

**Informal expert paper:**

**Measures available to the International Criminal Court  
to reduce the length of proceedings**

**Contents**

I.	Introduction .....	2
II.	Lengthy international trials.....	3
III.	General observations .....	3
	Some objective factors affecting the length of trials in ICC.....	3
	Experiences of the ad hoc Tribunals.....	4
IV.	Investigation stage .....	4
	Investigative strategy.....	4
	Principle of objectivity .....	5
	Investigations.....	6
	Seizure of documents .....	6
	Charging policy .....	7
V.	Pre-trial and trial preparation stage.....	8
	Judicial control over the preparations for confirmation of charges .....	8
	Confirmation hearing.....	8
	Communication between the parties.....	8
	Preparatory measures to expedite the proceedings .....	9
	Disclosure.....	9
	Defence disclosure .....	9
	Availability of the dossier to the judges .....	10
	Motions and interlocutory appeals .....	10
	Change of legal counsel.....	11
VI.	Trial .....	11
	Concentrated trials.....	11
	Time limits for the presentation of a case at trial .....	12
	Form of adjudication .....	12
	Judicial Regulations.....	13
	Admissibility of evidence.....	13
	Evidence by witness testimony.....	14
	Written statements and testimonies in lieu of oral testimony .....	14
	Overview witnesses.....	15
	Some documentary evidence.....	16
	Judicial Notice.....	16
	Unsworn statements of the accused.....	16
VII.	Victims' participation.....	16
VIII.	Reparations proceedings.....	17

## I. Introduction

1. Trials before the *ad hoc* Tribunals for the former Yugoslavia and Rwanda have proved to last long and involve considerable budgetary implications.
  2. The ICC will benefit from the experience of the Tribunals. In some respects, however, the ICC's procedural framework deviates from the law of the Tribunals. It is thus likely that the ICC's and the Tribunal's procedural practice will not be identical.
  3. In order to help face up to this problem, a consultative process among a small group of experts was initiated by the Director of Common Services of the ICC in October 2002. The group was invited to present the high officials of the Court, when they take up their work in March 2003, some reflection on measures available to the Court to reduce the length of trials as well as pre-trial and trial preparation stage.
  4. The members of the group who have prepared this informal paper are as follows:
    - Former Judge *Håkan Friman*,  
Swedish Ministry of Justice, formerly member of the Swedish ICC delegation;
    - Mr. *Fabricio Guariglia*,  
Appeals Counsel in the Office of the Prosecutor of the ICTY; formerly member of the Argentine ICC delegation;
    - Dr. *Claus Kress*,  
University of Cologne, formerly member of the German ICC delegation;
    - Professor *John Rason Spencer*,  
Cambridge University; an expert on criminal procedures and comparative law;
    - Dr. *Vladimir Tochilovsky*,  
Trial Attorney in the Office of the Prosecutor of the ICTY, formerly representative of the ICTY to the Preparatory Commission for the ICC.
  5. This paper also incorporates comments on an earlier draft paper prepared by the members of the group given by the following experts:
    - Mr. *Tor Aksel Busch*,  
Director General of Public Prosecutions, Norway;
    - Professor *Antonio Cassese*,  
Professor at the University of Florence, former President of the ICTY;
    - Mr. *Christopher Keith Hall*,  
Head, International Justice Programme, Amnesty International;
    - Mr. *Russell Hayman*,  
Latham & Watkins, Los Angeles, former Defence Counsel for General Tihomir Blaškić before Trial Chamber I, ICTY;
    - Mr. *Geoffrey Nice QC*,  
Principal Trial Attorney, ICTY;
    - Professor *Thomas Weigend*,  
University of Cologne, expert in international criminal law and procedure.
- The following experts were invited to comment, but at the time of the finalisation of this paper, comments on the draft paper had not yet been received:
- Judge *Maureen Harding-Clark*\*;

---

\* Judge Maureen Harding-Clark was elected Judge at the International Criminal Court after she had been contacted for comments. She has been in kind communication with the co-ordinator of the project.

