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IBA/ICC Monitoring and Outreach Programme



Enhancing efficiency and effectiveness of ICC proceedings: a work in progress

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List of Abbreviations

ASP	Assembly of States Parties
CBF	Committee on Budget and Finance
CSS	Counsel Support Section
DRC	Democratic Republic of Congo
HWG	Hague Working Group
IBA	International Bar Association
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
NGO	Non-governmental organisation
OTP	Office of the Prosecutor
OPCD	Office of Public Counsel for Defence
OPCV	Office of Public Counsel for Victims
VPRS	Victims Participation and Reparations Section
VWU	Victims and Witnesses Unit

Background

Since its inception, the issue of the efficiency and effectiveness of the International Criminal Court (hereinafter Court or ICC) has been a matter of much interest and often concern. Despite the much broader global mandate of the ICC, the experience of lengthy proceedings at the ad hoc tribunals has prompted greater scrutiny of the Court's judicial efforts. From July to November 2010, the issue assumed greater significance following the suspension of the ICC's first trial against Congolese citizen Thomas Lubanga Dyilo (the *Lubanga* case) – the second since its commencement in January 2009 – prompting criticism about the protracted pace of judicial proceedings at the Court.

In keeping with its oversight mandate and in the continuing spirit of review evident since the first ICC Review Conference held in Kampala, Uganda in June 2010, the Assembly of States Parties (ASP), the ICC's governing body, adopted a proposal to establish a Study Group tasked with leading discussions on efficiency and other relevant operational issues. The proposed dialogue is aimed at strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court, while preserving its judicial independence.

The Court has, for a number of years, actively taken steps to enhance its level of efficiency. In 2008, prompted in part by a report of the Committee on Budget and Finance, the subsidiary mechanism of the ASP responsible for budgetary matters, and in accordance with ASP resolution ICC-ASP/7/20, the Court formally commenced a process to review the efficiency of its judicial and administrative processes. The process has reportedly, to date, resulted in significant improvements in the efficiency levels of the Court in key areas. In an effort to address the risks associated with lack of clarity in the roles of respective organs of the ICC, the Court also prepared a *Report on measures to increase clarity on the responsibilities of the different organs* (Governance report), which describes the relevant aspects of the Corporate Governance framework and the measures that it has taken or intends to take to address the risks. Notwithstanding notable achievements to date in this regard, issues of concern regarding the efficiency of ICC proceedings remain.

Given the importance of this issue to the credibility and legitimacy of the Court, this ninth IBA/ICC Monitoring Report will discuss steps that the ICC has taken to enhance its efficiency and maximise its effectiveness, and consider what challenges remain. The IBA placed particular emphasis on judicial and policy developments at the Court from July to November 2010, the period under review, but also considered other relevant developments outside of the reporting period where appropriate.

Identifying the issues

This report identifies four main areas which have an impact on the efficiency levels and effectiveness of the ICC, as outlined below.

- *Judicial determination of foundational procedural issues are ongoing and have a significant impact on the efficiency of proceedings*

A number of fundamental procedural legal issues at the ICC are still unsettled, demanding considerable time and resources in extensive legal filings and judicial decisions. During the period under review, filings and decisions in both trial and pre-trial proceedings predominantly concerned victims' participation, disclosure, protective measures and admissibility of evidence. Decisions have not always been consistent. For example, the majority of judges in the ICC's third case against Jean-Pierre Bemba Gombo radically departed from the approach adopted by judges in the first and second trial cases (Thomas Lubanga and Germain Katanga and Mathieu Ngudjolo Chui) concerning the admissibility of evidentiary material, prompting a strong dissenting opinion from one of the judges involved in the trial and requests for leave to appeal by both prosecution and defence.

Interlocutory appellate matters also continue to occupy a significant amount of time: from July to December 2010, six interlocutory appeal decisions were delivered by the Appeals Chamber, two in each of the three trial cases. While interlocutory appeals and rulings on procedural issues are not peculiar to proceedings at the ICC, it is worth recalling that the ICC is unique in affording victims the opportunity to actively participate in proceedings and the role played by States Parties (for example in admissibility proceedings, cooperation requests and when interim release is being considered). This has an impact on the number of written filings presented by the parties and participants, the length of the proceedings and the manner in which issues are ultimately addressed by the judges. While there are undoubtedly further steps that can and must be taken to enhance the efficiency of judicial proceedings, such as by aiming for greater judicial consistency, it is important that the practice of the ICC is allowed to develop organically in order to ensure that sound foundational decisions are made at this stage of the ICC's judicial development.

- *Measures to streamline processes and clarify roles are still at the initial implementation phase, making it difficult to fully assess impact*

The Court's Governance report is an important step in the right direction towards clarifying the respective roles and responsibilities of different organs of the Court and addressing overlapping functions. Lack of clarity concerning the scope of particular roles and obligations in certain areas, such as witness protection, has been a hindrance to efficiency in some aspects of the Court's operations. For example, tensions have previously arisen between the Office of the Prosecutor (OTP) and the Victims and Witnesses Unit (VWU) of the Registry on this issue, resulting in extensive litigation and delays. The Appeals Chamber had previously clarified one specific aspect of the witness protection responsibilities of the OTP and VWU, but declined to more broadly address the general roles and responsibilities of the respective organs. More generally, encouraging efforts are being made to streamline internal operations and to make policy documents on important issues such as the Court's relationship with intermediaries and the Office of the Prosecutor's policy on preliminary examinations publicly available in the spirit of openness and transparency. It is, however, too early to fully assess the impact of these efforts as a number of the measures are still at the initial implementation phase. Furthermore, the governance report addressed only the issue of internal coordination and overlapping roles, but did not attempt to clarify the respective management and oversight roles of the ASP and the ICC Presidency. The inclusion of this issue within the remit of the Study Group is welcome.

- *Some challenges to efficiency and effectiveness are structural and may require textual amendment*

Some of the challenges affecting the expeditiousness and effectiveness of ICC proceedings may be structural, based on the special nature of international criminal proceedings, the uniqueness of the Rome Statute system itself (concurrent jurisdiction rather than primacy and victims' participation, to name a few), which will improve as more cases are tried, issues are resolved by judges and the Court develops its own organic practice. Some issues, such as the inability of ICC judges to compel a witness to appear in person and testify before the Court, may ultimately require an amendment to the Court's legal texts.

- *States play a major role in ensuring the efficiency and effectiveness of the ICC*

Given the multi-faceted nature of the institution – a judicial body reliant on States to enforce its orders and operating in a multi-cultural context – inefficiency in the ICC's operations cannot only be ascribed to the Court's judicial procedures, internal operational policy and strategies. Any assessment of the ICC's efficiency would be incomplete without consideration of the crucial role played by States through cooperation in helping the Court to fulfil its core mandate. Non-cooperation or lack of timely cooperation by States in, for example, enforcing outstanding arrest warrants, or responding to requests for judicial assistance, significantly contributes to inefficiency at the Court and undermines its potential to stem impunity.

The timing and scope of review

It is worth considering whether a formal Study Group to lead a discussion on efficiency is somewhat premature. Some stakeholders consider that a full review of the efficiency and effectiveness of the Court's judicial proceedings should await the completion of at least one case from the investigation phase, through the confirmation of charges, trial, appeal and reparations phase (a full judicial cycle). The ICC Review Conference focused only on a limited number of important amendments to the Rome Statute – including agreement on the definition and trigger mechanism for the crime of aggression – and provided an opportunity to take stock of the broader impact of the Court in specific thematic areas. The IBA considers that the Review Conference was not an appropriate forum for extensive technical and detailed review of the actual cases, proceedings and developments at the ICC after seven years in operation, and States correctly opted to limit the scope of review. The proposal for a Study Group to facilitate dialogue with the Court concerning its levels of efficiency at this stage is both timely and appropriate.

Summary of key findings and recommendations

- The IBA supports the establishment of a Study Group to review the Court's level of efficiency and strengthen its institutional framework. Whilst there may be good reasons to await the completion of a full judicial cycle, commencing the dialogue earlier may also provide ample opportunity for more thoughtful consideration of the issues. For example, a discussion on measures to further improve the efficiency of the pre-trial stage of proceedings could potentially be very productive. The group should, however, avoid discussing the specifics of cases at the trial phase of proceedings.
- The IBA considers, however, that the mandate of the Study Group is too broad. Therefore in order to be effective, given the limited timeframe of one year, the Chair of the Study Group is urged to clearly delineate the precise scope of the review, particularly of judicial activities, and ensure that this is communicated to the Court and all relevant stakeholders.
- Apart from fully engaging the Court in this dialogue, States must ensure that relevant stakeholders, such as civil society organisations and academics, are included. The IBA is mindful that the underlying rationale for enhancing efficiency may differ between managers of the Court's budget and the judiciary. While judges generally wish to ensure an expeditious trial because it is a critical element of a fair trial, managers generally seek expeditious trials because they are cost effective. It is therefore absolutely critical that there is strict adherence to the terms of reference of the Study Group concerning the respect for judicial independence.

Judicial proceedings

- In 2011, with three or possibly four simultaneous proceedings expected at the ICC, the Court's operational and judicial efficiency will be tested. States must continue to fully support the Court in its efforts to achieve the highest levels of efficiency and effectiveness by ensuring that sufficient resources are allocated to meet the projected expenditure for judicial proceedings in 2011. While judges must be fully mindful of and accountable for the most efficient and effective use of the hearing days, it is incumbent on States Parties to ensure the necessary allocation of

resources to meet the increasing demands of the Court's judicial operations.

- Effective judicial management is critical to achieving efficiency at the ICC. For example, the Appeals Chamber decision reversing the stay of proceedings in the *Lubanga* case is a welcome example of the importance of judicial management. Whilst making it clear that a stay was a drastic and disproportionate remedy in the circumstances, the decision clearly reaffirms that full respect for and compliance with judicial decisions is critical to maintaining the integrity and efficiency of proceedings. If the relevant judicial Chamber 'loses control' of the proceedings this could lead to potentially deleterious consequences for all parties and participants.
- Timely and consistent judicial decisions are also key to efficient proceedings. The IBA welcomes the timely manner in which the interlocutory appeal decision in the *Lubanga* case was delivered by the Appeals Chamber. However, the IBA notes that some previous Appeals Chamber decisions, for example on victims participation at the situation phase, did not provide sufficient guidance to the pre-trial Chambers resulting in inconsistent approaches by different Chambers. The IBA welcomes the decisions of judges of the Pre-Trial Chamber in the situations in Kenya and the Central African Republic, clarifying the participation of victims at the situation phase in an attempt to address this lacuna and provide consistency and certainty for victims and other parties to the proceedings.
- The IBA considers that the Appeals Chamber plays an important standard setting role in its interlocutory appeal decisions which could contribute to the level of consistency in judicial decisions issued by the ICC Chambers, and is therefore urged, where appropriate, to ensure that adequate guidance is provided to the other Chambers.

Victims' participation

- The IBA considers that victims' participation remains one of the most important achievements of the Rome Statute system. However, there is a very real risk that, if not correctly managed, the participation of victims in the proceedings could negatively impact its fairness. For example, the process of submitting observations on victims' applications for participation could potentially hamper the fair and efficient conduct of the proceedings, as the parties' attention is diverted from conducting crucial preparations for the trial. This

is particularly true for the defence, who have fewer resources than the prosecution to devote to such tasks shortly before the commencement of trial.

- The IBA acknowledges that efforts have been made by the respective Chambers and the relevant sections of the Registry to manage different aspects of the participation process, including by redeploying staff from other sections of the Registry and utilising staff of the Office of Public Counsel for Defence to deal with significantly larger than expected numbers of victims applications.
- The IBA considers that it would be premature to implement textual amendments to the victims' participation regime at the Court at this time, in light of the fact that the Court has not yet completed a trial or reparations phase of proceedings, and considering recent operational changes within the Registry and amendments to the application form. Judges, however, need to ensure that the rights of defendants under the Statute are not compromised by the participation of victims in proceedings.

Streamlining processes and clarifying roles

- The IBA welcomes the continuing efforts by different organs of the Court and the judiciary to enhance operational efficiency, including through the restructuring of key units and through publishing policy documents such as the Registry's protocols on dealing with vulnerable witnesses and the OTP's policy document on preliminary examinations, among others.
- The IBA regrets, however, that despite important internal restructuring by the Registry to enhance its operational efficiency, more has not yet been done to publicise this important information on the Registry pages of the Court's website and to update existing information, including on the current leadership structure of the Registry and the role and function of the Deputy Registrar.
- The IBA welcomes the decision of Trial Chamber II in the *Katanga/Ngudjolo* case to implement best practices aimed at minimising the number of closed session hearings and, where unavoidable, to mitigate the effects on the public perception of the proceedings.
- While promising steps are being taken to further enhance the publicity of the proceedings, including by reclassification

of confidential material, the IBA regrets that the availability of transcripts of proceedings is still a major challenge. It is very difficult for external monitors and other members of the public to effectively follow the ICC proceedings in the absence of official public records.

