figure 2: Ethics and Business Conduct Office*



## Section VI. PERFORMANCE INDICATORS AND STRATEGIC PLANNING

32. To assess *efficiency* (internal performance), a report presenting raw data, based on quantitative indicators should be compiled. For meaningful results, data needs to be compared – in time and with other courts and international organisations (IOs). Assessing the *effectiveness* of the Court (measuring impact) should be delegated to external partners (CSOs, academia, international/regional organisations) and encompass quantitative and qualitative indicators. [R146-148]

## **Section VII. EXTERNAL RELATIONS**

### **VII.A. Relations with the United Nations**

33. The leadership of the Court, particularly the Prosecutor, should establish regular consultations with the heads of the UN agencies most relevant to the Court's operation, in cooperation with UN Office of Legal Affairs. [R152]

### **VII. D. Relations with Civil Society and Media Organisations**

34. The OTP should establish a focal point for maintaining bilateral relations with CSOs at Headquarters, and appoint a field staff member as responsible for relations with relevant CSOs and the media, jointly with the Registry's Outreach staff. [R156-157]

### **VII.E. Communications Strategy / VII.F. Outreach Strategy**

35. A cross-Organ, coordinated communications strategy and outreach strategy plan should be developed. [R163]

### **VII.G. External Political Measures against the Court**

36. The ASP and States Parties should develop a strategy for responding to attacks on the Court by non-States Parties, and should be prepared to speak up in the Court's defence, given that its dignity and political impartiality seriously inhibits its ability to defend itself against unsubstantiated and biased attacks. [R169]

## **Organ Specific Matters: Chambers**

## **Section IX. WORKING METHODS**

### **IX.A. Induction and Continuing Professional Development**

37. The Presidency should design and organise a compulsory, intensive, comprehensive and tailor-made Induction Programme for new Judges, to be held soon after commencement of their judicial mandate. External cooperation and support can be sought for both the Induction Programme and a Professional Development Programme for Judges. [R174-176]

### **IX.C. Code of Judicial Ethics**

38. The Code of Judicial Ethics should be updated and strengthened. An express prohibition of inappropriate campaigning, pledges, promises or indications in the election of the Presidency and for any other judicial leadership positions should be included in the updated Code. [R181-182]

### **IX.D. Judicial Collegiality**

39. The Presidency and the Presidents of the Divisions and Chambers should actively and continuously promote a more cohesive judicial practice of collegiality in the discharge of judicial functions. Collegiality should be included as a subject for facilitated discussion among Judges and in the Code of Judicial Ethics. [R185-187]

## **Section X. EFFICIENCY OF THE JUDICIAL PROCESS AND FAIR TRIAL RIGHTS**

### **X.A. Pre-Trial Stage**

40. The provision that Chambers should routinely, at the first appearance of an accused, request the Prosecution to specify the state of the investigation should be included in the Chambers Practice Manual. [R189]

41. A Review Team should urgently consider the system of pre-trial disclosure of evidence and all related matters, aiming to render the system more predictable and expeditious. [R190]

42. Judges should have regard to the purpose of the confirmation process as a filter for inadequately supported charges and to ensure the fair trial rights of the accused, including by conducting efficient and expeditious proceedings leading to a clear and unambiguous confirmation of charges decision. [R191]

43. The presentation of evidence for the purposes of confirmation, the parties' submissions thereon and the hearing itself, as well as the form, content and structure of the decision confirming the charges should follow the Chambers Practice Manual. Judges should adhere to the provisions set out in the Manual and other agreed protocols, including by applying the timelines and deadlines therein, unless there are substantial grounds not to do so. [R192-193]

44. Judges with extensive experience in managing and presiding over complex criminal cases should be assigned as Presiding Judges of Pre-Trial and Trial Chambers. [R196]

### **X.B. Trial Stage**

45. The Trial Chamber should commence trial preparation and issue the scheduling order for the first status conference as soon as possible, even while the confirmation decision might be pending on appeal. Any delay in or postponement of trial preparation should occur only if good cause is shown. [R200]

