Comments of the ABA’s Criminal Justice Section for the Independent Expert Review of the International Criminal Court

April 15, 2020

The views expressed in these comments by the ABA’s Criminal Justice Section have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association as a whole.

I. Introduction

The American Bar Association’s Criminal Justice Section appreciates the opportunity to comment on issues to be considered by members of the Independent Expert Review in the course of their mandate. The American Bar Association (“ABA”) has long advocated both in the United States and abroad for greater support for the Court’s work, and ABA members have participated as observers in the Rome Statute’s drafting, in the 2010 Kampala review conference, and in many Assembly of States Parties (“ASP”) sessions where ABA representatives have had the pleasure to address the ASP.1 With the benefit of decades of international justice practice, it is now clear that the Court’s unique structure and mandate, as well as the prevailing geopolitical environment, present certain challenges as well as many opportunities to further the cause of justice for mass atrocities around the world.

These comments and recommendations are submitted on behalf of the ABA’s Criminal Justice Section, developed in conjunction with the International Criminal Court Project and the ABA’s Center for Human Rights. Several ideas are also drawn from preliminary discussions of members of the International Criminal Justice Standards Project, a diverse and global group of international criminal law practitioners creating practical guidance for practitioners that addresses common challenges in international criminal law proceedings.2 These comments are by no means exhaustive of the topics we consider important for the Independent Expert Review (“Experts” or “IER”) to address. However, in recognition that the Experts will likely receive substantial comments on all areas, these comments focus more deeply on several topics essential to moving the ICC towards greater adaptiveness, effectiveness, and delivery of justice. The Criminal Justice Section stands ready to provide comments on other areas if desired and welcomes the opportunity to do so.

II. Executive Summary

Within this review process, we encourage members of the IER to consider issues that significantly impact the Court’s long-term efficiency and effectiveness, and to recommend potential solutions that address these challenges both in practical and, where applicable, in more structural ways. In summary, these comments suggest that the Experts:

• Recommend a review of ICC human resources policies to further the Court’s flexibility to adapt to rapidly evolving caseloads and to prioritize diversity within the Court’s leadership.

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• The ICC and Trust Fund for Victims should explore innovative funding mechanisms, including humanitarian investing and social bonds as well as UN funding for Security-Council-referred investigations.

• Evaluate whether there are ways to strengthen the profile and equality of consideration of defense issues within the Rome Statute system, including through significant changes to the structure of the office and defense practice.

• Examine suggestions for how increased judicial management of the trial process can impact efficiency and predictability, including: the role of timelines to move cases efficiently; more regular use of status conferences to narrow issues for trial; more reliance on oral decisions from the bench to improve efficiency; improved procedures for admitting evidence; and; clarifying the confirmation of charges process. More consistent trial practices across chambers would strengthen the Court's legitimacy and efficacy.

• Consider measures to strengthen judicial drafting and collegiality, clarify essential trial processes such as standards of review, and promote jurisprudence that will be accessible not only to future chambers, but also to a broad range of stakeholders and audiences.

• Recommend that the Court develop and invest in a strong culture of professional development across the institution, including more structured, mandatory training programs for newly-elected judges and regular professional development programs throughout their tenure.

• Consider recommendations that would make the framework for victims’ participation and reparations more predictable and consistent from case to case.

III. Cluster 1: Governance

1.7: Unified Governance and Leadership (One-Court Principle, Shared Values)

1) Ethics and Codes of Conduct: In further cementing shared values, the review process is a good time to revisit professional codes of conduct and ethics to build on existing articulated principles. While various entities and roles have specific ethics codes at the ICC, reviewing the strength of these codes or creating a shared, Court-wide document might be appropriate and help to cement those values and principles which are shared across roles. Continued allegations around conflicts of interest, potential ethics violations, and inappropriate behavior by Court personnel from multiple organs undermine support for the Court and the project of international justice more broadly. These broader ethics principles could be built into professional development (see below Topic 2.10). The ICC should also consider, if not already established, a process whereby issues not fully or clearly addressed in these ethics codes are resolved and elaborated upon in order to strengthen understanding and enforcement of the Court’s ethics framework.4

1.10: Adequate Qualitative and Quantitative Human Resources (Including Secondments, Recruitment Policies)

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3 See e.g., Code of Professional Conduct for Counsel (2011); Code of Conduct for the Office of the Prosecutor (2013); Code of Judicial Ethics (2005); Code of Conduct for Staff Members (2011); Rules and Regulations of the Court (2018).

4 The ABA’s Standing Committee on Ethics and Professional Responsibility, for example, issues formal ethics opinions interpreting the obligations of lawyers and judges in applied situations under the ABA’s Model Rules of Professional Conduct and Model Code of Judicial Conduct. For more resources, see ABA, Resources, CTR. FOR PROF. RESP., https://www.americanbar.org/groups/professional_responsibility/resources/.
2) **Diversity and Inclusion:** Diversity and inclusion should continue to be a priority for the Court, not only in recruitment, but in all levels of staffing, including career progression and election to leadership and high-level positions. While not a problem unique to the ICC, recommendations by the IER may be helpful in reviewing why, for example, gender imbalances persist in leadership and high-level positions at the Court. Some positions depend on the nomination of diverse applicants by States Parties, which may also be emphasized. Many bar associations and other organizations have studied the role of implicit bias in criminal justice systems and the practical challenges faced by diverse populations in advancing their legal careers. Studies have noted the quality of work assignments received by diverse staff, recognition of work, and integrating diversity onto teams throughout the institution as factors in maintaining gender diversity. At the ICC, for example, defense counsel’s status as contractors might exacerbate some issues such as lack of social benefits and opportunities for advancement.

3) **Flexibility:** One issue important for the Court’s adaptivity to future resource challenges is to streamline hiring practices. This would allow the OTP and Registry to quickly build staff with appropriate language and regional skills. Unlike the ad hoc tribunals where conflict-specific expertise could be solidified in institutional knowledge throughout years of operation, the ICC has the unique challenge of having to build such capacity quickly. The Court must build up such knowledge so it can build quality investigations and analysis efficiently and effectively as the Court’s caseload expands around the world. Improving hiring processes (most notably the ability to onboard staff promptly) would allow the Court to attract the most appropriate talent for its diverse personnel needs.