Summary of key recommendations

In its important efforts to review the ICC and strengthen the Court's institutional framework, the IBA *encourages* the Study Group, *in full dialogue with the Court and relevant stakeholders*, to consider the following non-exhaustive list of issues:

1. The impact of victims' participation on the efficient conduct of ICC proceedings. The IBA considers that the primary motivations for review must be: a) whether victims' participation as currently interpreted by judges remains consistent with the overall goal and mandate of the ICC; and b) whether adequate safeguards are being implemented by the judges to prevent unfairness to the defence.
2. The absence of subpoena powers of the ICC which could potentially jeopardise both the fair and expeditiousness conduct of the proceedings and the rights of defendants, and prevent judges from hearing the best evidence available if witnesses decline to appear voluntarily.
3. The reparations phase of proceedings.
4. The implications of the use of *ad litem* judges at the ICC.
5. The issue of how to make the right to interim release viable in light of continued reluctance of States, including the Host State, to host defendants being considered for interim release.
6. The role of the Pre-Trial Chamber and measures that can be taken to further enhance the efficient conduct of proceedings at the pre-trial stage.
7. The respective roles of the Presidency of the ICC and the ASP in general, and specifically concerning management oversight of the Court.

The IBA *urges* the Court in its continuing efforts to enhance efficiency:

8. To continue its ongoing efforts to review its processes and maximise its level of efficiency through coordinated, systematic effort and internal restructuring where appropriate.

9. The judges and Registrar are encouraged to increase efforts to ensure public access to the transcripts of proceedings, in particular of ongoing trial proceedings, in order to allow members of the public and other relevant stakeholders to follow the testimony of witnesses. The IBA appreciates that there may be significantly disputed portions of the evidence which will trigger an extensive process of review. However, this process appears to be unduly protracted and does not take into account the public interest in obtaining a timely record of the proceedings.
10. The IBA welcomes the OTP's efforts to continue to streamline its internal operations to maximise efficiency as well as to publish policy papers in the spirit of transparency. However, the OTP is *urged* to expedite its efforts to publish a policy document on disclosure of evidence and the role of the Prosecutor under Article 54(1)(a) of the Rome Statute.
11. As part of its continued efforts to streamline its operations, the Registry is *urged* to update the relevant pages of the website concerning its internal restructuring including details of the leadership structure within the Registry and the role and functions of the Deputy Registrar, in order to ensure that all relevant stakeholders, individuals and organisations are fully informed. The IBA considers that this is particularly important given the Registry's crucial role concerning public information.

About the Programme

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. The IBA has a membership of 40,000 individual lawyers and more than 200 bar associations and law societies spanning all continents. It has considerable expertise in providing assistance to the global legal community.

The IBA is currently implementing a MacArthur Foundation-funded programme to monitor the work and proceedings of the International Criminal Court (hereinafter the Court or ICC) and to conduct outreach activities. The monitoring component follows and reports on the work and proceedings of the ICC. The outreach component of the programme works in partnership with bar associations, lawyers and civil society organisations disseminating information and promoting debate on the ICC in different jurisdictions across the globe.

IBA parameters for monitoring the ICC

The IBA's monitoring of both the work and the proceedings of the Court focuses in particular on issues affecting the fair trial rights of the accused. The IBA also assesses ICC pre-trial and trial proceedings, the implementation of the 1998 Rome Statute, the Rules of Procedure and Evidence, and related ICC documents in the context of relevant international standards.

In addition to the ICC's normative texts, where appropriate the IBA refers to internationally accepted principles enshrined in various UN and other instruments (such as the 1990 United Nations Guidelines on the Role of Prosecutors, the 1985 Basic Principles on the Independence of the Judiciary and the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power).

With regard to fair trial rights the IBA takes into account specifically:

- the right to be tried by a competent, independent and impartial tribunal;
- the right to a public hearing;
- the presumption of innocence;
- the right to legal counsel;
- the right to be present at the trial;
- the right to equality of arms;
- the right to have adequate time and facilities to prepare a defence;
- the right to call and examine witnesses;
- the right not to be compelled to testify against oneself; and
- the right to be tried without undue delay.

The IBA's monitoring work is not limited to pre-trial and trial proceedings per se, but may also include ad hoc evaluations of legal, administrative and institutional issues that could potentially affect the impartiality of proceedings and the development of international justice.

The IBA also monitors any significant developments in international humanitarian and human rights law, and international criminal law and procedure, which may result from the Court's activities.

Methodology

The ICC monitoring is carried out via a dual process of research and consultation. The IBA monitor engages in high level consultations with key stakeholders within and outside the ICC. Within the Court, the IBA monitor consults periodically with designated persons in specific organs of the Court, as well as with senior level ICC staff. While at all times preserving its objectivity, the IBA seeks to maintain close contact with the divisions of the Court. External consultations are conducted with non-governmental organisations (NGOs), individual defence counsel, representatives of diplomatic missions and other legal professional organisations. The IBA wishes to express its gratitude to all the persons who graciously participated in consultations for this report, and to the IBA interns who provided research assistance.

The efficiency and effectiveness of the International Criminal Court (ICC) are major determinants of the Court's credibility and legitimacy. The Court's strategic objectives include conducting fair, effective and expeditious proceedings, as well as being a model of public administration.¹

The Court has made notable progress since its inception. Significant attention has been invested to date in consolidating its organisational structure, ensuring adequate support mechanisms for victims, witnesses and defendants and increasing efforts to develop and implement outreach and public information strategies. Important decisions on procedural and substantive legal issues such as jurisdiction and admissibility, participation and protection of victims and witnesses, admissibility and disclosure of evidence, and modes of liability, among others have been handed down by the respective Chambers.

Since 2008, the Court has engaged in a court-wide process to review its level of efficiency and has presented four reports to the Assembly of States Parties (ASP), the Court's governing body, concerning its progress to date. In response to prompting from the Committee on Budget and Finance (CBF), a subsidiary body of the ASP which advises it on budgetary matters, the Court produced a *Report on measures to increase clarity on the responsibilities of the different organs* (Governance report) outlining its efforts to further streamline aspects of its operational processes and policies and clarify roles to reduce the risk of inefficiency due to overlapping roles and duplication.

Notwithstanding encouraging efforts in this regard, issues of concern regarding the efficiency of ICC proceedings remain. Despite eight years in operation, the Court has not yet completed a trial. The ICC's first trial against a Congolese citizen Thomas Lubanga Dyilo (the *Lubanga* case), has twice been suspended since its commencement in January 2009, and his unconditional release ordered by the Chamber. The most recent suspension on 8 July 2010 was due to the material non-compliance by the Office of the Prosecutor (OTP) with the Chamber's order to disclose material evidence to the defence on the grounds that it conflicted with their protection obligation under the Rome Statute. Although the Appeals Chamber subsequently reversed the stay,

overturned the decision on release, ruled on the legal issues involved and ordered the resumption of the trial, the impact of the delays for the defendant, victims and the public perception of the ICC is still significant.

2011 is likely to be a major test of the efficiency level of the ICC. The Court projects that at least three trial cases will continue in 2011, namely the trials of Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui from the situation in the Democratic Republic of Congo (DRC) and Jean-Pierre Bemba Gombo from the situation in the Central African Republic, and a possible fourth depending on the outcome of the confirmation of charges hearing in the case of Abdallah Banda and Saleh Jerbo, Sudan, which took place on 8 December 2010. In order to effectively organise the hearings, the Court proposes to use the two available courtrooms – with one courtroom holding two hearings in one day using a split shift system, and another holding a single hearing of two sessions in one day – and has requested additional resources to cover the costs associated with parallel proceedings.

2011 will also see the establishment, within the Hague Working Group (Working Group), of a Study Group tasked by the ASP with leading discussions on efficiency and other relevant operational issues at the ICC. The Study Group will have the opportunity to closely examine structural, operational and judicial impediments to efficiency as well as governance issues generally, while fully respecting judicial independence.

Focus of the report

In keeping with its mandate to monitor proceedings and developments at the ICC, this ninth IBA monitoring report will discuss measures that the Court has taken to enhance efficiency and maximise its effectiveness, and consider what challenges remain.

The issue of the ICC's efficiency is a complex one. It is clear that while efficiency can be achieved in some areas through restructuring and re-engineering, judicial processes are somewhat different, as judges must take into account the impact of efficiency measures on the rights of the accused and the overall fairness of the proceedings.

Exploring every dimension of the current discussions on governance and steps to enhance the effectiveness of the ICC is beyond the scope

¹ Report of the Bureau on the strategic planning process of the International Criminal Court, ICC-ASP/8/46, Annex I. In 2006, the Court adopted its first Strategic Plan, providing 'a common framework for the Court's activities over the next ten years, with particular emphasis on the three immediate years'. The Court reviewed its Strategic Plan in 2008 and a revised set of strategic objectives covering the years 2009-2018 was adopted.

of this report.² The report will focus on specific judicial developments between July and November 2010, the reporting period, which highlight some of the main areas in which the Court's practice has evolved or where it continues to face challenges in its ongoing efforts to improve efficiency, and also discuss specific efforts on the part of the Court to streamline administrative operations and the impact of these initiatives on judicial efficiency.

Chapter One of the report provides a contextual overview of the issues discussed in the report. The chapter considers the Court's efforts to maximise efficiency through the process of review initiated since 2008; and discusses the feasibility of the proposed Study Group on efficiency and governance.

Chapter Two of the report examines procedural developments in the cases of Jean-Pierre Bemba, Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui, and other judicial proceedings during the reporting period, and identifies particular issues which potentially jeopardise the expeditious conduct of proceedings and the effectiveness of the Court, such as: maintaining judicial control of proceedings; balancing expeditiousness and fairness; victims' participation; and interlocutory appeals. The chapter also highlights a number of other areas of concern such as the lack of subpoenae powers of the ICC and the role of the Pre-Trial Chamber.

Chapter Three examines concrete measures taken by the Court to streamline processes and clarify roles, including the organisational restructuring of the Registry; the issuing of policy documents; implementing best practices to minimise the frequency of closed session hearings and confidential documents; and a decision clarifying the scope of counsel's responsibility in the event of a conflict of interest.

The IBA's conclusions and recommendations are made in **Chapter Four** of the report.

2 Relevant issues not covered in the report include the Independent Oversight Mechanism and the relations between the ASP and the Court, which are important matters that also impact the effectiveness of the ICC. These issues were, however, the subject of debate during the IBA Expert's Roundtable Discussion entitled: 'Great Expectations: exploring the mutual and individual responsibility of States and the ICC', held on the 30 November 2010 at the Peace Palace in The Hague. The film recording of the Roundtable discussion may be viewed on the IBA website at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=40D63C2C-4374-4C74-A046-4D85EBD55831>.

1.1 Introduction

Efficiency may be defined as the degree to which maximum productivity is achieved without wasted energy or effort.³ In the context of international criminal proceedings this is often difficult to achieve given the hybrid nature of such proceedings, a unique blend of the adversarial (common law) and inquisitorial (civil law) legal traditions. Moreover, the experience of the ad hoc tribunals has demonstrated that factors such as the factual and legal complexity of cases coupled with the volume and scope of evidentiary material; use of sophisticated e-court technology; protection of witnesses and victims; multiple languages requiring interpretation and translation, among others, have resulted in pre-trial, trial and appellate proceedings that are notoriously lengthy.⁴

Goal 1 of the ICC's Strategic Plan states that the Court will deliver quality justice through 'fair, effective and expeditious public proceedings in accordance with the Rome Statute and with high legal standards, ensuring full exercise of the rights of all participants.'⁵ Therefore in order to meet the objective of its first strategic goal, ICC proceedings must meet three essential elements: fairness, effectiveness and efficiency. It is not always easy to meet all three requirements – a trial may be efficient or expeditious but still unfair. Furthermore, while it is important to focus on efficiency, the effectiveness of the Court should not be overlooked. The Court may well become a model of administrative and procedural efficiency yet fail to have an impact on victims and affected communities or to stem the tide of impunity for egregious crimes, thus rendering it ineffective.

During the 9th session of the ASP meeting in New York, States Parties to the Rome Statute approved a Draft Resolution⁶ to establish a Study Group on the governance framework of the Rome Statute system (The Governance Resolution). The proposed Study Group will be established within

the Working Group, a subsidiary mechanism of the Assembly, for a period of one year, and tasked with conducting 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'.⁷

As will be discussed in this chapter and elsewhere in this report, during the reporting period the ICC continued to make significant efforts to streamline its operations and examine its policies in order to enhance the Court's level of efficiency. In an effort to realise these objectives, the Court has made it a priority for 2010 and 2011 to excel in achieving the desired results with minimal resources.⁸ Furthermore, the efficiency review is consistent with the overall strategic review process initiated by the Court in 2008 and which continues during the period under review.⁹

1.2 Efforts by the Court

Since 2008, the Court has formally commenced a process to improve the efficiency of all its processes, from judicial to administrative.¹⁰ A Court-wide Working Group on efficiencies, comprising representatives of the Judiciary, Office of the Prosecutor (OTP) and the Registry, was set up by the Court's Coordination Council.¹¹ The Working Group reviews possibilities for increased efficiency within the current legal framework, and considers the financial implications of judicial decisions in consultation with the Registrar and the need for possible amendments to the Court's constitutive texts.¹² The OTP is conducting its own internal review of possible efficiency measures¹³ and the Registry has initiated a broader process, consulting

3 See <http://oxforddictionaries.com/definition/efficient>.

4 O-Gon Kwon, 'The Challenge of an International Criminal Trial as seen from the Bench', *Journal of International Criminal Justice* 5 (2007), 362.

