

**Eleventh session**

The Hague, 14-22 November 2012

**Study Group on Governance: Lessons learnt:
First report of the Court to the Assembly of States Parties****I. Introduction**

1. The present report is submitted by the Court in response to the invitation by the Study Group on Governance (“the Study Group”) of the Assembly of States Parties (“the Assembly”) to take stock of the lessons learnt in its ten years of operation and to reflect upon measures that could be envisaged in order to expedite the judicial proceedings and enhance their efficiency, including amendments to the legal framework.
2. This first report constitutes, in the view of the Court, only the starting point of a longer process to be pursued by the Assembly and the Court in the years to come with a view to improving the functioning of the institution. This process will require in-depth discussions and consultations within the Court, as well as regular interaction with the Assembly and other external stakeholders.
3. Therefore, and as requested by the Study Group acting on the mandate of the Assembly, this report contains a compilation of issues that need to be addressed (section II) as well as a proposed “road map” of steps to be taken to ensure timely discussions and actions (section III).
4. In order to identify the issues that need to be addressed under section II, judges were invited by the Presidency to submit their individual ideas and suggestions, together with proposed solutions. In response, several judges identified issues and recommended solutions, either by suggesting the standardization of best practices or proposing amendments to the legal framework.
5. In their submissions, judges took diverse approaches to the invitation of the Assembly transmitted by the Presidency. Some of them considered that the Court should not refrain from proposing all types of amendments, including amendments to the Rome Statute itself, when necessary to achieve the required result. Other judges took the view that the Court should only propose discrete amendments to the Rules of Procedure and Evidence or the Regulations of the Court since amendments to the Rome Statute would be premature at this stage.
6. In discussions with the Study Group of the Assembly on 26 June 2012, State representatives clarified that they expected the Court to focus on the Rules of Procedure and Evidence. They also indicated that, in addition to receiving the issues broadly identified by the Court, they also expected to receive a minimum number of detailed amendment proposals to the Rules. Therefore, in addition to the current report, a proposal to allow a single judge to deal with the preparations of a trial (see paragraph C.1 of the annex), which has already been considered by the Advisory Committee on Legal Texts (ACLT), will be sent in the coming weeks to the Study Group, following approval by an absolute majority of judges in accordance with article 51, paragraph (2) (b), of the Rome Statute.

7. The issues identified by the judges were then circulated to the Office of the Prosecutor (OTP), the Registry and a representative of Counsel, who were invited to suggest any further issues for inclusion in this report. These interlocutors provided considered and detailed submissions which both suggested new issues and provided further detail concerning issues already under contemplation. A number of these issues and suggestions were then included in this report. In addition, the interlocutors made a number of considered suggestions concerning diverse matters, ranging from defence and general counsel issues to details concerning the decision on the confirmation of charges to technical matters such as the production of transcripts and judicial recesses. To the extent that such proposals were operational in nature or did not engage the Rules of Procedure and Evidence, they have not been expressly included in the current report. Nonetheless, these useful suggestions will continue to be explored by the Court, both through the ongoing lessons learnt project and through other relevant fora.

II. Identification of issues

8. The issues outlined in the annex were identified by the organs of the Court and a representative of Counsel as issues that need discussion with the view to expediting proceedings and enhancing their quality. Some concrete proposals for amendments were already proposed for some of these issues.

9. Only the issues identified are outlined in the annex. The concrete proposals that were formulated are not included as they need to be subject to in-depth discussions and, if appropriate, the ACLT will be seized for their consideration, in accordance with regulation 5(1) of the Regulations of the Court, before being sent to the Assembly.

10. As noted above, other issues identified by the organs of the Court and the representative of Counsel have not been included in this report as they could be addressed through adoption of best practices or amendments to the Regulations and thus need not be submitted to the Assembly at this stage.

11. The list of issues to be discussed as developed in the annex is by no means intended as exhaustive and it does not preclude the addition of other issues that may arise during future discussions. It only constitutes a first step of a process to be continued in the coming months and beyond with a view to enhancing the efficiency of the proceedings of the Court.

III. Proposed road map

12. The Study Group also indicated that it desired the Court to identify a proposed road map which would serve to outline the procedures going forward in the lessons learnt process. Accordingly, the following is proposed.

13. A Working Group on Lessons Learnt (“Working Group”) will be established in October 2012 which will be open to all interested judges in order to commence work on the issues identified in the current report and to determine whether amendments to the Rules of Procedure and Evidence are required.

14. The Working Group will discuss the issues contained in the current report with the view to identifying and drafting necessary proposals for amendments to the Rules of Procedure and Evidence, if any.

15. Amendment proposals that receive support of at least five judges will be sent to the ACLT by December 2012.

16. The Working Group will reconvene in early 2013 to continue discussion of the issues contained in this current report. Additional proposals, if any, shall be sent to the ACLT by July 2013. In effect, paragraphs 13-15 above describe an ongoing dual-track process in which the Working Group and the ACLT will consider the identified issues on a rolling basis.

17. A second report on lessons learnt shall be conveyed to the Assembly in August 2013 with a view to its finalization for the twelfth session. This report will update the Assembly on discussions held and will include amendments proposed in accordance with article 51, paragraph (2) (b), of the Rome Statute, if any, as well as a list of proposals under consideration by the ACLT.

18. There will be regular interface between the Court and States Parties throughout the process.

19. The above process will be repeated until all the clusters identified by the Court have been considered by the Working Group on Lessons Learnt and, where relevant, the ACLT.