4) Experts might also choose to review the process by which staff are removed within the ICC. The inability of the Court to swiftly remove underperforming staff members (or worse), including those at high levels, is one of its most significant weaknesses. One option is to suggest the ICC engage international administrative law experts to review its human resource and retention system overall with the intention of maintaining job security and institutional memory among those who produce quality work yet permitting more ability and control for ICC managers to terminate individuals who do not live up to performance expectations or otherwise hamper the Court’s ability to discharge its mandate.

5) **Limited Terms of Service:** To enable top positions at the ICC to change periodically, the ICC could consider adopting (without amendment of the Statute) a limit of seven to eight years of service for some professional staff, with defined extensions possible where staff’s departure

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6 For ABA studies on interrupting bias in the legal profession, see ABA COMM’N ON WOMEN IN THE PROFESSION & MINORITY CORPORATE COUNSEL ASSOC., YOU CAN’T CHANGE WHAT YOU CAN’T SEE: INTERRUPTING RACIAL AND GENDER BIAS IN THE LEGAL PROFESSION, EXECUTIVE SUMMARY (2018), available at https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf; for other resources from ABA Commission on Women in the Profession, see ABA, *Fighting Implicit Bias*, https://www.americanbar.org/groups/judicial/committees/fighting_implicit_bias/.


8 Registry, *Strategic Plan 2019-2021*, ¶ 20 (July 17, 2019) (noting need for flexibility and mobility of essential staff, and instituting better knowledge management to support it).
at a certain time would risk significant delay to ongoing proceedings or like considerations. Similar limitations are in practice at other international institutions such as the Office for the Prevention of Chemical Weapons and the Organization for Security and Co-operation in Europe. Imposing term limits in this way would enable the Court to benefit from fresh thinking and cutting-edge managerial competence that new high-level recruits could deliver. It would also give the Court the ability to remove underperforming staff at high levels across all parts of the Court when necessary.

1.18: The Budget Process of the Court and 1.19: Mandate and Functioning of the Trust Fund for Victims

6) The Court relies almost exclusively for its funding needs on the annual assessments of all States Parties. As reported by the Bureau of the Assembly of States Parties on January 24, 2020, while 90% of the funding for the 2019 approved budget had been received by December 31, 2019, “[t]he total amount of outstanding contributions, for 2019 and for prior years, stood at €25.8 million. A total of 20 States Parties had outstanding contributions of more than one year, and 11 of those were ineligible to vote under article 112, paragraph 8 of the Rome Statute.” Thus, a funding gap of at least 10% of the annual budget exists and its accumulated amount each year creates an even larger gap in overall funding. This issue is highly detrimental to both short-term and long-term requirements. This gap has obvious impacts on the ability of the Court, and of the Office of the Prosecutor in particular, to undertake the full range of judicial and investigative responsibilities. The threat and rise of ineligibility of voting also impairs the overall credibility of the Court. It would not be surprising if, during and in the aftermath of the COVID-19 pandemic, a larger number of States Parties delay or even refuse to pay their assessments by arguing that other public policy priorities take precedence.

7) **Length of Process and Credibility:** The budget process continues to be a source of concern to civil society, Court staff, and States Parties as negotiations typically occupy the better part of a year and take much time and energy—resources that could otherwise be deployed to advance the mission of the institution and international justice more broadly. However, appropriate resources will be key to effectively addressing problems identified through this review, and States Parties should recognize the need for additional investment in the Court in order to change practices and increase professional development to track with the factual progression of the Court’s increasingly global slate of investigations.

8) Some have suggested considering a multi-year budget for the Court, perhaps with room for negotiating smaller amendments if necessary in intervening years. Recognizing that States Parties often operate on annual budgets, a longer budget cycle that enhances the Court’s average annual allotment might allow for the Court’s organs to better plan for anticipated growth, establish strategies and priorities, and to shift resources more quickly when cases, investigations and world events dictate a more nimble response, such as in reviving dormant

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9 A working group of OPCW recommended in November 2018 that “in order to sustain successes on its complex and technical mandate, the Director-General should be empowered to retain the Organisation’s most talented and experienced personnel, particularly in the area of chemical weapons related knowledge and expertise, beyond the current seven year tenure.” Office of the Prevention of Chemical Weapons, Open-Ended Working Group on Future Priorities of the OPCW Recommendations to the Fourth Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention, ¶ 42, Doc. RC-4/WP.1, (July 16, 2018), available at https://www.opcw.org/sites/default/files/documents/2018/07/rc4wp01%28e%29.pdf.

investigations. However, an insufficient multi-year budget might alternatively constrain the Court’s ability to expand its resources rapidly with an annual budget review to adjust to new situations that fall within its jurisdiction and are targets either of preliminary examination or of investigations and prosecutions. The IER should weigh the pros and cons of an annual budget versus a multi-year budget.

9) **Exploring Innovative Funding:** Article 115(a) of the Rome Statute requires that States Parties pay assessments to meet the budgetary requirements of the Court. Article 116 also permits “voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.”

Far too little has been done to examine the full range of potential “voluntary” funding and then to draft criteria for approval by the Assembly of States Parties. Experts should consider how the ICC and the Trust Fund for Victims (“TFV”) should both explore and seek to utilize innovative funding mechanisms.

10) In addition, the TFV, which relies on voluntary governmental funding to meet its foreign assistance and reparations obligations, suffers from chronic funding shortages each year. The TFV’s annual funding gap is €6-7 million, but it requires a steady revenue stream of about €10 million per year. Otherwise, underfinanced reparations awards will impair the credibility of judgments (including the judges who award reparations without knowing whether they can be paid for the benefit of victims) and the Court in general, potentially further harming victims beyond their experience in connection with the original crimes.

The Rome Statute leaves TFV financing to the will of the Assembly of States Parties (Article 79), which has the authority to adopt a method of funding for the TFV that could include access to innovative means of funding. That method includes “humanitarian investing” options that are gaining traction among humanitarian aid organizations and strongly promoted by, for example, the World Bank, the International Committee of the Red Cross, and the World Economic Forum.

