 

**FCO Seminar on ICC Procedures**

**Executive Summary**

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**On behalf of the United Kingdom Foreign and Commonwealth Office.**

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**Background**

On Friday 26 October 2012, the United Kingdom Foreign and Commonwealth Office (FCO) convened a seminar on the procedures of the International Criminal Court (ICC). The seminar was chaired by Sir Adrian Fulford, former ICC Judge (2003-2012).

The seminar focused on the necessity of reconsidering ICC procedures with a view to maximising efficiency whilst adhering to the fundamental criterion of fair trial as well as recognising the importance of understanding the procedural issues faced by the ICC.

The seminar was attended by representatives from academia, the ICC and other *ad hoc* international criminal tribunals. The significance of facilitating discussion among the representatives will be important when setting out proposals and recommendations for moving forward. The recommendations will improve current inefficiencies such as the length of proceedings and will be vital to the ICC’s future reputation and standing within the international community.

**Summary of Discussions**

**1.1 Paper 1 –*Towards a more effective and efficient International Criminal Court: improvements t*o *legal procedures***

The first paper noted that the existing procedural model upon which the ICC is founded requires review however any changes must adhere to the principles upon which it rests.

A number of issues have arisen that are relevant to both pre-trial and trial stages. In particular, the application of the current disclosure proceedings requires revision and input from the Office of the Prosecutor (OTP) and the Judges who are central to the implementation of the existing procedure. Currently, Rule 121(3) provides for a final OTP disclosure deadline for the Decision on Confirmation of Charges. In practice, the OTP has used the deadline for the purposes of substantive disclosure. The paper suggested adopting an alternative approach based upon the Rules of Procedure and Evidence (RPE) of the ICTY such as Rule 66, which provides for 30 days disclosure following the initial appearance of the defendant. It was suggested that the ICC should allow the Defence at least a month after the final OTP disclosure and not the current 15 days. Thus, permitting the Defence proper time to analyse and conduct any final investigations, and to prepare their final submissions to the Court. It would also enable the Prosecution to focus on the applications that they have received. A Rule change can be easily made, especially given that Judges are required to set a trial date within three months.

It was argued that the role of the Confirmation Hearing can be illustrated by the way it has been applied to date. In the *Callixte Mbarushimana* and the *Abu Garda* cases the charges were not confirmed at the Confirmation Hearing. Moreover, in the *Banda* and *Jerbo* case, the Defence agreed to go straight to trial.

In the case of *Abu Garda* there was delay in disclosure at the beginning of the Confirmation Hearing. Mr. Abu Garda initially appeared on 18 May 2009 but the Defence did not receive a single item of disclosure from the Prosecution until more than three months later. This example demonstrates that cases are taking too long to be confirmed which is indicative of bureaucracy and prevarication.

The discretionary case management duties are functions of the Chambers and where a case is not rigorously managed this can lead to drift and delay. In the *Banda & Jerbo* case, no status conference was held for a year and decisions have been outstanding for a considerable length of time. Consideration must be given to Rule changes that require greater rigour in the Chamber’s case management functions. The paper noted that Judges must set a date within reasonable time frames e.g. 90 days from the final submission of the parties.

The paper suggested that despite the lack of a hierarchy of evidence in the Statute, *viva voce* evidence carries the most weight, as it is evidence that can be tested. It was argued that the *Kenya II* case sacrificed this without good cause. The single Judge held that the number of witnesses was disproportionate and in view of the limited scope of the Confirmation Hearing and in order to protect the Defendant from unfounded charges reduced the number of witnesses for live testimony to two for each suspect. This was considered to be just.

The final concern raised by the paper regarding delay was the over-emphasis on conducting legal and procedural argument via written arguments even for relatively straightforward matters. There have been refusals of Chambers to issue oral decisions on matters that the Defence has deemed very pressing and which can impact on witness security. There is too great a reluctance on the part of many Judges to give extemporaneous decisions. Chambers and the Prosecution are denuding the importance of oral hearings in favour of written submissions that take longer and in many cases are less effective. One suggestion to limit the time spent on this practice could be to allocate a block of time to both Defence and Prosecution rather than the current practice of specifying a number of witnesses. Alternatively, Special Counsel could be instructed to deal with these issues.