Professor *Mireille Delmas-Marty*,  
University of Paris I (Panthéon-Sorbonne);  
  
Judge *David Hunt*,  
Judge of the Appeals Chamber of the ICTY;  
  
Former Judge *Patricia Wald*,  
Former Judge at the ICTY.

## II. Lengthy international trials

6. There are, of course, many reasons in favour of expeditious trials. Quite apart from the general interest in providing quick reactions to crimes, the passage of time may result in evidence (both incriminatory and exculpatory) getting lost. Thus, public confidence as well as the rights of the accused and of victims could be affected by lengthy proceedings. For the accused, to be tried without undue delay is a matter of right both in the Statute (Article 67(1)(c)) as well as in all major international and regional human rights instruments. He or she should not for an unduly long period remain uncertain about his fate, while at the same time having to face various disabilities normally associated with criminal proceedings. The adverse effects are particularly pertinent if the accused is deprived of liberty or constrained by other restrictions. The Prosecutor is under an obligation to fully respect the rights of persons arising under the Statute (Article 54(1)(c)) and the Chambers are required, *inter alia*, to ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused (Article 64(2)). Consequently, providing for expeditious trials – both in the statutory regime and in practice – is of the utmost importance.

7. For an assessment of whether trials are adequately expeditious, some kind of objective yardstick is necessary. However, it is scarcely feasible to find one, since every trial is different and therefore must be assessed separately. While five years could be acceptable in one case, two years could be considered unduly lengthy in another. We have not attempted to establish any specific yardstick over and above a general conclusion that international criminal trials can reasonably be expected to last longer than most national trials. Thus, a comparison with what is considered acceptable in a national context is only of limited use as guidance. Irrespective of this, however, there is a need to ensure that the procedures are framed and applied in a way that enhances expeditiousness to the greatest extent possible without prejudicing or conflicting with other fundamental interests enshrined in the Statute.

## III. General observations

### *Some objective factors affecting the length of trials in ICC*

8. Due to the fact that international crimes typically involve atrocities committed on a massive scale, international criminal justice has to cope with cases which are more extensive and complex than most national cases. In particular, hundreds of witnesses will have to be interpreted and heard and volumes of documentary evidence will have to be translated and evaluated. The complexity will be multiplied whenever more than one conflict fall to be addressed concurrently.

9. Various differences that exist between the procedural law of the two Tribunals and the ICC may well affect the length of the proceedings before the ICC. Amongst those differences are, in particular, the extensive procedural rights to challenge the admissibility of the proceedings under the complementarity principle (Articles 17 to 19), the scope of investigation (Article 54(1)) and 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).

10. The regime on the disqualification of judges (Article 41(2), Rule 34(1)) in combination with the rather rigid regime on the assignment of judges to Divisions (Article 39(3/4)) reduces the options available to the President to speed up proceedings. Additionally, there is a strict requirement for the presence of all judges of the Chamber at trial (Article 74(1)).

11. Given all these factors, it may take years to complete some trials if the cases before the Court are adjudicated without efficient procedures in place. Indeed, such lengthy trials are not unknown even in national legal systems where recent cases related to war crimes committed in World War II involved many of the same sort of practical issues as trials in the *ad hoc* Tribunals, complicated by the fact that the events took place decades ago.

#### *Experiences of the ad hoc Tribunals*

12. In the experiences of the Tribunals, especially at the initial phase of their functioning, certain procedures have proved to be particularly lengthy and cumbersome: long investigations, extensive amendments of the charges after confirmation of the indictment, a large number of preliminary and pre-trial motions, disclosure issues, questions of exclusion of evidence notwithstanding a generally liberal regime based on a presumption that evidence should rather be weighed at trial than tested for admissibility, and long trials with extensive indictments and evidence. One basic reason underlying all this, and thus the delays, has been uncertainty as to how the procedural regime should operate. Another cause of delays – and concerns relating to fairness and accuracy – is the extensive need for and reliance upon translations and interpretations. Both uncertainty and language problems will also occur in the ICC process and should, to the extent possible, be remedied.