11) One of the avenues of innovative funding, or humanitarian investing, that should be explored by the Registry and TFV staff with the supplemental advice of an ad hoc group of external finance experts is the social bond market. Funding gaps in several critical societal priorities—including health, education, infrastructure, domestic criminal justice, and the environment—have been addressed with bonds that are purchased by “social investors,” who agree to discount terms on interest and/or accept other conditions that enable public institutions to advance these societal priorities with additional sources of funding. A similar model could be accomplished for the Court and/or the TFV with an “endowment social bond” of long-term value, perhaps 20 to 30 years, that would provide a steady source of revenue each year to help cover the gaps in funding arising from defaults on assessments for the ICC budget and/or from insufficient voluntary contributions to the TFV. The social bond would need to be guaranteed

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14 The American Bar Association’s Center for Human Rights has provided financial and other support for research into the humanitarian investing concept as it relates not only to the ICC and TFV, but also other organizations that need to meet the needs of victims of atrocity crimes, particularly in the treatment of trauma and mental health. We thus strongly encourage the Independent Expert Review to inquire with the International Criminal Court Project for further information that can assist with the examination of the concept by the Court and by the TFV.
by perhaps three or four of the 29 sovereign risk Category AAA, AA, and A States Parties of the Rome Statute, many of which have been introduced to the concept. Only qualified social investors, namely those who are approved by the Court or TFV as reputable and credible investors for international criminal justice, would be approached. An appropriate issuing body for the social bond, as well as a trusted management team for the largely passive investments required to generate the rate of return each year that can be used for the budgetary needs of the Court and/or the TFV, would need to be established, all of which are common attributes of the social bond market.\textsuperscript{15} Commencing long-range planning now for an endowment social bond and identifying qualified social investors could position the Court and/or the TFV to enter the market when it begins to recover following the COVID-19 pandemic.

12) **UN Funding for Security Council-referred Investigations:** Another potential source of funding that demands concerted attention and advocacy is United Nations funding for investigations arising from Security Council Chapter VII referrals. Funding mechanisms could be built into a Council-Court agreement or UN Security Council resolution language. Allies should be found within the General Assembly and the Fifth Committee in particular to put forward concrete proposals and build diplomatic support.\textsuperscript{16}

2.13: **Fair Trial, Defense and Legal Aid**

13) **Strengthening Institutional Equality of Defense Issues:** We encourage the IER through this review process to take a concerted look at how defense and legal aid can be protected and strengthened within the Rome Statute system. Defense practitioners are in a unique position at the ICC, appointed as counsel but not considered ICC employees. Defense practitioners consistently face challenges in practice concerning structuring cases with predictability, extensive motion practice, and alleged inequality of arms compared to OTP institutional resources, especially for issues such as disclosure. Given that the Registry is still considering its draft/revised legal aid policy, these discussions are especially timely and could significantly impact that process for the better. The review process is an opportunity for the IER to also suggest larger structural changes, if necessary, that would likely be deemed outside the mandate of the Registry’s legal aid policy revision, which is limited to “reform that can be achieved within existing resources.”\textsuperscript{17} As discussed below in Topic 2.11, the victims representation process also falls within the Court’s legal aid policy and likewise deserves concerted review and consideration of any significant structural changes that will allow the process to better serve victims’ rights and interests within the Rome Statute.

14) Experts should also review whether there are ways to strengthen the profile and equality of consideration of defense issues within the Rome Statute system, including through significant


\textsuperscript{16} Better cooperation between the Security Council and the Court in funding should be followed by UNSC evaluation in the event of material non-compliance. The Court and Assembly of States Parties should also consider how to engage and produce working relationships with the UN Sanctions Committee and comparable sanction bodies as another tool to strengthen the implementation of arrest warrants and other like measures. For more on the UN-ICC relationship, see, e.g., Jennifer Trahan, *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, 24 INT’L CRIM. L. FORUM 417 (2013).

changes to the structure of the office and defense practice.\textsuperscript{18} Without taking a position as to the merits of establishing a separate organ for defense, we suggest this review process is an opportune time to consider whether larger structural changes to the defense and legal aid system would better position defense practitioners to assert defense interests in internal debates and whether consolidating oversight and support functions currently performed by the Registry, individual legal teams, and professional associations would contribute to the principles of defense and greater equality before the ICC.\textsuperscript{19}

\textbf{X.X. Strengthening Public Awareness and Image of the Court}

\textbf{15) Continue to Strengthen and Prioritize Outreach and Accessible Information:} The Court has made many positive attempts to make information about the Court’s cases more understandable and approachable, including short explanatory documents, questions and answers, and other documents that now regularly accompany major decisions. Although the Court has updated its website, there is still room for improvement—it remains difficult to find certain information and the website is overall not particularly welcoming to users, whether seasoned professionals or interested members of the public. The Court should continue to strengthen its outreach and engagement efforts, especially with affected communities, but also States Parties and other key States whose greater support for the Court would be welcomed. It is important for ICC personnel, including the OTP, to communicate clearly to affected communities a balanced and realistic sense of the ICC’s capabilities. The Matrix recognizes the need for strengthened communication strategies regarding the external environment, and of course a more accurate understanding of the Court’s cases, its mandate, and its limitations will help to manage expectations appropriately, build trust, and expand the Court’s impact. The Court should continue to build its institutional expertise, either through staff or consultants, in strategic communications and marketing. States Parties also have a major role to play in taking the Court’s outreach efforts further, as the Court itself should resist being seen as (or in actuality) political or partisan, either in making decisions or responding to them.