**1.2 Discussion**

The group noted the three main proposals that arose from the first presentation:

1. All disclosure must be submitted 30 days prior to the beginning of the trial;
2. The need for more rigorous case management duties of the Chambers;
3. Greater emphasis to be placed on oral advocacy and relevant judicial training should be implemented.

1.2.1 Rule Change v Change in Practice

The main focus of the group discussion emphasised that the current procedures for disclosure of evidence must be changed as they are not in the interests of justice. It was suggested that current practice was to ‘play’ the Rules; as such it is common for Defence Counsel to receive large amounts of paper shortly before the trial. The main implications of this current approach are that there is limited time to respond to witness statements and other information and to identify witnesses increasing the possibility blackmail attempts.

It was considered that reform can be achieved either through i) an amendment to the Rules or by ii) encouraging practitioners to amend their behaviour and practice within the current regulatory framework.

1. *Changing the Rules*

Some members of the group noted that the current system was not effective and as such there should be a change to Rule 121. It was observed that the Rules on disclosure must be consistent with the Statute and so in the first instance it was the Rules that should be amended. If the Rules were to be changed, any amendments would need to take into account the inherent difficulties in obtaining approval for amendments to the Rules. To this end, the group outlined two approaches that could be adopted i) revision of the current Rules or ii) new Rules to replace the existing ones.

From the perspective of the Defence, regulatory change would be required as the judiciary’s role is limited where procedure is not prescribed by the Rules. Further to this, the role of the judiciary in managing the process and encouraging change in practice cannot always be relied upon due to the wide variation in different jurisdictions. The group noted that this can be evidenced by the existence of a divergent jurisprudence between Chambers, which suggests that there needs to be tighter regulation and enforcement in the OTP. This regulation should set out time limits on the information that is intended for use before trial. If the Prosecution wants to add to disclosure then there should be a process that exists within the current regulatory framework.

It was suggested that a recommendation for a new provision for a 30-day Rule is similar to the obligation on the Prosecution to disclose if someone is in custody.

One overarching principle to be adhered to when drafting new Rules is the preservation of judicial independence. This should be a common thread that will give power to the Court and an element of judicial discretion to consider the Statute when developing jurisprudence.

The current Rules were negotiated by the Assembly of State Parties (ASP) and the need to renegotiate amendments may be problematic. Therefore, it is important to consider alternative methods, such as encouraging a change in practice. Domestic experience [in Sweden] of implementing procedural reform favours the encouragement of change in practice. The group considered this approach to be preferable to changing the Rules as that process can often be too complicated.

1. *Changing Practice*

The group commented upon the main change to be encouraged in practice; the timely disclosure of all exculpatory evidence prior to the Confirmation Hearing. An example was given of the Special Court for Sierra Leone where there are 30 days to list all exculpatory evidence to start the Defence preparation. Cases are slowed unnecessarily if time limits are exceeded. To avoid this, the core of the evidence should be outlined in two or three critical documents and early disclosure must be assured so that the Defence may be informed and know the content of the evidence.

1.2.2 The Role of the Confirmation Hearing

The purpose of the Confirmation Hearing would be reviewed were any recommendations to change the disclosure procedure to be implemented. The group observed that the Confirmation Hearing is not a trial and as such the evidentiary nature of the hearing should always be considered in conjunction with the philosophy and goals of disclosure. It was noted that there is always a great deal of uneasiness relating to Confirmation Hearings. There is limited disclosure for confirmation purposes and it is a long process for all parties. The ICC has in one case ended up disclosing in two batches. The role of the Confirmation Hearing was established by Statute and needs to be limited to the purpose it is meant to serve.

The Confirmation Hearing should essentially be a filtering process of cases that should proceed to trial. Therefore, it was suggested that any evidence should be brought on timely, speedily and precisely. It was noted that the filtering function of the hearing is the most important thing. For Article 58 applications the hearing is the first opportunity for a defendant to raise any objections regarding the charges brought against them.

In addition to this filtering function, the Confirmation Hearing should have a regulatory function wherein it should question the non-disclosure of evidence and any compelling reasons against complete disclosure, such as the need for the Prosecution to withhold evidence from the Defence.

From the point of view of Judges, they must achieve greater clarity at the confirmation stage by addressing reasons for proceeding with the trial. Essentially, disclosure is dependent on confirmation.

It was suggested that the purpose of the Confirmation Hearing is to determine the rationale for proceeding to trial and should necessitate full disclosure. It was noted that there is a duty to investigate the full evidence, both inculpatory and exculpatory. The latter should be stringently disclosed. It is also important to link the end of the confirmation process to the beginning of the trial so that the process of disclosure is clear.