13. Various measures have been taken to expedite trials, such as measures to simplify cases (to reduce the number of offences, to reduce the number of witnesses, and to encourage co-operation) and to monitor the parties and the proceedings (to counteract dilatory tactics and non-cooperation and enhancing judicial control). Procedural measures of this kind have been taken into account when drafting this paper.

14. However, other practical limitations which affect the length of the trial, particularly in respect of human and other resources (e.g. the number of judges, court rooms, technical equipment, court management systems, research tools, travel budgets etc.), fall beyond the scope of the paper. Organisational issues, such as the coordination between different organs of the court, have only been addressed insofar they are directly related to the issues at hand.

15. One measure that is available to the Tribunals but has not been used in practice is the possibility for a Chamber to exercise its functions at a place other than the seat of the Tribunal. In some cases the Court may also sit elsewhere than at its seat (Articles 3(3) and 62, and Rule 100) and it should be explored whether this could provide for speedier proceedings (and other positive effects) due to, for example, closer proximity to witnesses and the scenes of crimes.

## **IV. Investigation stage**

### *Investigative strategy*

16. Given the limited investigative and prosecutorial resources of the Office of the Prosecutor (OTP) and the broad scope of investigations under Article 54(1)(a), the Prosecutor may not be able to investigate each and every incident arising from a single situation or to prosecute every perpetrator. It is essential to review each potential new investigation by a set of rational standards that will allow the effective marshalling of OTP resources.

17. Under Article 53(1)(c), the Prosecutor may decide not to initiate an investigation where the latter would not serve the interests of justice. Under Article 53(3)(b) and in accordance with Rules 109 and 110, the Pre-Trial Chamber may, on its own initiative, review such a decision. This review power may create problems because the drafters of the Statute and the Rules have left the term “*interests of justice*” more or less undefined and have failed to define the respective fields of competences of Prosecutor and Pre-Trial Chamber with any real precision.

18. It is highly desirable to specify the general criteria guiding the selection of cases at the outset of the Court’s operation. A clear pronouncement of the prosecution policy, given in the abstract, could prevent the public from harbouring unrealistic expectations and also avoid any appearance of political bias in particular cases. An early declaration of the prosecution policy could also help preventing a backlog of non-priority suspects.

19. It is worth considering a cooperative approach between the Prosecutor and all the Judges, with a view towards an early agreement on general standards for prosecution. This appears the preferable approach compared

to leaving the task of discussing this matter with the Prosecutor to the President and the Vice-Presidents under Article 38(4) of the Statute.

20. With the length of trials in mind, it is important that the agreed standards set out clear priorities aimed at limiting the number of cases before the Court. This could be achieved by, *inter alia*, a main focus on perpetrators in leadership positions (political, military, police, etc.) and suspects related to crimes of a particular gravity. The lower the threshold, the higher the number of suspects that will have to be investigated and, thus, the greater the effects on the Court's limited resources. It should be borne in mind that material from ICC investigations related to other potential perpetrators can be made available for domestic investigations and prosecutions.

21. The translation of the abstract standards of the prosecution policy into the investigative strategy in concrete situations should be a matter for the Prosecutor to decide under Article 53(1)(c). If the judges decide to exercise a parallel power within the review mechanism under Article 53(3)(b), their impartiality could be perceived as compromised. Additionally, multiplicity of prosecutorial policies, stemming from different organs of the Court, could be self-defeating and lead to paralysis. The Pre-Trial Chamber should thus avoid excessive interference with the concrete investigative policy of the Prosecutor and should instead confine its task to ensure that this policy does not obviously fall outside the abstract standards and does not obviously suffer from inconsistencies.

#### *Principle of objectivity*

22. Pursuant to Article 54(1)(a), the Prosecutor has an obligation to investigate both incriminating and exonerating circumstances in order to assess whether there is criminal responsibility under the Statute. Although it introduces a significant burden for the prosecution, such an objective investigation does also have a potential for reducing the length of the trials.