\textbf{16) While noting the Court’s (most notably the OTP’s) improved external relations, the ICC should continue to strengthen its relationships and engagement with outside academics, bar associations, human rights groups and other civil society organizations. This engagement has many benefits both for the Court and external actors. These external actors would continue to gain a better understanding of the ICC, its processes, its challenges, and could then better extend accurate information about the Court to important stakeholders and the broader public, thus strengthening public awareness of the Court. These organizations also have much

\textsuperscript{18} Past suggestions have included “creating an independent unit within the Registry that would include a limited pool of junior counsel, paralegals, investigators and support staff with the status of employees of the Court, who would be available to support independently-retained senior counsel for a number of cases”; “setting up an independent Defence Office … placed under the authority of an independent Head of the Defence Office (as is the case before the STL)” and centralizing existing offices under Registry oversight but with more independence pending regulatory or statutory amendment. Assemb. of States Parties, \textit{Report of the Bureau on Legal Aid}, Annex. ¶ 19, Doc. ICC-ASP/18/11 (Nov. 12, 2019); GUENÊL METTRAUX ET. AL., EXPERT INITIATIVE ON PROMOTING EFFECTIVENESS AT THE INTERNATIONAL CRIMINAL COURT 205 (2014).

expertise to offer in training and capacity building as well as through research on best practices, which would be valuable given the Court’s limited resources.

17) Lastly, resources should continue to be printed and translated into relevant languages so that affected populations can receive accurate and up-to-date information. To maximize impact and minimize confusion and miscommunication, these resources should be issued at the same time as judgments and major case announcements. Even if not officially considered “victims” under the Rome Statute, the Court should continue to strengthen its practice of providing information to victims and affected communities about case progress.20

IV. Cluster 2: Judiciary and the Judicial Process

2.7: Efficiency of the Judicial Process (At All Stages, Including Role of Pre-Trial, Timelines and Limits)

18) Increasing efficiency and addressing the length of ICC proceedings, while maintaining quality, is not a budgetary or abstract goal. Increasing efficiency at all stages of the process will help to ensure the due process and speedy trial rights of the accused and the rights of victims to a remedy and information; it is also of paramount importance to the Court’s long-term effectiveness, sustainability, integrity, and positive public perception. Further, responsibility is shared by all elements of the Rome Statute system.21 The suggestions below are grounded in the conviction that more consistent trial practices across Chambers, despite origins in different legal systems and environments, would strengthen the Court’s legitimacy and efficacy.

19) It is worth noting that the relevant comments herein are meant to focus Chambers inwards on how judges can enhance their productivity and, in effect, assert themselves in a more dynamic and constructive manner that thus far is not uniformly found at the Court. However, these remarks should not be confused with encouraging judicial micromanagement or heavy-handedness with the parties. To do so would hamper, for instance, the OTP’s ability to prioritize investigations, present cases, and meet its burden. Rather, these comments are directed at encouraging a stronger judicial presence throughout the legal process, yet in concert and conformity with, inter alia, prosecutorial discretion and independence, victims’ interests, the fair trial and due process rights of accused individuals, and other rights and responsibilities enshrined in the Rome Statute.

20) Timelines: In November 2019, the ICC issued an updated Chambers Practice Manual including several timelines for issuing decisions, such as 10 months for an Article 74 judgment.22 This is a positive step and will add needed structure and predictability to the Court’s practice and shield against criticism of politics or financial concerns affecting the length of some considerations.


21 Int’l Criminal Court, Strategic Plan 2019-2021, p. 11 (July 17, 2019).

21) As the Manual is meant to provide guidance and best practices rather than as a binding instrument, the Presidency should continue to examine whether these deadlines are followed and ensure that extensions or continuances are only issued when truly merited. Release of judgments within these timelines should also include translation into all relevant languages, including those of the situation country, at the time of decision and public announcement. In order to make these changes effective, adequate support staff must be in place (translators, clerks, etc.). Judges should be expected to work full time and remain in residence working for a minimum amount of time per year to ensure that they are focused on their core tasks and that more in-court days are devoted to trials and motion practice, given concerns that courtrooms are underutilized.

22) Lastly, judgments should generally contain full reasoning at the time they are issued. In addition to positively impacting the length of proceedings by creating necessary pressure to issue timely decisions, this principle would also contribute to coherent decision-making and transparency, and help to insulate the Court from suggestions of partiality in how judges arrive at decisions or confusion about the reasoning in the interim.

23) Judicial Management of the Trial Process: After in-depth consultations with practitioners from all Court organs (including defense counsel) on the issue of judicial management, the Experts should give serious consideration to practical suggestions on how trials can be more efficient, especially ways to facilitate greater judicial management of the trial process during all phases of a case. Differences in the role of judges in common and civil law systems are reflected in the varying ways trials are managed at the ICC. It has been consistently suggested, however, that ICC judges should play a greater role in managing the pace of proceedings and instituting more rigorous structures and fostering predictability. With the onset of increased supervisory and managerial proficiency within Chambers, litigating parties hopefully will be more willing to narrow contested issues and limit testimony and other forms of evidence to only what is necessary. Of course, international criminal trials will always retain length and complexity that exceeds the great majority of domestic criminal trials. However, seeking practical solutions to limit the length and issues litigated at trial, while maintaining appropriate due process protections, is essential for the Court’s long-term legitimacy.

24) In general, judges should be empowered and encouraged to assert greater control over the “length, manner and timing of argument” in order to promote trial efficiency and predictability. Judges should take concrete steps that incentivize counsel to make succinct arguments on trial issues such as evidence admission and other motions. Parties should be expected to present cases within established time periods, based on and subject to the


complexity of given cases, unless good cause is shown to extend this period.\textsuperscript{25} Rules should permit and encourage judges to exclude the presentation of evidence where the probative value is substantially outweighed by the danger of undue delay, wasting time, or needlessly presenting cumulative evidence.

\textsuperscript{25} See also, \textit{ABA CRIMINAL JUSTICE SECTION STANDARDS ON SPEEDY TRIAL, STANDARD 12-4.5} (AM. BAR ASS’N 2006) (Court responsibility for management of calendars and caseloads) and \textit{STANDARD 12-4.3} (Plans for effective criminal caseflow management: essential elements).

