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## Report of the Bureau on Study Group on Governance

### Note by the Secretariat

Pursuant to paragraph 7 of resolution ICC-ASP/12/Res.8, annex I of 27 November 2013, the Bureau of the Assembly of States Parties hereby submits for consideration by the Assembly the report on the Study Group on Governance. The present report reflects the outcome of the informal consultations held by the Study Group with the Court.

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## I. Introduction

1. The Study Group on Governance (the “Study Group” or “SGG”) was established via a resolution of the Assembly of the States Parties (the “Assembly”) in December 2010 “to conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence [...]”; and “to facilitate this dialogue with a view to identifying issues where further action is required, in consultation with the Court, and formulating recommendations to the Assembly through the Bureau”. It was further decided that “the issues to be dealt with by the Study Group include, but are not limited to, matters pertaining to the strengthening of the institutional framework both within the Court and between the Court and the Assembly, as well as other relevant questions related to the operations of the Court”.

2. The Study Group, in 2011, dealt with the relationship between the Court and the Assembly, strengthening the institutional framework within the Court and increasing the efficiency of the criminal process. Following requests of the Assembly in its tenth and eleventh sessions the dialogue between the organs of the Court and States Parties was continued throughout 2012, 2013 and 2014.

3. The twelfth Assembly took note of the report of the Bureau on the Study Group on Governance and the recommendations contained therein. The Bureau was requested to extend, for a period of one year, the mandate of the Study Group, already extended in the previous year, in order to continue to facilitate the dialogue. Furthermore, the Assembly endorsed the Revised Roadmap (the “Roadmap”) aimed at expediting the criminal process of the Court through facilitating amendments to the Rules of Procedure and Evidence; and the recommendations to improve the transparency, predictability and efficient conduct of the entire budget process.

4. On 18 February 2014, the Bureau reported that it had appointed Ambassador Håkan Emsgård (Sweden) as Chair of the Study Group. In addition, focal points for two clusters were appointed: (a) Cluster I: Increasing the efficiency of the criminal process. Co-focal points: Mr. Shehzad Charania (United Kingdom) and Mr. Thomas Henquet (Netherlands); and (b) Cluster II: Intermediaries. Focal point: Mr. Klaus Keller (Germany). On 5 May 2014, following the departure of Mr. Henquet, the Bureau appointed Mr. Nobuyuki Murai (Japan) as a new co-focal point for Cluster I.

5. The Study Group held a number of regular meetings between February and October 2014, as well as several informal meetings by the focal points with the States Parties and the organs of the Court.

6. This report on the Study Group describes the activities of the Study Group in the past year and contains a number of recommendations regarding the continuation of its work and issues which have been identified as requiring further action or where further study is recommended.

## II. Cluster I

7. The work plan of the Study Group was much broader than in previous years. While a large part of the work remained the consideration of proposals to amend the Rules of Procedure and Evidence of the Court, in accordance with the priority areas set in the Court’s first lessons learned report in 2012, there were a number of additional strands to the work of Cluster I in 2014.

### A. Proposals to amend the Rules of Procedure and Evidence

8. On 28 February 2014, the Working Group on Lesson Learnt (WGLL), in accordance with the Roadmap,<sup>1</sup> introduced two reports. The first contained recommendations to amend rule 76(3), rule 101(3) and rule 144(2)(b) of the Rules of Procedure and Evidence (RPE)

<sup>1</sup> ICC-ASP/12/37, annex 1.

identified under the “Language Issues” cluster.<sup>2</sup> The second contained a recommendation for a new rule 140 *bis*, identified under the “Organizational Matters” cluster.<sup>3</sup>

9. The Study Group on Governance expressed its appreciation to the Court for producing the reports in good time, and well ahead of the timelines envisaged under the Roadmap.

10. Between February and September 2014, members of the Study Group met with the Court several times, formally and informally, to express their respective views and seek clarifications. Following these discussions, the Court prepared revised versions of its reports. A summary of those discussions is contained at annex I in a report, which has been forwarded to the Working Group on Amendments in accordance with the Roadmap.

## **B. Seminar at The Hague Institute for Global Justice**

11. On 9 July, Sweden, Japan and the United Kingdom convened an all-day seminar, in conjunction with The Hague Institute for Global Justice. The seminar, entitled “Increasing the Efficiency of the Criminal Process, while Preserving Individual Rights”, and moderated by Professor Håkan Friman, provided a unique opportunity for interaction, and discussion of radical ideas, between representatives of the Court, including over a third of the Court’s judges, and senior members of the Office of the Prosecutor, the *ad hoc* tribunals, States Parties to the Rome Statute, members of the Bar, NGOs and academia.

12. Following a welcome address from Mr. Abiodun Williams of The Hague Institute, the Chair of the Study Group, Ambassador Håkan Emsgård, explained the work of the Study Group. Judge Sanji Monageng, Vice President of the Court and Chair of the WGLL, explained the role of the Court in this process. Professor Claus Kreß and Professor Guénaél Mettraux then presented different initiatives, aimed at improving the efficiency and effectiveness of the Court. Professor Kreß introduced a non-paper from Germany, the aim of which was to contribute to a systemic review of the framework of the proceedings before the court. It suggested, as a starting point for a wider-reaching discussion, deeper reflection on the role of the confirmation proceedings and their relationship with the ensuing trial stage, and, in this regard posed a number of questions which merited closer analysis and discussion. Professor Mettraux introduced an expert initiative, funded by the Swiss Government, which has tackled a broader range of issues, from the role of the Pre-trial chamber, to disclosure, defence issues, victims participation and cooperation. Reference was also made to the outcome of a seminar held at the United Kingdom Foreign and Commonwealth Office in 2012, chaired by former International Criminal Court judge Sir Adrian Fulford, which focussed on the role of the Pre-trial chamber, and the relationship between the pre-trial and the trial chambers.<sup>4</sup>

13. The seminar’s four breakout sessions covered issues which go to the heart of the Rome Statute system. During the session entitled “The Role of the Pre-Trial Chamber”, the participants discussed some key questions, such as how the “substantial grounds to believe” standard has been interpreted by the judges so far, whether a new rule was required to clarify the standard, whether the process should be confined to a narrow filtering mechanism, or the Pre-trial chamber should perform an expansive oversight role, for example, over the efficacy of the Prosecution case more generally. There was also brief discussion on whether a Pre-trial chamber was necessary at all; the scope of the Prosecutor’s disclosure obligations at the pre-trial stage; and the extent to which the Prosecutor could and should continue investigations beyond the confirmation decision. The question was raised as to whether the Trial Chambers made the best possible use of the record of the proceedings as transmitted by the Pre-Trial Chambers.

14. More technical aspects of efficiency were discussed during the session on “How new technology can assist in expediting trials”. This focused on the appearance at trial of witnesses and accused persons via video link. Participants discussed the financial and logistical advantages of video-link technology, the experiences of Courts, both domestic

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

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

<sup>4</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/330921/FCO\\_Seminar\\_on\\_ICC\\_Procedures\\_Executive\\_Summary.docx](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330921/FCO_Seminar_on_ICC_Procedures_Executive_Summary.docx).

and international, with using video technology, as well as the unique difficulties with using such innovations, tried and tested at the domestic level, at the Court.

15. The session on the “pre-trial and trial relationship and common issues” focused on the balance of responsibilities and roles between the pre-trial and trial phases of proceedings. Some key questions discussed were how respective Chambers should conduct pre-trial and trial preparation so that the distinct features of both could be preserved; to what extent the Prosecutor should be “trial-ready” at the pre-trial phase; and to what extent the pre-trial chamber should seek to fully resolve issues for trial, for example, in relation to disclosure, victims’ participation and protective measures.

16. The final breakout session explored the “Interests of victims: increasing the efficiency of the victims’ participation mechanism in accordance with article 68(3) of the Rome Statute”. This discussed the merits of a harmonized approach across Chambers to victims’ applications and participation. It considered whether the system should be radically streamlined, in light of obstacles in assessing the legitimacy of applications, the additional burdens placed on the defence in sometimes having to respond to two separate cases, and the potential logistical difficulty of large numbers of victims wishing to participate in cases involving crimes such as genocide.

### C. Cluster B

17. The Chair of the Study Group has over the year highlighted the importance of the issues in “Cluster B” of the First report of the Court to the Assembly of States Parties on Lessons Learnt.<sup>5</sup> Cluster B deals with issues relating to the pre-trial and trial relationship and common issues. The Chair accordingly asked the Court to hold additional discussions on the issues contained in Cluster B, in order to identify the most important “bottlenecks” affecting the Court’s work, and to propose measures to deal with them.

18. On 13 March 2014, Vice President Monageng, Chairperson of the WGLL, addressing the inaugural session of the 2014 Study Group, provided a status update on the Court’s work on Cluster B since the twelfth session of the Assembly. At that time, Vice President Monageng confirmed that Cluster B had been the subject of numerous meetings of the judges of the Pre-Trial Division. She further explained the importance of the issues addressed by Cluster B while highlighting their inherent complexity, which derives from one of the major pillars of the Rome Statute: the unique combination of tenets of the common law and the Romano-Germanic legal systems. Thus, Vice President Monageng emphasized that any reform measures need to strike the right balance between both legal systems while promoting efficiency. On 8 April 2014, the WGLL circulated its first progress report, which summarized preliminary discussions among the judges of the Pre-Trial and Trial Divisions.

19. On 15 September 2014, the WGLL circulated its second progress report<sup>6</sup>, which described important changes in practice implemented by Pre-Trial Chambers that have served to enhance the efficiency and effectiveness of the pre-trial and trial process. These developments include the clarification of facts and circumstances that are confirmed by Pre-Trial Chambers, the flexibility that Pre-Trial Chambers are incorporating into their legal characterization of those facts, the means by which evidence is presented by the Prosecutor, and the expediting of the redactions process.

20. While all participants in the efforts to expedite and enhance the criminal proceedings of the Court strive to ensure efficiency in this process, the matters in Cluster B require carefully considered, detailed review within the Court, due to their technical aspects, their potential impact on the fairness of proceedings and their practical effects on the procedures currently employed at the pre-trial and trial levels.

21. The changes in practice implemented by Pre-Trial Chambers are an example of the ongoing process undertaken by all organs of the Court to learn from past experience and to originate solutions to problems impeding the efficiency and effectiveness of the Court’s work. They also reflect the co-dependency of the pre-trial and trial stages and the

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<sup>5</sup> ICC-ASP/11/31/Add.1.

<sup>6</sup> See Annex II.

importance of understanding how each can enhance the other. Finally, they demonstrate that some of the problems identified early in the Court's existence can be addressed through changes in practice, without necessarily requiring amendments to the Rules of Procedure and Evidence.

22. Yet like all developments at the Court, the value of these changes in practice will be assessed most usefully through experience, and some of them, should they indeed prove beneficial, may justify incorporation by amendment. The WGLL will continue to monitor these and other developments, as well as to encourage pre-trial and trial judges to maintain their ongoing dialogue and discussions to identify problems and solutions to all issues relating to Cluster B.

23. The Study Group thanked the judges of the Pre-Trial and Trial Chambers for their work, and looked forward to further exchanges next year. One delegation, while praising the work done so far, asked whether attempting to deal with difficulties encountered at the end of the confirmation process, as referred to in section III of the second progress report on Cluster B, might have an effect on admissibility proceedings, in particular the complementarity threshold applied by the Court under Article 17 of the Rome Statute. The Court stated that decisions relating to admissibility were of a judicial nature, and would be decided on a case by case basis. The same delegation enquired as to the effect on the rights of the accused through the application of Regulation 55, as referred to in paragraph 20 of the Second Progress Report on Cluster B. The Court acknowledged that in order to ensure better protection of the rights of the accused it was best to have recourse to Regulation 55 at the earliest possible stage.

#### **D. Future Work**

24. The Court has been in existence for well over ten years. In this time, it has developed a significant body of jurisprudence and internal practice. For the future development of the Court, it is essential that the Court continues to build on this experience, and plays a central role in developing law and practice.

25. The Study Group aims to continue its ongoing dialogue with the Court, with a view to enhancing the efficiency and effectiveness of the Court, and ensuring the best use of the Court's resources; while, at the same time, fully preserving the ICC's judicial independence and the quality of its work, as well as safeguarding the rights of the accused and victims. The Court and the Study Group noted that many problems identified during the first years of the Court could be addressed through changes in practice, and even through amendments to the Regulations of the Court, without the need for amendments to the Rules of Procedure and Evidence.

26. Although important progress has been made regarding Cluster B, "Pre-Trial and Trial Relationship and Common Issues", over the course of this year, the Study Group expressed its support for the position set out by the Court that in order to enhance the system an overall revision of all issues common to pre-trial and trial proceedings was warranted.<sup>7</sup> The Study Group encouraged the Court to take such a comprehensive approach to all pending issues within this Cluster. The Study Group looked forward to the Court's next report on those matters.

27. The Study Group also noted that some preliminary work had been done within the Court on Cluster D: "Victims participation and reparations", particularly with respect to Cluster D.1 "Applications for victim participation". The Study Group, therefore, encouraged the Court to continue its work in this area, with a view to presenting a first report in 2015.

28. The Study Group expressed its willingness to continue to consider proposals for amendments to the Rules of Procedure and Evidence, in accordance with the Roadmap on reviewing the criminal procedures of the Court, which was set out in annex I to the 2013 report of the Bureau on the Study Group (ICC-ASP/12/37). In this regard, the Study Group encouraged the Court to continue its more holistic approach, thereby allowing States to discuss future proposals in a more systematic way. The Study Group highlighted in this

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<sup>7</sup> Annex II, para 32.

context the Court's report on Cluster B as a very valuable contribution. In the same vein, the Study Group wished to emphasise that the Rome Statute provides that amendments to the Rules of Procedure and Evidence may be proposed also by any State Party. In this regard, the Study Group should be seen also as a forum to discuss amendment proposals emanating from States Parties so as to allow for a structured and fruitful dialogue between States Parties and the Court. This would, on the one hand, reinforce the role of States Parties in the amendment process, while at the same time allow the Court, including the Working Group on Lessons Learnt and the Advisory Committee on Legal Texts, the opportunity and necessary time to form its view on any such amendment proposals. It may be the case that the Roadmap would need to be amended to address such a scenario.

29. Finally, the Study Group considered that an active dialogue with external stakeholders to the Court whose work aimed to improve the efficiency and effectiveness of the criminal process of the Court was an important part of its mission. In this respect, the Seminar of 9 July, referred to above, at The Hague Institute for Global Justice brought together a number of initiatives, including external ones, which looked at reform of the Court in varying respects. The Study Group decided to remain informed of these existing, and any new, dialogues, so as to stimulate a broad and fruitful debate on those issues within the mandate of the Study Group. Such initiatives could also provide a useful forum for a more generic discussion on how to enhance the efficiency and effectiveness of criminal proceedings, which would not necessarily lead to amendment proposals in the short term, but which would form the basis for a more thorough reflection of the functioning of the Court in the longer term.

### **III. Cluster II**

30. At its meeting on 17 March 2014, the Bureau requested the President to engage in consultations with The Hague Working Group to clarify and report to the Bureau: a) The specific mandate intended on intermediaries for Cluster II; b) The broader plan for Cluster II as referred to in the informal summary of the 13 January 2014 meeting of the Hague Working Group; and c) The plans of the Hague Working Group to implement the recommendations of the Bureau on the evaluation and rationalization of Working Methods of the Subsidiary Bodies of the Bureau. At its meeting on 16 April 2014, the Bureau was informed by the President that the Hague Working Group intended to complete the review of additional mandates it had created for 2014 for consideration in the Working Group. The Bureau took note of this briefing and decided that any need for an additional facilitation that may arise in the inter-sessional period would be considered by the Bureau and allocated to its New York or Hague Working Group according to the established practice.

#### **A. Background**

31. The issue of intermediaries was initially discussed in the framework of The Hague Working Group facilitation on Strategic Planning at its informal meetings on 14 June 2012 and 5 July 2012. In 2013, this issue was transferred to The Hague Working Group facilitation on Victims, which devoted its meeting 13 March 2013 to the issue.

#### **B. Programme of work**

32. Prior to holding informal sessions, the Study Group held informal consultation with the relevant Court organs, interested States Parties as well as the NGOs. The Focal Point stressed his willingness to engage in informal consultations with any stakeholder on numerous occasions. He also briefed the New York Working Group during the visit of facilitators from The Hague to New York 4 June 2014.

33. The Study Group held one informal meeting under the Cluster on 19 June 2014. After hearing presentations from the Court on the issue of intermediaries, the Study Group held focused and comprehensive discussions with the relevant Court organs on the topic at hand. At this meeting, the Court's policy documents on intermediaries were also presented. The following paragraphs purport to present the salient points of this discussion.