5 Report of the Bureau on the strategic planning process of the International Criminal Court, ICC-ASP/8/46, Annex I.

6 Draft resolution on Governance/efficiency and effectiveness/strengthening of the institutional framework of the Rome Statute system, HWG Draft (25 November 2010) (on file with IBA). The Draft Resolution was reportedly adopted by the plenary on 10 December 2010. However, at the time of writing the official records of the ASP had not yet been updated. Information concerning the adoption of the Resolution was thus obtained from the informal daily summaries prepared by the NGO Coalition for the International Criminal Court, available at <http://www.iccnw.org/?mod=newsdetail&news=4276>.

7 Draft resolution, *ibid*. The Hague Working Group had previously been mandated by the Bureau of the Assembly to consider this issue. See Resolution ICC-ASP/8/Res.6 para 9.

8 Fourth Status Report on the Court's progress regarding efficiency measures (copy obtained from the Court on file with IBA).

9 Report on the Activities of the Court, ICC-ASP/9/23, paras 119-123.

10 Status report on the Court's investigations into efficiency measures for 2010 (hereafter Efficiency Status Report), ICC-ASP/8/6.

11 Efficiency Status Report, at para 11.

12 *Ibid*.

13 According to the OTP, internal efficiency reviews is an ongoing priority of that office. For example, the office is able to conduct more investigations and prosecutions simultaneously, with the same number of staff, due to the organisation of lean and flexible joint investigations and trial teams, successful cooperation and optimised support in key areas. See *Second status report on the Court's investigations into efficiency measures*, ICC-ASP/8/30.

all organs as appropriate. The review process consists of two parallel processes – preliminary analysis of possible efficiency measures by the Court and a re-engineering exercise which includes selection of priority areas of emphasis.¹⁴

The Court's efficiency review is prompted in part by recommendations from the CBF, the subsidiary mechanism of the ASP tasked with advising the Assembly on budgetary matters.¹⁵ Confronted by CBF concerns that divisions among the organs and a lack of clarity of roles represented a significant risk for inefficiencies at the Court,¹⁶ the Court took decisive steps to address internal governance issues.¹⁷ According to reports prepared by the Court, considerable progress has been made to date in the ongoing process of enhancing its efficiency.¹⁸ However, internal governance initiatives are still at the initial implementation phase and the level of commitment to its objectives is still to be assessed. The IBA considers that the progress made by the Court in enhancing efficiency to date is commendable and must be encouraged.

Notwithstanding significant gains, particularly in relation to administrative matters, issues of concern regarding the efficiency of ICC proceedings remain. Despite eight years in operation, the Court has not yet completed a trial. The ICC Review Conference focused only on a limited number of important amendments to the Statute – including agreement on the definition and trigger mechanism for the crime of aggression – and provided an opportunity to take stock of the broader impact of the Court in specific thematic areas.¹⁹ For practical reasons, States wisely opted to defer more technical review of the judicial processes and activities at the ICC. These and other structural and operational issues are now within the terms of reference of the Study Group.

1.3 The timing and mechanism for review

The establishment of a Study Group to oversee issues concerning the efficiency of the Court is clearly within the scope of the oversight functions of the ASP. Under Article 112(2) of the Rome Statute, the ASP provides management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court. However, the ASP is not expected to be involved in the routine administration of the Court. It is therefore important that the oversight remit of the ASP does not descend into micro-management of the Court's judicial activities and trespass on the functional independence of the judges. As one international non-governmental organisation (NGO) Human Rights Watch recently noted, it is important that the ASP maintain an 'active and engaged role that includes providing scrutiny and feedback on ICC operations, although only in a manner that respects judicial independence.'²⁰

The timing and scope of the proposed efficiency review is, however, the subject of some debate. The Study Group will be chaired by a member of the Working Group and has an ambitious mandate which includes facilitating dialogue on matters pertaining to the strengthening of the institutional framework both within the Court and between the Court and the Assembly, as well as other relevant questions related to the operation of the Court.²¹ The scope of review is therefore quite broad. In order to be effective, given the limited timeframe of one year, the Chair of the Study Group is urged to clearly delineate the precise scope of the review, particularly of judicial activities, and ensure that this is communicated to the Court and all relevant stakeholders.

It is also felt that in some ways the proposed review is premature, given that the Court has not yet completed a full judicial cycle.²² The IBA considers that constituting the proposed Study Group at this juncture in the life of the Court could have several advantages. For example, although the ICC has not yet completed a trial, the Court has completed at least four Confirmation of Charges proceedings²³

14 Efficiency Status Report page 12, para 4.

15 In the report of the work of its eleventh session, the CBF noted that the Court had completed its establishment phase and would soon be in full operation with the commencement of trials therefore consideration needed to be given to cost drivers in the Court, managing workload and reforming administrative processes. The Committee identified the length of proceedings, legal aid for the accused, legal aid for victims, protection of witnesses and victims, and participation of victims as areas where there were significant pressures on the Court's budget and where policy and jurisprudence were continuing to evolve. In their view, decisions on these matters would have significant, long-term budgetary implications, notwithstanding their vital importance to the successful implementation of the Statute and the mission of the Court. See Report of the Committee on Budget and Finance on the work of its eleventh session, ICC-ASP/7/15.

16 Report of the Committee on Budget and Finance on the work of its thirteenth session, ICC-ASP/8/15 Advance Version, 15 September 2009, paras 25-6.

17 Report of the Court on measures to improve clarity on the responsibilities of the different organs, ICC-ASP/9/34.

18 See Fourth report of the Court on measures to increase its efficiency.

19 For general information on the ICC Review Conference see <http://www.icc-cpi.int/Menus/ASP/ReviewConference/>.

20 Human Rights Watch Memorandum for the Ninth Session of the International Criminal Court Assembly of States Parties, November 2010 available at <http://www.hrw.org/en/news/2010/11/16/human-rights-watch-memorandum-ninth-session-international-criminal-court-assembly-st>.

21 Governance Resolution, operative paras 1, 3 and 4.

22 The term 'judicial cycle' refers to the passage of a case through all stages of the proceedings: summons or arrest warrant, pre-trial proceedings, first appearance, confirmation of charges proceedings, trial, conviction or acquittal, appeal on the merits and reparations (in the event of a conviction).

23 The ICC has completed Confirmation of Charges proceedings in the case of Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo from the situation in the DRC; Jean-Pierre Bemba Gombo arising from investigations in the Central African Republic; and of Bahr Idriss Abu Garda from the Darfur, Sudan investigations. While charges in respect of the first three cases were confirmed and the matter remitted for trial, the Pre-Trial Chamber declined to confirm the charges against Abu Garda.

and issued several arrest warrants. Whilst it would be premature to review the trial phase of proceedings at this stage, review of judicial activities at the pre-trial stage of the Court's proceedings would not be inappropriate, and may yield some useful results.

1.4 IBA comment

The IBA considers that, in principle, the idea of a Study Group to facilitate dialogue with the Court concerning its levels of efficiency is a welcome one. While there may be good reasons to await the completion of a full judicial cycle, commencing the dialogue earlier may also provide ample opportunity for more thoughtful consideration of the issues. Apart from fully engaging the Court in this dialogue, States Parties must ensure that relevant stakeholders such as civil society organisations and academics are included.

The IBA is mindful that the underlying rationale for enhancing efficiency may differ between managers of the Court's budget and the judiciary. While judges generally wish to ensure an expeditious trial because it is a critical element of a fair trial; managers generally seek expeditious trials because they are cost effective. Indeed, some civil society organisations have expressed concern that if not carefully and thoughtfully managed, there is potential for the ASP mechanism to overreach, that is, to encroach on the Court's ability to independently fulfil its judicial mandate due to budgetary considerations.²⁴ The terms of reference of the proposed Study Group are therefore critical.

It is unclear whether the ASP has given thought to performance outcomes, benchmarks or indicators by which to assess the level of efficiency of the ICC's judicial operations. It should, however, be recalled that there is no measurable performance indicator for quality of judicial decision making.²⁵ The fairness of outcomes and the fairness of procedures can be assessed but not measured. Developing performance indicators to measure effectiveness requires a nuanced understanding of qualitative values such as impartiality, fairness, accessibility, openness, and fairness. Some even doubt that developing such performance indicators is even possible.²⁶ Crude measures of performance based upon turnover of cases, regardless of their length or complexity, or based upon comparisons between courts, regardless of their comparative workloads and resources, are clearly inappropriate.

24 ASP Structures Team, Coalition for the International Criminal Court (CICC), Comments and Recommendations to the Ninth Session of the Assembly of States Parties, 6 – 10 December 2010, New York, 26 November 2010, available at http://coalitionfortheicc.org/documents/CICC_ASP_Structures_Team_Paper.pdf

25 Judicial accountability and Performance Indicators, 10 May 2001, JJ Spigelman, available at http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_10050.

26 The 'New Public Management' and the Courts, 27 July 2001, JJ Spigelman, available at http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_270701.

2.1 Introduction

The most strident criticism of the ICC concerns the slow pace of its proceedings. In order to be credible, the ICC must conduct proceedings that are expeditious and fair. Indeed, some critics contend that '[f]ears are warranted that [the Court's] credibility may be questioned when ... since its creation, the Court has no tangible result to show the international community (that is, the acquittal or conviction of one of the persons arrested since its creation).'²⁷ In order to assess whether these misgivings are justified, it is important to examine the emerging practice at the Court to determine what efforts, if any, have been made, in particular by the judiciary, to ensure efficiency and effectiveness of ICC proceedings.

As managers of the proceedings and final decision makers, judges have the ultimate responsibility to ensure that proceedings are expeditious and fair. The IBA has previously noted that:

'Judges play an important role in ensuring the overall efficiency of the Court. At the pre-trial and trial level judicial management of procedural issues such as disclosure between the parties and participants; timely rulings on filings and submissions of the parties; and determining the overall conduct of proceedings is critical to ensuring an expeditious process. At the appellate level, it is imperative that the Appeals Chamber and Presidency in their respective capacities deliver timely and informed decisions which correctly interpret the law while providing guidance for the [other Chambers] and the parties and participants.'²⁸

Since its inception, there have been commendable efforts by judges at the ICC in this regard. Numerous decisions have been handed down which clearly evince the commitment of the judiciary to upholding the fair trial rights of defendants before the Court and to ensuring the safety and security of persons at risk.

However, this has not been without challenges. Decisions issued by the respective Chambers during the reporting period, clearly reflect the difficulties faced by the judges in balancing considerations of expeditiousness against those of fairness. Rulings on key procedural issues have sometimes

been inconsistent, leading to uncertainty for the parties and participants. Despite the increasing expeditiousness of interlocutory decisions by the Appeals Chamber, there are concerns regarding the level of guidance provided to the other Chambers. Questions have been asked by civil society concerning whether the Pre-Trial Chambers are effectively fulfilling their role. Issues remain concerning the impact of victims' participation on the expeditiousness of the proceedings and whether this is a matter that will be solved only by judicial intervention.

From July to November 2010, the period under review, the IBA considered several judicial decisions in the cases and situations at the ICC. Six main procedural issues which could potentially impact the expeditious conduct of proceedings and the effectiveness of the Court were identified, and will be discussed in more detail below. These are:

- judicial management of proceedings;
- interlocutory appeals;
- balancing expeditiousness with fairness
- disclosure of evidence;
- redactions; and
- the participation of victims.

2.2 Judicial management of proceedings

The legal texts of the ICC vest significant power in the judges to control the proceedings.²⁹ Full compliance with judicial orders is therefore key to maintaining the integrity and efficiency of proceedings, and the ICC legal texts clearly prescribe the appropriate channels for registering disagreement with judicial decisions at first instance by way of an appeal. The Prosecutor's failure to comply with the order of Trial Chamber I in the *Lubanga* case – to disclose information concerning an intermediary to the defence in the case³⁰ – led to the second suspension of the trial and order for the defendant's unconditional release in July 2010. The judges considered the Prosecutor's material non-compliance with the Chamber's order to be an abuse of the process of the Court.³¹

27 Marc Dubuisson, Anne-Aurore Bertrand, Natacha Schauder, 'Contribution of the Registry to greater respect for the principles of fairness and expeditious proceedings before the International Criminal Court' in *Emerging Practice of the International Criminal Court*, Carsten Stahn and Goran Sluiter (eds) 565-584, at page 566 (hereafter Contribution of the Registry).

28 IBA/ICC Monitoring Report, *Sustaining the International Criminal Court: Issues for consideration at the 2010 Review Conference and Beyond*, November 2009, available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=3C77C783-4EE1-4EB8-BD28-8B0B80C6A1F2>.