25) In this regard, the IER should recommend measures that mandate more regular and more useful status conferences that, in turn, will incentivize the litigating parties to narrow issues for trial. Status conferences can cover whether agreed facts are possible and practical in a given case; whether stipulations or other means of narrowing issues are possible; settle issues relating to disclosure in advance; and foster greater understanding of trial format, procedures, and timelines. Practitioners have noted that pre-trial conferences, which were more widely used at the ICTY and ICTR, helped parties to plan for specific issues that arose at trial and to dispense of more routine issues earlier rather than later, such as through increased use of oral rulings (discussed below).\textsuperscript{26} Lastly, as recognized by the Rome Statute system, conferences or meetings are valuable to remind parties of their obligations and to air disagreements or deficiencies of disclosure before trial.\textsuperscript{27}

26) The Experts should strongly consider making recommendations that increase judicial familiarity and comfort using judicial notice of uncontested facts as well as to encourage parties to stipulate to agreed facts.\textsuperscript{28} At the conclusion of many atrocity crime cases, there is general and uncontested understanding about the conflict and/or underlying crime base, and the real disputes pertain to the individual culpability of the defendant, namely their linkage to the criminal allegation(s). Accordingly, Experts should encourage Trial Chambers to look for measures to focus in-court litigation on the issues in controversy, including through judicial reliance on expert testimony or other Court evidence for factual background, thus limiting the need for parties to call witnesses on those facts.\textsuperscript{29} In every case, it is the duty of judges to seek

\textsuperscript{26} For an example of instructions at the trial level, see Prosecutor v. Ongwen, Initial Directions on the Conduct of the Proceedings, Doc. No. ICC-02-04-01/15 (July 13, 2016), \url{https://www.icc-cpi.int/CourtRecords/CR2016_04979.PDF}. See also, Rome Statute art. 64(3) (regarding trial status conferences); \textit{Rules of Procedure & Evidence} rule 132(2) (can hold status conferences as necessary to “to facilitate the fair and expeditious conduct of the proceedings”), rule 121(2)(b) (“The Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a judge of the Pre-Trial Chamber shall be appointed to organize such status conferences, on his or her own motion, or at the request of the Prosecutor or the person;”), rule 132bis (in preparation for trial, assigned judge “shall take all necessary preparatory measures in order to facilitate the fair and expeditious conduct,” “may hold status conferences and render orders and decisions. The judge may also establish a work plan indicating the obligations the parties are required to meet pursuant to this rule and the dates by which these obligations must be fulfilled”) (emphasis added). Although many of these rules address what is considered the “trial” phase at the ICC, status conferences or informal discussions where more routine matters could be resolved would still be beneficial at the pre-trial stage as well.

\textsuperscript{27}\textit{ABA CRIMINAL JUSTICE SECTION STANDARDS ON SPEEDY TRIAL, STANDARD 12-4.5} (AM. BAR ASS’N 2006) (Court responsibility for management of calendars and caseloads) and \textit{STANDARD 12-4.3} (Plans for effective criminal caseflow management: essential elements).

\textsuperscript{28} Rome Statute art. 64(3), \textit{Rules of Procedure & Evidence} rules 84, 132bis; \textit{Intl’l Criminal Court, Chambers Practice Manual} ¶ 25 (4th ed. 2019); \textit{ABA Policy 102D} (Midyear Meeting, 2010) ("urges federal, state, local and territorial courts to adopt a procedure whereby a criminal trial court shall conduct at a reasonable time prior to a criminal trial involving felony or serious misdemeanor charges a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under applicable discovery rules, statutes, ethical standards and the federal and state constitutions and to offer the court’s assistance in resolving disputes over disclosure obligations.").

\textsuperscript{29} Given the global breadth of ICC investigations as opposed to previous international tribunals, there will be situations (such as where defendants from the same armed group or same geographic conflict) where this is more practical than others.

\textsuperscript{29} \textit{GUENEL, METTRAUX ET AL., EXPERT INITIATIVE ON PROMOTING EFFECTIVENESS AT THE INTERNATIONAL CRIMINAL COURT} 139, 155-56 (2014).
resolution and/or limit issues in controversy during pre-trial procedures, and the Experts should consider mechanisms designed to drive agreement on undisputed aspects of the allegations.

27) Chambers should also consider allowing parties to utilize a new set of pre-trial procedures that seek preliminary conclusion on crime base allegations (in whole or in part) or other relevant issues pursuant to incontrovertible evidence. Amongst other proposals, such a process could be initiated by a summary judgment-type motion filed by the prosecution along with their pre-trial brief and attached evidence that includes proposed findings of fact on issues not concerning the acts and conduct of the defendant(s). Defense would be able to respond with any challenges to the prosecution evidence by clearly articulating their objections and what evidence they will call at trial that will rebut such finding of facts. The judges would then rule on the request either in part or in its entirety, mindful of the defendant’s presumption of innocence. Further, any judicial conclusions could be rebutted later during proceedings if necessary. Through this process, if a crime base incident was deemed established by a Chamber during pre-trial (for example), then the parties would be able to exclude batches of witnesses, documents, or other forms of evidence that pertained to that matter and would be better placed to identify what issues are truly uncontested. In the end, trials might then be able to identify and focus on issues clearly in controversy, such as the linkage of particular defendants to particular crimes.

28) With increased comfort with trial management and the Rome Statutes’ rules, judges also could be encouraged to make greater use of oral rulings/rulings from the bench (while ensuring these decisions are entered into the record) and to rule more quickly in interlocutory appeals. Some guidelines for quicker rulings on interlocutory appeals have been incorporated into the recently-revised Chambers Practice Manual, and some issues will require more detailed written submissions and consideration. However, practitioners often mention these two practices as areas where there is significant room for improvement when it comes to ensuring trial efficiency and limiting the volume of written filings in ICC practice. Like all suggestions in this section, this practice would also necessitate that judges have substantive understanding of the law and procedure and confidence in managing complex criminal trials in order to institute such practices and issue clear-cut oral decisions, a matter that can be addressed through training, exchanges of best practices, and other forms of professional development (see below Topic 2.10).