23. From the outset, the Prosecutor may consider giving guidance as to how this principle of objectivity ought to operate. Properly operated, an objective investigation with some type of defence involvement has a potential for narrowing the scope of the prosecution case, reducing the number of charges and, subsequently, the length of the trial. Instead of being limited to the choice between dropping or amending charges later in the proceedings, this could be done also before any charges are filed. Hence, the Prosecutor and the suspect could have a common interest in communicating fairly early in the process.

24. Coordination of the defence investigation with the investigation conducted by the Prosecutor may, to some extent, reduce the contrast between "prosecution and defence cases" prepared at the investigation stage. This could, in turn, contribute to a less contradictory – and thus less time-consuming – presentation of the evidence at the trial stage.

25. Perhaps such coordination could also encourage agreements as to evidence under Article 69 and, in some cases, even a "common proposal" under Article 65(5).

26. The informed participation of the defence might, in appropriate cases, justify the "transport" of evidence taken at the investigative stage to the trial stage in accordance with Rule 68(a) (see also Rule 112(4)). The coordination envisaged here would involve the presence of both the prosecution and the suspect/defence during certain investigative measures, the Prosecutor's compliance with requests by the suspect/defence to take investigative measures, and the seeking of the Prosecutor's view in cases envisaged in Rule 116(2).

27. In this context, thought might also be given to granting the suspect/defence the opportunity to inspect the investigative dossier or part of it before the disclosure stage, where this does not endanger the success of the investigation, does not concern confidential information and is not outweighed by interests of witnesses and victims as protected by Article 68 of the Statute. While such access to information is not provided for in the Statute or the Rules, it may assist in obtaining cooperation and shortening the time for preparations by the parties. Whether to grant such access or not will accordingly have to be decided by the Prosecutor on a case-by-case basis and a pre-established, principled approach would assist such determinations.

28. It should be noted that the question whether prosecution and defence activities ought to be coordinated is an open question. It is clear that such coordination is possible. In particular, the defence may request the Prosecutor to take certain investigative measures. In deciding upon such a request, the Prosecutor will have to duly consider his or her obligation under Article 54(1)(a) to investigate exonerating circumstances equally. On the other hand, the Defence, in principle, retains the right to adopt a go-alone investigative strategy. In particular,

the Defence cannot be required to rely exclusively on the investigative activities of the Prosecutor, despite its necessary objectiveness. There are, however, two possible limitations of the Defence's freedom of action. First, the Pre-Trial Chamber *may* seek the views of the Prosecutor before complying with a Defence request under Article 57(3)(b). Hearing the Prosecutor at this point may save time, in particular where the Prosecutor has already conducted investigations in the same direction. At the same time, however, it would give the Prosecution a certain insight in the Defence strategy. Secondly, the Defence will have to involve the Prosecution wherever it wishes to make use of the "transport-function" of Rule 68(1).

29. However, it must also be noted that in many situations, there will no "defence" in a position to intervene at the early stage of the investigation, either because no individual has yet been signalled as suspect or accused, or because the person in question has been neither arrested nor summoned under Article 58 of the Statute. This will leave the determination of what may constitute "exonerating circumstances" entirely in the hands of the Prosecution. Accordingly, it is desirable that the Prosecutor should explain, as part of his or her prosecutorial policy, how he or she intends to approach the matter and how he or she considers that the principle should operate in practice.

30. Apparently the principle of objectivity is not confined to the investigation only but also applies throughout the proceedings. The Prosecutor is, for example, entitled under Articles 81(1)(b) and 84(1), to appeal a judgment and seek revision on behalf of a convicted person. Consequently, the principle of objectivity will also have an impact on when prosecution disclosure should take place, and, in particular, may extend the prosecutorial duty of disclosure of exculpatory information to the appellate stage (as happens in the ICTY pursuant to the Appeals Chamber's settled jurisprudence).

