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Remarks to the Assembly of States Parties in relation to Cluster I: Increasing the efficiency of the criminal process

Your Excellency, Ambassador Tsuji,
Your Excellency, Ambassador Infante,
Excellencies,
Ladies and gentlemen,

It is an honour and a privilege to present a few introductory words in this special plenary session on the topic of panel on the efficiency and effectiveness of Court proceedings.

Let me first of all thank Ambassador Maria Teresa Infante Caffi (Chile) and Ambassador Mauri Tsuji (Japan), the Co-Chairs of the Study Group on Governance for organizing this timely and important debate. Efficiency and effectiveness are of key importance for the success of the Court.

It is in honor to be in such distinguished company. Both the Court and the Prosecutor have devoted significant attention to this item in the past years. Please allow me to provide some remarks from an external perspective, in to place some of the contemporary developments into perspective.

Efficiency and effectiveness in perspective

Efficiency and effectiveness are key for the Court's mandate. The Court is only able to achieve its goals, and to serve as a potential model for other institutions and jurisdictions if it is seen as effective and efficient.

Effectiveness and efficiency are interrelated. They have slightly distinct meanings**.**

Effectiveness is typically tied to the inherent aims and goals of an institution. In the ICC context, these goals include fair and effective and expeditious public proceedings and ensuring full exercise of the rights of all participants. The defendant has the right be tried without undue delay pursuant to article 67(l)(c) of the Statute. Chambers are required to ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused (Article 64(2)). Public confidence as well as the rights of the accused and of victims are affected by the Court's performance.

Efficiency is linked to the management of proceedings, most notably the objective to optimize productivity and make best use of resources. It includes judicial and administrative considerations.

The Court has formulated four key goals for the assessment of its performance:

- Expeditiousness, fairness and transparency of proceedings;
- Effective leadership and management;
- Adequate security of its work, including including protection of those at risk from involvement with the Court; and
- Adequate access of victims to the Court.[1]

These key goals must be linked to the specific context of the ICC, namely nature of the ICC as a criminal Court, and the architecture of the Statute.[2]

[1] See Report of the Court on the development of performance indicators for the International Criminal Court, 12 November 2015.

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Performance assessment

Excellencies,
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Expeditiousness, fairness and transparency of proceedings are of particular concern. States Parties, NGOs and other stakeholders inquire what to expect from the ICC, and what the Court can legitimately deliver. As the Court moves into its second decade, it has been seized with 23 cases. They vary across 9 situations. 8 other situations are under ongoing preliminary examination (Afghanistan, Colombia, Georgia, Guinea, Iraq, Nigeria, Palestine, Ukraine). Many provisions of the Statute, the Rules of Procedure and Evidence and the Regulations have been put to a test. This is a crucial moment to take stock of existing practices and cases.

Measures and techniques to expedite proceedings have been contemplated since the start of the operation of the Court.[3] Several expert reports have been prepared, with recommendations on how to expedite the criminal process at the ICC: studies by the International Bar Association[4], the Washington College of Law War Crimes Research Office[5], a report by the United Foreign and Commonwealth Office[6] and the study of the Expert Initiative on 'Promoting Effectiveness at the ICC'.[7] These efforts have gained structural attention with the work of the Study Group on Governance, the Judges Working Group on Lessons Learnt (WGLL), and internal review processes of judicial and prosecutorial practice.

Experience from other international criminal courts and tribunals suggests that evaluating effectiveness and efficiency is a complex exercise. Such an effort requires long-term attention, and a combination of internal and external scrutiny.

Some of the main criticisms of the existing practice are that the Court has (i) produced lesser cases than other tribunals, that (ii) its procedure is at times overly complex, and that (iii) there might be a certain degree of duplication in relation to procedures.

One example is the high number of filings and decisions in ICC proceedings. For instance, the *Lubanga* case gave rise to more than 3090 filings, and 275 written decisions and orders, although it was comparatively narrow in terms of charges. This number is higher than certain multi-defendants cases at the International Criminal Tribunal for the former Yugoslavia.

Such figures need to be placed in context. Reviewing the efficiency of the criminal process requires a targeted, and to some extent fresh methodology which takes into specific features of ICC procedure.

It is difficult to formulate *objective yardsticks* for the assessment of effectiveness and efficiency of the Court's proceedings. There is no immediate compariter for the ICC. Comparison with what is considered acceptable in a national context is

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[2] For instance, effectiveness cannot be judged solely by the mere number of trials or proceedings. A trial may be efficient or expeditious, but lack effectiveness if it not perceived as fair. Similarly, administrative and procedural efficiency alone may not suffice to create effective justice for victims and affected communities, or to enhance national investigation or prosecution.

[3] Informal Expert Paper, Measures available to the International Criminal Court to reduce the length of proceedings, ICC-OTP 2003.

[4] IBA, Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress (January 2011); The Confirmation of Charges Process at the International Criminal Court: A Critical Assessment and Recommendations or Change (October 2015).

[5] American University Washington College of Law, War Crimes Research Office, Expediting Proceedings at the International Criminal Court (June 2011).

[6] Foreign and Commonwealth Office, FCO Seminar on ICC Procedures – Executive Summary.