29 See, for example, Article 57-61 (functions and powers of the Pre-Trial Chamber); Regulations 46-53 of the Regulations of the Court; Article 64 (functions and powers of the Trial Chambers); Rules 140, 141 of the Rules of Procedure and Evidence and Regulations 54-56 of the Regulations of the Court.

30 *Prosecutor v Lubanga*, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of I-143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04-01/06-2517-Red, 8 July 2010 (Decision to stay proceedings).

31 *Ibid*, para 31.

The Prosecutor asserted that his non-compliance was not an indication of disrespect or disregard for the Chamber's inherent power to control the proceedings, but was due to his independent and autonomous obligation to ensure the protection of witnesses and other persons at risk pursuant to Article 68 of the Rome Statute.³²

The judges found that in such circumstances 'the fair trial of the accused is no longer possible, and justice cannot be done, not least because the **judges will have lost control** of a significant aspect of the trial proceedings' (emphasis added).³³ Given the numerous procedural delays previously experienced in the case, the Trial Chamber concluded that the unconditional release of the defendant was appropriate in the circumstances.³⁴

The matter was resolved only with the intervention of the Appeals Chamber, who made it clear that even if there is a conflict between the orders of a Chamber and the Prosecutor's perception of his duties, the Prosecutor is obliged to comply with the Chamber's orders.³⁵ The Appeals Chamber ruled, however, that the Trial Chamber had failed to utilise all means at its disposal, including sanctioning of the Prosecutor, before taking the drastic measure of staying the proceedings.³⁶

The developments in the *Lubanga* case were significant for a number of reasons. First, the stay of proceedings arose in the context of litigation over the prosecution's use of intermediaries which has been a contentious feature of the *Lubanga* and *Katanga/Ngudjolo* cases. This was amidst allegations by the defence that some intermediaries sought to induce witnesses to testify falsely before the Court. Second, the filings and decisions highlighted broader concerns regarding the scope of the respective obligations of the OTP, the Victims and Witnesses Unit (VWU) and the Chambers concerning the protection of witnesses and other persons at risk before the Court under Article 68 of the Rome Statute, an issue not fully clarified by the Appeals Chamber decision.

The Appeals Chamber decision also served as an important lesson for both the prosecution and the Trial Chamber. While the decision affirmed that compliance with judicial orders is critical to preserving the integrity of the proceedings, it also made clear that a stay of proceedings was a drastic and excessive remedy which should be resorted to only in

exceptional circumstances after all other means at the Chamber's disposal to ensure compliance with its orders had failed. However, the decision itself arguably did very little to mitigate the effect of the prosecution's non-compliance on the defence. While the Trial Chamber was advised that sanctions should have been employed as a tool to ensure compliance with its orders, retrospective application would do little to remedy the effect of the delay on the defendant.³⁷

2.3 Interlocutory appeals

The decision in the *Lubanga* case was one of several interlocutory appeals delivered by the Appeals Chamber during the reporting period. On the one hand, increasing numbers of interlocutory appeals do have significant potential to delay the proceedings; on the other, they facilitate the settling of foundational jurisprudential issues at the Court. Timely decisions, guidance from the Appeals Chamber and consistent application of decisions by the Chambers will go a long way towards maximising efficiency and mitigating the effect of any delays.

The Appeals Chamber has notably improved in the timeliness of its decisions.³⁸ The *Lubanga* decision was delivered within a record six weeks (following the final sets of supporting documents filed by parties and participants on 30 August 2010).³⁹ This Chamber has not, however, been insulated from criticism concerning the performance of its functions.⁴⁰ Concerns have been expressed that some previous Appeals Chamber decisions have failed to provide sufficient guidance to the other

32 Urgent Prosecution's Application for Leave to Appeal the Trial Chamber I's decision of 8 July 2010 staying the proceedings for abuse of process, ICC-01/04-01/06-2520-Red, para 25.

33 Decision to stay proceedings, para 31.

34 ICC-01/04-01/06-T-314-ENG, p 21, lines 19-23.

35 Ibid para 2.

36 Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU', ICC-01/04-01/06-2582.

37 Under Article 71, the Court may sanction persons who commit misconduct, including disruption of its proceedings or a deliberate refusal to comply with its directions. Pursuant to Rule 171 of the Rules of Procedure and Evidence, when the misconduct consists of a deliberate refusal to comply with an oral or written direction by the Court and that direction is accompanied by a warning of sanctions, in case of breach, the Presiding Judge may order the interdiction of that person from the proceedings for a period not exceeding 30 days. Alternatively, if the misconduct is of a more serious nature, the Court may impose a fine not exceeding €2,000, provided that in cases of continuing misconduct, a new fine may be imposed on each day that the misconduct continues, and such fines shall be cumulative.

38 The Chamber has also been very strict in encouraging timeliness by the parties to proceedings. On 12 July 2010, the Appeals Chamber decided by majority (two judges dissenting) to dismiss Mr. Katanga's appeal against his unlawful pre-surrender arrest and detention. The Appeals Chamber agreed with the Trial Chamber's determination that the parties must act 'in a timely manner' or within a reasonable time, in keeping with considerations of efficiency and judicial economy. The Appeals Chamber found that the decision of the Trial Chamber did not infringe Mr Katanga's right to a fair hearing and that he had been given adequate notice and opportunity to raise the issue of his alleged unlawful pre-surrender arrest and detention.

39 The Appeals Chamber decision was delivered on 8 October 2010.

40 See Professor William Schabas, 'Nice Work, If You Can Get It', PHD studies in Human Rights weblog, 3 February 2010.

Chambers.⁴¹ For example, in its decision on the participation of victims at the situation phase in the Kenya situation, the Pre-Trial Chamber opined that no clear guidance on the issue had been provided by the Appeals Chamber.⁴² Indeed, notwithstanding that numerous decisions have provided important judicial guidance on key procedural issues, the Appeals Chamber has, in general, practised judicial economy and refrained from commenting on issues that go beyond the scope of the appeal, or that are considered obiter dicta.⁴³

The IBA considers that the Appeals Chamber plays an important standard-setting role which could contribute to the level of consistency in judicial decisions issued by the ICC Chambers. As such, the IBA encourages the Appeals Chamber (where appropriate and taking into account the need for a case-by-case approach in certain circumstances) to continue to provide much needed clarity on foundational procedural issues at the ICC in order to foster judicial consistency and certainty for parties and participants in the proceedings.

2.4 Balancing fairness and expeditiousness

Finding an appropriate balance between expeditiousness and fairness is a difficult task for judges. A decision in November 2010 in the case of

Jean-Pierre Bemba provides a relevant example.⁴⁴ The majority of judges ruled, shortly before the commencement of the trial on 22 November, that ‘all statements of witnesses to be called to give evidence at trial’, as well as all documents submitted to the Chamber in the prosecution’s List of Evidence were prima facie (on the face of it) admissible for the purposes of the trial.⁴⁵ This wholesale admissibility of evidence, in the majority’s view, was consistent with the legal texts of the ICC and would contribute to the ‘expeditiousness and proper conduct of the proceedings as it will allow for more coherence between the pre-trial and trial stages of the proceedings’.

In a forceful dissenting opinion, Judge Kuniko Ozaki submitted that the majority decision obliging the prosecution to tender wholesale all witness statements as evidence, without making a prior determination of the merits of each statement, is contrary to the principle of orality (that is, the testimony of witnesses in person) enshrined in the ICC’s legal texts,⁴⁶ and could have a significant impact on the fairness of the proceedings and the rights of the defence.⁴⁷

The decision of the majority also reflects the inherent challenge of seeking to apply procedural approaches from the civil or common law system within the hybrid *sui generis* context of the ICC. The majority of the judges were of the view that the proposed approach to the admissibility of evidence, albeit a significant departure from that of Trial Chambers I and II, was an effective compromise between allowing the Chamber to eschew the ‘technical formalities of the common law system of admissibility of evidence in favour of the flexibility of the civil law system’.⁴⁸

While the rationale of the decision of the majority of judges appears to be expeditiousness of the proceedings, the potential for unfairness to the defendant is nevertheless troubling. Both the prosecution and the defence have since sought leave to appeal the decision on grounds of fairness.⁴⁹

2.5 Disclosure of evidence

The timely disclosure of evidence is critical to the efficient conduct of proceedings at the ICC. The Rome Statute and other legal texts contain

41 Professor William Schabas, *supra* n 63.

42 Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09-24, para 11, where the judges noted that ‘the Appeals Chambers Judgment of 19 December 2008, which addressed the question of victims’ participation in the context of the situation, fell short of any guidance as to the possible scenarios that could lead to such participation at the situation stage.’ In an effort to ensure greater judicial consistency concerning victims’ participation at the situations phase of proceedings, the Pre-Trial Chamber in the Central African Republic situation has since applied the approach adopted by the Pre-Trial Chamber in the Kenya decision. See Decision on Victims’ Participation in Proceedings Related to the Situation in the Central African Republic, ICC-01/05-31.

43 See, for example, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497. At para 38 of the judgment, the Appeals Chamber noted that it ‘even if it were to conclude that the Trial Chamber made an error in respect of its interpretation of the term “commencement of the trial” in Article 19 (4) of the Statute, this error would not, in itself, be a reason to reverse the Trial Chamber’s decision on the admissibility of the case. The Appeals Chamber considers it inappropriate to pronounce itself on obiter dicta. To do so would be tantamount to rendering advisory opinions on issues that are not properly before it. In these circumstances, the Appeals Chamber does not consider it necessary to determine the merits of the Appellant’s submissions under the first ground of appeal. The Appeals Chamber nevertheless wishes to stress that the fact that the Appeals Chamber is refraining from pronouncing itself on the merits of the issue raised under the first ground of appeal does not necessarily mean that it agrees with the Trial Chamber’s interpretation of the term “commencement of the trial” in Article 19 (4) of the Statute’.

44 Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, 19 November 2010, ICC-01/05-01/08-1022 (Majority Decision).

45 ICC-01/05-01/08-1022, paragraph 8.

46 Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, ICC-01/05-01/08-1028, para 6.

47 Dissenting Opinion, paras 13-28.

48 Majority Decision at para 17.

49 Prosecution’s Request for Leave to Appeal the Trial Chamber’s Decision on Directions for the Conduct of the Proceedings, ICC-01/05-01/08-1060 and Application for leave to appeal Trial Chamber III’s decision on the admission into evidence of materials contained in the prosecution’s list of evidence, ICC-01/05-01/08-1061.

detailed provisions governing the manner, timing and limitations on disclosure during the pre-trial and trial phases of proceedings. During the period under review, there were numerous filings and decisions on the issue of disclosure by both the Prosecution and defence reflecting the significant attention given to this issue. In the *Lubanga* case, for example, in the face of continued defence criticism that the Prosecutor has failed to fully comply with its disclosure obligations, the trial judges ordered the prosecution to file a document summarising the principles and approach applied by the OTP to disclosure during the trial.⁵⁰ In response, the prosecution reiterated its compliance with the disclosure regime enunciated in the Court's legal texts, but expressed concern that the defence's failure to provide key words to facilitate searches of the prosecution's evidentiary material limited its ability to anticipate what material would be relevant to the defence case.⁵¹

The disclosure of evidence is an issue which must be resolved within the context of judicial proceedings. At the heart of the issue is the question of whether or not the prosecution's obligations under Articles 54(1)(a) and 67 of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence require that the OTP anticipates material aspects of the defence case and effects disclosure accordingly, or whether the defence is obliged to provide sufficient information to the prosecution to facilitate the disclosure process.

2.6 Redactions

The ICC Rules of Procedure and Evidence allow for appropriate protective measures to be taken to restrict disclosure of the identity of witnesses or persons who may be at risk on account of their testimony before the Court.⁵² Redacting relevant portions of transcripts, witness statements or victims' applications for participation prior to disclosure is routinely carried out by the Court in the interest of preserving the security of witnesses, confidentiality of information, or preserving ongoing investigations.

Regrettably there appear to be two main problems with redactions which potentially affect the efficiency of the proceedings. First, the process of redacting documents does not appear to be carried out in a careful and thorough manner, resulting in significant duplication of effort. For example, the IBA understands that on some occasions the judges and the staff assigned to Chambers have had to invest considerable time and effort in cross-checking redacted documents

submitted to the Chambers by the OTP, despite the latter's reportedly rigorous internal review procedure.⁵³ Secondly, the IBA understands that the nature and scope of the redactions suggests the absence of a systematic approach to the process. The IBA is informed that in some instances identifying details, along with other relevant information, are completely obliterated, making it impossible to fully comprehend the application or statement. Attention to these issues will certainly help in facilitating the efficient conduct of proceedings.