#### *Investigations*

31. Lawyers with trial experience should be involved in investigations from the very beginning.

32. A focused and trial oriented investigation, aided by a clear prosecution strategy, would limit the scope of the investigation. While there may be other reasons for more extensive historical research into the conflict in question, research of this type can be very time-consuming and expensive.

33. As a general rule, in order to reduce post-indictment investigation, a case should be trial-ready by the time when the charges have been confirmed. In particular, to the extent possible, the Prosecution should prepare the materials intended for use at trial, for disclosure, the list of potential witnesses and exhibits for the trial, and a pre-trial brief.

34. Although the ICC Statute entrusts the Prosecutor with primary responsibility for the conduct of the investigation, the Pre-Trial Chambers have also been given a role in the investigative process.

35. By virtue of their powers under Article 56(3) and 57(3)(b), the Pre-Trial Chambers may contribute further to less time-consuming trials. In addition, it should be explored whether the powers under Article 56(1) and (2) and Rules 47(2), 68, 86 and 112(5) can be interpreted broadly enough to significantly shorten the presentation of evidence at the trial stage.

36. Complementing the Prosecutor's obligation to conduct objective investigations (Article 54(1)(a)), the Pre-Trial Chamber may, at the request of the suspect, order specific investigative measures to be taken (Article 57(3)(b) and Rule 116). If used properly, this function may serve to enhance equality of arms and foster adherence to the statutory requirement of objective investigations and to promote coordination between "prosecution and defence cases". Even the mere existence of this mechanism could serve these objectives (which is the experience at least in some national jurisdictions with a similar scheme). There is, however, a risk that the mechanism could be misused, which could give rise to long and unnecessary delays. Hence the Chamber ought to be vigilant so that misuse is prevented.

#### *Seizure of documents*

37. Under Rule 77, the Prosecutor has an obligation to disclose to the defence the material that is *in his possession or control*. As the *ad hoc* Tribunals' experience shows, there may be situations when an enormous amount of domestic records (archives) will have to be seized by the prosecution in the various domestic archives.

38. Such massive seizures may be necessary because access to relevant domestic records in the territory of the conflict will be too limited in time (due to the hostile environment) to go through a given archive to identify relevant evidence. If left in the State's territory, the records may be meddled with and access may later be severely restricted.

39. Because of these factors, the selection of the relevant portions of the records (as against the initial seizure of evidence) will be done on the broadest relevance criteria (relevant time period and territory). If all these seized domestic archives are brought into the prosecution's custody, this will then activate in the prosecution's burden of disclosure. Indeed, processing, translation and disclosure of such a quantity of materials inevitably requires immense resources, and causes delays and complains (sometimes frivolous) from the defence.

40. In order to avoid this situation, once the selected portions of the given archive are brought to the seat of the Court to ensure their preservation, the Prosecutor could have them placed in a common archive under the Registry's supervision. This would ensure that the material is equally accessible both for the prosecution and defence. If there are legitimate confidentiality concerns, the Prosecution retains at all times the ability not to choose this procedure and to keep the material solely in its possession, in which case the normal disclosure duties would be triggered.

#### *Charging policy*

41. The charging policy to be adopted by the Prosecutor, with later amendments as ICC jurisprudence develops, will have an impact on the length of trials. Every count that requires proof of additional elements will prolong the proceedings. Hence an excessive charging policy will lead on to lengthy trials and extensive evidence.

42. A major reason for an extensive charging policy is legal uncertainty concerning the crimes and how they relate to each other as well as about the fundamental approach the judges will take regarding classification of the charges as one crime or another. These are complex matters where different legal traditions offer different approaches and which the Court will have to resolve. While the principle of *jura novit curia*, which allows the judges to freely classify the facts of a charge as a crime, may provide for fewer counts in the indictment (and a lesser risk of acquittals for mainly "technical" reasons), other considerations might be thought to pull in the opposite direction. If the Chamber allows itself to re-classify offences from charges in the indictment to residual or "lesser-included" charges, a power that the Statute does not preclude, charges can be avoided.