*What is meant by disclosure?*

The group discussion regarding the Confirmation Hearing focused heavily upon the definition of disclosure. Clarification of the purpose of the Confirmation Hearing can be achieved by clarifying what is meant by disclosure. This does not necessarily require the Statute to be amended. The principal consideration at the Confirmation Hearing is to ensure that the Prosecution has met its obligations by attaining the required threshold of evidence. This places pressure on the Prosecution and Defence to be ready for trial and avoids any duplicity of disclosure.

Overall, the group maintained that there should be maximum disclosure at an early stage, although it was noted that the process of disclosure of inculpatory and exculpatory evidence may vary. Therefore it is necessary for the Prosecution to have a very clear timetable of when this information should be handed over. This timetable may be determined by ensuring that there is a clearly defined relationship between the hearing and the trial. Ultimately, the Defence must receive full information before the Confirmation Hearing.

This means that the Prosecution must be trial-ready before the Confirmation Hearing and disclosure is necessary for the filtering process (during the Confirmation Hearing) to occur. Some members considered that all inculpatory and exculpatory evidence should be disclosed by the time the Accused comes to trial. Essentially, the case must go to trial with all information disclosed. There must be full disclosure before confirmation and then a short period before the trial. Others considered that, bearing in mind the confined nature of the confirmation hearing, disclosure should take place in a progressive manner. First, the material that will be relied at the hearing is disclosed together with any exculpatory material. If and when charges are confirmed, there should be full disclosure at the earliest available opportunity, with the proviso that specific delays may be authorized for witness protection purposes.

The relevance of the need to ensure that the Prosecution be trial-ready was queried as the Prosecution should always be so. It was suggested that there may however be reasons why the Prosecution might not want to give full disclosure before Confirmation: for example issues of witness protection and redactions must be considered. In other words, full disclosure before confirmation hearing would necessarily mean increasing the danger to victims and witnesses when it is not even clear whether there will be a trial at all. Consequently, disclosure should increase as the trial approaches. Additionally, it was noted that there is a proportionality argument in relation to the OTP being trial-ready. The practical question to be considered is the amount of time that should reasonably be given to the Defence but does not cause undue delay. In addition, the modality of disclosure must be considered as well as the use of In-Depth Analysis Charts (IDACs).

The group noted that there is a sentiment of dissatisfaction with the system and the lack of enforcement by the Court, leading to too much complacency and delay in disclosure by the Prosecution. Legal aid was available in the *Abu Garda* case however following the initial appearance nothing was disclosed by the Prosecution to the Defence for three months. The system should police both sides and should ensure that the Prosecution disclose in a timely manner.

It was accepted that the Defence should be afforded more time to prepare the case. It was suggested that there should also be a procedure for proportional disclosure, similar to that of the ICTY, where there is rolling disclosure throughout the trial process. It was noted also that the reliance on ICTY rules, which govern pre-trial, and not pre-confirmation disclosure, was misplaced. In this context it was noted that the ICTY has allowed for rolling disclosure of voluminous amounts of evidence. .

Members of the group highlighted that the ICTY has had problems with disclosure in that there have been too many exculpatory evidence documents however, inculpatory evidence can be progressively disclosed so that within 60 days all supporting material should be received. However, it was noted that the price of progressive disclosure is delay and disputes. It was felt that disclosing all evidence in its totality is the best way forward to avoid re-trials and avoids delays. It was, however, noted that the ICTY does not have a confirmation hearing stage.

The broad concerns raised by the group following the first paper were:

1. The obligation on the Prosecution to be trial-ready before the Confirmation Hearing;
2. Disclosure must be early, rather than late;
3. The group were divided on whether full disclosure should be made before or after the confirmation stage. Where disclosure occurs immediately after the Confirmation Stage it should be made in full.

**2.1 Paper 2 - *ICC Trial Issues***

2.1.1 Relationship between pre-trial process and trial process

The second paper presented maintained that the relationship between the Confirmation Hearing and the Trial is complicated. The current system means that there is little synergy between the procedural stages and many questions are resolved twice. Art. 61 of the Statute outlines the evidence which must be disclosed for the purpose of confirmation. The current scheme for disclosure with respect to the Prosecution and exculpatory evidence has given rise to problems, such as multiple decisions and delays which is exacerbated by the ICC’s dual disclosure scheme. Nevertheless, it is unrealistic to consider statutory amendments at this time. Amendments should be confined to the RPE and ICC Regulations.