Annex

Identification of issues

A. Pre-trial

1. Decision on confirmation of charges

A discussion is needed on the best format and content of the confirmation of charges decision for the purposes of framing the trial proceedings. In addition, the discussion needs to address the required extent of the legal interpretation made by the Pre-Trial Chamber as well as the necessary degree of precision of the legal characterization of facts and modes of liability.

2. *Viva voce* witnesses

A discussion is needed on the presentation of *viva voce* witnesses in the confirmation of charges hearing which significantly lengthens proceedings.

B. Pre-trial and trial relationship and common issues

1. Disclosure

A discussion is needed regarding the system of disclosure, including the possibility of establishing a standard system of disclosure, a unified e-Court protocol and a simplified system for applying and lifting redactions.

2. Additional evidence for trial

Pre-Trial and Trial Chambers have applied different rules with regard to the relevance and admissibility of evidence. This practice is time consuming and needs to be discussed in order to see whether there is a possibility of achieving greater cohesion between the two phases and greater uniformity between chambers.

3. Presentation of evidence

The extent of the evidence that needs to be presented and the scope of the Chamber's power when giving directions in relation to the presentation of evidence, as well as the most convenient format and procedure of the presentation of evidence need to be discussed. The discussion should include consideration of "in-depth analysis chart" (IDAC) for the presentation of evidence, as well as the format of such document.

4. Record of proceedings

Having two distinct records of proceedings for the pre-trial and trial phases contributes to the duplication of disclosure of evidence. The possibility of establishing a unified record of the case throughout all stages of the proceedings should be explored.

5. Recorded testimony

In order to expedite proceedings, a discussion is needed on the possibility of giving the Trial Chambers more discretion to introduce transcripts or previously recorded reliable testimony in certain specific circumstances, in accordance with the Rome Statute.

6. Litigation of jurisdiction/contextual elements

A discussion is proposed on the options available to avoid repetitive litigation of some jurisdictional and contextual elements of evidence already decided at the pre-trial phase. Further, a discussion is needed on the options to avoid unnecessary litigation, for instance by encouraging agreement on facts, where possible.

7. Witness protection

A discussion is proposed on the relationship between Chambers, the OTP and the Victims and Witnesses Unit in relation to witness protection.

8. Documentary evidence

A discussion is needed in order to explore the need for imposing strict authentication requirements of documentary evidence.

C. Trial

1. Single judge in Trial Chamber

The phase of preparation for trial after the confirmation of charges has been very lengthy. Some judges have considered that allowing a Single Judge to deal with the preparation for the trial could contribute to expediting the preparation proceedings. Others have objected that preliminary arrangements for the trial involve decisions on crucial procedural and substantive matters and require the involvement of the full bench. A concrete proposal to this effect has already been considered and agreed upon by the ACLT and the judges are currently considering approving a final proposal for amendment (see annex).

D. Victims participation and reparations

1. Applications for victim participation

The current system of individual applications for victims' participation has been burdensome and difficult to manage both in terms of time and human resources. The management of the application system needs to be improved, including, for instance, by considering the possibility of applying a collective system of victims' application

2. Participation in the proceedings

A number of proposals have been made to streamline the participation of victims in all phases of the proceedings and ensure that participation of victims is not detrimental to expeditious proceedings. It has also been suggested that mechanisms should be envisaged to ensure participation is meaningful and enhance its efficacy. Similarly the need to revise the current system of victims' representation, including the access by legal representatives and victims to anything other than publicly filed documents has been raised. This discussion might involve a comparative analysis of the victim representation models used in different cases to date.

3. Principles and assessment of reparations

A discussion needs to take place on the system of reparations after the *Lubanga* and *Katanga/Ngudjolo* cases have concluded. This will involve consideration of diverse matters, including individual and collective reparations, whether principles on reparations should be addressed in a court-wide document or need to be further developed on a case-by-case basis and whether reparations to victims might be dealt with by a Single Judge.

E. Appeals

1. Certification procedure for interlocutory appeals

The current certification procedure based on authorisation by the Chamber which rendered the decision subject to appeal needs to be discussed.

2. Expediency

The options to expedite proceedings related to interlocutory appeals need to be discussed.

F. Interim release

The requirement to consult relevant States before granting release to an accused has led to difficult and long consultations, often involving several requests for information and extensions of time limits. The system and alternative options need to be discussed.

G. Seat of the Court

The options to simplify the procedure for designating an alternative seat for the proceedings of the Court need to be discussed.

H. Language issues

1. Translation

The practice of the Court has shown that translations have been one important cause of delays in proceedings, with a significant proportion of the budget being spent on translation and interpretation. Clarification is needed as to the extent that witness statements and other documents need to be translated.

2. Witness statements/transcripts

The current system provided for in rules 111 and 112 might involve the transcription and, where relevant, translation of thousands of pages. The options to simplify the system need to be discussed.

3. Transcripts

Consider procedures for streamlining the review, correction and reclassification of transcripts, including through the utilization of time limits and reclassification on a rolling basis.

I. Organizational matters

1. Assignment to divisions

The interpretation of article 39 needs to be discussed as well as the options to facilitate the movement of judges between all three divisions.

2. Absence/replacement of a judge

The potential for Chambers to sit temporarily with only two judges for a limited period of time (e.g. in the case of illness or temporary unavailability) needs to be discussed.

3. Assignment of judges/extension of mandate

The interpretation of article 36 (10) needs to be discussed as well as the possibility for judges under a mandate extension to perform other duties, be replaced or perform as part-time judges.