43. Further, it is clear that uncertainty tends to result in extensive charges. Uncertainty as to the relevant criteria for criminal liability may also result in unfocused investigations. It is therefore advisable that these fundamental procedural issues are settled as early as possible by the Court.

44. The charging practice and the form of the charges are of course also important as the framework of the trial and to ensure the accused person has an opportunity to prepare for and answer to the case. Uncertainties will mean longer time for preparations (for both parties) and give rise to challenges to the relevant Chamber. OTP Guidelines issued by the Prosecutor on criteria for opening new individual investigations and the form of the charging document, which can then be amended as ICC's own jurisprudence develops, may save both the Court's time and its resources.

45. Another question is whether the Prosecutor could and should avoid the charging of offences that are clearly of relatively minor importance, such as war crimes against property interests where there is a strong case of, for example, deliberate targeting of civilians on a massive scale. This is of course a policy question and the answer does, to an extent, depend upon how the legal issues mentioned above are settled.

46. One may also ask how many incidents that should be included in an indictment in relation to a particular crime – should, for example, a crime against humanity during a certain period cover all 50 villages where various incidents took place or should only some of them be selected and proved? This is clearly another policy issue, where a more limited selection would reduce the length of the proceedings (from investigation to judgment), but other reasons may speak in favour of more extensive charges, such as a wish to expose the totality of the crimes committed and the degree of victimisation, whereby both legal reasons (e.g. requirements of scale or intensity or for sentencing purposes) and policy considerations will come into play. A complicating factor could be that a selection of incidents may affect the possibility of awarding reparations to victims (Article 75). In this regard, it might also be worth exploring whether reparations could be awarded not only to persons affected by incidents that were subject to trial (and conviction) but also, for example, to persons affected by other

incidents related to such incidents in time and space. This would not be precluded by the very broad definition of "victims" in Rule 85.

## V. Pre-trial and trial preparation stage

### *Judicial control over the preparations for confirmation of charges*

47. Article 61 sets out measures that are to be taken before the hearing for confirmation of charges and Rule 121 envisages relatively strict judicial control over these preparations, including setting a date for the hearing at the first appearance of the suspect at the Court and time limits for disclosure requirements and motions. Although the date of the hearing may be postponed, this scheme is intended to provide for expeditious proceedings.

### *Confirmation hearing*

48. Pursuant to Article 61, the Pre-Trial Chamber must hold a hearing to confirm the charges in the presence of the Prosecutor and, normally, the person charged, as well as his or her counsel.

49. Thorough scrutiny of the charges brought by the Prosecution, including, if necessary, the rejection of insufficiently substantiated charges could substantially contribute to more streamlined, and consequently less time consuming trial proceedings. There is, however, a risk of turning the confirmation hearing into a quasi trial.

50. To avoid that risk, the Prosecutor should, as a general rule, rely on documentary or summary evidence instead of calling witnesses expected to testify at the trial (Article 61(5)). Where the defence chooses to call witnesses, it will be important to bear in mind that the scope of the confirmation hearing is limited by its purpose: to determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. The risk of extensive live testimony at this stage should not be overestimated, however, since the defence may be reluctant to reveal evidence and to produce oral testimony on oath which could later be used at trial (or at least for the purpose of cross-examination). In addition, the principle of objectivity may lead to more limited charges due to exonerating evidence being already exposed to the Prosecutor during the investigation. But defence evidence in live form may have the effect of making the Prosecutor also inclined to present live evidence for the indictment ("just to be sure"), with the result that more extensive evidence would be submitted than is really needed for the purpose of confirmation.

51. If however witnesses do have to testify in person, thought should be given to the possibility of using, if necessary, the transcripts of their testimonies at trial (cf. Rule 68(a)) instead of calling the witnesses to appear again at trial. This may provide for a more expeditious trial. Repeated testimonies may also affect the quality of the evidence and have negative effects for the victims and witnesses.