The second paper outlined two main questions:

1. What is the purpose of the Confirmation Hearing?
2. What is the Trial Chamber supposed to do with the findings of the Pre-Trial Chamber?

The Confirmation Hearing is a pre-trial hearing and allows for disclosure. The application of Regulation 55 by the PTC in *Lubanga* in the confirmation decision has led to procedural uncertainty regarding the extent to which the confirmation decision binds the Trial Chamber in its determination of the charges.

2.1.2 Trial Preparation

The second paper raised one central issue in respect of trial preparation relating to the composition of the Trial Chamber. One proposal has been to empower a single Judge of the Chamber to prepare the case for trial, similar to Articles 39(2)(b)(iii) and 57(2)(b) ICC Statute. This was proposed in the report by the Study Group on Governance (SGG) entitled *Lessons Learnt: First Report to the Assembly of State Parties* and would be a reasonable resource saving solution.

The Trial Chamber has multiple functions that may well enhance the efficiency of the trial preparations and of the trial itself. It was noted that the Trial Chamber does not only deal with disclosure but also with the schemas or formats for the trial. The parties may be required to link their evidence to an evidentiary theme. A question arises as to how each piece of evidence relates to what the Defence and Prosecution want to prove. Some Chambers have therefore established requirements such as the In-depth Analysis Charts (IDACs).

2.1.3 Reconsideration of Decisions

The second paper noted the powers of the Chamber to reconsider an earlier decision on administrative or substantive and contentious matters is a question that has been answered differently by different Chambers. The resulting case law does not correspond to the Statute. The ICC Statute framework does not explicitly provide for a procedure for general reconsideration of decisions once deadlines for appeals have passed. However, Chambers have considered that on different facts it might be persuaded to consider earlier precedent. The paper suggested that the relationship between reconsideration and interlocutory appeals should be defined.

2.1.4 Evidence at Trial

A number of areas for possible change to the procedure relating to evidence at trial were highlighted, including:

* Documentary Evidence - The simplification of the administration of documentary evidence.
* Witnesses and Experts – The further restriction of live evidence before the Court, including submission of written testimonies, the use of expert witnesses and the use of video conference appearances.

2.1.5 Strengthening the System to Sanction Parties

The second paper noted various forms of misconduct by parties aiming to implement delaying tactics. The legal basis for sanctioning parties who partake in such misconduct lies in Art. 71 ICC, more detailed provisions exist under the RPE (170-172), however practice suggests that these could be further developed to ensure proper enforcement.

**2.2 Discussion**

2.2.1 The Pre-Trial and Trial Chamber

*Clarification of the purpose of the Pre-Trial Chamber* (*PTC)*

It was noted that there is a need to determine a mechanism to work out the function/definition of the PTC. Such clarification must consider whether the PTC is a filter or a mini-trial and how best to regulate it. The group put forward two possible ways of clarifying the function of the PTC, either by implementing pre-existing Statute provisions e.g. Art. 61 or by making a request to the ASP.

It was noted that any change, either by amending the Statute or otherwise needed to emphasise long-term change. Amending the Statute would not be a practical solution as this would be a time-consuming exercise. Any developments should be considered through the experience of the Court in pre-trial proceedings. The same could be said for the Court’s trial experience, although this is still in its infancy and drawing upon any experience may not be possible for another 10 years. Members of the group noted that in the interim, a Lessons Learnt approach has been adopted by the SGG working group which has considered the areas of Rules of evidence. The SGG has consulted with the Defence Prosecution and all actors in Courtroom proceedings. A document has been produced by the judiciary concerning pre-trial charges which has been shared with all states.

The group noted that an essential function of the PTC is witness protection and its centrality should be taken into consideration when clarifying the function of the PTC. Witness protection requires judicial control and management as problems can emerge from both the Defence and Prosecution. To avoid problems such as corruption, a member of the group suggested the use of special advocates or independent counsel. It was noted that in the history of the ICC there have been no incidents where victims or witnesses have been harmed. Members of the group agreed that asylum claims associated with witness participation is not problematic, as it adds an additional level of protection and the majority of witnesses are not detained upon arrival in the country.