46. Chambers should make the widest practicable use of the means of presenting evidence provided for by Article 69(2) and Rules 67 and 68. [R204]

### **X. B. 10. Technology in the Judicial Process**

47. Budgetary provision should be made for the completion and on-going update and development of the Case Law Database. The Registry should develop a plan for regular review and evaluation of the current capabilities of the Court's digital systems, to ensure timely and appropriate steps are taken to update digital support. [R207-209]

48. The Court should make maximum possible use of technology in the presentation of evidence. A Task Force comprising staff from both Chambers and the Registry's IT department, should be set up, to identify working methods and potential technological tools that could be introduced in Chambers and proceedings. [R208-209]

### **X.D. Management of Transitions in the Judiciary**

49. Substitute Judges should be assigned to Chambers, to enable a trial to continue with a differently constituted bench (in case of death, disabling illness or any other event preventing a Judge from completing a trial), after the substitute Judge has certified that they have familiarised themselves with the record of the proceedings. [R214]

## **Section XI. DEVELOPMENT OF PROCESSES AND PROCEDURES TO PROMOTE COHERENT AND ACCESSIBLE JURISPRUDENCE AND DECISION-MAKING**

50. The Court should depart from established practice or jurisprudence only where that is justified on grounds precisely articulated in the decision/judgment. Before departing from Appeals Chamber practice or jurisprudence, the Chamber should be required to notify the parties in writing of the specific point, requesting written submissions thereon and deciding only after hearing the parties' arguments. [R217-218]

51. Trial Chambers are encouraged to show respect for and pay particular regard to the obligation to arrive at a unanimous decision (Article 74(5)), and make increased efforts to do so, including by endeavouring to arrive at a compromise on divisive issues or exercising judicious restraint. [R221]

52. Trial decisions and appeal judgments on conviction or acquittal and all related dissenting and concurring opinions should be issued in writing at the same time. Chambers should be required to circulate the final draft of the judgment among the Bench sufficiently in advance of its issuance to enable any judge intending to issue a separate opinion to have time to finalise it and circulate it to their colleagues before the judgment is finalised. Guidelines as to the length and content of separate judgments should be introduced in the Chambers Practice Manual. [R222-224]

53. The Presidency should encourage the development within Chambers of a genuine deliberation practice. Deliberations and judgment drafting should begin once the relevant Chamber is constituted, continue based on directions generated through on-going deliberations of Judges, and follow the Judgment Structure and Drafting Guidelines set out in the Chambers Practice Manual. [R219-220]

## **Organ specific matters: OTP**

### **Section XII. OTP SITUATIONS AND CASES: PROSECUTORIAL STRATEGIES OF SELECTION, PRIORITISATION, HIBERNATION AND CLOSURE**

54. The OTP should focus on a narrower range of situations, and limit their interventions to the extent possible, focusing on situations of the highest gravity and on those most responsible for the crimes, which may well include mid-level perpetrators. The Prosecutor should adopt a higher threshold for the gravity of the crimes alleged to have been perpetrated. Gravity should also be taken into account at Phase 1 of PEs. [R227, R233, R236]

### **Sections XIII/XIV. PRELIMINARY EXAMINATIONS AND INVESTIGATIONS**

#### **XIII.Length of PE Activities, Time Limits /XIV.Investigative Strategy**

55. The OTP should consider adopting an overall strategy plan for each PE, with benchmarks and provisional timelines for all its phases and activities, including its closure, and, if relevant, re-opening. Upon authorisation of an investigation, this plan should provide the foundation on which to build the OTP's targets and strategies for the investigation. [R255-256, R258]

56. In parallel, the ID should develop long-term situation-specific investigative strategies that cover all stages of the situations, from the opening of a PE/Investigation, to possible de-prioritisation, hibernation and closure of an investigation. These plans should have flexible benchmarks to enable appropriate responses and monitoring of their implementation. [R269-271]