2.7 Victims' applications for participation

The participation of victims at the ICC – one of the unique features of the Rome Statute system – could also prove to be the Court's 'Achilles heel' if not efficiently managed. Rightly embraced by the international legal community as a progressive development, one commentator indicates that 'the ICC's innovative and highly ambitious victim involvement scheme has nevertheless engendered caution and misgivings as to its expedience and viability.'⁵⁴ As the various decisions interpreting Article 68(3) of the Statute have clearly demonstrated, the text lends itself to a high degree of judicial discretion. Thus, the jurisprudence on this issue is still not settled and essential issues relevant to the determination of the prerequisites to and the scope of victim participation continue to evolve.⁵⁵

Defence counsel have expressed concern that the Chamber's interpretation of Article 68 granting extensive participatory rights to victims at the trial phase, including the right to present evidence as to the guilt of the accused, could have negative impact on the fairness of the proceedings. Admittedly, these rights have been subject to specific strict modalities concerning the manner of presentation of such evidence or the questioning of witnesses imposed by the Chamber, which in some ways has mitigated fears that victims' legal representatives would have been allowed to become, in effect, a second prosecutor.

50 ICC-01/04-01/06-T-326-ENG

51 Prosecution Submissions on Disclosure pursuant to Trial Chambers I Order of 5 November 2010, ICC-01/04-01/06-2625-Red, para 5

52 Rule 81 of the Rules of Procedure and Evidence.

53 During consultations the OTP indicated that there are clear internal procedural guidelines for carrying out redactions. This included a systematic process of review by more than one person in the department. The OTP noted, however, that the possibility of human error cannot be ruled out but the process of review was designed to minimise such possibilities.

54 Sergey Vasiliev, 'Article 68 (3) and personal interests of victims in the emerging practice of the ICC', in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers (2009) 635-690, p 636.

55 Ibid.

However, some concerns remain about the right of victims to introduce incriminating evidence in trial proceedings without being subject to the same disclosure obligations as the OTP. Counsel for Germain Katanga challenged the ruling of Trial Chamber II in this regard, submitting that the Trial Chamber ‘erred in law or abused its discretion in setting up a participation regime by which the victims may propose to the Trial Chamber incriminating evidence without the Trial Chamber imposing a corresponding obligation on the victims to disclose the evidence to the accused prior to the trial.’⁵⁶

The Appeals Chamber did not agree that such a situation was necessarily antagonistic to the rights of the defendant, provided that the Trial Chamber orders disclosure to the accused sufficiently in advance of its presentation at the trial, and takes any other measures necessary to ensure the accused’s right to a fair trial, in particular the right to adequate time and facilities for the preparation of the defence.⁵⁷ In the *Katanga* case the issue of timely advanced disclosure was moot, since the impugned decision was issued two months after the commencement of the trial. Interestingly, the Appeals Chamber also agreed that there was no general obligation for victims to disclose potentially exculpatory evidence in their possession to the defence.

Reviewing applications to participate

Victims may apply to participate in proceedings at the pre-trial, trial or appeal stage, provided that the relevant criteria under Article 68 of the Rome Statute are met. Under Rule 89 of the Rules of Procedure and Evidence, these applications are to be made in writing to the Registrar, who then transmits them to the relevant Chamber. The prosecution and defence are also given a copy of the applications and may then make observations or objections as appropriate. The relevant Chamber then issues a written decision on the applications.

The process of reviewing and commenting on victims’ applications to participate has created significant challenges for the parties in the proceedings and for the Chambers.

In the *Bemba* case, Trial Chamber III received over 1,300 applications to participate in the proceedings. The bulk of the applications were received and processed from June to November during the trial stage of proceedings and shortly before the commencement of the trial on 22 November 2010.

56 Defence’s Document in Support of Appeal against the *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*, ICC-01/04-01/07-2063.

57 Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled ‘Decision on the Modalities of Victim Participation at Trial’ (16 July 2010) ICC-01/04-01/07-2288, para 1.

Procedural solutions

The judges have made efforts through creative procedural solutions (such as the batch system and the cut-off date for applications implemented in the *Bemba* case) to manage the increasing number of victims’ applications. The judges have also proactively insisted that the Victims Participation and Reparations Section (VPRS), the unit responsible for processing and transmitting applications, conduct a thorough review of the applications to check that all relevant supporting documents have been obtained, prior to transmission to the Chambers. Furthermore, other administrative revisions including a shorter application form will contribute to minimising delay in judicial rulings on applications for participation.

While important, judicial efforts may need to be supplemented by non-judicial solutions. A Registry official pointed out during consultation, that the VPRS, with a staff of five to six persons, was not designed to accommodate the number of applications received. The situation in the *Bemba* case was managed by redeploying interns and staff from other sections of the Registry and with the assistance of the Office of Public Counsel for the Defence; however, the IBA considers that this is not sustainable.

Managing the risks

Ultimately, there remains a very real risk that, if not correctly managed, the process of submitting observations on victims’ applications for participation could have a negative impact on the fairness of the proceedings, as the parties’ attention is diverted from conducting crucial preparations for the trial. This is particularly true for the defence, who have fewer resources than the prosecution to devote to such tasks shortly before the commencement of trial.

There continue to be mixed reactions to the participation of victims at the Court. There is clear consensus, even among defence counsel, that victims’ participation is a positive innovation of the Rome Statute system. However, the ICC Committee – an informal group of eminent jurists, academics and other experts in international criminal law conducting a review of the ICC and its legal instruments – found that while there is full commitment among States to the idea of victims’ participation, in principle there are concerns that ‘widespread and unrestricted participation by victims in the ICC proceedings jeopardises the fair and effective functioning of the Court’.⁵⁸ Unsurprisingly the ICC Committee found that concerns appeared to focus more on ‘efficiency’, ‘expeditiousness’, and ‘costs’, and not so much on fairness.⁵⁹

58 Draft report of the International Criminal Court Committee, International Law Association Conference, The Hague 2010, available at <http://www.ila-hq.org/en/committees/draft-committee-reports-the-hague-2010.cfm>.

59 Ibid page 9.

2.8 Other relevant issues

During consultations and research a number of stakeholders proposed several additional issues at the Court which in their view could have an impact on the efficiency and effectiveness of ICC proceedings and thus merit further consideration. A number of procedural issues may be resolved as the Court develops organically. Others may require more fundamental amendment. They are outlined below:

The subpoena powers of the Court

There is currently no obligation for witnesses to appear and testify before the ICC. While a Trial Chamber may *require* the appearance and testimony of witnesses and production of documents, strictly speaking it cannot compel them to appear.⁶⁰ While the absence of such powers at the ICC may frustrate the efforts of the judges to obtain all relevant evidence that would lead them to a determination of the truth,⁶¹ even more troubling is the potential impact on the fairness of the proceedings – a clear example being circumstances where a witness who could give cogent potentially exculpatory evidence refuses to cooperate with the defence and to testify. Save for any efforts on the part of the relevant State, the ICC would be powerless to act.

The pre-trial stage

Some persons consulted appeared concerned by the length of proceedings during the pre-trial phase. It was also felt that decisions on arrest warrants appeared to take a significantly long time to be delivered, in contrast to the decision on confirmation of charges which had a statutorily imposed time limit.⁶² While aspects of the pre-trial process may merit review, the length of some processes, such as the confirmation of charges hearings, have significantly decreased.⁶³ For example, the confirmation of charges hearing against Mr Abdallah Banda and Saleh Jerbo, in the so-called ‘Haskanita’ cases arising from the Darfur, Sudan investigations, took place on 8 December in the absence of the accused, and was quite brief as important facts had been agreed by the parties, thereby shortening the proceedings.⁶⁴

The reparations phase of proceedings

In the report of the work of its 15th session the CBF expressed a number of concerns regarding the reparations phase of proceedings at the ICC. The Committee noted that there was potential for cost increases resulting from the extension of judges’ terms, which would be particularly acute depending on the manner in which the Rome Statute is interpreted for reparations hearings.⁶⁵ The IBA notes that it is still unclear how the reparations phase of proceedings will be approached by the Court, although there is some indication that internal discussions and consultations on this issue have been taking place.⁶⁶ In the absence of a clear judicial position on the issue, the Committee recommended that the ASP provide guidance to the Court, for example, through an ‘interpretative declaration’, to ensure a consistent approach.⁶⁷

In light of the advanced stage of the ICC’s first trial it is indeed important for the Presidency, the judges, the Registry and other concerned organs at the ICC to accelerate principled dialogue concerning the most efficient manner in which to conduct the reparations phase of proceedings, which could commence (subject to the final verdict of the judges), in 2011. Given its importance, the issue is also properly a matter for consideration by the ASP. However, the IBA cautions against an ‘interpretative declaration’ by the ASP on this issue. The IBA considers that it would be preferable for the matter to be settled by judicial decision in a thoughtful manner without direct intervention of the ASP. However, if the ASP wishes to further clarify or regulate issues related to the reparations phase, the proper procedure for doing so would be to amend the Statute and/or the Rules as necessary.

60 Under Article 93(1) of the Statute, the Court can request cooperation from States in this regard but only to facilitate the ‘voluntary appearance of persons as witnesses or experts’. By contrast, Rule 54 of the Rules of Procedure and Evidence of the ICTY allows a Chamber to issue ‘orders, summonses, subpoenas and transfer orders as may be necessary for purposes of an investigation or for the preparation or conduct of trial’.

61 Article 69 of the Rome Statute.

62 ICC Committee, ILA Draft report at p 15.

63 The Confirmation of Charges against Mr Jean-Pierre Bemba and Mr Abu Garda were considerably shorter than that of Mr Thomas Lubanga, the ICC’s first case.

64 See ICC press release ICC-CPI-20101203-PR607.

65 Report of the Committee on the work of its 15th session, ICC-ASP/9/15. At para 67 the CBF noted that if a full panel of judges are required to sit for the reparations phase, and that panel consists of the same judges who adjudicated during the trial, there would be implications on the workload (by having three judges work on the reparations phase instead of on other trials); and (b) on the programme budget if one or more judges whose mandate would otherwise expire were to be extended for the purpose of being able to continue with the reparations phase.

66 The IBA understands that there has been internal dialogue at the Court and consultations with civil society organisations on the issue of reparations. The War Crimes Research Office has also made several recommendations concerning how the issue should be approached. See, WCRO report, ‘The Case-based Reparations Scheme at the International Criminal Court’, June 2010.

67 Report of the Committee on the work of its 15th session, at para 68.

Ad litem judges

The CBF also questioned whether consideration should be given to the use of *ad litem* judges at the ICC.⁶⁸ In contrast to the ICTY, *ad litem* judges are not currently used at the Court. *Ad litem* judges were introduced in the ICTY to allow the Tribunal to respond to fluctuations in caseload. An *ad litem* judge is an ‘ad hoc’ judge appointed to participate only in a particular case or a limited set of cases and who may serve for a shorter period than a full term. The CBF noted that having a single judge handle reparations would help avoid extending mandates of judges and the associated cost implications. In this connection, the CBF recommended that the ASP consider the possibility of using *ad litem* judges for the reparations phase in order to avoid situations of prolonged extension and so as to ensure greater efficiency.⁶⁹ The IBA considers that careful thought should be given to addressing the full implications of appointing *ad litem* judges at the ICC, and should not be limited to the reparations phase only.

Interim release

The issue of interim release of accused persons at the Court has become a vexed issue in light of the overt reluctance on the part of States Parties to finalise framework agreements with the ICC to facilitate this. The Appeals Chamber in the case of Jean-Pierre Bemba has clearly opined that in order for judges to consider provisional release, a State willing to host the defendant must also be identified.⁷⁰ Consequently, this has rendered the relevant provision of the Court’s legal text an essential ‘dead letter’, since States to date have not shown any inclination to formalise such agreements with the Court. Principled dialogue on this issue is urgently required and need not be limited to this Study Group but should also be considered in other discussions on cooperation.

2.9 IBA comment

The IBA considers that the ICC judges together with other parties and participants have made significant effort to enhance the efficiency of proceedings. In several decisions of the Chambers, judges reiterate the importance of ensuring that proceedings are conducted in an expeditious manner without compromising fairness. The emerging practice of the Court in the areas discussed above reflects the inherent difficulty that the Court currently faces in proceedings expeditiously while addressing fundamental procedural issues. The Appeals Chamber plays an important role in helping to facilitate judicial consistency through decisions that provide clear guidance to the other Chambers.

The main procedural issues at the moment, based on the large numbers of filings and decisions, appear to be disclosure of evidence and victims’ participation. On the issue of disclosure, the IBA considers that a number of issues can and will only be resolved through judicial intervention interpreting the scope of the respective obligations of the OTP and the defence in this regard. Concerning victims’ participation, there is real concern that the process must be managed both administratively and judicially in order to ensure the fair and efficient conduct of proceedings. However, the IBA considers that given its importance, review of the system of victims’ participation must be guided by the following principles:

- whether victims’ participation as currently interpreted by judges remains consistent with the overall goal and mandate of the ICC; and
- whether adequate safeguards are being implemented by the judges to prevent unfairness to the defence.

As such, the IBA urges thoughtful reflection prior to the implementation of any major changes on this issue. In our view, and in light of the fact that the Court has not yet completed a full judicial cycle including a reparations phase, together with the fact of the recent operational changes within the Registry and amendment to the application form, it would be premature to implement textual amendments to the victims’ participation regime at the Court at this time. It is therefore incumbent on judges to ensure that the rights of defendants under the Statute are not compromised by the participation of victims in proceedings.