## C. Discussion of the issue

34. The following policy documents have been issued by the Court and constituted the textual basis for discussions on this cluster:

- (a) The Guidelines Governing the Relations between the Court and Intermediaries;
- (b) Code of Conduct for Intermediaries; and
- (c) Model Contract for Intermediaries.

### 1. Adoption and Implementation of the Guidelines

35. The Guidelines were adopted and came into force on 17 March 2014. The process leading to the adoption of the guidelines included an internal working group and consultations with external counsel and other stakeholders, e.g. NGOs working in the field, States Parties. As the Court explained, the Guidelines had already been in use before their formal adoption as they reflected the Court's current practice on intermediaries. The Court explained that the task of developing Court-wide guidelines to govern the relations with intermediaries was undertaken by the Court to fill the gap in its policy framework. Relations with intermediaries are not regulated in the Court's legal texts, with one exception in the Regulations of the Trust Fund for Victims. The Guidelines were to be implemented within existing resources and two reports on their financial implications had been submitted to the Committee on Budget and Finance at their 2013 sessions.

36. The Guidelines cover a number of different topics, such as the selection process, forms of support, safety issues, and confidentiality. It was noted by the Court that the intermediaries were often not remunerated and only their expenses were reimbursed, and that the use of intermediaries was therefore a cost-effective tool for the Court.

37. In order to ensure effective monitoring of the Guidelines, the Court has established a monitoring mechanism. During the first two years of implementation, the monitoring will be conducted through meetings of the Working Group on Intermediaries, which is to convene on a biannual basis. As the Study Group was informed by the Court, this working group met recently and decided that the Immediate Office of the Registrar would act as the focal point for the permanent observation mechanism, consisting of all organs of the Court and relevant sections within these, with its first meeting held in September 2014. As explained in the Guidelines, a detailed review would take place in September 2015 and, meanwhile, individual organs and sections would monitor the implementation of the Guidelines.

### 2. The role of intermediaries in criminal investigations

38. Following the general presentation of the Guidelines, the Office of the Prosecutor (OTP or "Office") explained aspects relating directly to its activities. The Office of the Prosecutor's knowledge of a situation on the ground may, at the initiation stage of an investigation, still be somewhat limited. The sole function of Prosecution intermediaries is to assist the Office, where necessary and appropriate, in identifying and establishing contact with potential witnesses who might be willing to cooperate with the Office. These activities would sometimes be very time-consuming and costly for the Office without the possibility to rely on intermediaries and might also subject the persons with whom the OTP interacts to risk of exposure, the mandatory management of which would equally be costly for the Court. As the OTP explained, intermediaries are thus never used for the purpose of performing investigative activities, which is a responsibility solely of the OTP.

39. As the OTP explained, the Office had learned from problems encountered in the Lubanga case<sup>8</sup> and adopted measures to avoid such issues in the future, such as vetting of the intermediaries, testing of the intermediaries at an early stage of the process, close monitoring and avoiding the use of individual intermediaries for a large number of potential

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<sup>8</sup> International Criminal Court. Trial Chamber I, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo. Judgment pursuant to Article 74 of the Statute*, document ICC-01/04-01/06 of 14 March 2012, paras. 178-484. See, in particular, para. 482.



witnesses or sources of information. Further measures aimed at mitigating the risk associated with the use of intermediaries include closely reporting and monitoring; limiting the number of witnesses that an intermediary comes into contact with; providing information to intermediaries strictly on a need-to-know basis as well as asking witnesses about the approach of individual intermediaries. Such measures were codified in the OTP Operations Manual, in the section dealing with Intermediaries. This document, which sets out standard operating procedures followed by the OTP, is confidential.

40. The Study Group was informed that the OTP distinguished between two types of intermediaries:

- (a) Contracted intermediaries – identified individuals who the OTP wants to task to do something on behalf of the Court; these individuals are paid also for their time; and
- (b) Voluntary intermediaries – individuals who offer to assist the Court; paid only for the expenses incurred.

41. It was noted by the Office that investigative activities are not outsourced to intermediaries. Cooperation with an intermediary was based on the risk-benefit assessment which was conducted before establishing contact with a potential intermediary and also during his/her interactions with the Court. The person received a briefing and confirmed by signature that he/she had been briefed. The fees paid to contracted intermediaries were situation specific and based on the local United Nations fees and category of the activities.

42. As part of the exit strategy the OTP explained to intermediaries that there was no expectation of continuation of tasking or renewal of the contract. Upon termination of the contract the intermediaries received a briefing on confidentiality issues. As soon as any doubt was cast on an intermediary, the OTP stopped using the person in question.

### **3. Governance Issues**

43. As regards the issue of the Court's potential third party liability towards, or for the actions of, intermediaries, the Court explained that since intermediaries are not staff of the Court, they would not be able to avail themselves of the mechanisms under the Court's staff rules. Furthermore, third-party claims against the Court before national courts would fail in light of the Court's immunity from jurisdiction. However, article 31 of the Agreement on Privileges and Immunities of the Court requires the Court, without prejudice to the powers of the Assembly, to make provisions for appropriate modes of settlement of disputes of a 'private law character'. In doing so, inspiration might be drawn from the experience of the UN and other international organizations, in settling third-party claims, including through negotiation.

### **4. Discussion with States Parties in the framework of the Study Group on the issue and the way ahead**

44. At its meeting on 19 June 2014, the Study Group had a focused and instructive discussion, during which many different aspects of the issue of intermediaries came to the fore. States Parties demonstrated the strong interest they take in the issue at hand. Some States expressed the view that the use of intermediaries in a situation affects the sovereignty of the State concerned and that the current legal framework does not provide a clear ground to use and rely on intermediaries. In this vein, it was advanced that the Court was created to fulfill its mandate with the cooperation of States Parties pursuant to Part 9 of the Statute. Some delegations also expressed great concern on the confidential nature of the OTP Operations Manual. Some other States pointed to grey areas surrounding the use of intermediaries, with regards to the question when and in what process they would be used. Some other States welcomed the adoption of the Guidelines.

45. The Study Group also had the opportunity to address concrete queries to the Court, which, as far as the questions did not pertain to confidential issues, provided useful further information to States Parties. One question raised was about the financial and budgetary implications of using intermediaries. States Parties were informed that in case additional resources were needed, the Court had indicated in its second report to the Committee on

Budget and Finance in 2013 that it would absorb any additional costs in the 2014 budget. As regards the possibility of charges of offences against the administration of justice to be brought in respect of the Lubanga case, and the fact that the Trial Chamber had suggested that there might be grounds to investigate such offences against some individuals, the Study Group was informed that the OTP had engaged an expert to review in-house information relevant to the allegations. On the basis of the report produced by the expert and the Prosecutor's own assessment of all the relevant information before her, she decided not to formally investigate the allegations.

46. As to the way forward, some States Parties stressed their continued interest in the topic. At the same time, they were cognizant of the need to streamline the work of the Hague Working Group and the Study Group on Governance and to finalize discussions, wherever appropriate.

#### D. Evaluation

47. The Study Group considers the issue of intermediaries to be a crucial one. This was illustrated by the difficulties which the Prosecution had encountered in the Lubanga case, where problems related to some of its intermediaries resulted in the Trial Chamber's rejection of the evidence of the witnesses who had been in contact with those intermediaries. There was no agreement within the Study Group on the question whether or not reliance on intermediaries by the OTP should be welcomed. Whilst some States acknowledged that Prosecution would have, at times, to rely on the use of intermediaries, as good practice in the name of efficiency and witness protection, other States expressed their concern in this regard. There was, however, agreement within the Study Group on the need for the Court to implement a well-balanced policy on the issue.

48. In this context, the Study Group notes the adoption by the Court of the Guidelines.

49. The importance of the integrity of the judicial process requires a thorough and continued monitoring of the implementation of the Guidelines, taking into consideration present experience and judicial findings pertinent to the issue at hand. Whilst recognising the principle of prosecutorial independence as enshrined in Art. 42 paragraph 1 of the Rome Statute, the Study Group stresses the need for the Office of the Prosecution to ensure close oversight over intermediaries. In this regard, the Study Group took note of the fact that, as the Office of the Prosecutor has proposed, intermediaries will not assume any investigative function. The Study Group also commends the Court for the establishment of a mechanism to monitor the implementation of the Guidelines.

50. As the issue of intermediaries remains of importance to States Parties, and also given the concerns which some States have expressed during the discussions, the Study Group invites the relevant organs of the Court to keep States Parties informed about important future developments, including those connected to judicial proceedings, which might require the Court to amend its policy on the issue of intermediaries. As such information might also be provided outside of a separate facilitation on the issue of intermediaries, the Study Group recommends that the mandate of the facilitation be discontinued. In this context, it should also be noted that, should the need to act arise in the future, the Bureau could issue a new mandate to deal with the issue of intermediaries in any given format considered appropriate.

#### IV. Recommendations

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

*The Assembly of States Parties,*

1. *Extends* for another year the mandate of the Study Group, provided in [*resolution ...*], and *requests* the Study Group to report back to its fourteenth session;
2. *Welcomes* the report of the judges' Working Group on Lessons Learned on the "Pre-Trial and Trial Relationship and Common Issues"; and *encourages* the judges to continue their work on this issue into 2015; and

3. *Looks forward* to receiving the judges' Working Group on Lessons Learned report on "Victims participation and reparations" in 2015.
4. *Invites* the Court to monitor the use of intermediaries through its Working Group on Intermediaries with a view to safeguarding the integrity of the judicial process and the rights of the accused.
5. *Requests* the Court to inform States Parties, when appropriate, about important developments pertaining to the use of intermediaries, which might require the Court to amend the Guidelines.

## Annex I

### **Report of the Study Group on Governance Cluster I in relation to amendment proposals to the Rules of Procedure and Evidence put forward by the Court**

#### **I. Introduction**

1. On 28 February 2014, the Working Group on Lesson Learnt (WGLL), in accordance with the Roadmap,<sup>1</sup> introduced two reports. The first contained recommendations to amend rule 76(3), rule 101(3) and rule 144(2)(b) of the Rules of Procedure and Evidence (RPE) identified under the “Language Issues” cluster.<sup>2</sup> The second contained a recommendation for a new rule 140*bis*, identified under the “Organisational Matters” cluster.<sup>3</sup>

2. The Study Group on Governance expressed its appreciation to the Court for producing the reports in good time, and well ahead of the timelines envisaged under the Roadmap.

3. Between February and September 2014, members of the Study Group met with the Court several times, formally and informally, to express their respective views and seek clarifications. Following these discussions, the Court prepared revised versions of its reports. In accordance with the Roadmap, the Study Group should convey to the Working Group on Amendments, where possible sixty days before the next session of the Assembly, final recommendations on proposals to amend the Rules.

#### **II. Proposals to amend rule 76(3), rule 101(3) and rule 144(2)(b)**

4. The proposed amendment to rule 76(3) would allow the Court to authorise partial translations of prosecution witness statements, where such partial translations would not infringe the rights of the accused. The proposed amendment to rule 144(2)(b) allows the Court to authorise partial translations of decisions of the Court, where such partial translations would not infringe the rights of the accused. The proposed amendment to rule 101(3) allows the Court to delay the commencement of time limits of certain decisions until their translations are notified.

5. The Court explained to the Study Group that the proposed amendment to rule 76(3) was drafted in response to circumstances where full translations of prosecution witness statements have proven unwieldy and resulted in considerable delays to Court proceedings. The Court considered that partial translations of prosecution witness statements are fully consistent with article 67(1)(f), which provides that the accused is entitled to “such translations as are necessary to meet the requirements of fairness”, and article 67(1)(c), which provides that the accused must be “tried without undue delay”. Accordingly, the Court stated that the proposed amendment would afford Chambers greater flexibility in making decisions that would balance both considerations of fairness and expediency.<sup>4</sup>

6. The Court explained to the Study Group that the proposed amendment to rule 144(2)(b) arose out of ambiguity as to whether a Trial Chamber could authorise partial translations of certain decisions. Although one Trial Chamber has interpreted the rule to permit such partial translations, the Court determined that greater clarity was warranted. The Court affirmed that the amendment would continue to be subject to the safeguards of article 67(1)(f).<sup>5</sup>

7. The Court explained to the Study Group that the proposed amendment to rule 101(3) was drafted in response to the ad hoc practice of Chambers extending time limits where

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<sup>1</sup> ICC-ASP/12/37, annex 1.

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

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

<sup>4</sup> Study Group on Governance Cluster 1: Expediting the Criminal Process, Recommendation on a proposal to amend rule 76(3), rule 101(3) and rule 144(2)(b) of the Rules of Procedure and Evidence.

<sup>5</sup> *Ibid.*

translations of certain decisions had been deemed necessary. Accordingly, the proposed amendment would clarify that a Chamber may order that time limits shall begin to run once the translations of certain decisions are notified.

8. During discussion in the Study Group, delegations raised a number of points. The Study Group debated whether the proposed amendments prejudiced the rights of the accused as set out in article 67 of the Rome Statute. In particular, article 67(1)(f) provides that the accused has the right to have such translations “as are necessary” to meet the requirements of fairness, free of any cost. Rule 76(3) currently provides that prosecution witness statements must be translated into a language the accused fully understands and speaks. Some delegations raised serious concerns as to the understanding that the current standard set out in rule 76(3) was uniquely stringent. The Court stated that the proposed amendment was simply seeking to harmonise the Rome Statute and rule 76(3). The Chair of the Study Group produced a note (see appendix of this report) setting out his research on the matter, which noted that treaty law is silent on the scope of the right of the accused to translation and interpretation and that there was no international or regional jurisprudence or standard which claimed that all documents, prosecution statements or decisions, had to be fully translated in order to protect the rights of the accused. A delegation brought some legal instruments to the attention of the Study Group, such as Directive 2010/64 of the European Union. A view was expressed that the jurisprudence could be read in a way which supported the contrary position.

9. A concern was expressed that the proposals focussed on holding an expeditious trial at the expense of the right of the accused to a fair trial. The Rome Statute states that the accused has the right to a “fair hearing conducted impartially”<sup>6</sup> and “to be tried without undue delay”<sup>7</sup>. The Court and some delegations considered that waiting for complete translations may cause too great a delay for a trial to be considered fair, thereby undermining the accused’s right to a fair and expeditious trial. Conversely, other delegations noted that the accused must have sufficient knowledge of the case to be able to defend the case against them, and that only full translations of witness statements could fulfil this requirement. Some delegations maintained that budgetary and manpower considerations should not be the criteria to amend the current legal framework where a human right or due process of law is at stake.

10. Further clarity was sought on which criteria would be used to decide which parts of a prosecution witness statement or decision would be translated. Examples of International and regional case law were provided, which included references to “relevant material”, “essential points”, and “necessary for the accused to have knowledge of the case against him”. The representative of the Court stated that the decision was exclusively judicial in nature, and that the elected judges had the duty both to determine the requirements of fairness and uphold the rights of the Defence. Some delegations maintained their concerns and stated that it is the Defence, and only the Defence, which could determine what is relevant and what is not for the purposes of its strategy in the proceedings.

11. A further view was expressed that the proposed amendments had the potential to increase the cost burden upon the Defence. Currently, the Court pays for translation services. If it were the case that the proposals were adopted, and the Court ordered partial translations, the Court would no longer be obliged to translate those parts of prosecution statements or decisions which fell outside the scope of the order. If the Defence still considered it necessary to receive full translations of certain documents, notwithstanding the Court’s determination that partial translations met the requirements of fairness pursuant to article 67(1)(f), they would be liable to pay for these services themselves. As a further consequence, the Court would be able to order proceedings to continue, without having to postpone hearings until the translations were complete.

12. Finally, a view was expressed that even if it were concluded that the proposal was in conformity with the Rome Statute, it was not entirely clear that the three amendment proposals would entail more expeditious proceedings, as the determinations of the Court on the fairness of partial translations could be subject to appeal pursuant to article 82(1)(d) of the Statute. Some delegations expressed their concern that causing further litigation would

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<sup>6</sup> Article 67, Rome Statute of the International Criminal Court.

<sup>7</sup> Article 67(1)(c), Rome Statute of the International Criminal Court.

be contrary to the mandate of the Study Group, while other delegations stated that the short-term risk of appellate procedures was inherent in any legislative amendment in the immediate aftermath of its adoption in order to clarify the law, and was not a *per se* reason to reject the proposals.

### III. Proposal to introduce rule 140bis

13. Proposed rule 140bis provides that where a Trial Chamber judge is absent for illness or other unforeseen and urgent reasons, the remaining judges of the Chamber may continue hearing the case to complete a specific matter, provided that such continuation is in the interests of justice and the parties consent.