[7] Expert Initiative on Promoting Effectiveness at the International Criminal Court (December 2014).

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only of limited use as guidance. Various differences also exist between the ICC and the procedural law of the two *ad hoc* Tribunals and the ICC.[8]

The ICC procedural regime is *sui generis* in nature. It combines features of common law and Romano-Germanic traditions, and certain novel provisions, specifically geared at the investigation and prosecution of international crimes. Some norms are marked by ambiguity and subject to different legal interpretations. Specific procedures, such preliminary examination, are comparatively unique at the ICC. Many filings or decisions in the ICC are of a procedural nature, and less visible to the broader public.

Most of all, international criminal procedure is a *living instrument*. Many of the core issues are developed through practices, policies, and procedural decisions. In certain areas, the law needs to be developed gradually, or through 'trial and error', in order to establish 'good practices'.

In light of the features, it is helpful to strengthen modalities of ICC self-assessment. Such assessment allows external stakeholders to set action in context and facilitate performance assessment. Not all of the four goals identified by the Court are fully quantifiable. But the development of specific indicator may be a useful step of departure, in order to clarify internal and external factors that affect the Court's performance.

Challenges

Excellencies,
Ladies and Gentlemen,

International criminal proceedings typically take several years. Many of the major causes of the length of proceedings have been identified in practice. Some of them are known from other international criminal courts and tribunals. They include inter alia:

- The length and modalities of investigations;
- A large number of preliminary and pre-trial motions, disclosure issues, including redactions for the protection of witnesses and victims;
- Reframing of facts or charges after pre-trial confirmation,
- Evidentiary issues;
- Court management issues and matters interpretation/translation.

Other factors are more genuinely connected to the framework of the ICC, such as victim participation or reparation proceedings.

Structurally, there are different methods to address these challenges. One option is to provide clarification, through judicial practice or regulatory action. A second option is to strive for a harmonization or at least, approximation of procedures across chambers at the Court. A third option is to encourage identification and application of 'good practices', through processes of internal review or practice directions. The Pre-Trial Practice Manual, agreed earlier this year, marks an important step in this direction.

These three techniques need to complement each other, in order to make informed choices.

[8] These include the selection and definition of the scope of situations, the application of complementarity (Articles 17 to 19), the investigative mandate, including with the obligation to investigate both incriminating and exonerating circumstances, (Article 54(1)), the confirmation hearing (Article 61), the participation of victims at the various stages of the proceedings (Article 68(3)), and the need to provide for reparation proceedings (Article 75).

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The way ahead

As the work of the ICC proceeds, this process is now well on the way. Please allow me to address a few areas that are key to the criminal process.

The first one concerns the interplay between pre-trial and trial. One of the lessons from procedural practice is that 'time invested in pre-trial may save time at trial'. Significant efforts have been made to improve this relationship.

- It is increasingly acknowledged that cases should be as trial ready as possible at pre-trial, and that it would be 'desirable for the investigation to be complete by the time of the confirmation hearing'.[9]

- The Pre-trial Practice Manual establishes an outline for the structure of the decision on confirmation of charges, in order to make clear which factual allegations have been confirmed and to what precise extent. This structure clarifies the basis of the confirmation of charges and ensures that the Defence might 'not be presented with a wholly different evidentiary case at trial'.[10]

- Third, improvements are made to the efficiency of the disclosure process and case management, in order to enhance continuity between pre-trial and trial levels.

The practice of interlocutory appeals has been reviewed. In July 2015, the Appeals Chamber took an important decision, through which it reduced potential delays in relation to the participation of victims in interlocutory appeals.[11]

The regime of victim participation is also under review. With the increase of cases, the Court has faced a large number of victim applications. In existing practice, the Court has applied four different models at pre-trial and trial, in order to deal with a backlog of cases. These approaches involve (i) limitation of information provided by applicants, (ii) delegation of assessment by Chambers to the Registry, (iii) fewer redactions and (iv) early organization of Common Legal Representation. Steps are under way to harmonize this system. This is a desirable from the perspective of consistency, in order to avoid that the treatment of victim participation depends on the procedural regime adopted by each Chamber.

Further efforts are made to establish an effective regime concerning cases concerning offences against the administration of justice under Article 70 cases. The cases have involved multiple defendants. They might pose constraints to the adjudicative capacity of the Court, should they become the rule rather than exception.

Conclusion

Excellencies,
Ladies and Gentlemen,

Effectiveness and efficiency is a cornerstone of criminal procedure. Rome was not a built in a day. This also applies to the refinement of procedures. It a dynamic process that warrants continued attention. It requires collective input by States Parties, the Court, civil society and other stakeholders to make the ICC a better and stronger institution.

Thank you for your attention.

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[9] Appeal Chamber, *Lubanga*, 13 October 2006, ICC-01/04-01/06-568, para. 54.
[10] Trial Chamber III, *Gbagbo*, 19 October 2010, ICC-01/05-01/08-1022, para. 25.
[11] Appeals Chamber, *Gbabgo and Blé Goudé*, 31 July 2015, ICC-02/11-01/15-172.

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