68 Ibid.

69 Ibid.

70 Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’, ICC-01/05-01/08-631-Red, at para 2.

Chapter Three – Clarifying Roles and Streamlining Processes

3.1 Introduction

2011 is likely to be a major test of the efficiency levels of the ICC. The Court projects that trials in three cases will run concurrently through at least part of 2011.⁷¹ A fourth trial may be added depending on the outcome of the confirmation of charges hearing in the case of Mr Abdallah Banda and Mr Saleh Jerbo.⁷² It is therefore vital that the role of those involved in the trials is clear. It is also critical that processes that have begun to be formalised are streamlined.

Different organs of the Court have implemented specific initiatives to streamline its operational functions and clarify roles in an effort to enhance the efficiency of the institution. For example, the Registry and the OTP issued draft policy papers on the Court's relation with intermediaries and preliminary examinations respectively, and consulted with civil society and other stakeholders for feedback. Judges also took decisive steps to facilitate greater publicity of the proceedings by implementing best practices to limit the number of closed session hearings or mitigate their effect, as well as initiating a reclassification of a number of previously confidential documents.

Streamlining of the Court's operations is a work in progress. This section will consider a number of steps that the Court has initiated in this regard including the internal restructuring of certain units of the Registry, policy papers issued during the monitoring period, and judicial efforts to increase the openness and publicity of proceedings and the public access to documents.

The chapter will further examine the importance of clarifying roles of different parties and participants in the proceedings. Particular attention will be paid to three specific issues which emerged during the period under review: protection of witnesses and other persons at risk; the role of counsel, in resolving potential conflicts of interest; and the important role played by States Parties.

3.2 Streamlining processes

Internal restructuring

In order to maximise operational efficiency, the Registry has implemented a restructuring of some of its key units. The former Division of Victims and Counsel, comprised of the Defence Support Section, the VPRS and the Offices of Public Counsel was abolished in March 2010 and the administrative and logistical aspects of matters relating to both victims and defence counsel will now be serviced by the Counsel Support Section (CSS).⁷³ Meanwhile the VPRS, having had its legal aid and assistance functions assumed by the CSS,⁷⁴ shifted to the Division of Court Services.⁷⁵ The substantive functions of the independent Offices of Public Counsel for Defence and Victims including providing legal research, advice and support to defence and victims counsel, remain the same.

The IBA welcomes the streamlining of processes aimed at enhancing the efficiency level of the Registry. It is, however, too early to assess whether the desired efficiencies have been realised. The IBA regrets that although the reorganisation took effect over six months ago, little information has been made available about the restructuring of the Registry pages of the Court's website. Furthermore, the IBA observes that while there is detailed information on the ICC's website about the leadership structure of the Presidency (the President and both Vice-Presidents are featured on the website) and the OTP (Prosecutor, Deputy Prosecutor, Head of Investigations and Head of the Jurisdiction, Cooperation and Complementary Division are featured on the website), the Registry pages of the ICC's website lack important information concerning the senior leadership of the Registry including the role and functions of the Deputy Registrar of the ICC. In the coming months, the Registry is urged to update the relevant pages of the website in order to ensure that all relevant stakeholders, individuals and organisations concerned are fully informed. The IBA considers that this is particularly important given the Registry's crucial role concerning public information.

71 The three trials are: the cases of Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui and Jean-Pierre Bemba Gombo. See Proposed Programme Budget for 2011 of the International Criminal Court, ICC-ASP/9/10, para 9

72 Suspects in the *Haskanita* case in the Darfur, Sudan investigations. The confirmation of charges hearing is scheduled to commence on 8 December 2010. See ICC Press Release 3 December 2010, ICC-CPI-20101203-PR607, available at <http://www.icc-cpi.int/NR/exeres/605E4DD8-2925-44E5-9B4D-2B1CA9A9C32D.htm>

73 Report on the job evaluation study of posts at professional level, ICC-ASP/9/17, 28 September 2010, para. 66 ('Report on job evaluation'), available at http://212.159.242.181/iccdocs/asp_docs/ASP9/ICC-ASP-9-17-ENG.pdf.

74 Ibid, para 67.

75 Ibid, para 51.

Policy papers

During the period under review, the Registry and the OTP have taken concrete steps to produce policy documents outlining policies and protocols governing specific aspects of their operational mandates. For example, the OTP has produced the long-anticipated draft policy paper on preliminary examinations,⁷⁶ and a court-wide Working Group has continued the process of finalising court-wide guidelines governing the relations between the Court and intermediaries.⁷⁷ The Registry has also documented and publicised certain key protocols on support procedure for vulnerable witnesses, witness familiarisation and on its e-court protocol.⁷⁸ A senior official at the ICC's Division of Court Services pointed out that in order for the Registry to fully evaluate these protocols, they should remain in effect for at least another five years. In the official's opinion, it is counterproductive and a waste of resources to amend certain operational policies too soon after implementation without full opportunity to assess their viability.⁷⁹ The IBA agrees, but cautions that given the evolving nature of the ICC, there should be some flexibility on the part of the Registry to adapt its protocols to reflect the emerging practice of the Court.

The IBA welcomes the Court's efforts to issue these policy papers in the spirit of transparency. The IBA continues to urge the OTP to issue, as soon as possible, a policy document on disclosure of evidence.

Openness and publicity of proceedings

In a previous monitoring report, the IBA expressed concern at the apparent frequency of closed session hearings which significantly hindered public access to the proceedings and had a potential impact on the fairness of the trial.⁸⁰ During hearings on 24-28 May, Trial Chamber II in the *Katanga/Ngudjolo* case expressed concern about the frequency and high number of closed sessions.⁸¹ Shortly thereafter, defence counsel for Mr Katanga requested that the Chamber review the issue and take positive steps to mitigate the effect of this practice.⁸² Subsequently, Trial Chamber II invited all the parties to make observations and suggestions.⁸³

There was significant consensus from the parties that effort should be made to mitigate the number of closed sessions. The observations filed by the Registry, which included detailed analysis about hearings, the case file/filings and the use of protective measures, were particularly instructive. The Registry conducted an analysis of the hearings for two protected witnesses: P-279 and P-280.⁸⁴ As illustrated in Figure 1 and Table 1 on page 28, contrary to the public perception of this issue, the actual record of the Court confirms that in fact the majority of the proceedings (over 84 per cent) have been conducted in open session. On the other hand, a significant portion of the documents were filed confidentially. A Registry official has, however, explained that many of the confidential documents were not filed by the parties to the proceedings but were in fact filed by States.

76 See OTP Draft Policy Paper on Preliminary Examinations, available at http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf

77 Draft guidelines governing the relations between the Court and intermediaries, 1 October 2010 (copy on file with IBA).

78 See Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses; Registration of the eCourt Protocol in the Record of the Case (ICC-01/05-01/08-971) and Victims and Witnesses Unit's Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, ICC-01/05-01/08-972.

79 IBA consultation with senior Registry official (notes on file with the IBA).

80 The ICC's trials: An examination of key judicial developments at the International Criminal Court, IBA/ICC Monitoring Report, May 2010, available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=9E70A60C-9E4C-411B-95A3-A434FC70ACE7>.

81 ICC-01/04-01/07, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Transcript, 7 June 2010, p 2 lines 21-24, available at <http://www.icc-cpi.int/iccdocs/doc/doc902904.pdf>.

Transcript 7 June 2010, p.2 line 1 – p 3 line 3. Hearings may be held in one of three ways: **open session** – hearing is open to the public and there is an audiovisual stream broadcast outside the Court with a 30 minute delay (Regulation 21(2) of the Regulations of the Court). This is the default unless the Statute, Rules, Regulations or an order of the Chamber provides otherwise (Regulation 20(1) of the Regulations of the Court); **private session** – hearing is not open to the public and there is no audiovisual stream broadcast outside the Court (Regulation 94(d) of the Regulations of the Registry); or **closed session** – hearing is held in camera (Regulation 94(e) of the Regulations of the Registry).

82 ICC-01/04-01/07, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Defence Request with Regard to Private Session Hearings, 1 June 2010, <http://www.icc-cpi.int/iccdocs/doc/doc881895.pdf> ('Defence Request') which refers extensively to the IBA Monitoring Report and accompanying annexes.

83 Transcript 7 June 2010, p.2 line 16- p.3 line 3.

84 Registry observations, para 4.

Hearings

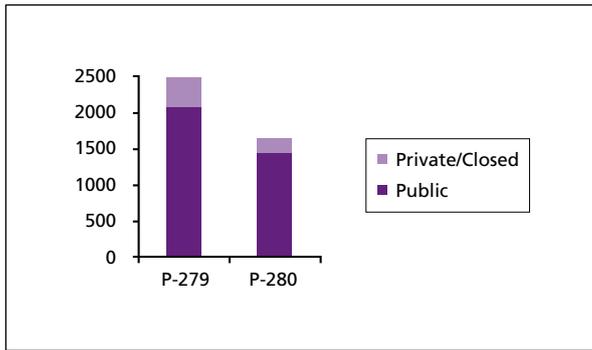


FIGURE 1

	Total time	Private	Percentage
P-279	2497 min.	411 min.	16%
P-280	1653 min.	188 min.	11%

TABLE 1

Case file/filings

The Registry also conducted an analysis of the case file/filings.¹ In the *Katanga/Ngudjolo case* 4,237 documents were filed. Of these 1,431 were public and 2,807 were submitted confidentiality. Figure 2 illustrates the difference in proportion.

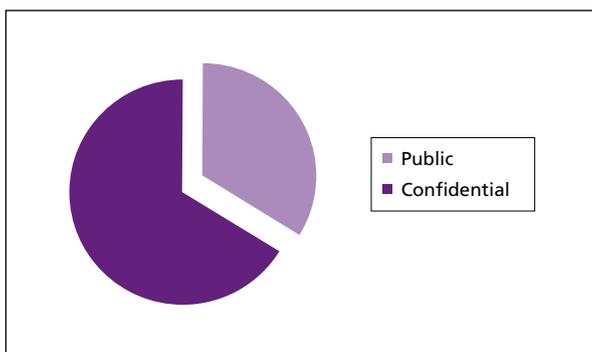


FIGURE 2

Protective measures

The Registry further conducted an analysis of the frequency with which protective measures were implemented in the case. At the time of the Registry's filing, the OTP had had 15 witnesses or experts appear before the Trial Chamber. Twelve of those 15, or 80 per cent, benefitted from Court protective

measures (see Figure 3.1).⁸⁵ In contrast, at the ICTY between approximately 28 per cent and 39 per cent of witnesses testified with protective measures (see Figure 3.2).⁸⁶

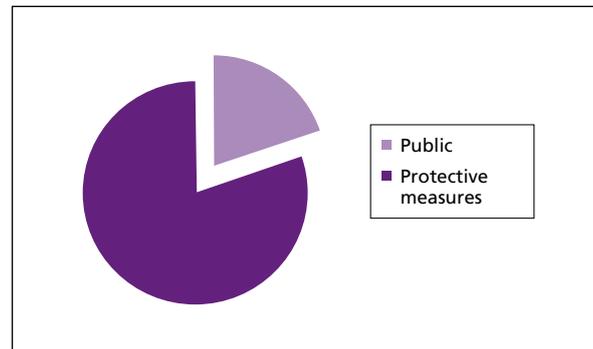


FIGURE 3.1

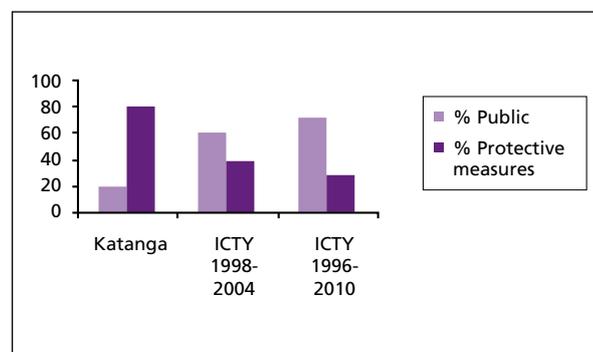


FIGURE 3.2

Best practices

Mindful of the public perception and taking into account the submissions of the parties and the Registry, the judges implemented several best practices aimed at minimising the number of closed session hearings and where unavoidable, limiting the impact on the public perception of the proceedings.⁸⁷ The IBA welcomes the efforts by the Chamber in this regard and notes that if these measures are fully adhered to by all concerned, the frequency and duration of closed session hearings will be reduced, thus promoting openness of ICC proceedings and further maximising the impact and effectiveness of the Court.

⁸⁵ Registry observations, para. 10.

⁸⁶ See also Figures 3.1 and 3.2 for further details.

⁸⁷ ICC-01/04-01/07-T-189-ENG, 20-09-2010, p 13-15, 16, lines 1-17.