14. The Court explained that the proposed new rule sought to grant the Trial Chamber a measure of flexibility to respond to the absence of a judge in unforeseen and exceptional circumstances. The Court noted that the proposed rule arose in response to several situations where a single judge was temporarily absent and that absence resulted in delays to Court proceedings. The Court stated that the proposed rule would contribute to the efficient management of the work of Trial Chambers and that its structure both emphasises the exceptional nature of the measure and gives due regard to the rights of the accused.<sup>8</sup>

15. Some delegations expressed concerns regarding the proposed amendment's consistency with the letter and spirit of the Rome Statute, in particular with article 39(2)(b)(ii) and article 74(1), and that while the expeditiousness of trial was of central concern, the integrity of the Rome Statute must be preserved. The Court considered that article 64(3)(a), which permits a Trial Chamber to adopt, after conferring with the parties, such procedures as are necessary to facilitate the fair and expeditious conduct of proceedings, could reconcile the potential tension between the proposed rule and article 39(2)(b). It was noted that during the Court-wide consultations, a minority noted that in light of its exceptional application, the proposed amendment would have limited added value and questioned whether it was then worth being pursued.

16. It was observed that to establish whether the proposal was consistent or not with the Statute, an assessment of whether the expression "hearing", contained in the proposed rule 140bis, meant the same as "stage of the trial" in article 74 of the Rome Statute would be necessary. A view was expressed that a strictly literal interpretation may lead to the conclusion that there is no such parallel meaning and, therefore, no contradiction. Another view expressed that the expression "hearing" may be interpreted as the same as the expression "stage of the trial" under the Rome Statute. If the latter were the case, the amendment proposal would purport to create an exception to the Rome Statute through an amendment to subordinate legislation. It was also recalled that article 74 was not a provision of a purely institutional nature that could be more easily modified under article 122 of the Rome Statute.

17. A concern was also raised regarding the concept of "the interests of justice", which was not defined in the legal framework despite being a key provision of the decision-making process throughout the Rome Statute and the Rules of Procedure and Evidence. It was stated that this was not an ordinary or plain expression, but a term of art, and so should be interpreted accordingly.

18. The principle of immediacy was also raised, with the view expressed that the proposal could lead to a situation where a judge, due to his or her absence, would not be able to engage with the evidence, parties and participants in the proceedings, or exercise some of his or her powers, such as questioning a witness. That view noted that the reduced ability of a judge to interact with witnesses could potentially undermine his or her *conviction intime*. The Court observed that proceedings in the courtroom are audio and video-recorded and that the recordings, as well as transcripts of testimony, would be made available to any judge who is temporarily absent. The Court further observed that various chambers, including the Appeals Chamber, have determined that they can receive witness evidence in a different physical location from the witness using video technology, which permits them to observe demeanour, body language and assess witness credibility.

<sup>8</sup> Study Group on Governance Cluster 1: Expediting the Criminal Process, Recommendation on a proposal to introduce a rule 140bis to the Rules of Procedure and Evidence: Temporary Absence of a Judge.

19. Following formal and informal discussions, one delegation suggested an amendment which sought to clarify further the circumstances in which a judge may be temporarily absent from trial (proposed text change underlined):

**Rule 140bis RPE**

If a judge, due to illness or other unforeseen urgent personal reasons, is unable to be present at any hearing, the remaining judges of the Chamber may exceptionally order that the hearing of the case continue in the absence of that judge for completion of a specific matter which has already commenced and can be concluded within a short timeframe, provided that:

- (a) 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 required for compelling reasons in the interests of justice, inter alia in order to preserve evidence that will otherwise be lost or endangered;
- (b) At least one of the remaining judges has not been temporarily absent before in the hearing of this case;
- (c) The absent judge is given the opportunity to make himself familiar with the entirety of the proceedings conducted in his absence by means of video recording and the transcript; and
- (d) The parties consent to this arrangement.

20. The amendment was discussed, and it was agreed that the text should be considered by the Working Group on Amendments, alongside the Court's text.

21. Together with the wide variety of views expressed by delegations, the Study Group refers the proposed amendments to the Working Group on Amendments

## Appendix I

### Paper from the chair of the Study Group on Governance - Amendments to rule 76(3), rule 101(3) and rule 144(2)(b) - Relevant International Legal Standards

#### A. European Court of Human Rights

1. The ECtHR has held many times that complete translations of every court document are not needed in order to guarantee a fair trial. In *Luedicke, Belkacem and Koc v Germany*,<sup>1</sup> the ECtHR held that an accused has the right to the translation of documents when they are “necessary for him to understand in order to have the benefit of a fair trial.” This standard has been confirmed by subsequent jurisprudence.<sup>2</sup>

2. In *Kamasinski v Austria*, the ECtHR found no breach of the Convention where “all essential points of the indictment, of the witnesses’ depositions, of the contents of the documents read out in court as well as of the judgment, including its reasoning” were translated. The ECtHR also explicitly denied the right of an accused person to have all documents or written evidence translated, stating that translations should “enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.”

3. In both *X v Austria*<sup>3</sup> and *Erdem v Germany*, the ECtHR held that the rights of the accused and the defence are not to be considered separately, meaning that documents must only be translated into a language the accused or his/her counsel understand. The ECtHR also further held in these cases that there is no general right to the translation of all court documents under the ECHR.

#### B. ICTY

4. The ICTY has held on multiple occasions that the right to have documents translated is not unlimited. In *Prosecutor v Tolimir*,<sup>4</sup> *Prosecutor v Karadzic*,<sup>5</sup> and *Prosecutor v Praljak*,<sup>6</sup> it was held that the obligation to provide translations in a language the accused understands extends only to ‘relevant material’ and that the determination of which translations are necessary should be decided on a case-by-case basis.

5. In *Prosecutor v Popovic et al.*,<sup>7</sup> leave to appeal a decision not to translate transcripts into *Bosnian/Croatian/Serbian (BCS)* was denied, with the Judge recalling that the Prosecutor had offered to identify the direct evidence linking the accused to the crimes, and that translating the relevant documents “would result in an extremely significant delay in proceedings, which would be contrary to the accuseds’ right to an expeditious trial and would be harmful to the interests of justice”

6. In *Prosecutor v Naletilic and Martinovic*,<sup>8</sup> the Trial Chamber noted that there was no explicit right to receive all documents in a language the accused understands, but only evidence which forms the basis of the determination by the Chamber of the charges against the accused.

<sup>1</sup> *Luedicke, Belkacem and Koç v Germany* (6210/73, 6877/75 and 7132/75), (1978), at paragraph 48.

<sup>2</sup> *Kamasinski v Austria* 9783/82, 1989; *Husain v Italy*, 18913/03, 2005; *Hermi v Italy*, 18114/02, 2006; *Diallo v Sweden* 13205/07, Admissibility Decision, 2010;

<sup>3</sup> *X v Austria*, 6185/73, *Erdem v Germany* 38321/97.

<sup>4</sup> Decision on Interlocutory Appeal against Oral Decision of the Pre-Trial Judge of 11 December 2007, IT-05-88/2-AR73.1, 28 March 2008, at paragraph 15.

<sup>5</sup> Decision on Interlocutory Appeal of the Trial Chamber’s Decision on Prosecution Motion Seeking Determination that the Accused Understands English, IT-95-5/18-Ar73.3, 4 June 2009 at paragraph 2 and 18.

<sup>6</sup> Decision on Praljak’s Request for Stay of Proceedings, IT-04-74-A, 27 June 2014, at paragraphs 14-16

<sup>7</sup> Decision on Joint Defence Motion Seeking Certification of the Trial Chamber’s Decision on the Joint Defence Motion Seeking the Trial Chamber to Order the Registrar to Provide the Defence with BCS Transcripts of Proceedings of Past Two Cases before the International Tribunal, IT-05-88-PT, 23 March 2006.

<sup>8</sup> Decision on Defence’s Motion Concerning Translation of All Documents, IT-98-34, 18 October 2001.



7. In *Prosecutor v Delalic et al*<sup>9</sup> and *Prosecutor v Ljubicic*,<sup>10</sup> it was held that there is a balance between the right to receive documents in a language the accused understands, and the substantial cost and time burden on providing those translations, and that the right to an expeditious trial may be jeopardised by that burden.

8. In *Prosecutor v Kvočka et al*,<sup>11</sup> the Pre-Appeal Judge ordered that all documents directly relating to his appeal to be translated, and that any future filings relating to his present appeal should also be translated. The Judge here limited the right to receive documents in a language the accused understands to those specifically related to the matter at hand, and no general right to receive translations was created.

### C. African Union

9. The African Union's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also states that the accused has the right to translations of documents necessary to understand the proceedings or assist in the preparation of a defence.<sup>12</sup>

### D. European Union

10. Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings sets out that documents "which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings"<sup>13</sup> must be translated. Additionally, within essential documents, there is no requirement to translate passages not relevant to the accused knowing of the case against them.<sup>14</sup>

### E. Human Rights Committee

11. General Comment 32 of the Human Rights Committee states that 'oral' translations of some documents, through an interpreter or defence counsel, may be sufficient to guarantee the accused's right to document translations, provided that this does not prejudice rights of the accused.<sup>15</sup>

### F. OSCE

12. The OSCE's Legal Digest of International Fair Trial Rights also recognises that the right to have documents translated is not unlimited, and that there is no general right for an accused to express themselves in a language of their choosing.<sup>16</sup>

### G. Amnesty International

13. The Amnesty International Fair Trial Manual notes that the right to have documents translated free of charge is not unlimited, and reflects the jurisprudence outlined above. It states that if the accused needs something translated, he or she should make a request to the relevant court. A decision to refuse a translation request should be subject to appeal.<sup>17</sup>

<sup>9</sup> Decision on the Defence Request for Forwarding the Documents in the Language of the Accused, IT-96-21-T, 25 September 1996.

<sup>10</sup> Decision on the defence counsel's request for translation of all documents, T-00-41-PT, 20 November 2002.

<sup>11</sup> Decision on Zoran Zigic's Motion for Translation of Documents Pertaining to his Appeal, IT-98-30/1-A, 3 October 2002.

<sup>12</sup> Section N(4)(d).

<sup>13</sup> Directive 2010/64/EU, Article 3(1)

<sup>14</sup> Ibid, Article 3(4).

<sup>15</sup> General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007; See also *Harward v. Norway*, Communication No. 451/1991, U.N. Doc. CCPR/C/51/D/451/1991, 1994 at paragraph 9.5

<sup>16</sup> OSCE ODIHR Legal Digest of International Fair Trial Rights, 2012, pages 155-156.

<sup>17</sup> Amnesty International Fair Trial Manual, Second edition, 2014, section 23.3

## Appendix II

### Working Group on Lessons Learnt: Recommendation on a proposal to introduce a rule 140 bis to the Rules of Procedure and Evidence: Temporary Absence of a Judge

#### *Executive Summary*

This report provides a recommendation on a proposal to introduce a rule 140 bis into the Rules of Procedure and Evidence (“Rules”), relating to procedures to be followed in the event of the temporary absence of a judge of the Trial Chamber. The proposed amendment relates to sub-cluster 2 of Cluster I (Organizational Matters), as annexed to the Court’s First report on lessons learnt to the Study Group in October 2012.<sup>1</sup>

Article 39(2)(b)(ii) of the Statute of the International Criminal Court (“Statute”) provides that “[t]he functions of the Trial Chamber shall be carried out by three judges of the Trial Division”. Article 74(1) of the Statute provides that “[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations”.

The amendment proposal provides that if a Trial Chamber judge is, by reason of illness or other unforeseen urgent personal reasons, unable to be physically present at any hearing, the Chamber, or, if it is not practicable to consult the absent judge, the remaining judges may exceptionally order that the hearing continues in the absence of that judge for completion of a specific matter which has already commenced and can be concluded within a short timeframe, provided that the remaining judges of the Chamber are satisfied that such action is in the interests of justice, and the parties consent to the arrangement. In the event that the remaining judges are not satisfied that it is in the interests of justice to order that the hearing of the case continue, the remaining judges may, with the consent of the parties, conduct those matters which they are satisfied it is in the interests of justice to dispose of notwithstanding the absence of that judge, and may then adjourn the proceedings until such time as the absent judge returns.

It is considered that the proposed amendment creates a measure of flexibility to respond to unforeseen and exceptional circumstances that may arise in the course of a trial. If adopted, this amendment would enable the proceedings to continue in situations in which a judge is temporarily absent, while also safeguarding the rights of the accused and having due regard to the interests of justice. The proposal to add a new rule 140 bis was prepared in consultation with major stakeholders. In particular, its text was adopted by the Advisory Committee on Legal Texts (“ACLT”).

#### I. Introduction

1. The present report is submitted by the Working Group on Lessons Learnt (“WGLL”) in accordance with the Roadmap on Reviewing the Criminal Procedures of the International Criminal Court (“Roadmap”), endorsed by the Assembly of States Parties (“ASP”) in November 2012 and as amended in November 2013.<sup>2</sup> The WGLL was established in accordance with the Roadmap to consider recommendations on proposals to amend the Rules of Procedure and Evidence (“Rules”). The Roadmap provides that the WGLL is to submit recommendations on proposals to amend the Rules that receive the support of at least five judges both to the Study Group on Governance (“the Study Group”)<sup>3</sup> and to the Advisory Committee on Legal Texts (“ACLT”).<sup>4</sup>

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

<sup>2</sup> ICC-ASP/11/Res.8. The Roadmap was annexed to the Report of the Bureau on the Study Group on Governance, ICC/ASP/11/31. The “Revised Roadmap” was endorsed by the ASP on 27 November 2013. ICC-ASP/12/Res.8.

<sup>3</sup> Established via a resolution of the ASP in December 2010 (ICC-ASP/9/Res.2). In March 2012 it was decided to organize the work of the Study Group into two Clusters. These are Cluster I: Expediting the Criminal Process, and Cluster II: Enhancing the transparency and predictability of the budgetary process. ICC/ASP/11/31, para. 5.

<sup>4</sup> In accordance with the Regulations of the Court, all proposals for amendments to the Rules shall be submitted to the ACLT. See Regulations of the Court, regulation 5. Membership in the ACLT is regulated by the Regulations

2. The Court submitted its First report on lessons learnt (“First Report”) to the Study Group in October 2012.<sup>5</sup> The Annex to the First Report lists and provides a brief description of nine clusters and 24 sub-clusters identified as requiring discussion, with a view to expediting proceedings and enhancing their quality.

3. After the ASP endorsed the Roadmap in November 2012, the WGLL met to review the nine clusters. The WGLL decided, on the basis of the judicial experience of the Court at that stage, to place its main focus on three clusters: “Pre-trial”, “Pre-trial and trial relationship and common issues” and “Seat of the Court”. In the Second report of the Court to the Assembly of States Parties, dated 16 August 2013, the WGLL noted that it had expanded its focus to include an examination of translation issues under the “Language Issues” cluster.<sup>6</sup>

4. The present report addresses a potential amendment related to the “Organizational Matters” cluster. Sub-cluster 2 of this cluster addresses the issue of the absence or replacement of a judge, and suggests that discussion is needed on 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 of unforeseen temporary unavailability). The WGLL is pleased to make a proposal to amend the Rules to include:

Rule 140 *bis*: Temporary Absence of a Judge

5. The WGLL considers that the proposed amendment creates a measure of flexibility to respond to unforeseen and exceptional circumstances that may arise in the course of a trial. Adoption of the proposed amendment would contribute to the efficient management of the work of Chambers in such circumstances, by allowing the remaining members of the bench to continue hearings temporarily if a judge is absent due to illness or other urgent unforeseen personal reasons. The structure of the proposed amendment emphasises the exceptional nature of this measure, and gives due regard to the interests of justice and the rights of the accused.

## II. Recommendation on a proposal to introduce rule 140 *bis*

### A. The Current Provision

6. There is currently no provision in the Rules that enables the Trial Chamber to carry out its functions if a judge of the Chamber is temporarily absent.

7. The Rome Statute of the International Criminal Court (“Statute”) stipulates two relevant requirements for the exercise of functions by the Trial Chamber. Article 39(2)(b)(ii) of the Statute provides that “[t]he functions of the Trial Chamber shall be carried out by three judges of the Trial Division.” Article 74(1) further provides that:

- (a) All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending; and
- (b) Conversely, article 39(2)(b)(iii) of the Statute provides that functions of the Pre-Trial Chamber may be carried out either by three judges, or by a single judge of that division.<sup>7</sup>

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of the Court, which were adopted by the judges of the Court on 26 May 2004, pursuant to article 52 of the Statute. Regulation 4(1) of the Regulations of the Court provides:

“1. There shall be an Advisory Committee on Legal Texts comprised of: (a) Three judges, one from each Division, elected from amongst the members of the Division, who shall be members of the Advisory Committee for a period of three years; (b) One representative from the Office of the Prosecutor; (c) One representative from the Registry; and (d) One representative of counsel included in the list of counsel.”