29) Procedure for Admitting Evidence: The Experts should consider whether recent practice of ruling on the admissibility of evidence at the end of trial, as opposed to at the time of offer or start of trial, may detract from trial efficiency. While this practice was adopted as an attempt to improve efficiency, it will be important to assess whether the practice has helped or hindered the process overall. Some practitioners have argued that allowing counsel a better understanding of the evidentiary record as the trial continues could result in less repetitive

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30 Rome Statute art. 69(4), art. 64(8)-(9); Rules of Procedure & Evidence rules 63-64, 140(1). See, e.g., Prosecutor v. Ongwen, Initial Directions on the Conduct of the Proceedings, Doc. No. ICC-02/04-01/15, ¶ 25 (July 13, 2016) (describing reasoning for the approach of evaluating evidence at the end of trial).
testimony, encourage trial strategies that focus on a narrowed set of issues, and disincen
tivize parties from proffering excessive and potentially duplicative evidence in order to
discharge or contest the applicable burden of proof. Resolution of admissibility questions
earlier in the process might also encourage parties to focus on higher quality evidence and allow Chambers to start work on parts of the judgment (such as the crime base) as appropriate
earlier in the process. Evidentiary issues are exacerbated by the lack of guidance as to admissibility criteria in the Rome Statute system, which would likely benefit from elaboration. The practical impact of differing views on evidence admission deserves careful study and recommendations from the Experts.

30) Critical Examination of the Confirmation of Charges Process: The legal structure and expectations of the confirmation of charges process would benefit from a concerted review and recommendations or guidelines. Previous editions of the Chambers Practice Manual included a number of useful recommendations for streamlining and clarifying the confirmation of charges process, which have not consistently been followed. As the Manual only provides guidance, it would be useful for judges to adopt some of these recommendations in a binding form. The confirmation of charges process greatly impacts the efficiency of proceedings, the judicial process overall, and therefore the Court’s limited resources. Reforms of this process should ensure that it does indeed protect defendants’ due process rights and allows defendants to identify the alleged criminal conduct and historical events at issue in their trial. However, a confirmation of charges process should not require the level of specificity and comprehensiveness afforded to the actual trial, and a critical look at the Court’s practice to date might shed light onto whether this process effectively protects defendants’ rights, how confusion about the level of specificity necessary at this stage impacts trial efficiency, and whether the Court’s confirmation of charges process should be more fundamentally changed.

31) In short, proposals should seek to make ICC trials more consistent, predictable, and structured. These changes will allow parties and the trial process to focus on what is most at issue in each case and, by extension, create an environment where strategic decisions and management procedure flourish, all of which would ultimately enhance the efficiency of trials. Solutions should be pragmatic, and resist being drawn into a competition between the merits of civil and common law procedures. With several complete and lengthy trials in its history that utilized varying procedures, the Court has a valuable opportunity to learn from its own experience as well as that of other international tribunals in moving towards more coherent pre-trial and trial procedures. In considering recommendations about the larger role of judicial management of trials and timelines, budgetary resources should be part of the IER’s eventual recommendations. It will be important for States Parties to know how these changes require a

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31 ABA Criminal Justice Section Standards, Special Functions of the Trial Judge, Standard 6-2.3 (Am. Bar. Ass’n 2000) (“The trial judge should permit reasonable latitude to counsel in the examination and cross-examination of witnesses, but should not permit unreasonable repetition or permit counsel to pursue clearly irrelevant or improper lines of inquiry.”).
32 Int’l Criminal Court, Chambers Practice Manual, 8-19 (4th ed. 2019); see also Int’l Criminal Court, Chambers Practice Manual (1st ed. 2015), where these recommendations were first proposed.
shift in resources and staffing in order to make them effective—details which can be also be further articulated by best practices initiatives and other partners outside the Court.


32) The combination of elements from various legal traditions continues to be a challenge in many aspects of the ICC’s legal framework and casework. While judicial independence is essential, bringing about improvement in efficiency as well as consistency in the legal process across cases is vital. This subject may require significant changes to manuals, regulations, the Rules of Procedure and Evidence, and/or even the Rome Statute itself. This review is an opportune moment to suggest improvements in training and procedure, and to encourage additional discussions and exchanges among judges that would benefit the process and jurisprudence of the Court as a whole. In addition, the IER could recommend that the Court convene a serious conversation about collegiality and judicial temperament given recent concerns directed at the Chambers. Given the different previous experiences and approaches of judges coming to the ICC, providing guidelines and moving towards consistency would be of value without infringing on individual reasoning and decisions.  

33) Greater Consistency in Trial Processes: The Experts have an opportunity to consider recommendations that will institute additional clarity and consistency in the applicability of different legal systems and the impact of inconsistency on the trial and appellate process. One example of this inconsistency is whether “no case to answer” motions are allowed and under what circumstances, an uncertainty which evidence admission at the end of trial and other practices mentioned herein further magnify. Other examples mentioned by judges include approaches to admitting and evaluating evidence, treatment of previous statements and unsworn statements, and how requests for leave to appeal fit within the Rome Statute’s rules. Within this ambitious review process, the IER is in a unique position to suggest measures that will harmonize ICC trial practice across the Court, whether through revising ethics codes, the Chamber Practice Manual and internal guidelines, additional judicial retreats and other forms of professional development, and/or more structural changes to ICC practice through the Rules of Procedure or regulations.

34) The Court should seek to establish and follow consistent standards of review, including those in appellate proceedings that offer deference to the Trial Chambers on appropriate issues.

35 Judge Silvia Fernández de Gurmendi, Symposium on the Rome Statute at Twenty, Judges: Selection, Competence, Collegiality, 112 AJIL UNBOUND 163, at 167 (2018) (describing increased recognition “that judicial independence was in no way incompatible with exchanging views on matters of law procedure with colleagues of other chambers and divisions with a view to identifying the best responses to some common challenges”).


37 Ex. Prosecutor v. Ntaganda, Judgment on the Appeal of Mr Bosco Ntaganda against the “Decision on Defence Request for Leave to File a ‘No Case to Answer’ Motion”, Doc. No. ICC-01/04-02/06 OA6, ¶¶ 42-45 (Sept. 5, 2017) (holding that while no case to answer motions are not incompatible with the Rome Statute, it is up to Trial Chambers’ discretion whether or not to allow them considering other obligations for fair and expeditious proceedings). See also, GUENAELE MITTRAUX ET AL., EXPERT INITIATIVE ON PROMOTING EFFECTIVENESS AT THE INTERNATIONAL CRIMINAL COURT p. 159 (2014).