Public access to documents

The judges have also made significant effort to facilitate the public's access to documents by extensively reclassifying confidential documents or issuing public redacted versions where appropriate. This is consistent with the principle of public proceedings, which also encompasses the public's right to access documents, material, orders and decisions. As with hearings there are provisions which permit restricting access to the Court record. Where the Registrar or a participant seeks to deviate from this norm, they must set out the factual and legal basis for their chosen classification.⁸⁸ According to the Appeals Chamber, '[t]he purpose of this provision is to clearly inform the relevant Chamber of the reason why the filing as non-public is necessary.'⁸⁹

While promising steps are being taken to further enhance the publicity of the proceedings including by reclassification of confidential material, the IBA regrets that there is still a major challenge with the availability of transcripts of proceedings. It is very difficult for external monitors and other members of the public to effectively follow the ICC proceedings in the absence of a public record. The IBA urges the judges and Registrar to increase efforts to ensure public access to the transcripts of proceedings, in particular those of ongoing trial proceedings in order to follow the testimony of witnesses. The IBA appreciates that there may be significantly disputed portions of the evidence which will trigger an extensive process of review. However, this process appears to be unduly protracted and does not take into account the public interest in obtaining a timely record of the proceedings.

3.3 Clarifying roles

Each organ of the Court plays a unique and distinct role in ensuring its effective and efficient function. The OTP is mandated by Article 54 (b) of the Rome Statute to take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court. The Registrar is responsible for the non-judicial aspects of the Court's management and for servicing the Court, which includes the protection and support of victims, witnesses and issues concerning the defence, while respecting the full independence of the Prosecutor and under the authority of the Presidency.⁹⁰ Judges are responsible for the judicial management of the Court's operations and are crucial to the effective functioning of the Court. Under Article 64 of the Rome Statute, judges must ensure the fair and expeditious conduct of proceedings and are

88 Regulation 23*bis*(1), Regulations of the Court.

89 *Katanga* Appeals Chamber Decision 12 July 2010, para 15.

90 Article 43(1) of the Rome Statute.

empowered to take necessary measures to facilitate this. Unlike the Special Tribunal for Lebanon, the defence is not an organ of the ICC.⁹¹ Nevertheless, counsel play a key role in ensuring that judicial proceedings at the Court are efficient, effective and fair. The ASP is the legislative body of the Court and, through its subsidiary bodies, performs the important function of overseeing the Court's administrative functions.⁹²

As previously indicated, three key roles will be discussed. The first is the role of each of each of the organs vis-a-vis the protection of witnesses. The second is the role of counsel in resolving potential conflicts of interest as well as in relation to other members of the team. The third is the role of States in enhancing effectiveness of the ICC.

Protection of witnesses

Under the ICC's legal framework, victims, witnesses who testify before the Court and persons at risk and their interaction with the Court on account of testimony at the ICC and their interaction with the Court are entitled to the protection of the Court. The issue of witness protection remains a challenging issue at the ICC with the potential to seriously jeopardise the efficiency of the Court's proceedings. Under the Court's legal framework, the Registry is responsible for the non-judicial aspects of the Court's work, with the exception of the OTP, with specific obligations in relation to victims' and witnesses' protection and support. However, the statutory framework of the Court makes it clear that every organ of the Court has a positive duty to take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses. There is, therefore, a potential for overlapping or conflicting measures.

The interpretation of the protection obligation under the Statute has in the past led to tensions between the OTP and the VWU, with the former citing its overarching duty to protect its witnesses as the basis for unilaterally relocating witnesses. The matter was ultimately determined by the Appeals Chamber. The Appeals Chamber agreed with the Pre-Trial Chamber that in light of its neutrality and expertise, the responsibility for witness relocation should be vested in the VWU.⁹³ In case of disputes between the VWU and OTP, the prosecution should

91 The defence office is one of the four organs of the Special Tribunal for Lebanon (STL). See further Article 13 of the Statute of the Special Tribunal. Additional information can also be found at <http://www.stl-tsl.org/sid/28>.

92 Article 112 of the Rome Statute.

93 Judgment on the appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' (Decision on Witness Relocation) of Pre-Trial Chamber I, 26 November 2008, ICC-01/04-01/07-776 at para 91-93, available at <http://www.icc-cpi.int/iccdocs/doc/doc602198.pdf>.

bring the matter to the Chamber for resolution, rather than taking the matter into their own hands.⁹⁴ This judgment was limited to that issue and did not further clarify the roles and responsibilities of the organs regarding witness protection. More recently in the case of Thomas Lubanga, the issue of witness protection arose again, albeit differently, and the Appeals Chamber again did not elaborate on the scope of the respective responsibilities under Article 68.⁹⁵

The Court itself has identified that its priority must be to further clarify the mandates, but stresses that considerable progress has been made in this regard. The Court has identified that the risks of divisions between the organs and a lack of clarity in the roles and responsibilities can and will be further better managed through:

- the institution of a management control system;
- a common understanding of services;
- and more clarity on the roles and responsibilities of the organs in specific areas.⁹⁶

The IBA considers that the precise scope of each organ's responsibility to protect needs to be further clarified, ideally by decisive judicial interpretation of the relevant provisions. However, textual amendment may be required to further streamline this process. For example consideration should be given to amending the wording of Article 43(6), which stipulates that 'the VWU shall provide, *in consultation with the Office of the Prosecutor...* counselling and other appropriate assistance for witnesses' (emphasis added). The current wording of the Article suggests that the VMU should consult the OTP concerning all witnesses, and not only OTP witnesses. The IBA understands that in practice the OTP is consulted only in respect of its own witnesses. Nevertheless, an amendment to the text should be considered for greater clarity as it would be inappropriate for the prosecution to be consulted concerning the provision of protective measures for defence witnesses.⁹⁷

The role of counsel

The Rome Statute framework specifies a limited number of roles that legal practitioners may undertake at the ICC.⁹⁸ The legal texts draw a clear line between the responsibilities and privileges of counsel and those of team members who are assisting counsel.⁹⁹

This delineation between counsel and the other team members was highlighted in a decision by the Trial Chamber in the *Bemba* case.¹⁰⁰ The prosecution sought to invalidate the appointment to Mr Bemba's defence team of a legal consultant who had formerly worked in the OTP. The OTP alleged that the appointment violated certain provisions in the Code of Professional Conduct for Counsel, including those related to conflicts of interest.¹⁰¹ The Code of Professional Conduct for Counsel at the ICC governs the professional behaviour, duty and responsibilities of counsel appearing before the Court and is applicable to defence counsel, counsel acting for States, amici curiae and counsel or legal representatives for victims and witnesses practising at the ICC.

The Chamber found that only the conduct of counsel is *directly* governed by the Code of Conduct and that therefore a legal consultant is not necessarily governed by the provisions of the Code. However, the Chamber noted that the Code of Conduct places the burden on Counsel to ensure compliance by all members of his/her team (irrespective of the nomenclature) with the Code.¹⁰² In that case, the Chamber was ultimately not persuaded that there was a conflict of interest or that the appointment was prejudicial to the ongoing proceedings.

The Chamber's decision and the accompanying submissions have helped to clarify the scope of responsibility for resolving conflicts of interest. Counsel has the principal responsibility for ensuring that no conflict arises with his or her team

94 Ibid, paras 91-93.

95 Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU', ICC-01/04-01/06-2582.

96 Report of the Court on measures to increase clarity on the responsibilities of the different organs, ICC-ASP/9/34, para 39.

97 Contributions of the Registry, Marc Dubursson et al, supra n27 at p 573.

98 Qualified persons may act as counsel at Court. See generally Rules 20, 21, 22, Rules of Procedure and Evidence; Chapter 4, Regulations of the Court; Code of Conduct. Persons may also be appointed as assistants to counsel – Regulation 68, Regulations of the Court; Regulations 124-127, Regulation of the Registry; Articles 7(4), 8(3), 24(1) and 32, Code of Conduct.

99 See for example: APIC, Article 18(1) applies to Counsel whereas Article 18(4) applies to persons assisting counsel; Headquarters Agreement, Article 25(1) applies to Counsel whereas Article 25(6) applies to persons assisting counsel; and Code of Conduct, Article 1 limits the scope of the code of conduct to counsel; Articles 7(4) and 32 set out the relationship of counsel vis-a-vis members of his/her team.

100 *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Trial Chamber III, 'Decision on the Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team, 7 May 2010, available at <http://www.icc-cpi.int/iccdocs/doc/doc868447.pdf> ('Legal Consultant Decision'), para 3.

101 The OTP alleged violations of Articles 12 and 16 of the Code of Conduct.

102 Legal Consultant Decision, para 39 which relies on Articles 12, 13(2) and 16 of the Code of Conduct.

members.¹⁰³ Where a conflict is alleged in relation to an appointment, the Registry will provide ‘a channel of communication’¹⁰⁴ to assist the parties reach a resolution, but ultimately the onus to address and resolve the conflict remains with Counsel.¹⁰⁵ A party seeking to challenge Counsel’s solution to the conflict may file a motion with the Chamber; however, the Chamber will refrain from intervening unless the dispute risks causing unfairness in the proceedings.¹⁰⁶

By contrast, Registrars at the ad hoc Tribunals¹⁰⁷ and more recently at the Special Tribunal for Lebanon¹⁰⁸ have a more proactive role in resolving conflicts of interest. However, the ICC construct appears to be overwhelmingly preferred by counsel, since by playing the neutral role as facilitator¹⁰⁹ the ICC’s Registry may avoid a number of the tensions that arose between counsel and the Registrars at its counterpart Tribunals.

This Decision also highlights the fact that the role of counsel is distinct from that of other team members; different responsibilities and privileges apply. It also highlights the need to ensure consistency in the use and interpretation of the various terms concerning counsel. In November 2008, the Bemba Pre-Trial Chamber reminded the

Registry and the parties that ‘terms such as ‘co-lead counsel’, ‘associate counsel’, ‘temporary associate counsel’ and ‘counsel of record’ do not exist in the Statute, the Rules, the Regulations and the Code of Conduct’.¹¹⁰ This point was reiterated in a decision the following year.¹¹¹ Nonetheless, the use of a variety of terms has persisted in other Court-generated documents, such as undertakings.¹¹² The likely reason for their continued use is that in practice, legal professionals perform a number of roles that are not reflected in the legal texts of the Court.

The IBA is aware that the relevant provisions concerning counsel in the Regulations of the Court are currently under review by the Legal Text Review Committee at the ICC. The IBA understands that significant progress has been made but discussions and outcome documents are at this stage confidential. It is anticipated that the final outcome will provide much needed clarity for Counsel appearing before the Court.

The role of States in enhancing efficiency and effectiveness of the ICC

Any discussion of the efficiency and effectiveness of the ICC must also focus on the critical role played by States in this regard. During the ICC Review Conference many States Parties and other stakeholders pledged to strengthen their commitment to the ICC with regard to cooperation. Many States pledged to take concrete steps including with regard to implementing legislation, assistance to other States in their efforts to enhance their level of cooperation with the Court, support for victims, and witness protection and enforcement of sentences. Three States Parties signed agreements on enforcement of sentences.¹¹³

Since the Review Conference, there have been examples of situations where the expressions of support and commitments to fully implement the provisions of the Rome Statute were not translated

103 Article 16 (1) Code of Conduct.

104 ICC-01/05-01/08, Observations of the Registrar on invitation by the Chamber dated 19 January 2010, concerning the request of the ‘Prosecution’s Request to invalidate the Appointment of Legal Consultant to the Defence Team’ dated 18 January 2010, 27 January 2010, at para. 5 (‘Registrar’s Observations’)

105 Legal Consultant Decision, para 39 which relies on Articles 12, 13(2) and 16 of the Code of Conduct.

106 Legal Consultant Decision, para 39. Where necessary, the Chamber will act to ‘ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses’ as required by Article 64(2) of the Rules. Further, Article 64(3)(a) compels the Chamber to ‘confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings’. The Chamber suggests this is consistent with practice at the ICTY where the decisions of the Registrar are subject to Judicial Review by a Chamber.

107 The Registrar distinguishes her role from that of her counterparts at the ad hoc tribunals and the Special Tribunal for Lebanon (STL). With regard to the former, she submits that the Rome Statute framework is ‘wholly different’ from that of the ad hoc Tribunals whose Registrar ‘has been afforded wider powers and a broader margin of discretion to intervene where conflict of interests arise from an appointment’. Registrar’s Observations, at para 1.

108 She goes on to differentiate her role from that of the Head of the Defence Office at the STL where the legal texts specifically mandates him ‘to take a more active role in the management of conflict of interests issues that may arise from a contemplated appointment and to appear before a judge of the Pre-Trial Chamber or Chamber when warranted’. Registrar’s Observations, at para 2.

109 Where conflicts of interest arising from appointments need to be resolved, the Registrar asserts that its role is tightly circumscribed: ‘The Registry of the Court in its neutral role can only act within the limits set by the legal framework...’. Consequently, the Registry, through the Defence Support Section, restricts its involvement that providing ‘a channel of communication’ between parties whose views on an appointment conflict. Registrar’s Observations, at para 5.

110 *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-274, Pre-Trial Chamber III, Decision on the Request for Withdrawal of a Counsel, 21 November 2008, para. 9 (‘Decision on Withdrawal 2008’), available at <http://www.icc-cpi.int/iccdocs/doc/doc596443.pdf>.