<sup>5</sup> ICC-ASP/11/31/Add.1.

<sup>6</sup> ICC-ASP/12/37/Add.1.

<sup>7</sup> Article 39(2)(b)(iii) of the Statute provides that “[t]he functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division” in accordance with the Statute and the Rules. The Pre-Trial Chamber has relied on this provision several times: see e.g. Pre-Trial Chamber I, “Decision designating a single judge in the case of The Prosecutor v. Thomas Lubanga Dyilo”, ICC-01/04-01/06-

8. As noted above, the Presidency may, on a case-by-case basis, designate an alternate judge to replace a member of the Trial Chamber in accordance with article 74(1) of the Statute. Article 74(1) provides for the replacement of a member of the Trial Chamber by an alternate judge “if that member is unable to continue attending”. Rule 38 of the Rules stipulates that a judge may be replaced for “objective and justified reasons”, including *inter alia* an “accepted excuse”.<sup>8</sup> Rule 39 of the Rules stipulates that where an alternate judge has been assigned by the Presidency to a Trial Chamber in accordance with article 74(1), he or she shall be present during the proceedings and deliberations, but does not exercise any functions in the Trial Chamber unless and until required to replace a judge who is unable to continue. Rule 39 further stipulates that alternate judges shall be designated in accordance with a procedure pre-established by the Court. In light of the current operational resources of the ICC, it has not been possible to designate alternate judges to date. Furthermore, alternate judges are conceived of as a means of enabling permanent replacement of a judge who is unable to continue serving on a bench. As such, article 74(1) does not provide a resolution in situations in which a judge is absent for a temporary period.

## B. Background to the proposed amendment

9. Under the Statute and the Rules, there is presently no basis for the Trial Chamber to continue a hearing in the event that one judge of the Trial Chamber is temporarily absent. This situation has resulted in delays in proceedings to date. It can be anticipated that the situation will continue to cause delays if left unmitigated, particularly if a judge is assigned to more than one case at a time.

10. Trial Chamber I addressed the interpretation of the Statute and Rules in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, in its “Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial”.<sup>9</sup> Prior to the commencement of the hearing of evidence, the Chamber scheduled an “urgent hearing” for 29 January 2008, in the absence of one judge. At the hearing, after having invited oral submissions on the preliminary issue of whether a hearing may lawfully take place before only two trial judges, the judges decided that the hearing should be adjourned and the issue postponed until the return of the absent judge. The Chamber accordingly invited written submissions from the parties and participants and listed the issue for consideration at a status conference.<sup>10</sup> After conducting a survey of the relevant provisions, the Chamber concluded that the effect of the Rome Statute framework is to provide that all three members of the Trial Chamber must be present for each hearing and status conference from the period following the status conference, to the trial and deliberations.<sup>11</sup> In a similar vein, on 2 December 2009, Trial Chamber II postponed a scheduled hearing of a witness in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*<sup>12</sup> after a judge of the Chamber had a traffic accident and was unable to be physically present in Court.<sup>13</sup> The witness had not yet

51-tEN, 22 March 2006; Pre-Trial Chamber I, “Decision on the Designation of a Single Judge”, ICC-01/04-328-tEN, 10 May 2007; Pre-Trial Chamber I, “Decision on the Designation of a Single Judge”, ICC-01/04-167-tENG, 13 July 2006.

<sup>8</sup> In full, rule 38(1) provides that “A judge may be replaced for objective and justified reasons, *inter alia*: (a) Resignation; (b) Accepted excuse; (c) Disqualification; (d) Removal from office; (e) Death”. Rule 38(2) provides that “Replacement shall take place in accordance with the pre-established procedure in the Statute, the Rules and the Regulations”.

<sup>9</sup> Trial Chamber I, “Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial”, ICC-01/04-01/06, 22 May 2008.

<sup>10</sup> See Trial Chamber I, “Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial”, ICC-01/04-01/06, 22 May 2008, para. 2, citing Trial Chamber I, “Order for submission on whether two judges of the Trial Chamber may hold a hearing”, ICC-01/04-01/06-1168, 14 February 2008.

<sup>11</sup> Trial Chamber I, “Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial”, ICC-01/04-01/06, 22 May 2008, para. 15. See also *ibid.*, para. 15: “[I]t is clear beyond doubt that during the trial the three judges shall function *in banco*”.

<sup>12</sup> The charges against Germain Katanga and Mathieu Ngudjolo Chui were severed on 21 November 2012: Trial Chamber II, “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused person”, ICC-01/04-01/07-3319-tENG, 21 November 2012.

<sup>13</sup> Transcript of Trial Hearing, 2 December 2009, ICC-01/04-01/07-T-89-ENG, p. 1.

commenced his testimony<sup>14</sup> and the Presiding Judge indicated that he would begin his testimony when all judges of the Trial Chamber were available.<sup>15</sup>

11. There is one precedent for the use of a two judge bench in the temporary absence of a judge of the Trial Chamber. On 24 November 2010, Trial Chamber II in the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* sought the approval of the parties and participants to sit as a two judge bench for the purposes of hearing the testimony of a single witness.<sup>16</sup> At the time that the Chamber decided to continue with his evidence, he had already testified for six days and counsel was expected to complete his cross-examination on that day.<sup>17</sup> The Presiding Judge noted the requirements of article 39(2)(b)(ii) of the Statute,<sup>18</sup> while reflecting that the Chamber was confronted with “exceptional circumstances”.<sup>19</sup> The Presiding Judge further noted that the hearing would be recorded using audio and video equipment, and that a transcript would be provided, which would permit the absent judge to become familiar with the entirety of the proceedings conducted in her absence.<sup>20</sup> The parties and participants agreed with the proposed arrangement<sup>21</sup> and the hearing of the witness’ evidence was accordingly concluded before a two judge bench.<sup>22</sup>

12. Both the ICTY and ICTR have developed rules to allow for the continuation of the work of the Trial Chamber if one member is temporarily absent.<sup>23</sup> Rule 15 *bis* of the ICTY Rules of Procedure and Evidence (“ICTY Rules”) provides an extensive account of scenarios in which the hearing of a case may continue in the absence of a judge. The full text of ICTY rule 15 *bis* is provided in the attachment. For the present purposes, it is noted that the rule provides, *inter alia*, that if a judge is, for illness or other personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, the remaining judges of the Chamber may order that a hearing continue in the absence of a judge for a period of not more than five working days if they are satisfied that it is in the interests of justice to do so.<sup>24</sup> If the remaining judges are not satisfied that it is in the interests of justice to order that the hearing of the case continue in the absence of a judge, they may nevertheless conduct those matters which they are satisfied it is in the interests of justice to dispose of notwithstanding the absence of a judge, and may then adjourn the proceedings.<sup>25</sup> Rule 15 *bis* also provides

<sup>14</sup> Transcript of Trial Hearing, 1 December 2009, ICC-01/04-01/07-T-88-Red-ENG, p. 69.

<sup>15</sup> Transcript of Trial Hearing, 2 December 2009, ICC-01/04-01/07-T-89-ENG, p. 1. The witness was an expert witness who was located in The Hague. Transcript of Trial Hearing, 26 January 2010, ICC-01/04-01/07-T-90-ENG, p. 10.

<sup>16</sup> Transcript of Trial Hearing, 24 November 2010, ICC-01/04-01/07-T-222-Red2-ENG, p. 1. The witness in question was a participant in the armed conflict who gave evidence about his experience as a child soldier and about the position of command of Germain Katanga. See Transcript of Trial Hearing, 15 November 2010, ICC-01/04-01/07-T-216-Red-ENG.

<sup>17</sup> Transcript of Trial Hearing, 23 November 2010, ICC-01/04-01/07-T-221-Red-ENG, p. 81-83.

<sup>18</sup> Namely, that “[t]he functions of the Trial Chamber shall be carried out by three judges of the Trial Division”.

<sup>19</sup> In that case, the father of a judge of the Chamber passed away overseas, and it was necessary for that judge to depart to fulfil her familial duties and the necessary formalities. Transcript of Trial Hearing, 24 November 2010, ICC-01/04-01/07-T-222-Red2-ENG, p. 2.

<sup>20</sup> Transcript of Trial Hearing, 24 November 2010, ICC-01/04-01/07-T-222-Red2-ENG, p. 2.

<sup>21</sup> See Transcript of Trial Hearing, 24 November 2010, ICC-01/04-01/07-T-222-Red2-ENG, pp. 3-8. However, the Prosecution later in the session sought to have the Chamber continue to receive the evidence of the witness as a deposition, which could be later incorporated as evidence into the record upon the return of the absent judge. The Chamber noted that the suggestion came rather late, and noted that the Chamber would continue its work within the framework of the decision issued earlier in the morning: *ibid*, pp. 29-32.

<sup>22</sup> Transcript of Trial Hearing, 24 November 2010, ICC-01/04-01/07-T-222-Red2-ENG, pp. 3-8. Witness 0028 concluded his evidence on 25 November 2010: Transcript of Trial Hearing, 25 November 2010, p. 80.

<sup>23</sup> See ICTY, Rules of Procedure and Evidence, IT/32/Rev.49, 22 May 2013, rule 15 *bis*; ICTR, Rules of Procedure and Evidence, as amended on 10 April 2013, rule 15 *bis*. The ICTY rule is reviewed here for two reasons. First, in 2013 the States Parties asked the WGLL to provide comparative analysis, where appropriate, in the recommendation papers for proposed amendments to the Rules. Second, the experience of the ad hoc tribunals is relevant in this instance to the problem faced by the Court. The complexity and duration of proceedings, including but not limited to the number and circumstances of witnesses appearing before supranational criminal courts and tribunals, is unlike the typical criminal case in a national jurisdiction. Any delay occasioned by the temporary absence of a judge may affect not only logistics for witnesses traveling from distant and/or remote locations, but may also affect the well-being of a witness or have implications for maintaining protective measures.

<sup>24</sup> ICTY rule 15 *bis* (A).

<sup>25</sup> ICTY rule 15 *bis* (B).

measures to address absences for longer periods, in particular through the assignment of another judge to the case.<sup>26</sup>

### C. Issues

13. An amendment to the Rules to introduce a provision to allow the Chamber to continue to sit in the event that one judge is temporarily absent for reasons of illness or urgent unforeseen personal reasons would be beneficial and would facilitate the work of the Court. During Court-wide consultations that led to the adoption of this recommendation, concerns were discussed regarding the compatibility of the proposed amendment with the principle of immediacy and with some provisions of the Statute. In this respect, there was discussion regarding article 74(1) of the Statute, which provides that “[a]ll judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations”, and article 39(2)(b)(ii) of the Statute, which provides that “[t]he functions of the Trial Chamber shall be carried out by three judges of the Trial Division”. In 2012, the ACLT and Study Group considered whether any provision of the Statute provided legal support for a bench of less than three judges to exercise limited functions. The Court and the Study Group found that article 64(3)(a), which allows a Trial Chamber to adopt, after conferring with the parties, such procedures as are necessary to facilitate the fair and expeditious conduct of proceedings “could reconcile the potential tensions between [rule 132 *bis*] and article 39, paragraph (2)(b)(iii)”.<sup>27</sup> The Study Group further noted that article 64(3)(a) and the constraints of article 39(2)(b) informed the adoption of a conservative text for proposed rule 132 *bis*.<sup>28</sup>

14. Article 64(3)(a) also provides legal support for the adoption of proposed rule 140 *bis*, as it reconciles the potential tensions between the rule and article 39(2)(b)(ii). For this reason and with due consideration to the rights of the accused enshrined in article 67, , it was generally recognized that any rule authorising the continuation of hearings in the absence of a judge must be strictly confined to exceptional and limited circumstances, have a limited scope, and contain procedural safeguards, all as further developed below. While endorsing this view, during the Court-wide consultations, a minority noted that in light of its exceptional application, the proposed amendment would have limited added value and questioned whether it was then worth being pursued at all.

15. While the text of ICTY rule 15 *bis* provides a useful precedent for the Court in considering an appropriate amendment to the Rules, the WGLL considers that any amendment to the Rules must necessarily be more restrictive. In reaching this conclusion, the WGLL notes that neither the ICTY Statute nor the ICTR Statute contains a provision equivalent to that of article 74(1) of the Statute, which provides that “[a]ll of the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations”.<sup>29</sup>

16. Accordingly, the WGLL proposes a rule which permits the temporary absence of a judge in exceptional circumstances. This rule is subject to internal guarantees to ensure that it is consistent with the spirit of the Statute.

17. Accordingly, this section provides commentary on the proposed amendment to include a rule 140 *bis*.

<sup>26</sup> Namely, where ICTY rule 15 *bis*, paragraphs (D) and (G) apply. See ICTY rule 15 *bis* (C).

<sup>27</sup> See Report of the Study Group on Governance on rule 132 *bis* of the Rules of Procedure and Evidence, ICC-ASP/11/41.

<sup>28</sup> *Ibid.*

<sup>29</sup> The Statute of the ITCY (as amended on 7 July 2009) provides that a maximum at any one time of three permanent judges and six *ad litem* judges shall be members of each Trial Chamber (article 12(2)). While provision is made for the appointment of reserve judges in the event that a judge is unable to continue sitting (article 12(5)), no strict requirement of the presence of all three judges in the Trial Chamber appears in the Statute. The Statute of the ICTR (as amended at January 2010) provides that each Trial Chamber may be divided into sections of three judges each (article 11(2)). As is the case for the ICTY, no strict requirement of the presence of all three judges in the Trial Chamber appears in the ICTR Statute.

## D. Rule 140 *bis*

18. The text of the proposed rule 140 *bis* reads:

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 timeframe, provided that:

- (a) 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
- (b) The parties consent to this arrangement.

19. Rule 140 *bis* provides the core requirements that govern the continuation of a hearing<sup>30</sup> in the case of a temporary absence of a judge. These requirements are:

- (a) The absence must be due to illness or other unforeseen urgent personal reasons; and
- (b) The hearing may continue in the absence of that judge solely in order for completion of a specific matter which has already commenced and can be concluded within a short timeframe; and
- (c) The Chamber or, if it is not practicable to consult the absent judge, the remaining judges must be satisfied that the arrangement is in the interests of justice; and
- (d) The parties must consent to the arrangement.

The formulation “for illness or other unforeseen urgent personal reasons” provides a clear account of the limited circumstances in which rule 140 *bis* may be applicable. The requirement that urgent personal reasons be “unforeseen” underscores the exceptional nature of the measures provided for in the proposed rule and makes it unnecessary to provide a list of such events. Any determination to proceed with the hearing of a case during the temporary absence of a judge will thus be made on a case-by-case basis.<sup>31</sup> The WGLL notes that the bases for absence in rule 140 *bis* are more restrictive than those in ICTY rule 15 *bis*. It will be recalled that ICTY rule 15 *bis* does not require that urgent personal reasons be “unforeseen”, and that the rule provides for a third basis for absence, namely “for reasons of authorised Tribunal business”. The WGLL considers that this third basis should not be transposed into the proposed rule. It is not countenanced that judges of the Court shall have official business to attend to that would be in conflict with their trial schedule.

20. The language “unable to be present at any hearing” is intended to make clear that the provision is only limited to actual court sessions, and not to proceedings outside the courtroom. In this regard, it is worth recalling that the proceedings in the courtroom are audio and video-recorded and that the recordings, as well as transcripts of testimony, will be made available to any judge who is temporarily absent.<sup>32</sup> Further, various chambers, including the Appeals Chamber, have determined that they can receive witness evidence in a different physical location from the witness using video technology<sup>33</sup> that allows them to observe demeanour and body language and assess witness credibility. It has previously been determined that witnesses can testify from a remote location, including pursuant to

<sup>30</sup> The term “any hearing” should be interpreted using the common meaning of the term, i.e. “a particular hearing”. Thus, the term “any hearing” should not be interpreted to mean “all hearings”.

<sup>31</sup> See, for example, the situations that arose in the *Katanga* proceedings, namely a temporary absence of a judge due the death of a family member or as a result of a traffic accident.

<sup>32</sup> In the *Katanga* case, the Presiding Judge noted that the absent judge would be provided with all such recordings “so that she will lose nothing with respect to these proceedings”. Transcript of Trial Hearing, 24 November 2010, ICC-01/04-01/07-T-222-Red2-ENG, p. 7. See *ibid.*, p. 2.