Disparate views on the appropriate process have been highlighted by recent decisions and this discrepancy greatly impacts the consistency of the overall trial process as well as credibility, given that the Court is not necessarily required by the Rome Statute to consistently “apply principles and rules of law as interpreted in its previous decisions.” The Court should consider how to provide more clarity to these paramount issues of procedure.

35) **Promoting Clarity and Accessible Jurisprudence:** Increased comfort with judicial management of trials might also help to promote coherent and accessible jurisprudence. As described above and mindful of Chambers’ need to maintain objectivity in evaluating admitted evidence from all parties, beginning to process evidence as the trial proceeds—rather than only beginning to process evidence and draft a judgment after closing submissions—would likely contribute to shorter deliberations and more concise, organized opinions. Clearly communicating the Chamber’s evaluative process to the parties, in turn, would enable litigants before the Court to better frame subsequent trial strategies and submissions.

36) When majority and minority opinions are issued, they should remain clear on which portions and reasoning have been adopted by a majority and therefore control the decision and result, versus which only garnered support from a plurality or fewer judges. It should be generally expected that written decisions, including in appropriate languages, are released at the same time as oral decisions for major case events so as to limit speculation over reasoning or influence and ward against unmet expectations from victims and other stakeholders.

37) While ICC judgments understandably will be longer and more complex than those of typical criminal trials in national courts, judges must remain mindful of their potential for use in future cases, in national or other international courts, and as interpretations of the Rome Statue and customary international law. Therefore, it is paramount that judges seek to issue decisions that make their reasoning as clear and transparent as possible—“well-reasoned judgments, based on the applicable law, remains their central role and the lynchpin of their institution’s legitimacy.”

38) **Strengthen Judicial Drafting:** Collegiality is an essential foundation for an effective judiciary. As noted below, a strengthened judicial training system would positively impact both coherent decision-making and the working methods of the judiciary. Training also would emphasize the importance of coherence in decision-making as central to the Court’s role in building a body of law, including customary international law, where clear decisions have the


40) Rome Statute art. 21(2).


42) See Leila Nadya Sadat, “Judicial-Speculation-Made-Law: More Thoughts about the Acquittal of Jean-Pierre Bemba Gombo by the ICC Appeals Chamber and the Question of Superior Responsibility under the Rome Statute,” ICC Forum (May 27, 2019), https://iccforum.com/responsibility#Sadat (“four separate opinions, raising questions about Pre-Trial and Trial Chamber procedures, the standard of Appellate Chamber review, and the scope of command responsibility, revealed sharp disagreements between the judges of the Court and generated considerable confusion over the state of ICC law and procedure”).

43) Recognizing that Chambers issued an oral judgment in order to limit defendants’ detention time, there was, for example, a six-month difference in time between the oral decision acquitting Mr Laurent Gbagbo and Mr Charles Blé Goudé and written decision containing full reasoning.

potential for higher precedential value and positive influence over the global development of international criminal law. It would allow for greater information-sharing and discussion amongst judges and might build better trust between the different chambers involved in trials. Building a culture of judicial training that garners complete participation of all ICC judges will require ASP mandates as well as the full and continual support of Court leadership.

2.10: Working Methods of the Judiciary (Calling of Newly-Elected Judges, Training, Collegiality, Mechanisms for Exchanging Best Practices with Other International and National Judges)

39) Election: The election of diverse and highly qualified judges is critical to the ICC’s success, as are judges’ preparation and support during their professional transitions to the ICC. Building on changes made by the Advisory Committee on Nominations and their bolstered role in eliciting evidence of experience from nominees, the Experts may consider whether there are additional ways to amend the process to reflect the importance of criminal law, procedure, and trial experience in the selection process. Although both criminal and international law competency is important, practical trial experience and comfort in a courtroom is essential for ICC judges, who are required to preside over long and uniquely complex trials.

40) Creating a Culture of Professional Development: Instituting a compulsory (at least in part) training program, and creating a culture and expectation of professional development and continuing legal education (which is an ordinary expectation of national judiciaries) will be essential in preparing even highly qualified judges for the unique circumstances of ICC legal proceedings. All judges would likely benefit from deeper understanding of the nuances of civil and common law systems with which they are not intimately familiar. It also will further many goals noted in the Matrix, such as cultivating shared values and a sense of purpose among leadership across the Court. Additionally, it would likely result in improved efficiency of the judicial process, more coherent and reasoned jurisprudence, and improvements to the working methods of the judiciary. These professional development opportunities should be seen as an occasion to cement the skills necessary to be effective in the unique ICC environment by engaging with and learning from peers inside and outside of the Court who have faced the same practical challenges. Lastly, although this section focuses on judicial training and exchanges, all staff at the ICC would benefit from a stronger culture of expected professional development across the institution.

41) In the United States, for example, the majority of federal court judges participate in several weeks of initial practical skills-focused training led by experienced judges through the Federal Court

46) Judge Silvia Fernández de Gurmendi, Symposium on the Rome Statute at Twenty, Judges: Selection, Competence, Collegiality, 112 AJIL UNBOUND 163, at 164 (2018) (noting that a combination or criminal, international and personal skills is important but not guaranteed by current Rome Statute framework, and that “practical knowledge and experience in criminal law and procedure is in fact needed at all phases of the process, including the appeals process”).

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Judicial Center (a government research and education agency). This training covers, *inter alia*, case management, ethics, and judgment writing. Many state court systems also have mandatory continuing education requirements for judges regardless of seniority. Both civil and common law systems consistently build in judicial training both for new judges and as continuing education and professional development for even experienced judges. Though models differ, many include significant practical skills components and these programs have trended towards containing at least some mandatory aspects. Training by peers, including other judges who have successfully managed either other international criminal trials or other large cases (such as mass torts), would likely be especially useful to ICC judges.