Members of the group suggested that another problematic issue at the PTC stage is a lack of respect for the Defence Bar. Over-emphasis on Witness protection can impact on the amount of evidence that is disclosed to the Defence leading to an inefficient hearing. An example given was in *Banda & Jerbo* where too wide a margin was given for redaction to the Defence. Against this it was pointed out that it was important to note that (a) there had been a number of instances of defence team members colluding with the accused and groups related to him; (b) defence counsel did not control the accused; and (c) at times, defence counsel relied on resource persons linked to the accused who engaged in illicit conduct

2.2.2 Trial Preparation

The main focus of discussion in relation to trial preparation was the composition of the bench and the judicial management of the pre-trial process. The group felt that there must be trust in the process that Judges put forward, as their experience facilitates future procedural amendments. On the one hand, it was suggested that a single Judge Rule could be applied with one Judge being responsible for preparatory functions. If the case were to be opened *proprio motu* the parties might be seized of the matter. On the other hand, it was suggested that the use of one Judge to deal with all the issues was not the best model to use e.g. the Kenya case where the PTC lasted two weeks. Another suggestion was a panel of Judges whose functions would be clearly defined. One proposed change was that there could be three Judges, one dealing with disclosure, another with victim applications and another with miscellaneous issues. Another counter-argument to the single Judge concept was that the chosen Judge may not have the correct experience or skills to deal with the particular nuances of the case at the PTC stage. Furthermore, it was suggested that the clarification of trial preparation could be a matter for judicial training.

An additional mechanism for reducing the delay in proceedings could be the application of time limits throughout the trial process, including during trial preparation and not just at the pre-trial stage. However, the SGG working group did not think it was appropriate to oblige Judges to give guidance on time limits.

The group discussion made reference to the application of Regulation 55 in the *Lubanga case*, it was considered that this did not facilitate the overall case, especially as decisions are often convoluted and there is often no explanation for such lengthy decisions. It was suggested that recommendations should be made for encouraging shorter judgments. However, it was noted that it is not always possible to make a ruling concise as the case may involve many complicated aspects that simply cannot be summed up in a short judgment.

The group suggested that the production of a model practice direction would be a useful tool as no guidance currently exists. If it were to achieve academic support it could become a powerful tool for the Judges to apply. However, it was noted that the length of a decision is irrelevant *per se* except for where it leads to a delay.

The Confirmation Hearing should be a wide berth of disclosure and there should be a clear set of issues.

The main issues raised by the group following the second paper were:

1. The filter mechanism of the PTC must be emphasised;
2. The charges cannot be re-written; the wrong decision at confirmation impacts on the trial.
3. Measures to clarify Article 61 are clear – there should be a process to clarify the Confirmation Hearing. The scope of time limits also should be clarified, the associated problems cannot be regulated away.

2.2.3 Reconsideration of Decisions

The group noted that the issue of whether a Chamber may reconsider its decisions absolutely requires clarification due to the level of hostility on the subject.

2.2.4 Oral and Written Evidence at Trial

In relation to evidence at trial, it was noted that there are gaps in Rule 68 of the RPE. The introduction of Rule 92bis and 92ter of the ICTY to prevent the submission of written evidence in lieu of oral testimony that does not go to the core of the matter could enable the proceedings to be expedited as experienced by the ICTY. However, it was suggested that the admission of written statements could be subject to abuse and that convictions should be based on the cross-examination of witnesses. Clarification of rulings taking place in absentia must be assured at Confirmation as the absence of a witness does not provide an opportunity for the Defence to dispute what they are saying and for Judges to assess their demeanour. This could have negative implications on justice. Nevertheless, the use of written statements could be used in peripheral areas as long as the appropriate safeguards are implemented, although it may be difficult to distinguish between central and peripheral areas. Members of the group noted that the ICTY has admitted written statements in cases of witness intimidation.

The group suggested using alternative techniques, rather than the physical presence of the witness, e.g. a video link. This could be implemented whereby the presence of the witness in the Courtroom is assimilated. Some witnesses are critical to the case and there should be a margin of deference to appropriate forms of evidence. It may be necessary for the witness to be present. This distinguishes between categories of witness and their role in and contribution to proceedings. A suggestion was made for multiple Judges to be used according to the different methods of giving evidence. For example, one Judge to oversee witnesses and another Judge to review recorded statements, however the group stressed that it is appropriate to have a separate bench.