<sup>33</sup> See e.g. Appeals Chamber, “Scheduling Order for a Hearing before the Appeals Chamber”, ICC-01/04-01/06-3067, 21 March 2014, p. 3; Trial Chamber I, “Judgment pursuant to article 74 of the Statute”, ICC-01/04-01/06-2842, 14 March 2012, para. 93; Trial Chamber II, “Judgment pursuant to article 74 of the Statute”, ICC-01/04-02/12-3-t-ENG, 18 December 2012, paras. 23 n. 43, 40; Trial Chamber II, “Jugement rendu en application de l’article 74 du Statut”, ICC-01/04-01/07-3436, 7 March 2014, paras. 21, n. 42, 74.

rule 67, utilizing video or audio link technology, provided that such measures are not prejudicial to, or inconsistent with, the rights of the accused.<sup>34</sup>

21. Under the proposed amendment, it is not possible to continue a hearing of the case beyond the completion of a specific matter which has already commenced and can be concluded within a short timeframe. This limit is consistent with the limit provided for in ICTY rule 15 *bis* (A). It was considered that a longer period would be inappropriate given that any hearings conducted in the temporary absence of a judge should be subject to strict limits in accordance with their use as an exceptional measure, in light of the strict requirements of the Statute. However, a strict time limit, such as only continuing for five working days, may not be adequate for completing certain specific matters when it would be in the interests of justice to do so. The fact that the proposed rule only applies to a matter that has already commenced (before the full Trial Chamber) and that the matter must be deemed capable of conclusion within a short timeframe ensures that any sitting pursuant to rule 140 *bis* will be of a limited duration. It is to be noted that, for hearings related to the preparation of the trial, rule 132 *bis* already would allow for these hearings to continue in the absence of one judge.<sup>35</sup>

22. Rule 140 *bis* (a) stipulates that the Chamber or, if it is not practicable to consult the absent judge, the remaining two judges of the bench must be satisfied that continuing the hearing in the absence of the third judge is in the interests of justice. This protection ensures that judges are best placed to balance the requirements of justice and fairness as may arise, bearing in mind the complexities of the evidence to be presented and the current stage of the proceedings.

23. Rule 140 *bis* (b) provides that the consent of the parties must be obtained before the hearing of a case can continue in the absence of a judge. This protection does not appear in ICTY rule 15 *bis* (A).<sup>36</sup> In the context of the present rule, it was considered that inserting a requirement that the consent of the parties be obtained would provide robust protection for the rights of the accused, while also underscoring the exceptional nature of the measure.

24. There was discussion as to whether another sub-section of rule 140 *bis* should be added to address what routine matters short of continuing the hearing were available when it was determined that it was not in the interests of justice to proceed. Given the availability of rule 132 *bis*, it was not deemed necessary to address this issue in rule 140 *bis*.

## E. The proposed provision

25. The WGLL accordingly proposes that the following amendment be introduced as rule 140 *bis* of the Rules:

### **140 *bis* Temporary Absence of a Judge**

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 timeframe, provided that:

- (a) 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

<sup>34</sup> See e.g. Trial Chamber III, “Decision on the Defence’s ‘Motion to Replace a Witness’ of 7 November 2013”, ICC-01/05-01/08-2865-Red, paras. 13, 17.

<sup>35</sup> Rule 132 *bis*(5) bears emphasis in this regard, as it provides that (emphasis added): “[t]he functions of the judge may be performed in relation to preparatory issues, *whether or not they arise before or after the commencement of the trial*”.

<sup>36</sup> The consent of the accused is however required under ICTY rule 15 *bis* (C) in the case that a judge is unavailable for a period that is “likely to be longer than of a short duration”, when such absence occurs after the opening statements provided for in ICTY rule 84, or the beginning of the presentation of evidence pursuant to ICTY rule 85. ICTY rule 15 *bis* (D) provides however that if the consent of the accused is withheld, the remaining judges may nonetheless decide whether or not to continue the proceedings before a Trial Chamber with a substitute judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. Such a decision is subject to appeal directly to a full bench of the Appeals Chamber by either party.



- (b) The parties consent to this arrangement.

### **III. Conclusion**

- 26. If adopted, the proposal outlined above would:
  - (a) Provide an avenue to allow the proceedings to continue in the event that a judge is temporarily absent for illness or other unforeseen urgent personal reasons;
  - (b) Provide due regard to the interests of justice; and
  - (c) Safeguard the rights of the accused.

## Attachment

### Comparison of ICTY rule 15 *bis* and proposed rule 140 *bis*

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#### *ICTY rule 15 bis*

##### **Absence of a Judge**

(A) If

(i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and

(ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so,

those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days.

(B) If

(i) a Judge is, for illness or urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and

(ii) the remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case continue in the absence of that Judge, then

(a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied it is in the interests of justice that they be disposed of notwithstanding the absence of that Judge, and

(b) the remaining Judges of the Chamber may adjourn the proceedings.

(C) If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the remaining Judges of the Chamber shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of all the accused, except as provided for in paragraphs (D) and (G).

(D) If, in the circumstances mentioned in the last sentence of paragraph (C), an accused withholds his consent, the remaining Judges may nonetheless decide whether or not to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken from the decision to continue proceedings with a substitute Judge or the Appeals Chamber affirms that decision, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made.

(E) For the purposes of paragraphs (C) and (D), due consideration shall be given to paragraph 6 of Article 12 of the Statute.

(F) Appeals under paragraph (D) shall be filed within seven days of filing of the impugned decision. When such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

(i) the party challenging the decision was not present or represented when

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#### *Proposed rule 140 bis*

##### **Temporary Absence of a Judge**

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 timeframe, provided that:

(a) 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

(b) The parties consent to this arrangement.

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*ICTY rule 15 bis**Proposed rule 140 bis*

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the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from the filing of the written decision.

(G) If, in a trial where a reserve Judge has been assigned in accordance with Rule 15 *ter*, a Judge is unable to continue sitting and a substitute Judge is not assigned pursuant to paragraphs (C) or (D), the trial shall continue with the reserve Judge replacing the Judge who is unable to continue sitting.

(H) In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.

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## Appendix III

### Working Group on Lessons Learnt: Recommendation on a proposal to amend rule 76(3), rule 101(3) and rule 144(2)(b) of the Rules of Procedure and Evidence

#### *Executive Summary*

The WGLL proposes to amend rule 76(3), rule 101(3) and rule 144(2)(b) of the Rules of Procedure and Evidence. These three amendment proposals fall under the “Language Issues” cluster, as identified in the Annex to the Court’s “First report on lessons learnt”, submitted to the Study Group on Governance in October 2012.<sup>1</sup>

Currently, rule 76(3) addresses the translations of statements of prosecution witnesses, rule 103 addresses time limits and rule 144(2)(b) addresses the translation of decisions of the Trial Chamber. The proposed amendments would allow Chambers to authorise partial translations of witness statements, in accordance with rule 76(3), and decisions, in accordance with rule 144(2)(b), when such partial versions are determined to be sufficient to meet the requirements of fairness. An amendment to rule 101(3) has been proposed to delay the beginning of time limits of certain decisions until their translation, or parts thereof necessary to meet the requirements of fairness, is notified. These amendments are intended to expedite proceedings by giving greater flexibility to Chambers, while also having due regard to the principles of fairness and the rights of the accused. These amendments were prepared in consultation with major stakeholders. In particular, the text was adopted by the Advisory Committee on Legal Texts (“ACLT”).

#### I. Introduction

1. The present report is submitted by the Working Group on Lessons Learnt (“WGLL”) in accordance with the Roadmap on Reviewing the Criminal Procedures of the International Criminal Court (“Roadmap”), endorsed by the Assembly of States Parties (“ASP”) in November 2012 and as amended in November 2013.<sup>2</sup> The WGLL was established in accordance with the Roadmap to consider recommendations on proposals to amend the Rules of Procedure and Evidence (“Rules”). The Roadmap provides that the WGLL is to submit recommendations on proposals to amend the Rules that receive the support of at least five judges both to the Study Group on Governance (“the Study Group”)<sup>3</sup> and to the Advisory Committee on Legal Texts (“ACLT”).<sup>4</sup>

2. The Court submitted its First report on lessons learnt (“First Report”) to the Study Group in October 2012.<sup>5</sup> The Annex to the First Report lists and provides a brief description of nine clusters and 24 sub-clusters identified as requiring discussion, with a view to expediting proceedings and enhancing their quality.

3. After the ASP endorsed the Roadmap in November 2012, the WGLL met to review the nine clusters. The WGLL decided, on the basis of the judicial experience of the Court at that stage, to place its main focus on three clusters: “Pre-trial”, “Pre-trial and trial relationship and common issues” and “Seat of the Court”.

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

<sup>2</sup> ICC-ASP/11/Res.8. The Roadmap was annexed to the Report of the Bureau on the Study Group on Governance, ICC/ASP/11/31. The “Revised Roadmap” was endorsed by the ASP on 27 November 2013. ICC-ASP/12/Res.8.

<sup>3</sup> Established via a resolution of the ASP in December 2010 (ICC-ASP/9/Res.2). In March 2012 it was decided to organize the work of the Study Group into two Clusters. These are Cluster I: Expediting the Criminal Process, and Cluster II: Enhancing the transparency and predictability of the budgetary process. ICC/ASP/11/31, para. 5.

<sup>4</sup> All proposals for amendments to the Rules shall be submitted to the ACLT in accordance with the Regulations of the Court, which were adopted by the judges of the Court on 26 May 2004, pursuant to article 52 of the Statute. See Regulations of the Court, regulation 5. Membership in the ACLT is regulated by Regulation 4(1) and provides:

“1. There shall be an Advisory Committee on Legal Texts comprised of: (a) Three judges, one from each Division, elected from amongst the members of the Division, who shall be members of the Advisory Committee for a period of three years; (b) One representative from the Office of the Prosecutor; (c) One representative from the Registry; and (d) One representative of counsel included in the list of counsel.”

<sup>5</sup> ICC-ASP/11/31/Add.1.

4. In the Second report of the Court to the ASP, dated 16 August 2013, the WGLL noted that it had expanded its focus to include an examination of translation issues under the “Language Issues” cluster.<sup>6</sup> Translation of witness statements and other important documents and decisions has proved to be extremely time-consuming at all stages of the proceedings and poses a significant challenge to the Court’s resources. In the Annex to the First Report, the Court noted that clarification was needed as to the extent to which witness statements and other documents need to be translated.<sup>7</sup>

5. The present report addresses potential amendments related to translation under the “Language Issues” cluster. The WGLL is pleased to make recommendations on proposals to amend:

- (a) Rule 76(3) of the Rules;
- (b) Rule 101(3) of the Rules; and
- (c) Rule 144(2)(b) of the Rules.

6. The amendments to rule 76(3) and rule 144(2)(b) proposed in this report would allow Chambers to authorise partial translations of witness statements and decisions respectively when such partial versions are determined to meet the requirements of fairness. The proposed amendment to rule 101(3) would allow Chambers to delay the beginning of time limits of certain decisions until their translation, or parts thereof necessary to meet the requirements of fairness, is notified. These amendments are intended to expedite proceedings by giving greater flexibility to Chambers, while also having due regard to the principles of fairness and the rights of the accused.

## **II. Recommendation on a proposal to amend rule 76(3) of the Rules**

### **D. The Current Provision**

7. The WGLL proposes an amendment to rule 76(3) of the Rules. The full text of rule 76 currently reads:

#### **Rule 76**

##### **Pre-trial disclosure relating to prosecution witnesses**

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.
2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.
3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.
4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

### **E. Background**

8. Rule 76 articulates the Prosecutor’s disclosure obligations with respect to prosecution witnesses at the pre-trial and trial preparation stages.<sup>8</sup> Pursuant to paragraph 1

<sup>6</sup> ICC-ASP/12/37/Add.1.

<sup>7</sup> ICC-ASP/11/31/Add.1, Annex.

<sup>8</sup> Rule 76 is located within Chapter 4 of the Rules on “Provisions relating to various stages of the proceedings” and, accordingly, applies “both to disclosure which takes place prior to the trial and to disclosure which takes place

of the rule, the Prosecutor has a duty to “provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses”.<sup>9</sup> Paragraph 2 indicates the Prosecutor’s continuing obligation to make such disclosures if the decision is made to add new prosecution witnesses. Paragraph 3, which is the provision at issue, requires that the Prosecutor’s disclosure of prosecution witness statements is “made available in original and in a language which the accused fully understands and speaks.” Finally, paragraph 4 indicates that the Prosecutor’s duty to disclose pursuant to rule 76 is subject to other obligations concerning the protection and privacy of victims and witnesses as well as of confidential information arising under the Statute and the Rules.<sup>10</sup>

9. In the Court’s jurisprudence to date, rule 76(3) has not been interpreted as allowing for the provision of partial translations. While there was relatively little controversy during the negotiations on the drafting of rule 76,<sup>11</sup> the current rules on translation have been shown to be unwieldy in Court proceedings to date, and may result in delays.

10. It has been consistently noted by the Court that rule 76(3) is “the only provision which expressly imposes upon the Prosecution a statutory obligation to provide the Defence with a translation ... of evidentiary materials”.<sup>12</sup> In the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain* (previously *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*),<sup>13</sup> translations into Zaghawa raised many problems at both the pre-trial and trial preparation stages, as it was extremely difficult and time-consuming to hire and train appropriate translators for a non-written language with a

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prior to the confirmation hearing.” See Helen Brady, “Disclosure of Evidence”, in Roy S. Lee (ed.), “The International Criminal Court; Elements of Crimes and Rules of Procedure and Evidence”, Transnational Publishers Inc., USA, 2001, p. 404.

<sup>9</sup> A literal reading of paragraph 1 suggests that, with respect to the confirmation of charges stage, the Prosecutor must provide statements only of those witnesses that she intends to call to testify at the confirmation hearing. See Helen Brady, “Disclosure of Evidence”, in Roy S. Lee (ed.), “The International Criminal Court; Elements of Crimes and Rules of Procedure and Evidence”, Transnational Publishers Inc., USA, 2001, p. 410. However, the Court’s jurisprudence has made it clear that, at the confirmation of charges stage, Rule 76 is not limited to statements of prosecution witnesses who will testify at the confirmation hearing. Rather, Rule 76 applies to all statements of prosecution witnesses on which the Prosecutor intends to rely at the confirmation hearing regardless of whether she intends to call such witnesses to testify. See Pre-Trial Chamber II, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 12 April 2013, ICC-01/04-02/06, para. 12 (finding that “the Chamber shall have access to the following disclosed evidence: ... (b) all names of witnesses and copies of their prior statements on which the Prosecutor intends to rely at the confirmation hearing, regardless of whether the Prosecutor intends to call them to testify (rule 76 of the Rules)”); Pre-Trial Chamber III, Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012, ICC-02/11-01/11-30, para. 43 (finding that “the Prosecutor is under an obligation, pursuant to Rule 76(1) of the Rules, to provide the Defence with the names of his witnesses, regardless of whether he intends to call them to testify ... and copies of their statements”); Pre-Trial Chamber I, Decision on issues relating to disclosure, 30 March 2011, ICC-01/04-01/10-87, pp. 17-18 (ordering the Prosecutor “pursuant to rule 76 of the Rules, to disclose to the Defence ... in original and in a language [the accused] fully understands and speaks, the names and the statements of the witnesses ... on which he intends to rely at the confirmation of charges hearing, regardless of whether the Prosecution intends to call them to testify”).

<sup>10</sup> The Registry provides language services to the Presidency and Chambers, including the translation of Court documents and interpretation for Court proceedings. The Office of the Prosecutor (“OTP”) has its own language services unit, which is responsible for, *inter alia*, translating OTP evidence, including prosecution witness statements. The Registry may, however, assist OTP with translating OTP evidence when specifically ordered to by a Chamber, such as in *The Prosecutor v. Abdallah Banda Abakaer Nourain*, which is discussed further below. See paras. 10-11. OTP currently covers the following languages: English, French, Arabic, Kalenjin, Kinyarwanda, Lingala, Swahili, and Zaghawa. (OTP relies on freelance resources for languages that are not covered internally.) The Registry and OTP apply the same translation rates. The typical translation cost of one page is 45 euros at the standard rate and 67.50 euros at the urgent rate. (A typical page consists of 300 words and the cost of translating one word is 0.15 euros at the standard rate and 0.225 euros at the urgent rate.) Administrative costs add about 15-20% to the original cost of a page. The typical translation time is 1,500 words per day for standard texts and 1,200 words per day for technical texts. OTP applies the 1,500 word per day rate with respect to prosecution witness statements for standard languages (*e.g.*, the official languages of the Court). However, with rarer languages, the rate will vary based on the language.

<sup>11</sup> See Helen Brady, “Disclosure of Evidence”, in Roy S. Lee (ed.), “The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence”, Transnational Publishers Inc., USA, 2001, p. 409.

<sup>12</sup> Pre-Trial Chamber I, Decision on the Defence Request Concerning Languages, 21 December 2007, ICC-01/04-01/07-127, para. 39. See also Pre-Trial Chamber I, Decision on the Defence for Mathieu Ngudjolo Chui’s Request concerning translation of documents, 15 May 2008, ICC-01/04-01/07-477, p. 3; Pre-Trial Chamber I, Decision on the Defence for Mathieu Ngudjolo Chui’s request for leave to appeal the Decision concerning translation of documents, 2 June 2008, ICC-01/04-01/07-538, p. 6; Trial Chamber III, Decision on the “Defence Application to Obtain the French Version of Certain Filings and Statements”, 8 September 2010, ICC-01/05-01/08-879, para. 18.