57. PEs should last no longer than two years. Extensions could be granted by the Prosecutor, but only in exceptional and justified circumstances. [R257]

#### **XIII.Complementarity and Positive Complementarity**

58. The OTP should not have regard to prospective national proceedings and focus solely on whether national proceedings are or were ongoing, in line with Article 17 ('is', 'has been' conducted) and the requirements set out by the Appeals Chamber ('tangible' steps). [R262]

### **XIV.B. Investigative Techniques and Tools**

#### **1. Cooperation for Evidence Collection**

59. The OTP and the ASP should consider the development of a uniform cooperation framework for all States Parties, or for regional groups of States Parties. Agreements with international and intergovernmental agencies with which the OTP engages frequently, such as UNHCR and International Organisation for Migration, could also be revisited. [R274-275]

## **Section XV. OTP INTERNAL QUALITY CONTROL MECHANISMS**

60. The OTP should consider increased monitoring of the evidence reviews, which should be obligatory for every investigation and trial preparation, and appropriately regulated. Practices employed by OTP teams to monitor trials should be reviewed, and a comprehensive and consistent approach to preparations for witness examinations, presentations of complex evidence, and oral arguments should be ensured. Further, the OTP should review the guidelines relating to lessons learnt, and consider making adherence to the process mandatory and/or part of the performance appraisal of managers. [R305, R311, R313]

### **Organ Specific Matters: Registry**

## **Section XVI. DEFENCE AND LEGAL AID**

### **XVI.A. Institutional Representation**

61. The Office of Public Counsel for Defence (OPCD) should be strengthened and empowered to represent the Defence on an institutional level, by transforming it into a Defence Office. It should retain its functional independence, while being entrusted with additional responsibilities such as: (i) management and governance of defence services and legal aid; (ii) representing the Defence on an institutional level; (iii) oversight, capacity building and strategic development for defence representatives before the Court; (iv) being consulted on the Court's public information and outreach strategies. [R322-324, R326]

### **XVI.B. Legal Aid**

62. A Working Group should carry out a full reform of the legal aid policy, taking into account past assessments, aiming to produce a policy that is accessible, effective, sustainable and credible, and ensures adequate facilities to Defence and Victims teams. [R328]

63. The current framework and resources available for the identification, tracing, freezing and seizure of assets should be reviewed. Seconded personnel with specific expertise could be employed to complement the sole Registry Financial Investigator position, as well as the Registry's capacity to support States Parties in implementing cooperation requests in this field. [R330-332]

## **Section XVII. VICTIM PARTICIPATION**

64. The VPRS should be recognised as the lead entity charged with tracing and identifying further victims with claims for reparation during the reparations phase. Arrangements for facilitating and collecting applications for victim participation should commence once an arrest warrant or a summons to appear has been issued. [R336-337]

## **Section XVIII. VICTIMS: REPARATIONS AND ASSISTANCE**

### **XVIII.B. Judicial Matters Related to Reparations**

65. Consistent and coherent principles relating to reparations should further be developed (Article 75(1)). Standardised, streamlined and consistent procedures and best practices applicable in the reparations phase of proceedings should be incorporated in the Chambers Practice Manual. [R342-343]

66. Increased investment should be made in, and more value drawn from, an early and proper completion, collection and processing of the combined standard application form for victim participation and reparations. [R345]

67. The Court should confer on the Registry (Victims Participation and Reparations Section (VPRS)) the principal responsibility for identifying, facilitating, collecting, registering and processing, including the legal assessment of all applications by (i) victims for participation at trial intending to request reparations, and (ii) new potential beneficiaries

eligible for participation, prior to the issuance of the Reparations Order. Identification and collection of applications from victims requesting to participate only in the reparations phase should continue even after the time limit before the commencement of trial set by the Trial Chamber. The Registry should intensify efforts to identify and register reparations experts (Regulation 44, Regulations of the Court). [R347-348, R350]