42) The existing lack of emphasis on training is visible in the Court’s budget—this is currently one of the smallest line items. The judiciary plays such a central role in the Court’s processes—controlling trial process, timelines, and jurisprudence—that investing in this way would exert a significant return when it comes to the ICC’s efficiency and effectiveness overall. With the ICC’s permanence comes an increased ability to invest in professional development, which was not necessarily a priority at the temporary tribunals. Professional development should be an ongoing process throughout judges’ tenure at the ICC, with more structured, mandatory training programs for newly-elected judges, regular training throughout their tenure, and input as to effectiveness or any shortcomings to continually improve the program. If States Parties and the Court choose to make such an investment, there are many bar associations, academies, universities, and other civil society organizations with a breadth of experience in both national-level and international professional development programs that would be invaluable partners to a robust ICC professional development program as well as cost-effective. While the Court should lead in determining the substance of training, many outside organizations and resources can help in, for example, facilitating courses led by judicial peers as part of an extensive training program.

2.11: Victims (Participation) and 2.12: Reparations

43) **Greater Predictability in Victims’ Engagement:** Although they are independent processes, the legal framework and practical consequences for victims’ participation (Topic 2.11) and reparations (Topic 2.12) are also in need of further clarification and critical review, as acknowledged in the Court-wide Strategic Plan. Because victims’ participation is an ICC innovation among international tribunals, the Court’s practice has evolved and changed from

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49 *Federal Judicial Center: Education and Research for the U.S. Federal Courts*, *Fed. Judicial Ctr.* (2014), [https://www.fjc.gov/sites/default/files/2015/About-FJC-English-2014-10-07.pdf](https://www.fjc.gov/sites/default/files/2015/About-FJC-English-2014-10-07.pdf) (though training is not mandatory for federal judges). The Center also conducts empirical research about the administration of justice, such as the impact of case management, the need for changes to the Rules of Procedure and Evidence, which often informs advocacy for policy changes made by other organizations.


53 Int’l Criminal Court, *Strategic Plan 2019-2021*, at 3 fn. 1 (July 17, 2019) (“Goal 2: Further develop the Court’s approach towards victims in all phases of the judicial proceedings, including reparations, the latter in cooperation with the Trust Fund for Victims.”).
case to case\textsuperscript{54} and is a perfect topic for focused reflection through this Court-wide review process. Victims and their representatives play a significant role in proceedings—their wishes have informed decisions to open investigations, they have contributed legal arguments on both substantive and procedural issues throughout proceedings, and they have of course played a central role in reparations proceedings. Despite these contributions, questions remain as to whether participation in many parts of proceedings is really “meaningful” given the limited ability of victims’ counsel to interact with (especially) groups of victims.\textsuperscript{55} In addition, some questions remain on whether past participation processes cost some level of efficiency and lack evidentiary value while increasing litigation volume.\textsuperscript{56} In many cases, victims remain confused and disappointed by the limited opportunities to participate directly and the reparations awards that eventually emerge from ICC cases. The IER should review these topics with concerted consultation and involvement of victims themselves and their legal representatives, as well as other stakeholders, to gain a deeper understanding of how victims’ participation both benefits and complicates proceedings. Without asserting a position as to particular processes used in previous cases, we suggest that clearer and more consistent procedures for victims’ participation and reparations would help to better manage expectations, improve the length and efficiency of proceedings, and allow for more meaningful participation. Suggestions and amendments should be considered that would make the framework for victims’ participation and reparations more predictable and consistent from case to case, even if the exact modalities differ according to demands of victims’ interests and the nature of crimes in particular cases.

\textsuperscript{44} The reparations process should also be examined with an eye towards greater efficiency and predictability, while maintaining appropriate flexibility to respond to the unique needs expressed by victims and affected communities in each situation. The Trust Fund for Victim’s “assistance mission” should also be reviewed as to how it fits into the work of the TFV and the Court based on resource constraints (and imbalances in the TFV’s awards and administrative costs) and demonstrated value to victim communities. Because ICC reparations are formally tied to establishing individual criminal accountability in the Rome Statute, the “assistance mission” has the potential to reach victims and communities excluded from the formal process, and therefore to increase the ultimate goal of the Court in providing some measure of justice to communities affected by mass atrocities.\textsuperscript{57}

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V. \textbf{Other}

45) \textbf{Adaptive Rules:} The proposed review is also an opportune time to conduct a critical review of the effectiveness of the process for amending the Rules of Procedure and Evidence. The system should allow for periodic review of the Rules, including opportunities for external

\begin{itemize}
\item \textsuperscript{57} See Topics 1.18 and 1.19 above for funding challenges for the Trust Fund for Victims applicable to the reparations process.
\end{itemize}
input and influence, in a way that enables the Rules to adapt more quickly from the benefit of lessons learned and to truly further the efficiency and predictability of the ICC’s legal processes. 58 This discussion would benefit from involvement of a broad range of stakeholders before concluding in an ASP resolution.

VI. Conclusion

The Criminal Justice Section commends the leadership of the Court and the Assembly of States Parties for proposing an appropriately holistic review of the Court’s and ASP’s governance, operations, processes, and effectiveness, and hopes that this review process will inspire continued reflection, review, and debate in the months to come. The Section extends its deep appreciation to members of the IER for their sincere engagement in what is certainly a tall task. The Section especially appreciates the IER’s openness to receive comments from civil society organizations, which have unique expertise and valuable perspectives on the Court’s value as well as its many strengths and challenges. As supporters of the ICC and its essential role in the global system of international justice, we believe this review process, when embraced by the Court’s many stakeholders, critics, and supporters, could have an invaluable impact on the institution’s readiness to face the challenges inherent in its mission to seek accountability for atrocity crimes.

The Criminal Justice Section, in conjunction with the International Criminal Court Project and Center for Human Rights, stands ready to clarify any of the matters discussed in these comments, to answer any questions, to provide input on subjects under Experts’ review that were not contained in these comments, and to assist in any other way. The Section also looks forward to future engagement with the Independent Expert Review and Assembly of States Parties throughout this review process.