<sup>13</sup> Proceedings against Mr Jerbo were terminated on 4 October 2013. See Trial Chamber IV, Public redacted Decision terminating the proceedings against Mr Jerbo, 4 October 2013, ICC-02/05-03/09.

vocabulary of no more than 5,000 words.<sup>14</sup> Given the arduous nature of such translations, the defence waived its rule 76(3) entitlement to full translations of witness statements at the pre-trial stage.<sup>15</sup>

11. At the trial preparation stage, the Prosecutor indicated that the relevant material would have to be transliterated and subsequently read on to audio tapes in Zaghawa, which would in total require 30 months of full-time work for three translators.<sup>16</sup> Trial Chamber IV did not consider that the translation of summaries of the witness statements, proposed by the Prosecutor, would be sufficient in light of the requirements of the Rules.<sup>17</sup> Instead, the Chamber required the translation of the entirety of the statements or a structured version thereof when available.<sup>18</sup> A structured version of a statement was characterised as a “comprehensive and well-organised” witness statement, “in narrative form based on all the available material relating to these witnesses”.<sup>19</sup> The Chamber considered that structured witness statements would facilitate translation, reducing significantly the number of pages to be translated.<sup>20</sup>

12. Translation issues relating to rule 76(3) have also been at issue in other cases. In the case of *The Prosecutor v. Callixte Mbarushimana*, the Pre-Trial Chamber held that the Prosecutor had failed to respect the “rationale behind ... rule 76(3) of the Rules” by merely providing the accused with English and Kinyarwanda audiotapes of the witness interviews in question together with English transcripts, rather than providing full French or Kinyarwanda transcripts.<sup>21</sup> The Chamber accordingly found that the Prosecutor had an obligation to either (i) disclose French or Kinyarwanda transcripts of all interviews that were, at that time, only transcribed in English; or (ii) provide the defence with French summaries of this evidence, in accordance with article 61(5)<sup>22</sup> of the Rome Statute of the International Criminal Court (“Statute”).<sup>23</sup> As a result of this finding, the Chamber ordered a postponement of the confirmation hearing.<sup>24</sup>

13. The translation of a structured version of the statements, as was adopted in the *Banda* case (at that stage the *Banda and Jerbo* case), may indeed be a way to improve the expeditiousness of proceedings. Nevertheless, as is demonstrated in that case, this option

<sup>14</sup> See Prosecution’s Response to the Trial Chamber’s Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011, 14 April 2011, ICC-02/05-03/09-131, para. 7.

<sup>15</sup> See Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation, 12 September 2011, ICC-02/05-03/09-214, para. 6 (citing Transcript of hearing on 19 April 2011, ICC-02/05-03/09-T-10-ENG CT WT, p. 18, lines 16 to 20).

<sup>16</sup> Trial Chamber IV, Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation, 12 September 2011, ICC-02/05-03/09-214, para. 4. The Prosecutor later reduced the number of witnesses on which she was intending to rely but continued to reiterate the practical difficulties involved in the translation into Zaghawa. *ibid.*, paras. 8-10.

<sup>17</sup> *ibid.*, paras. 6, 9-10, 15, 31.

<sup>18</sup> *ibid.*, paras. 31-32.

<sup>19</sup> *ibid.*, paras. 23, 32.

<sup>20</sup> *ibid.*, para. 32. The Prosecutor appealed one aspect of the Trial Chamber’s Decision, namely that the Prosecutor provide written and signed statements for those witnesses whose interviews were audio- or video-recorded. The Appeals Chamber reversed the Trial Chamber’s finding in this respect, holding that when the Prosecutor created an audio- or video-recording of questioning in accordance with rule 112 of the Rules, he or she was not required as a matter of law to create written and signed records of the oral statements in lieu of those audio or video-transcripts. The Appeals Chamber did not address the translation of witness statements. However, it averred that it was aware that “in certain circumstances, making available the statements of witnesses in a language the [accused] fully understand[s] and speak[s] as required by rule 76(3) ... may create intractable difficulties” and suggested that it was “wholly within the powers of the Trial Chamber in consultation with the parties to devise practical solutions to these difficulties, ensuring expeditious proceedings while guaranteeing the rights of the accused.” See Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled “Reasons for Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation”, 17 February 2012, ICC-02/05-03/09-295, paras. 9, 28-29.

<sup>21</sup> Pre-Trial Chamber I, Decision on the “Defence request to deny the use of certain incriminating evidence at the confirmation hearing” and postponement of the confirmation hearing, 16 August 2011, ICC-01/04-01/10-378, para. 20.

<sup>22</sup> Article 61(5) provides that at the confirmation hearing, “the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial”.

<sup>23</sup> Pre-Trial Chamber I, Decision on the “Defence request to deny the use of certain incriminating evidence at the confirmation hearing” and postponement of the confirmation hearing, 16 August 2011, ICC-01/04-01/10-378, para. 24.

<sup>24</sup> *ibid.*, para. 24. The Chamber noted in its decision that part of the reason for the delay could be attributed to the Prosecutor’s failure to comply with its disclosure obligations as well as to the Defence’s failure to timely assert its right to receive full translations of witness statements. *ibid.*, paras. 19-21.

might not sufficiently expedite proceedings in cases where the statements, even in their structured form, are very long. The Trial Chamber's translation decision referenced above was issued on 12 September 2011. Over a year and a half later, on 22 April 2013, the Prosecution indicated that it had completed the translation of all material falling within the scope of Rule 76(1) and (3).<sup>25</sup> The translation of a structured version may also be problematic in cases in which the process of structuring such statements would be laborious and would prolong proceedings.

## F. Issues

14. It is proposed that rule 76(3) be amended to clarify that statements of prosecution witnesses need not be translated in full in all circumstances, without prejudice to the rights of the accused or the requirements of fairness.

15. Such an amendment to rule 76(3) would be consistent with article 67(1)(f) of the Statute. Article 67(1)(f) provides:

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(f) To have, free of cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

16. In accordance with article 67(1)(f), the accused is entitled to "such translations *as are necessary* to meet the requirements of fairness" (emphasis added) where proceedings or documents are not in a language which the accused fully understands or speaks. The use of the language "as are necessary" makes clear that the accused is not, as a matter of course, entitled to full translations of all case-related documents. Depending on the circumstances of the case, the requirements of fairness may be adequately satisfied without a need for all prior recorded testimonies of witnesses to be translated into a language the accused fully understands and speaks. As indicated, rule 76(3), as it has been interpreted, does not allow for sufficient flexibility in this regard. Whereas article 67(1)(f) conditions the right to translations on the requirement of fairness, rule 76(3) appears to require the translation of material in its entirety, without any limits or exceptions and irrespective of what is required to ensure fairness.

17. In addition, the proposed amendment to rule 76(3) would be in furtherance of article 67(1)(c) of the Statute.<sup>26</sup> It is worth recalling that the proposed amendment arose out of Court experiences where full translations of prosecution witness statements have proven to be extremely time consuming and resource depleting.<sup>27</sup> If left unchanged, the requirement to produce full translations in all circumstances may negatively impact the rights of the accused by unduly prolonging proceedings. Thus, the proposed amendment affords Chambers some flexibility in making decisions that would balance both considerations of fairness and expediency.

18. It is accordingly proposed that rule 76(3) be amended to allow the Prosecutor to provide translations "of relevant excerpts of the statements when, after seeking the views of the parties, [the Chamber] determines that full translations are not necessary to meet the requirements of fairness and would adversely affect the expeditiousness of the proceedings".

<sup>25</sup> Office of the Prosecutor, Tenth Prosecution Report on Translation Issues, 22 April 2013, ICC-02/05-03/09-467, paras. 3-4.

<sup>26</sup> Article 67(1)(c) provides:

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(c) To be tried without undue delay;

<sup>27</sup> See the discussion of the *Banda* case in para. 11.



19. The amendment seeks to import the consideration of fairness articulated in article 67(1)(f) into rule 76(3), by permitting partial translations where “full translations are not necessary to meet the requirements of fairness”. Limiting the proposed amendment to verbatim excerpts was considered to be fairer to the accused than expanding the scope of the proposed amendment to include “summaries” drafted by the prosecution.

20. Further, the proposed amendment requires the Chamber to seek “the views of the parties” prior to issuing any order for a partial translation. In situations in which the defence has agreed to receive excerpts, it was not seen as controversial that procedural rights of this kind can be waived in the absence of any statutory text authorising such a waiver.<sup>28</sup> However, it was seen as important to make seeking the views of the parties a requirement when partial translations are contemplated. Accordingly, before an order is issued for a partial translation, the defence will have the opportunity to make submissions on whether a partial translation will suffice.

21. If the defence does not agree to the translation of excerpts, the Chamber may still determine that partial translations are sufficient to meet the requirements of fairness. Nevertheless, as indicated above, the proposed amendment requires the Chamber to seek “the views of the parties”, providing the defence with the opportunity to make submissions on whether a full translation is warranted in the circumstances, including on fairness grounds. The proposed amendment further contemplates that the Chamber will consider all factors relevant to both fairness and expediency of the proceedings, after considering the specific circumstances of the case.<sup>29</sup> The Court is not in a position to enumerate every factor relevant to this consideration. The current proposal reflects one factor which goes to the fairness of the proceedings (e.g. whether the accused is self-represented, and may therefore require added consideration and assistance) and one which goes to the nature of the information being excerpted (e.g. the content of the statement). Further discussion could be had on these factors or whether other factors should be considered.

## G. The proposed provision

22. In line with the discussion above, the WGLL has prepared a draft amended rule 76(3). This proposed amendment is intended to expedite proceedings whilst conserving the principles of fairness and the rights of the accused.

23. Incorporating the proposed amendment to rule 76(3), the text of rule 76 would read as follows:

### **Rule 76**

#### **Pre-trial disclosure relating to prosecution witnesses**

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.

2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.

3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks. Where appropriate, the Chamber may authorise translations of relevant excerpts of the statements when, after seeking the views of the parties, it determines that full translations are not necessary to meet the requirements of fairness and would

<sup>28</sup> Indeed, the defence in the *Banda* case did waive its rule 76(3) rights in the confirmation of charges stage of the proceedings. See para. 10.

<sup>29</sup> The Chambers will determine how to manage this assessment in accordance with their respective pre-trial and trial management responsibilities. As such, a Chamber will promote agreement wherever possible. If litigation over the sufficiency of translated excerpts occurs, the parameters of the rule and an understanding of its application will gradually develop through decisions of the Chambers. Moreover, where briefing and arguing the matter would significantly reduce the efficiency value of partial translation, it is possible that a Chamber might decide in favor of full translation. In short, the judges are in the best position to determine the most fair and efficient manner of administering the rule and will have to balance the strain on various resources of the Court.

adversely affect the expeditiousness of the proceedings. For the purpose of such determination, the Chamber shall consider the specific circumstances of the case, including whether the person is being represented by counsel and the content of the statements.

4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

24. During Court-wide consultations that led to the adoption of these recommendations, a minority repeatedly expressed concerns with the proposed amendment. First, it was argued that the realities of criminal practice often mean that the accused is the person most familiar with factual details of the case, whether exculpatory or incriminating. In order to work effectively with the accused, the accused's counsel must be able to have full and frank discussions about all aspects of the case. By removing the unqualified right to full translations of prosecution witness statements, the defence would be consequently compelled to make such translations themselves. Accordingly, the minority maintained that the end result of this amendment proposal would therefore not be an efficiency measure, but rather a cost shifting measure which adversely affected the rights of the accused. The statements of prosecution witnesses were seen as so important for conducting a defence that anything less than full translations would be untenable. Second, there was also discussion as to whether the proposed amendment would prompt undue litigation. Even if the prosecution were only ordered to prepare excerpts of statements, the sufficiency of such excerpts could become highly contentious.

<i>Current rule 76(3)</i>	<i>Proposed rule 76(3)</i>
3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.	3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks. Where appropriate, the Chamber may authorise translations of relevant excerpts of the statements when, after seeking the views of the parties, it determines that full translations are not necessary to meet the requirements of fairness and would adversely affect the expeditiousness of the proceedings. For the purpose of such determination, the Chamber shall consider the specific circumstances of the case, including whether the person is being represented by counsel and the content of the statements.

### **III. Recommendation on a proposal to amend rule 144(2)(b) of the Rules**

#### **A. The Current Provision**

25. The WGLL proposes an amendment to rule 144(2)(b) of the Rules. The full text of rule 144 currently reads:

##### **Rule 144**

##### **Delivery of the decisions of the Trial Chamber**

1. Decisions of the Trial Chamber concerning admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused, sentence and reparations shall be pronounced in public and, wherever possible, in the presence of the accused, the Prosecutor, the victims or the legal representatives of the victims

participating in the proceedings pursuant to rules 89 to 91, and the representatives of the States which have participated in the proceedings.

2. Copies of all the above-mentioned decisions shall be provided as soon as possible to:

- (a) All those who participated in the proceedings, in a working language of the Court;
- (b) The accused, in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67, paragraph 1 (f).

## B. Background

26. Rule 144(2)(b) addresses the delivery by the Trial Chamber of decisions on admissibility, the criminal responsibility of the accused, sentencing and reparations. It requires that copies of these decisions be provided to the accused, in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67(1)(f) of the Statute.<sup>30</sup>

27. In the drafting of rule 144(2), certain delegations expressed the view that providing written translations to an illiterate accused in a language that he or she fully understands or speaks would be a waste of Court resources. The formula “if necessary to meet the requirements of fairness under article 67, paragraph 1 (f)” was introduced to respond to contrasting views.<sup>31</sup>

28. There has been scant case law on the application of rule 144(2)(b). However, in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues of translation arose regarding the Trial Chamber’s judgment. Specifically, the Trial Chamber addressed whether it was necessary to simultaneously deliver an English and French version of the judgment and, if the French version was delivered subsequent to the English version, when that decision would be considered “notified” to the Defence for the purposes of appellate proceedings in the event of a conviction.<sup>32</sup> Although the central issue concerned the timing of notification, the defence addressed the question of partial translation in its submissions. In particular, the defence submitted that in the event of a conviction, the sentencing stage could take place prior to the notification of the French version of the judgment provided that it was afforded sufficient time to secure a proper understanding of the judgment’s essential elements, including a partial translation into French of any important parts of the judgment.<sup>33</sup> The Chamber concluded that it would be “permissible and fair to move to the sentencing and reparations phase (in the event of a conviction) or the release of the accused (in the event of an acquittal) if the parties and the participants have not been provided with a complete French translation”, so long as the defence had been provided with translations of those parts of the judgment, identified by the defence, that the Chamber considered “essential”.<sup>34</sup> The Chamber noted that “this course is undoubtedly ‘permissible’ within the Rome Statute

<sup>30</sup> The Registry is responsible for translating decisions of the Trial Chamber. The Registry currently covers the following languages: English, French, and Arabic. (Like OTP, the Registry relies on freelance resources for languages that are not covered internally.) As discussed in note 11, the typical translation cost of one page is 45 euros at the standard rate and 67.50 euros at the urgent rate, but administrative costs add about 15-20% to the original cost of a page. The typical translation time is 1,500 words per day for standard texts and 1,200 words per day for technical texts. The Registry applies the 1,200 word per day rate with respect to Court decisions, which are considered to be technical texts.

<sup>31</sup> See Peter Lewis, “Trial Procedure”, in Roy S. Lee (ed.), “The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence”, Transnational Publishers Inc., USA, 2001, p. 553 (“This could be read to mean that a copy would always be provided, but others could read the words ‘if necessary’ to mean that a copy would not be required if, for example, the defendant was illiterate.”)

<sup>32</sup> Trial Chamber I, Decision on the translation of the Article 74 Decision and related procedural issues, 15 December 2011, ICC-01/04-01/06-2834.

<sup>33</sup> Defence Team, “Observations supplémentaires de la Défense à la suite de l’audience tenue le 15 November 2011”, 18 November 2011, ICC-01/04-01/06-2822, paras. 6-7. The defence proposed that it would identify suggested passages for translation once the English version of the judgment became available.

<sup>34</sup> Trial Chamber I, Decision on the translation of the Article 74 Decision and related procedural issues, 15 December 2011, ICC-01/04-01/06-2834, paras. 20-21.

framework” and that “bearing in mind the support of the parties and participants for this approach, there are no concerns as to fairness.”<sup>35</sup>

### C. Issues

29. Rule 144(2)(b) raises similar issues to those raised by the current rule 76(3). In particular, it is necessary to clarify whether partial translations of decisions are sufficient to satisfy the requirements of fairness under article 67(1)(f).