The core issues that were discussed regarding the pre-trial and trial issues are the reconsideration of order and evidence at trial. On the latter it was noted that:

* Imaginative use of methods and options for giving evidence should be adopted;
* Critical witnesses must be called to be present in Court;
* The group were reticent to permit the hearing of evidence where witnesses are in abstentia;
* Two schools of thought emerged in the group on the subject of written statements.

A short discussion followed on the merits of using In-Depth Analysis Charts (IDACs). It was felt that although the principle behind IDACs is a good one, their current format ought to be amended.

**3.1 Paper 3 –*Victim Participation, appeals and interim release in ICC proceedings.***

3.1.1 Victim Participation

The third paper maintained that the Court has turned a corner on the subject of the scope of participation of victims in proceedings and whether victims qualify as parties. It is clearer today that victims are not equal to parties except in reparation procedures and have no right to appeal other than in reparation orders.

The third paper considered victim participation to be a success but highlighted that it can be fair and expeditious conduct of the proceedings if not properly handled. Procedural complications exist and the Court is experimenting with ways of optimising the system. In *Gbagbo* a ‘partly collective’ system was developed where individual applications were made but, information relating to crimes and other common elements were recorded in a collective form. This is an expeditious way of conducting proceedings, but the problem lies with the lack of cut-off date for applications. The ICC is the only Court with a ‘rolling system’ of applications which is an ineffective procedure as the Chamber and parties are continually distracted from critical issues at trial and forced to devote time and resources to considering new applications. The paper suggested that this procedure should no longer be implemented. There was a strong risk of political considerations pushing trials in one direction or another. Parties may have an interest in fabricating large numbers of victims in order to influence or disrupt proceedings. There must be no disturbances during the trial.

The *Kenya* case was a drastic departure from case-law on victim participation and establishes a new dual system of ‘class participation without application’ in the hands of common legal representatives and a system of individual applications to express views and concerns in person to the chamber. However, it was felt that this dual system of victim participation lacks clarity with regard to the compatibility of this model with the Statute and the RPE and its practical functioning.

3.1.2 Reparations

In the *Lubanga* case, the first decision on reparation principles was delivered. However, the judiciary was not willing to develop principles outside of the framework of cases brought before them. The paper questioned whether the Trial Chamber made full use of the trial record to facilitate the reparations process. For example, in *Lubanga* no specific findings or reparations were made in the judgment. The paper suggested that a definitive judgment would have been more effective as there is now an assumption that the reparations process will be led by the Trust Fund for Victims who will have to look into the judgment to ascertain the most critical facts in order to make reparation orders.

3.1.3 Appeals

The paper noted that leave to appeal in the initial stages of the Court’s existence was unsatisfactory due to the overly restrictive approach to the requirements of ART. 82(1)(d) by PTCs. This adversely affected the functioning of the Court by prolonging the uncertainty of whether victims had the right to participate at the investigation stage.

Even if the current process is working more efficiently, there are still concerns whether it is still adequate to protect the rights of parties and advance proceedings. To this end, the paper suggested that the appeals system is still wholly unsatisfactory and should be amended. In particular, the paper affirmed that there is no doubt in the quality and importance of decisions of the Appeals Chamber but improvement of case management could be achieved in terms of case management. An easy change would be to abandon the system of rotating Judges for a more stable process with a presiding Judge for a reasonable period. The length of time for the Chamber to make a decision has discouraged lower Chambers from certifying matters for appeal.

The paper suggested that the manner in which the Chamber regulates victim participation in interlocutory appeals could be revisited. Victims granted participant status must re-apply for this on appeal and demonstrate that underlying issues affect their ‘personal interests’. This requires additional submissions and responses before the Chamber as well as a decision.

**3.2 Discussion**

3.2.1 ICC Experience of Victim Participation

Victim participation was discussed by the group in the context of two cases; *Lubanga* and the Kenya decision. The participation of victims in the *Lubanga* case proved to be valuable, despite concerns that their involvement would slow proceedings. The contribution made by the victims was concise, helpful and added to the witness statement. In contrast, it was felt that the Kenya decision devalues victims. In *Lubanga,* it was properly recognised that there is a threshold for participation but this was undermined in the Kenya case. The distinction between the recognition of victims in the *Lubanga* case in comparison to the Kenya case was queried. It was noted that the most important element of victim participation is that they are recognised. However, this recognition must be distinguished from any economic considerations, especially as the ICC does not have the funds to contribute to reparations. This key distinction was made in *Lubanga.* The Kenya decision does not place as much emphasis on recognising victims and subsequently devalues their involvement.