111 See *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-524, Pre-Trial Chamber II, Decision on the Requests for Withdrawal of Counsel, 17 September 2009, para. 10 (‘Decision on Withdrawal 2009’), available at <http://www.iccklamberg.com/Caselaw/CAR/Bemba/PTCII/524.pdf>. This states ‘no other term than “counsel” exists in the Statute, the Rules, the Regulations or the Code of Conduct’.

112 See for example the registration of a declaration of counsel accepting an appointment as associate counsel filed by the Chief of the Defence Support Section in February 2009. *Prosecutor v Germain Katanga et al*, ICC-01/04-04/07, Trial Chamber II, Registration in the record the declaration of Mr. Andreas O’Shea accepting his appointment as associate counsel in the team of Mr Germain Katanga and the executed undertakings, 24 February 2009, available at <http://www.icc-cpi.int/iccdocs/doc/doc636462.pdf>.

113 Report of the Bureau on cooperation, ICC-ASP/9/24, para 10

into the requisite action.¹¹⁴ During the period under review, Pre-Trial Chamber I issued decisions informing the UN Security Council of the lack of cooperation by the Republic of Sudan concerning the enforcement of the arrest warrants against Sudanese President Omar Al-Bashir in order for the Security Council to take any action it might deem appropriate. The Pre-Trial Chamber also informed the ASP and the United Nations Security Council of visits by Mr Al Bashir to two States Parties, Chad and Kenya.

The ICC's effectiveness depends significantly on political support from States Parties. Non-cooperation from States Parties in key areas such as non-enforcement of outstanding arrest warrants; slow responses to requests for cooperation in important areas such as freezing of assets; and reluctance to conclude framework agreements on interim release, among other issues, effectively jeopardises the Court's efforts to remain efficient.

114 Ibid para 13

In 2010 the first Review Conference of the ICC held in Kampala, Uganda saw detailed review of the Rome Statute system and its impact in key areas. Notwithstanding the success of the Review Conference, its focus was limited to considering the broader impact of the ICC in the sphere of international justice rather than on concrete aspects of the Court's performance since its inception.

The Study Group on governance to be established by the ASP, as part of its oversight function, provides an important avenue for both concerned stakeholders and the Court, led by the ASP as part of its oversight function, to continue its focused scrutiny of the ICC's efficiency levels, particularly in judicial proceedings, and the review of measures to increase the Court's impact. Indeed, the work has already begun. The Court has taken the urgings of the CBF seriously and has already started to make major shifts to transform the efficiency of its operations. For example, the Registry's internal restructuring and the publication of several protocols, including its support procedure for vulnerable witnesses, witness familiarisation and its e-court protocol, reflect an ongoing effort to streamline operations and processes to maximise efficiency. The OTP has also published a much-anticipated policy document on preliminary examinations and is reportedly prioritising the final phase of the process of standardisation, while continuing to work on draft policies and its operational manual.

Settling procedural issues

Despite these very encouraging efforts, the Court has been criticised for the extensive delay in its proceedings. The main reason appears to be that a number of fundamental procedural legal issues at the ICC are still unsettled, demanding considerable time and resources in extensive legal filings and judicial decisions. The ICC Chambers have taken an understandably cautious approach to proceedings in the early stages of the Court's existence. The lack of consistency on certain procedural issues, though troubling, may well signal that although the Court is now in its operational phase, a number of foundational issues will still take time to settle. While there are undoubtedly further steps that can and must be taken to enhance the efficiency of judicial proceedings, such as by aiming for greater judicial consistency, it is important that the practice of the ICC is allowed to develop organically in order to ensure that sound foundational decisions are made at this stage of the ICC's judicial development.

Too early to assess impact

The Court's Governance report is an important step in the right direction towards clarifying the respective roles and responsibilities of different organs of the Court and addressing overlapping functions. Lack of clarity concerning the scope of particular roles and obligations in certain areas, such as witness protection, has been a hindrance to efficiency in some aspects of the Court's operations. It is, however, too early to fully assess the impact of these efforts as a number of the measures are still at the initial implementation phase. Furthermore, the governance report addressed only the issue of internal coordination and overlapping roles, but did not attempt to clarify other important roles such as the respective management and oversight roles of the ASP and the ICC Presidency.

Ultimately, the proposed Study Group should tread cautiously, listen carefully to all concerned stakeholders and refrain from trying to accelerate a process that may ultimately be able to only develop over time as the Court's practice evolves.

Structural challenges to efficiency

Some of the challenges affecting the expeditiousness and effectiveness of ICC proceedings may be structural, based on the special nature of international criminal proceedings, the uniqueness of the Rome Statute system itself (concurrent jurisdiction rather than primacy and victims' participation, to name a few), which will improve as more cases are tried, issues are resolved by judges and the Court develops its own organic practice. Some issues, such as the inability of ICC judges to compel a witness to appear in person and testify before the Court, may ultimately require an amendment to the Court's legal texts.

Link between non-cooperation and inefficiency

Importantly, a critical assessment of the role of States Parties in assisting the Court to maximise its efficiency and effectiveness through timely cooperation must also be made. Non-cooperation or a lack of timely cooperation from States in enforcing outstanding arrest warrants, finalising agreements on interim release, among others, and responding to requests for freezing and seizure of assets significantly hampers the Court's efforts to be efficient. In its continuing discussions on cooperation, the ASP must emphasise the crucial link between non-cooperation and inefficiency and ineffectiveness of the Court.

Summary of key findings

- The IBA supports the establishment of a Study Group to review the Court's level of efficiency and strengthen its institutional framework. Whilst there may be good reasons to await the completion of a full judicial cycle, commencing the dialogue earlier may also provide ample opportunity for more thoughtful consideration of the issues. For example, a discussion on measures to further improve the efficiency of the pre-trial stage of proceedings could potentially be very productive. The group should, however, avoid discussing the specifics of cases at the trial phase of proceedings.
- The IBA considers, however, that the mandate of the Study Group is too broad. Therefore in order to be effective, given the limited timeframe of one year, the Chair of the Study Group is urged to clearly delineate the precise scope of the review, particularly of judicial activities, and ensure that this is communicated to the Court and all relevant stakeholders.
- Apart from fully engaging the Court in this dialogue, States must ensure that relevant stakeholders, such as civil society organisations and academics, are included. The IBA is mindful that the underlying rationale for enhancing efficiency may differ between managers of the Court's budget and the judiciary. While judges generally wish to ensure an expeditious trial because it is a critical element of a fair trial, managers generally seek expeditious trials because they are cost effective. It is therefore absolutely critical that there is strict adherence to the terms of reference of the Study Group concerning the respect for judicial independence.
- resources to meet the increasing demands of the Court's judicial operations.
- Effective judicial management is critical to achieving efficiency at the ICC. For example, the Appeals Chamber decision reversing the stay of proceedings in the *Lubanga* case is a welcome example of the importance of judicial management. Whilst making it clear that a stay was a drastic and disproportionate remedy in the circumstances, the decision clearly reaffirms that full respect for and compliance with judicial decisions is critical to maintaining the integrity and efficiency of proceedings at the ICC. If the relevant judicial Chamber 'loses control' of the proceedings this could lead to potentially deleterious consequences for all parties and participants.
- Timely and consistent judicial decisions are also key to efficient proceedings. The IBA welcomes the timely manner in which the interlocutory appeal decision in the *Lubanga* case was delivered by the Appeals Chamber. However, the IBA notes that some previous Appeals Chamber decisions, for example on victims participation at the situation phase, did not provide sufficient guidance to the pre-trial Chambers resulting in inconsistent approaches by different Chambers. The IBA welcomes the decisions of judges of the Pre-Trial Chamber in the situations in Kenya and the Central African Republic, clarifying the participation of victims at the situation phase in an attempt to address this lacuna and provide consistency and certainty for victims and other parties to the proceedings.
- The IBA considers that the Appeals Chamber plays an important standard setting role in its interlocutory appeal decisions which could contribute to the level of consistency in judicial decisions issued by the ICC Chambers, and is therefore urged, where appropriate, to ensure that adequate guidance is provided to the other Chambers.

Judicial proceedings

- In 2011, with three or possibly four simultaneous proceedings expected at the ICC, the Court's operational and judicial efficiency will be tested. States must continue to fully support the Court in its efforts to achieve the highest levels of efficiency and effectiveness by ensuring that sufficient resources are allocated to meet the projected expenditure for judicial proceedings in 2011. While judges must be fully mindful of and accountable for the most efficient and effective use of the hearing days, it is incumbent on States Parties to ensure the necessary allocation of

Victims' participation

- The IBA considers that victims' participation remains one of the most important achievements of the Rome Statute system. However, there is a very real risk that, if not correctly managed, the participation of victims in the proceedings could negatively impact its fairness. For example, the process of submitting observations on victims' applications for participation could potentially hamper the fair and efficient conduct of the proceedings, as the parties' attention is diverted from conducting crucial preparations for the trial. This is particularly

true for the defence, who have fewer resources than the prosecution to devote to such tasks shortly before the commencement of trial.

- The IBA acknowledges that efforts have been made by the respective Chambers and the relevant sections of the Registry to manage different aspects of the participation process, including by redeploying staff from other sections of the Registry and utilising staff of the Office of Public Counsel for Defence to deal with significantly larger than expected numbers of victims applications.
- The IBA considers that it would be premature to implement textual amendments to the victims' participation regime at the Court at this time, in light of the fact that the Court has not yet completed a trial or reparations phase of proceedings, and considering recent operational changes within the Registry and amendments to the application form. Judges, however, need to ensure that the rights of defendants under the Statute are not compromised by the participation of victims in proceedings.

Streamlining processes and clarifying roles

- The IBA welcomes the continuing efforts by different organs of the Court and the judiciary to enhance operational efficiency, including through the restructuring of key units and through publishing policy documents such as the Registry's protocols on dealing with vulnerable witnesses and the OTP's policy document on preliminary examinations, among others.
- The IBA regrets, however, that despite important internal restructuring by the Registry to enhance its operational efficiency, more has not yet been done to publicise this important information on the Registry pages of the Court's website and to update existing information, including on the current leadership structure of the Registry and the role and function of the Deputy Registrar.
- The IBA welcomes the decision of Trial Chamber II in the *Katanga/Ngudjolo* case to implement best practices aimed at minimising the number of closed session hearings and, where unavoidable, to mitigate the effects on the public perception of the proceedings.
- While promising steps are being taken to further enhance the publicity of the proceedings, including by reclassification of confidential material, the IBA regrets that

the availability of transcripts of proceedings is still a major challenge. It is very difficult for external monitors and other members of the public to effectively follow the ICC proceedings in the absence of official public records.

Summary of key recommendations

In its important efforts to review the ICC and strengthen the Court's institutional framework, the IBA *encourages* the Study Group, *in full dialogue with the Court and relevant stakeholders*, to consider the following non-exhaustive list of issues:

1. The impact of victims' participation on the efficient conduct of ICC proceedings. The IBA considers that the primary motivations for review must be: a) whether victims' participation as currently interpreted by judges remains consistent with the overall goal and mandate of the ICC; and b) whether adequate safeguards are being implemented by the judges to prevent unfairness to the defence.
2. The absence of subpoena powers of the ICC which could potentially jeopardise both the fair and expeditiousness conduct of the proceedings and the rights of defendants, and prevent judges from hearing the best evidence available if witnesses decline to appear voluntarily.
3. The reparations phase of proceedings.
4. The implications of the use of *ad litem* judges at the ICC.
5. The issue of how to make the right to interim release viable in light of continued reluctance of States, including the Host State, to host defendants being considered for interim release.
6. The role of the Pre-Trial Chamber and measures that can be taken to further enhance the efficient conduct of proceedings at the pre-trial stage.
7. The respective roles of the Presidency of the ICC and the ASP in general, and specifically concerning management oversight of the Court

The IBA *urges* the Court in its continuing efforts to enhance efficiency:

8. To continue its ongoing efforts to review its processes and maximise its level of efficiency through coordinated, systematic effort and internal restructuring where appropriate

9. The judges and Registrar are encouraged to increase efforts to ensure public access to the transcripts of proceedings, in particular of ongoing trial proceedings, in order to allow members of the public and other relevant stakeholders to follow the testimony of witnesses. The IBA appreciates that there may be significantly disputed portions of the evidence which will trigger an extensive process of review. However, this process appears to be unduly protracted and does not take into account the public interest in obtaining a timely record of the proceedings.
10. The IBA welcomes the OTP's efforts to continue to streamline its internal operations to maximise efficiency as well as to publish policy papers in the spirit of transparency. However, the OTP is *urged* to expedite its efforts to publish a policy document on disclosure of evidence and the role of the Prosecutor under Article 54(1)(a) of the Rome Statute.
11. As part of its continued efforts to streamline its operations, the Registry is *urged* to update the relevant pages of the website concerning its internal restructuring including details of the leadership structure within the Registry and the role and functions of the Deputy Registrar, in order to ensure that all relevant stakeholders, individuals and organisations are fully informed. The IBA considers that this is particularly important given the Registry's crucial role concerning public information.



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