30. The current text of rule 144(2)(b) refers to the provision of decisions to the accused, in a language he or she fully understands or speaks, “if necessary” to meet the requirements of fairness under article 67(1)(f). It is recalled that article 67(1)(f) guarantees to the accused “such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language that the accused fully understands and speaks.”

31. The drafting history of rule 144(2)(b), and its wording, are ambiguous as to whether the rule would countenance the provision of a partial translation of a decision to an accused, even in circumstances that are consistent with the principles of fairness. This provision could be, however, amended to state explicitly that the Chamber is entitled to allow partial translations of decisions in accordance with the safeguards of article 67(1)(f).

32. The WGLL therefore proposes clarifying that decisions shall be provided to the accused in a language he or she fully understands or speaks, “in whole or to the extent necessary to meet the requirements of fairness under article 67, paragraph 1 (f)”. The phrase “in whole or to the extent necessary” clarifies that partial translations of the text of the decision may be provided in appropriate circumstances.<sup>36</sup> The discussion of the requirements of fairness has been retained in order to underscore that partial translations are only acceptable in circumstances that are consistent with the requirements elucidated in article 67(1)(f), and that accordingly, no partial translation may be authorised if the requirements of fairness under that article would be adversely affected.

### D. The proposed provision

33. In line with the proposed amendment to rule 144(2)(b), the text of rule 144 would read as follows:

#### **Rule 144**

##### **Delivery of the decisions of the Trial Chamber**

1. Decisions of the Trial Chamber concerning admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused, sentence and reparations shall be pronounced in public and, wherever possible, in the presence of the accused, the Prosecutor, the victims or the legal representatives of the victims participating in the proceedings pursuant to rules 89 to 91, and the representatives of the States which have participated in the proceedings.

2. Copies of all the above-mentioned decisions shall be provided as soon as possible to:

- (a) All those who participated in the proceedings, in a working language of the Court;
- (b) The accused, in a language he or she fully understands or speaks, in whole or to the extent necessary to meet the requirements of fairness under article 67, paragraph 1 (f).

<sup>35</sup> Trial Chamber I, Decision on the translation of the Article 74 Decision and related procedural issues, 15 December 2011, ICC-01/04-01/06-2834, para. 20.

<sup>36</sup> The *Lubanga* case provides an example of this approach. See para. 30.

34. During Court-wide consultations that led to the adoption of these recommendations, a minority expressed concerns with the proposed amendment on similar grounds as the concern expressed in respect of rule 76(3), namely that allowing for partial translations of decisions would shift the burden of completing those translations to the defence.

<i>Current rule 144(2)(b)</i>	<i>Proposed rule 144(2)(b)</i>
2. Copies of all the above-mentioned decisions shall be provided as soon as possible to: [...] (b) The accused, in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67, paragraph 1 (f).	2. Copies of all the above-mentioned decisions shall be provided as soon as possible to: [...] (b) The accused, in a language he or she fully understands or speaks, in whole or to the extent necessary to meet the requirements of fairness under article 67, paragraph 1 (f).

## IV. Recommendation on a proposal to amend rule 101(3) of the Rules

### A. The Current Provision

35. The WGLL proposes to amend rule 101 of the Rules by adding a third paragraph. The full text of rule 101 currently reads:

#### **Rule 101**

##### **Time limits**

1. In making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims.
2. Taking into account the rights of the accused, in particular under article 67, paragraph (1) (c), all those participating in the proceedings to whom any order is directed shall endeavour to act as expeditiously as possible, within the time limit ordered by the Court.

### B. Background

36. Rule 101 addresses the setting of time limits with respect to the conduct of proceedings by the Court. Paragraph 1 articulates the Court's duty to pay "regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims". Paragraph 2 focuses on the rights of the accused and draws on article 67(1)(c) to emphasise the need for parties and participants to "endeavour to act as expeditiously as possible, within the time limit ordered by the Court."

37. The issue of notification is addressed in regulation 31(2) of the Regulations, which establishes that a participant is deemed notified on the day the document, decision or order "is effectively sent from the Court by the Registry." Neither the current rule 101 nor regulation 31(2) refer to issues of translation.

38. Where translations have been deemed necessary in accordance with Article 67(1)(f), it has been the practice of Pre-Trial and Trial Chambers to extend time limits on an ad hoc basis.<sup>37</sup> As discussed above, in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, an

<sup>37</sup> See Trial Chamber I, "Decision on the translation of the Article 74 Decision and related procedural issues", 15 December 2011, ICC-01/04-01/06-2834, paras. 23-24; Pre-Trial Chamber I, Decision on the "Requête urgente de la défense portant sur la détermination de la date à partir de laquelle courent les délais fixés pour qu'elle puisse déposer une éventuelle demande d'autorisation d'interjeter appel de la décision « adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute » (ICC-02/11-01/11-432) et/ou pour qu'elle puisse déposer une éventuelle réponse à une éventuelle demande d'autorisation d'interjeter appel déposée par le Procureur", 10 June 2013, ICC-02/11-01/11-434, paras. 6-8; Pre-Trial Chamber II, "Decision Pursuant to

issue arose as to when the judgment would be considered “notified” if the French version was delivered subsequent to the English version. The Chamber determined that, in the event of a conviction, “it would be unfair on the accused, and it would constitute a breach of Article 67(1)(f) of the Statute ... , as well as contravening the objective of Rule 144(2)(b) of the Rules, to require the accused to prepare for this particular stage of the proceedings when he is effectively unable to read the judgment in English.”<sup>38</sup> Accordingly, the Chamber held that in the event of a conviction, “notification” of the decision would run from the date “when the French translation is effectively sent from the Court by the Registry.”<sup>39</sup>

39. A different procedure was adopted on the basis of a similar request in the case of *The Prosecutor v. Germain Katanga*. Trial Chamber II was confronted with a request from the Katanga defence to delay the relevant appeal time limits until the English translation of the trial judgment was issued. Rather than rule on this request, the Chamber directed the Katanga defence to raise this issue with the Appeals Chamber.<sup>40</sup> The Appeals Chamber granted an extension to file the document in support of appeal in order for the Katanga defence to receive and review the draft English translation of the trial judgment.<sup>41</sup>

### C. Issues

40. In its current form, the statutory scheme does not specify any time limits that would apply in those situations in which translations are required. An amendment would provide clarity as to the starting point of time limits in such situations.

41. It is proposed that an amendment be adopted to clarify that a Chamber may order that certain landmark decisions in the proceedings be considered notified on the day that their translation or parts thereof are effectively notified by the Registry. In order to preserve the rights of the accused pursuant to article 67(1)(f), it will be clarified that such translations or parts thereof must be determined to be sufficient to meet the requirements of fairness.

42. This amendment would also have the important effect of clarifying that a Chamber’s determination that a time limit shall run from the date of notification of a translation applies equally to partial translations, where they are sufficient to meet the requirements of fairness.

43. Rather than amending regulation 31(2), it was considered more appropriate to place an amendment of this kind in the Rules. Regulation 31(2) addresses the notification of all filings, not just significant decisions. Moreover, an amendment to a regulation cannot change a time limit set out in the Rules, such as when a party seeks to delay the time limits for filing an appeal, a common situation contemplated in proposing this amendment.

44. The proposed amendment appears in the Chapter of the Rules which contains “Provisions relating to various stages of the proceedings” to indicate that it may apply to both Trial and Pre-Trial decisions. Given that rule 101 already addresses “Time Limits” and that the contemplated amendment would be used to vary certain time limits, the logical placement of the rule is after rule 101(2). Referencing rule 144 in the proposed rule is of assistance, as it gives an indication that only decisions of a certain significance should warrant delayed notification (and the corresponding delay to subsequent proceedings).

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Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08-424, p. 185; Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, 8 February 2010, ICC-02/05-02/09-243-Red, p. 98.

<sup>38</sup> Trial Chamber I, “Decision on the translation of the Article 74 Decision and related procedural issues”, 15 December 2011, ICC-01/04-01/06-2834, para. 23.

<sup>39</sup> Trial Chamber I, “Decision on the translation of the Article 74 Decision and related procedural issues”, 15 December 2011, ICC-01/04-01/06-2834, para. 24.

<sup>40</sup> Trial Chamber II, Ordonnance portant calendrier de la procédure relative à la fixation de la peine (article 76 du Statut), 9 March 2014, ICC-01/04-01/07-3437, para. 3.

<sup>41</sup> Appeals Chamber, Decision on the requests of Mr Germain Katanga and the Prosecutor relating to the time limits for their filings on appeal, 4 April 2014, ICC-01/04-01/07-3454.

## D. The proposed provision

45. In line with the proposed amendment, the text of rule 101(3) would read as follows:

### Rule 101

#### Time limits

1. In making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims.

2. Taking into account the rights of the accused, in particular under article 67, paragraph (1) (c), all those participating in the proceedings to whom any order is directed shall endeavour to act as expeditiously as possible, within the time limit ordered by the Court.

3. The Court may order in relation to certain decisions, such as those referred to in rule 144, that they are considered notified on the day their translation, or parts thereof, as are necessary to meet the requirements of fairness, are made available. Accordingly, any time limits shall begin to run from this date.

46. During Court-wide consultations that led to the adoption of these recommendations, there were discussions as to which Chamber had the power to apply the provisions in the proposed amendment. As seen in the example where Trial Chamber I delayed the notification of the *Lubanga* Trial Judgment until the French translation was completed,<sup>42</sup> such decisions can cause significant delays for the proceedings in other Chambers. The proposed amendment does not specify which Chamber has the authority to delay notification of a decision, leaving such matters to internal discussion within judicial divisions.

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#### *Proposed rule 101(3)*

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3. The Court may order in relation to certain decisions, such as those referred to in rule 144, that they are considered notified on the day of their translation, or parts thereof, as are necessary to meet the requirements of fairness, and, accordingly, any time limits shall begin to run from this date.

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## V. Conclusion

47. If adopted, the above three amendments would:

- (a) Clarify the scope of rule 76(3) and rule 144(2)(b) to encompass partial translations where full translations are not necessary to meet the requirements of fairness;
- (b) Clarify the Chamber's power to delay the running of time limits from the date of notification of a translation by adding paragraph (3) to rule 101;
- (c) Expedite proceedings, by allowing Chambers to authorise the partial translation of witness statements and decisions respectively when the requirements of fairness are met; and
- (d) Preserve the rights of the accused and the requirements of fairness.

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<sup>42</sup> Trial Chamber I, Decision on the translation of the Article 74 Decision and related procedural issues, 15 December 2011, ICC-01/04-01/06-2834, para. 19.

## Annex II

### **Report of the Working Group on Lessons Learnt to the Study Group on Governance Cluster I: Expediting the Criminal Process Progress Report on Cluster B: “Pre-Trial and Trial Relationship and Common Issues”**

#### **I. Introduction**

1. The Working Group on Lessons Learnt (the “WGLL”) hereby submits the present report to update the States Parties on recent initiatives taken at the Court with a view to expediting judicial proceedings with regard to Cluster B (“Pre-Trial and trial relationship and common issues”).

2. The WGLL was established in October 2012 pursuant to the Roadmap on Reviewing the Criminal Procedures of the International Criminal Court (the “Roadmap”), which was drafted by the Study Group and subsequently endorsed by the ASP in November 2012 and as amended in November 2013.<sup>1</sup> The WGLL and the Roadmap were developed in response to a request by States Parties for a mechanism to identify areas for improving the efficiency and efficacy of judicial proceedings – *i.e.*, clusters – and propose amendments to the legal framework.

3. The WGLL submitted the First and Second reports on lessons learnt to the Study Group on Governance (the “Study Group”) in October 2012 and October 2013 respectively.<sup>2</sup> Both reports outlined the annual progress made by the WGLL, referring to nine clusters that were identified by the Court in the First report as the most useful areas for discussion with reference to the aims of expediting and improving the quality of proceedings.<sup>3</sup>

4. In November 2012, the WGLL narrowed the examination of the nine clusters to address three clusters, namely “Pre-Trial”, “Pre-Trial and trial relationship and common issues” and “Seat of the Court”, which it considered to be the most important at that stage on the basis of the judicial experience of the Court. By the time of the Second report in October 2013, the WGLL reported that it was continuing to focus on the two clusters of “Pre-Trial” and “Pre-Trial and trial relationship and common issues”, emphasising with respect to the latter cluster the issues of disclosure, additional evidence for trial, presentation of evidence, record of proceedings, and recorded testimony.<sup>4</sup>

5. Based on discussions at the 2013 ASP and the continuing dialogue between the Court and the Study Group, the WGLL has continued to focus on the “Pre-Trial and trial relationship and common issues” cluster, which was considered at the ASP to be a cluster that needs to be addressed on a priority basis in order to improve the expediency and quality of proceedings.

#### **II. Progress made by the WGLL**

6. The Study Group has specified the need for a regular interface with the Court throughout the process identified in the Roadmap,<sup>5</sup> indicating it would welcome ongoing discussions even if reported outside of the specific timeframes in the Roadmap,<sup>6</sup> and has

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<sup>1</sup> ICC-ASP/11/Res.8, ICC-ASP/12/Res.8. The original Roadmap was annexed to the Report of the Bureau on the Study Group on Governance to the Assembly of States Parties (“ASP”) in October 2012. ICC/ASP/11/31. The amended Roadmap was annexed to the Report of the Bureau on the Study Group on Governance to the ASP in October 2013. ICC-ASP/12/37. The WGLL is open to all interested judges and determines its own composition and working methods. ICC/ASP/11/31, Annex I, para. 5.

<sup>2</sup> ICC-ASP/11/31/Add.1; ICC-ASP/12/37/Add.1.

<sup>3</sup> ICC-ASP/11/31/Add.1, annex.

<sup>4</sup> ICC-ASP/11/31/Add.1, p.4. The WGLL also noted that it had expanded its focus to include an examination of translation issues under the “Language Issues” cluster. ICC-ASP/12/37/Add.1, para. 16.

<sup>5</sup> ICC-ASP/11/31/Add.1, para. 18.

<sup>6</sup> ICC-ASP/12/37, para. 12.



recognised the importance of “a fluid exchange of views”.<sup>7</sup> The WGLL responded to this need by engaging the Study Group in dialogue and providing a number of status updates with respect to Cluster B during the ASP cycle: On 13 March 2014, Vice President Judge Monageng addressed the Study Group and provided a status update, following which, on 8 April 2014, the WGLL transmitted to the Study Group a progress report on “Pre-Trial and trial relationship and common issues”. Further discussions were subsequently held and on 18 September 2014, Vice President Judge Monageng provided a further status update on the WGLL’s progress with regard to Cluster B.

7. In relation to these issues, no further amendments to the Rules of Procedure and Evidence were considered during the period covered by this Report. It was agreed that some of these issues could be addressed through practice innovations in ongoing pre-trial proceedings. In particular, both Pre-Trial Chambers sought to improve the transition of cases from the pre-trial to the trial phase by addressing the concerns expressed by the Trial Division in relation to the format and content of Confirmation Decisions. As further detailed in Section III below, both Chambers modified the content and format of their Confirmation Decisions with a view to achieving more clarity with regard to the facts and circumstances of the charges that are confirmed by the Chamber and more flexibility in relation to their legal characterization.

8. In addition, as further developed in Section IV below, other procedural innovations were introduced with the view to improving the efficiency and expeditiousness of pre-trial proceedings.

### **III. Practice innovations relating to the confirmation of charges decision**

#### **A. Clarification of facts and circumstances that are confirmed**

##### **1. The problems encountered at Trial**

9. At the end of the confirmation process, the pre-trial chamber must decide whether or not to confirm the charges formulated by the Prosecutor in the Document Containing the Charges (the “DCC”). In accordance with the legal framework of the Court, the charges must describe both the factual basis of the charge as well as its legal characterization.<sup>8</sup> The charges put forward by the Prosecutor as confirmed by the Pre-Trial Chamber provide the basis for the trial. Accordingly, pursuant to article 74(2) of the Rome Statute, the judgment of the Trial Chamber may not exceed the bounds of the facts and circumstances described in the Charges as confirmed by the Pre-Trial Chamber in the Confirmation Decision.<sup>9</sup>

10. In the practice of the Court, Trial Chambers have experienced difficulties in identifying the facts and circumstances confirmed at the pre-trial stage. Decisions of Pre-Trial Chambers have not identified with sufficient clarity which are the facts and circumstances that underlie the crimes charged and confirmed, as opposed to “evidence put forward by the Prosecutor” or other factual allegations provided as background, or other information contained in the DCC.<sup>10</sup>

11. As a result of these uncertainties, in most trials before the Court neither the Confirmation Decision nor the DCC presented by the Prosecutor during the confirmation

<sup>7</sup> ICC-ASP/12/37, para. 22(c).