### **XVIII.C. The TFV and its Secretariat: Governance and Functioning**

68. The TFV should focus on its mission as a trust fund, with functions restricted to fundraising, administration of the funds, and their release as ordered by the Court. Responsibilities and resources related to implementation of reparations and assistance mandates should be gradually moved under the Registry's authority, to the VPRS. [R354, R358]

69. The TFV should develop as soon as possible a comprehensive and effective fundraising strategy. [R356]

## **Section XIX. OVERSIGHT BODIES**

### **XIX.C. Secretariat of the ASP**

70. An office and a focal point should be appointed within the Registry to coordinate with the different services of the Court, so as to provide all necessary support to the ASP. In the long-term, the functions of the ASP Secretariat should be taken over by the Registry, and the Secretariat, in its current form, dismantled. [R369]

## **Section XX.IMPROVEMENT OF THE SYSTEM OF NOMINATION OF JUDGES**

71. Participation in Advisory Committee on Nominations of Judges (ACN) interviews and roundtable discussions before the election should be mandatory, with the failure to participate resulting in disqualifying the candidate, barring exceptional circumstances. [R371]

72. The design of round table discussions by the ASP should take into account the assessment of candidates highlighted in the ACN report, and include topics aimed to supplement the report in relation to these aspects. [R372]

73. The accuracy of the common questionnaire, to be completed by all nominees, should be certified by a senior member of the national judiciary or of the authority which oversaw the process. The ACN should endeavour to assess, during the interviews with candidates, their ability to manage and conduct complex war crimes trials fairly and expeditiously, and their suitability as a Presiding Judge. [R373-374]

74. The ASP should aim to harmonise the national procedures for nominating candidates. States Parties should provide information and commentary on their procedures in the course of 2021. Ahead of the 2023 elections, the Working Group on Nomination and Election of Judges should compile a set of criteria and guidelines to be applied in national nomination processes. The nominating state should submit, alongside their nomination, a certificate setting out the procedure followed for the nomination. [R375-377]

75. States Parties should accord utmost respect to the assessments in the ACN report and should not cast their votes in a way that is inconsistent with any aspect of an assessment. [R378]

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## **Section XXI. DEVELOPMENT OF THE RULES OF PROCEDURE AND EVIDENCE**

76. The Rome Statute should be amended to provide that changes to the RPE may be proposed by a Judge, the Prosecutor, the Defence Office or any State Party, and that any amendment will enter into force if agreed to by an absolute majority of the Judges. Until such an amendment enters into force, the ASP should vote on RPE amendments by two thirds majority, rather than consensus, in line with the provisions of Article 51(2). [R381]

## ANNEX II. CONSULTATIONS IN NUMBERS

### A. Interviews and Meetings

1. The Experts held a total of 278 interviews and meetings with 246 current and former officials, staff and external defence and victims representatives, alongside meetings with the Heads of Organs, Staff Union Council, 9 States Parties, 12 ASP representatives/bodies, 54 NGOs and 6 academics. Most of these meetings were held during the consultation phase, and prior to the issuance of the Interim Report. These details were included in the Appendix to the Interim Report. The following paragraphs present the updated numbers.

#### *Court Officials, Staff, (External) Defence and Victims' Representatives:*

2. In total, 246 individuals met with one or more clusters. Several individuals met with more than one cluster; some met with a cluster both in a group meeting and individually. This explains the difference between the number of interviews and the total number of individuals listed below.

3. Interviews held per Cluster:

- Cluster 1: 76 interviews with 80 individuals;
- Cluster 2: 72 interviews with 102 individuals;
- Cluster 3: 70 interviews with 132 individuals.

4. In addition, joint meetings, with all Experts in attendance or held on behalf of all Experts either through cluster representatives or by the Chair, were held with:

- The Court Presidency;
- The Prosecutor, OTP Senior Management and the Immediate Office of the Prosecutor;
- The Registrar and Immediate Office of the Registrar representatives;
- Staff Union Council (2);
- Heads of Organs, chaired by the ASP Presidency.