3.2.2 Impact of Victim Participation on Procedure

The group maintained that the main issue to consider when moving forward is how to deal with multiple applications. The principal concern is how the Court would manage thousands of victim applications, in particular with regards to how realistic it will be to provide legal representation. In real terms, where there are multiple applications, they must be considered to be a class action; although this would lead to a departure from Rule 89. One way of limiting the number of victims participating is to impose a deadline for victim applications however this may have implications on how fair the process is and the expectations of the victims to be able to participate.

Where victims are to participate, the group outlined a number of procedural considerations that must be clarified in the first instance:

* What level of detail should the victim screening include? Can it be individualised?
* Could the screening process be outsourced to a specially appointed counsel to decide on who is a victim? If an organisation, perhaps an NGO was willing to do it, it would reduce the Court’s workload.
* Who is to decide on the process, Chambers, the OTP or the Registry?
* At what stage of the proceedings will this be carried out?
* What deadlines are to be imposed to ensure effective case management? For example, if the confirmation stage was used to determine the participation of victims, where the situation is clear, then it could impact on the contours of the case.

The case of *Lubanga* was used as an example and the experiences of victim participation in this case were drawn upon to determine how to better implement the involvement of victims.

The current mechanism by which witnesses are selected is managed by the Victim Participation and Reparations Section which screened the victims by placing all the victim statements into a logical order. Outsourcing this task to an external provider would lead to increased costs. Once the victims have been screened, the final decision on who should participate in the trial should ultimately be made by the Judges.

The *Lubanga* case implemented a cut-off point for the screening of witnesses, which proved to be effective. The group considered the process to be more effective where victims are managed as a class and allows for multiple applications. The group agreed that there must be a cut-off point for the participation of victims; which should be during pre-trial stage prior to the beginning of the trial.

The SGG working group has conducted experiments into victim participation and has noted that under resourcing has led to the duplication of victims’ forms and details. Again, clarification of the judicial process would enable victim participation to be more clearly categorised and defined.

3.2.2 Victim Reparation

Where victim participation is permitted, the group maintained that it is also important to emphasise that there might not be any possibility of reparation. The recognition of this will minimise any lack of certainty, as experienced in *Lubanga,* whereit was unclear where reparations should be directed in the event of a conviction. It was noted that *Lubanga* should have included an independent reparations decision. It was observed that in *Lubanga* most of those who gave evidence were disbelieved and those making applications to the trust fund were not present. For example, the lack of certainty around the reparations to an amorphous group of child soldiers could have been resolved by the judiciary in the *Lubanga* case. It would have in fact been an appropriate moment for the judiciary to have outlined clearer direction as to where reparations should go: a roadmap for future reparations. It was noted that any future endorsement of proposals for collective reparation should also consider the more complex aspect of multiple single reparations.

The role of freezing of the Accused’s assets was also discussed. It was noted that in the Case of *Bemba*, the ICC has been quite successful in freezing some of his assets which could eventually be used for reparations. However, it was also noted that most other Accused have been declared indigent.

3.2.3 The Role of Victims

The group maintained that the provision of reparations and the participation of victims is central to the legitimacy of the Court. Therefore, the importance of clarifying and ensuring that there is a concrete approach for future victims is central. It is not sufficient to decide on matters of participation on a case by case basis.

The importance to be attached to victim recognition was qualified by the consideration that some victims can be unreliable and that errors will be made in attempts at large-scale recognition. This will not be a positive development for reconciliation. Participation requires greater involvement which will subsequently impose a greater administrative burden. It was also noted that there is no reporting mechanism for victims.

With regards to lessons learned from the *Lubanga* case, reflection was made upon the large amount of evidence that was not necessarily relevant to the most pertinent issues and that greater judicial intervention at the time would have led to proceedings being shorter. To avoid this occurring in future cases, the group suggested that there must be an emphasis on funding for advocacy training to ensure the ability to focus witnesses, particularly when there are language difficulties. It was noted that it is very difficult to formulate a series of questions using an interpreter when Counsel must often ask questions prior to receiving an answer to the previous question. In addition to this, the OTP should ensure that the witnesses are questions by experienced senior prosecutors.