<sup>8</sup> Regulation 52 of the Regulations of the Court.

<sup>9</sup> See also Regulation 55 of the Regulations of the Court, which refers to the “facts and circumstances described in the charges”.

<sup>10</sup> Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’, 8 December 2009, ICC-01/04-01/06-2205, footnote 163. The footnote reads as follows: “In the view of the Appeals Chamber, the term ‘facts’ refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged”.

proceedings was used as a basis for the trial, and instead, an additional document, the so called “Amended DCC”, was requested by the trial chambers.

12. Prior to the commencement of the *Lubanga* trial, following disagreement between the parties as to the wording of the charges, Trial Chamber I found that an Amended DCC was “necessary to ensure that there is complete understanding of the ‘statement of facts’ underlying the charges confirmed by the Pre-Trial Chamber, and to enable a fair and effective presentation of the evidence (as part of a fair and expeditious trial in accordance with Article 64 of the Statute).”<sup>11</sup>

13. In *Katanga*, subsequent to the confirmation hearing, Trial Chamber II concluded that the DCC could “no longer serve as a reference for the hearings on the merits”.<sup>12</sup> The Chamber criticised the Confirmation Decision, stating that its “disposition essentially consists of a list of only the legal characterisations accepted”, indicating that the statement of the facts and circumstances was not to be found in the disposition of the Confirmation Decision but was rather “included in the reasoning which [the Pre-Trial Chamber] developed as it considered each of the crimes”.<sup>13</sup> Therefore, the Chamber took what it acknowledged was an “exceptional step” of directing the prosecution to prepare a document “reiterating the language of the Pre-Trial Chamber in its Confirmation Decision and proceeding charge by charge numbering each one.”<sup>14</sup> The Chamber recognised, however, that it was for the Pre-Trial Chamber itself to “set out, with a maximum of precision, the facts and circumstances” and “specify not only the facts and circumstances on which it expressly relies but also those which it considers should be dismissed from the scope of the prosecution”.<sup>15</sup>

14. In *Bemba*, Trial Chamber III also ordered the Prosecutor to make further revisions to the Second Amended DCC, stating that the Confirmation Decision did not “provide a readily accessible statement of the facts underlying each charge”.<sup>16</sup> The Chamber went on to highlight the need for early clarification of the statement of facts by suggesting that in future, an annex to the Confirmation Decision could be used to provide such a statement of facts.<sup>17</sup>

15. More recently, in *Muthaura and Kenyatta*, Trial Chamber V was prompted by the Defence teams to request – after the close of pre-trial proceedings – an updated DCC reflecting “the material facts and circumstances underlying the charges as confirmed”.<sup>18</sup> The Chamber reasoned, on the basis of the previous practice of other Trial Chambers, that an updated post-confirmation DCC would assist in providing the defence with “a readily accessible statement of the facts underlying each charge”.<sup>19</sup>

16. Another aspect of the problem arises when Confirmation Decisions contain ambiguity as to whether certain facts and circumstances have been confirmed or not and this may lead to these facts and circumstances being presumed to underlie the charges when in fact they do not. Some Trial Chambers, when faced with a fact that has been neither confirmed nor explicitly unconfirmed have stated that they will regard the fact as confirmed. Trial Chamber V stated in both Kenya cases, that “as a general principle, the Pre-Trial Chamber’s silence on relevant statements of facts made in the DCC should [not] result in their removal from the post-confirmation Updated DCC”.<sup>20</sup>

<sup>11</sup> Order for the prosecution to file an amended document containing the charges, 9 December 2008, ICC-01/04-01/06-1548, paras. 9-10, 12-13.

<sup>12</sup> Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG, paras. 14-19.

<sup>13</sup> ICC-01/04-01/07-1547-tENG, para. 13.

<sup>14</sup> ICC-01/04-01/07-1547-tENG, para. 29.

<sup>15</sup> ICC-01/04-01/07-1547-tENG, para. 31.

<sup>16</sup> Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, 20 July 2010, ICC-01/05-01/08-836, para. 30.

<sup>17</sup> ICC-01/05-01/08-836, para. 30.

<sup>18</sup> Order for the prosecution to file an updated document containing the charges, 5 July 2012, ICC-01/09-02/11-450, para 9.

<sup>19</sup> ICC-01/09-02/11-450, para. 8.

<sup>20</sup> Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-01/11-522, para. 19; Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-02/11-584, para. 23.

## 2. Solutions sought at Pre-Trial

17. During the period covered by this Report, both Pre-Trial Chambers have sought to modify the format and content of the Confirmation Decisions, as shown by the recent confirmation of charges in the *Ntaganda* and *Gbagbo* cases.

18. The Confirmation Decision issued on 9 June 2014 by Pre-Trial Chamber II in the *Ntaganda* case sought to clearly identify the facts underlying the confirmed charges. The Chamber indicated that the facts and circumstances underlying the charges were confirmed only insofar as indicated by particular sections of the Confirmation Decision. The Chamber decided to confirm the “charges presented by the Prosecutor against Bosco Ntaganda to the extent specified in paragraphs 12, 31, 36, 74 and 97 of the decision” and committed Bosco Ntaganda to “trial on the charges as confirmed”.<sup>21</sup> The Chamber was careful to also specify which facts were *not* confirmed, namely the supporting facts identified by paragraphs 13, 32, 37, 75 and 98 of the decision.<sup>22</sup>

19. On 12 June 2012, Pre-Trial Chamber I issued the Confirmation Decision in the *Laurent Gbagbo* case, which identified, in the final section of the decision, the facts and circumstances confirmed. In so doing, the Chamber referred to a distinct segment in Section 9 of the Prosecutor’s DCC that described the facts amenable to confirmation. This distinct segment had been specifically requested by the Chamber in advance, on the understanding that it is for the Prosecutor to identify the factual allegations that underlie the charges.<sup>23</sup> The Chamber referred to the paramount importance of ensuring that the DCC “clearly and comprehensively identified” the material facts and “distinguished [the material facts] from those facts of a mere subsidiary nature.”<sup>24</sup> In doing so, the Chamber indicated that it was motivated partly by a desire to avoid some of the difficulties encountered in previous trial proceedings.<sup>25</sup> A similar request was made by the Chamber and implemented by the Prosecutor in ongoing proceedings in the *Blé Goudé* case.<sup>26</sup>

### B. Alternative legal characterization of facts

20. As part of the Lessons Learned process, in an internal discussion paper on Cluster B, the Trial Division considered it “important and urgent” to discuss the effect of flexibility in the Confirmation Decision on trial proceedings. A lack of sufficient flexibility in Confirmation Decisions in previous cases led to the recurrent recourse to Regulation 55 at different phases of the trial proceedings, including shortly after the outcome of the confirmation proceedings. It appears that earlier identification of potential alternative legal characterisations of the same facts may limit the recourse to modifications pursuant to Regulation 55, expedite the trial proceedings and provide better protection to the rights of the accused by providing earlier notification to the Defence.

21. The two recent Confirmation Decisions in *Ntaganda* and *Gbagbo* adopted a more flexible approach by confirming alternative legal characterizations of modes of liability and, in the *Gbagbo* decision also some alternative legal characterizations for certain crimes.

22. In *Ntaganda* Pre-Trial Chamber II was faced with an extensive DCC which relied on alternative charging on the basis of individual criminal responsibility under articles 25(3)(a), (b), (d)(i) or (ii), (f) and/or 28(a) of the Statute.<sup>27</sup> In the Confirmation Decision, the Chamber found it necessary to outline the different forms of individual criminal

<sup>21</sup> Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, p. 63. [Emphasis added].

<sup>22</sup> ICC-01/04-02/06-309, paras 13, 32, 37, 75 and 98.

<sup>23</sup> Decision on the date of the confirmation of charges hearing and proceedings leading thereto, 14 Dec 2012, ICC-02/11-01/11-325, para. 28.

<sup>24</sup> ICC-02/11-01/11-325, para. 28.

<sup>25</sup> ICC-02/11-01/11-325, para. 28. Referring to: Trial Chamber V, “Order for the prosecution to file an updated document containing the charges”, ICC-01/09-02/11-450, para 9; “Order regarding the content of the charges”, ICC-01/09-02/11-536, paras. 7 et seq.

<sup>26</sup> Decision establishing a system for disclosure of evidence, 14 April 2014, ICC-02/11-02/11-57, para. 12.

<sup>27</sup> Document de notification des charges, 22 August 2014, ICC-02/11-02/11-124-Conf-Anx2, paras 323-334.

<sup>27</sup> *Ntaganda* DCC, ICC-01/04-02/06-203-AnxA, para. 109 and pp. 56-60.

responsibility that were confirmed, organised according to each mode of liability confirmed in the alternative.<sup>28</sup>

23. Pre-Trial Chamber I explicitly indicated in *Gbagbo* that it was taking stock of past experiences when it confirmed the charges against Mr Gbagbo on the basis of alternative, referring to “article 25(3)(a), (b) or (d) of the Statute” as the possible modes of liability for each charge.<sup>29</sup> The Chamber also confirmed two different crimes as alternative legal characterisations of the same facts and circumstances – namely the crime against humanity of “other inhumane acts” under article 7(1)(k) or, in the alternative, the crime against humanity of “attempted murder” under articles 7(1)(a) and 25(3)(f).<sup>30</sup> The Prosecutor has continued its practice of presenting alternative legal characterisations of the same facts and circumstances, on 22 August 2014 filing the DCC in *Blé Goudé* alleging all of the modes of liability under article 25 in relation to each charge.<sup>31</sup>

## IV. Other procedural innovations

### A. Presentation of Evidence

24. The most recent practice of Pre-Trial Chamber I has been to request the Prosecutor to provide footnotes in the DCC, hyperlinking to individual items of evidence, to allow the reader to navigate directly to the location of an item of evidence in the electronic record of the case. The judges of Pre-Trial Chamber I considered that the inclusion of hyperlinked footnotes in the DCC in *Gbagbo* (an innovation initiated by the Prosecutor) was extremely useful in reaching the determination with respect to the charges. Accordingly, in a recent decision in *Blé Goudé*, Pre-Trial Chamber I itself suggested that footnotes be included in the DCC.<sup>32</sup>

25. Pre-Trial Chamber II has recently expressed its approval of these developments, stating in the *Bemba et al* proceedings under article 70, that the Prosecutor's proposal of structuring the DCC “‘in a way which will be footnoted and hyperlinked’, so as to ‘readily direct the Chamber and Defence to the relevant supporting evidence’, may be welcomed, as any practical proposal aimed at enhancing the easiness of access to the evidence should.”<sup>33</sup>

### B. Expediting the redactions process

26. Efforts have also been deployed at the pre-trial phase towards a more expeditious system of redactions, reflected in the *Blé Goudé* case by two decisions on the system of disclosure and discussions about the best approach to disclosure held with the parties at a status conference.<sup>34</sup> Pre-Trial Chamber I decided, after considering an agreement between the parties on disclosure issues, and referring to its approach in the previous *Laurent Gbagbo* case,<sup>35</sup> to adopt a procedure by which exceptions to disclosure (redactions) are proposed and implemented directly by the Prosecutor and the Chamber is only seized of the matter where no agreement is reached among the parties. The same procedure was also applied to the redaction of information in material disclosed by the Defence.<sup>36</sup>

<sup>28</sup> ICC-01/04-02/06-309, para. 97.

<sup>29</sup> ICC-02/11-01/11-656-Conf, para. 278. On 29 July 2014 the Defence sought leave to appeal the issue of whether the Majority of the Pre-Trial Chamber erred in confirming several modes of liability cumulatively, which if granted would raise the question for the Appeals Chamber of whether a DCC may include multiple modes of liability based on the same facts and circumstances and whether the DCC was correctly put in this particular case. Demande d'autorisation d'interjeter appel de la « Décision relative à la confirmation des charges » du 12 juin 2014 (ICC-02/11-01/11-656-Conf-tFRA), 29 July 2014, ICC-02/11-01/11-676-Conf, paras.135-148. See also Prosecutor's response, ICC-02/11-01/11-679, paras. 45-46.

<sup>30</sup> ICC-02/11-01/11-656-Conf, p. 131.

<sup>31</sup> Document de notification des charges, 22 August 2014, ICC-02/11-02/11-124-Conf-Anx2, pp. 125-127.

<sup>32</sup> Decision establishing a system for disclosure of evidence, 14 April 2014, ICC-02/11/02/11-57, para. 13.

<sup>33</sup> Decision on the “Defence request for an in-depth analysis chart” submitted by the Defence for Mr Jean-Pierre Bemba Gombo, ICC-01/05-01/13-134, 28 January 2014, para. 8.

<sup>34</sup> Decision establishing a system for disclosure of evidence, 14 April 2014, ICC-02/11-02/11-57; Second decision on issues related to disclosure of evidence, 05 May 2014, ICC-02/11-02/11-67; Status Conference, ICC-02/11-02/11-T-4-CONF-ENG, p. 11, line 13 to p. 17, line 20; p. 15, line 24 to p. 16, line 15.

<sup>35</sup> ICC-02/11-02/11-57, para. 17; Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012, ICC-02/11-01/11-30, paras. 48 to 51.

<sup>36</sup> ICC-02/11-02/11-67, paras. 11-13.

27. This procedure reduces the time spent by the Pre-Trial Chamber in considering the approval of each and every redaction prior to a party's disclosure of the material. A further advantage is that *inter partes* disclosure carried out in this manner inevitably results in earlier disclosure of material than would be achieved by waiting for the Chamber to determine whether to authorise the redactions and render a decision to that effect.

28. This approach to redactions might also be combined with the suggestion, already discussed by pre-trial judges, of a "redaction protocol" to be adopted for each new case, aimed at further reducing unnecessary litigation. Discussions have suggested that redaction protocols could be used to reflect various case-specific needs, such as the predominant types of redactions in the case, the need for associated protective measures, the likelihood that the status of particular individuals whose personal details are subject to redaction at one stage in the case may change in response to case-specific risk assessment issues, and lastly the effect that time spent by the parties responding to redactions may have on the disclosure timetable.

29. Finally, the WGLL points to the Pre-Trial Division's efforts to avoid unnecessary delays to proceedings by continuing the practice of setting intermediate time limits for disclosure of evidence by the Prosecutor ahead of the final time limit for full disclosure 30 days prior to the confirmation hearing.<sup>37</sup> Recent decisions of Pre-Trial Chamber II in the *Bemba et al* proceedings have recognised the appropriateness of intermediate deadlines "for the purposes of [...] properly organising the disclosure process and enhancing its efficiency".<sup>38</sup> The WGLL considers that efficiency-saving practices such as this should continue to be consistently adopted in pre-trial proceedings.

## V. Conclusion and further steps

30. The efforts described above constitute a deliberate attempt to provide solutions to some of the problems identified as part of the lessons learned process, on the basis of past experience at the Court. It is clear that pre-trial and trial proceedings before the ICC are essentially co-dependent and that without a case clearly and appropriately defined at the pre-trial stage, the trial cannot be expected to proceed smoothly. Likewise, the Pre-Trial Chambers and Trial Chambers cannot view their work in isolation; the effectiveness and utility of the Confirmation Decision depends on the requirements of the trial and it must be structured in a way that serves those needs. Similarly, the trial needs to take into account what has already been achieved at the pre-trial stage in order to avoid duplication of efforts and streamline and expedite proceedings.

31. The practices recently developed by Pre-Trial Chambers require some time for their assessment and their advantages will need to be tested during ongoing trials. However, these recent practices already confirm that many problems experienced in the first years of the Court can be addressed through practice changes without the need for an amendment to the Rules of Procedure and Evidence. However, if new practices prove to be indeed beneficial, it may be useful to consolidate them in another way, for instance through amendments to the Regulations of the Court.

32. Similarly, it is increasingly clear that the shortening and streamlining of pre-trial and trial proceedings cannot be achieved by individual amendments and a piecemeal approach to the legal framework. In order to enhance the system it appears that an overall revision of all issues common to pre-trial and trial proceedings is required in order to provide all necessary solutions in one single and coherent package of proposals. To this effect, the WGLL will encourage pre-trial and trial judges to continue their ongoing dialogue and discussions expeditiously, in order to identify problems and solutions to all pending issues in Cluster B of the Roadmap. The WGLL will report on the outcome of these discussions in its next report to the Study Group.

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<sup>37</sup> ICC-02/11-02/11-67, para. 6.

<sup>38</sup> Decision on the "Prosecution's request in respect of access to the Defence to certain materials" and related filings, 19 May 2014, ICC-01/05-01/13-409, p. 6; Decision on the "Prosecution's Request in respect of the Modalities of the Disclosure of Certain Material", 2 June 2014, ICC-01/05-01/13-451-Conf, p. 3.