#### *States Parties:*

5. In total, the Experts held 16 meetings with representatives of 9 States Parties. Some States Parties met with more than one cluster.

- Cluster 1: 6 States Parties;
- Cluster 2: 4 States Parties;
- Cluster 3: 4 States Parties;
- Joint meetings: 2 States Parties.

#### *Assembly of States Parties:*

6. In total, the Experts held 21 meetings with 12 ASP representatives/bodies. Some ASP representatives/bodies met with more than one cluster.

- Cluster 1: 11 ASP facilitators and working groups;
- Cluster 2: 3 ASP facilitators and working groups;
- Cluster 3: 1 ASP facilitator;
- Joint meetings:
  - The Hague Working Group (2);
  - New York Working Group (by VTC) (2);
  - ASP President, Mr. O-Gon Kwon, and the ASP Vice-President, Mr. Jens-Otto Horslund.

### *Civil Society:*

7. In total, the Experts held 14 meetings with 54 NGOs and 5 meetings with 6 academics.
- Cluster 1: 3 NGOs, 2 academics;
  - Cluster 2: 4 NGOs, 3 academics;
  - Cluster 3: 6 NGOs, 1 academic;
  - Round table with civil society: 47 NGOs (represented by 23 individuals attending in person, 47 connecting through video-conference). Some of the NGOs that met with clusters individually were also represented at the round table.
8. Of the 47 NGOs represented at the round table, 27 were from situation countries.

### *Other:*

5. Cluster 1 also met with representatives of the UN Office for Legal Affairs and the Court External Auditor working on carrying out an assessment of oversight bodies.

## **B. Written Submissions<sup>765</sup>**

6. The Experts received **130** written submissions:

	<b>On mandate</b>	<b>On substance</b>	<b>Other</b>	<b>Total</b>
States Parties	0	15	0	15
Civil society (NGO and academics)	7	20	6	33
Staff	0	49	7	56
Elected officials	0	4	1	5

<sup>765</sup> The numbers presented in this sub-section reflect the written submissions received before the deadline for consultations and the issuance of the Interim Report. Written submissions submitted to the Experts since were considered to the extent possible, but not counted here. Information and documents requested, received and consulted by the various clusters from specific units, sections, Organs or ASP subsidiary bodies are not included. The figures include the number of submissions received. Joint submissions received from several individuals/entities/States are counted as one.

Court unit/Division	2	5	1	8
Defence representatives (externals)	0	3	1	4
Victims representatives (externals)	0	2	0	2
Former elected officials	0	4	2	6
Former staff	0	1	0	1
<b>Total:</b>	9	103	18	<b>130</b>

### C. Representativeness

7. In total, **288** current and former Court officials, staff and external representatives met with one or more clusters and/or submitted written observations.<sup>766</sup>

- Current Court staff and elected officials per grade level:
  - **G-4: 2 G-5: 10 G-6: 2 G-7: 2**
  - **P-1: 13 P-2: 56 P-3: 58 P-4: 46 P-5 : 37**
  - **D-1 and above: 31**
  - Other elected individuals: 3
- (External) Defence and Victims' representatives:
  - Defence representatives (external): 8
  - Victims representatives (external): 2
- Former staff and elected officials:
  - Former staff: 6
  - Former elected officials: 1

### *Regional Representation*

8. The following presents a breakdown, by ASP regional group, of the States Parties that submitted written observations or whose representatives met with one or more of the clusters:

- African States: 1
- Asia-Pacific States: 2
- Eastern European States: 1
- Latin American and Caribbean States: 3
- Western European and Other States: 15

9. With regard to States Parties subject to Preliminary Examinations or Investigations, the Experts received the views of 3.

<sup>766</sup> Written submissions presented on behalf of a Court entity (e.g. unit) have not been included here.