### *Communication between the parties*

52. A Chamber or a judge, to whom the issues have been referred by the Chamber in accordance with Article 64(4), should co-ordinate communication between the parties during the trial preparation phase to ensure that the proceedings are not unduly delayed and take measures necessary to prepare the case for a fair and expeditious trial. The parties should adhere to the deadlines for various preparatory steps (Rule 101).

53. Regular meetings and various conferences for the preparations of the case (e.g. status conferences, Rule 132) should be held with the parties to observe the progress in trial preparation. Although senior legal officers of the Chambers cannot assume judicial functions, they may play a role in bringing the parties together to discuss matters that are outstanding between them.

54. Parties should be encouraged to consider agreements on the facts of the case as envisaged in Rule 69. Such agreements, although not binding on the Chamber, would often mean that evidence need not be provided regarding the facts in question.

55. Coordination between the parties may be conducted by a single judge designated by the Chamber in accordance with Article 57(2)(b). Coordinated and (single) judge-led communication between the parties has, in the experience of the *ad hoc* Tribunals, proved to be a valuable resource and result effective method to advance cases for trial.

*Preparatory measures to expedite the proceedings*

56. The judges may in accordance with Article 64(5) and Rule 136 direct that there be joinder or severance in respect of charges against more than one accused. Indeed, a *joinder* may save the time and resources of the Court and spare victims and witnesses from reappearing at multiple trials.

57. The judges should thoroughly control the presentation of evidence in order to avoid redundant or repetitive evidence. If the Chamber or a judge considers that an excessive number of witnesses are going to be called to prove the same facts, the party may be called upon to shorten the estimated length of the examination for particular witnesses, or reduce the number of witnesses.

*Disclosure*

58. The Rules provide for a system of mutual inspection, whereby both parties may inspect material in the opposing party's possession that is intended to be used at trial (and, in the defence case, information in the Prosecution's possession that is "material to the preparation of the defence", Rules 77 and 78). This provides for a very fertile ground to promote co-ordination and co-operation between the parties and, if properly used, should reduce the likelihood of subsequent claims of lack of disclosure.

59. Articles 61(3) and 67(2) as well as Rules 76, 77, 83 and 84 provide for the Prosecutor's disclosure obligations at the pre-trial and trial preparation stage. According to Article 64(3), a Chamber shall provide for disclosure of documents or information, not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

60. It is envisaged in Rule 121(2) that the bulk of disclosure will take place before the confirmation of charges. This will contribute to trial-readiness of the case by the time the charges have been submitted for confirmation. It also corresponds to practical operation of the principle of objectivity, which presupposes that disclosure should take place before the decision on the charges in order to allow the suspect to request further investigative measures to be taken by the Prosecutor on his/her behalf.

61. To comply with its disclosure obligations, the Prosecution must be aware of what information and evidence has been collected by OTP. To this end, the OTP investigative and legal staff must adhere to the OTP internal guidelines governing collection and handling evidence.

62. By taking the Prosecutor's disclosure obligations into account at early stages, and by instituting some way of noting or recording potentially discoverable evidence or information as it is found, the burdens of later providing disclosure at the appropriate time could be lightened.

*Defence disclosure*

63. The defence disclosure provided for in Rules 78-80 and 121 should certainly contribute to focusing and expedition of the trial.

64. Defence disclosure is an issue where different legal traditions offer substantively different answers. Early and comprehensive defence disclosure would normally reduce the length of the trial by providing for less of a "contest" at trial and allowing the Chamber better opportunity to plan it. This would be fully in line with a more coordinated approach by both parties as described earlier. While not incompatible with a more adversarial trial, a general defence disclosure before the end of the "prosecution case" would be seen by some as "unfair", i.e. the defence should not be required to say anything until the prosecution's evidence has been examined (at trial).

65. The Rules requires pre-trial disclosure of evidence that the defence wants to present at the hearing on confirmation of charges (Rule 121(6)) and disclosure of trial evidence regarding an alibi or a ground for excluding criminal responsibility "sufficiently in advance to enable the Prosecutor to prepare and to respond" (Rules 79 and 80). The Rules do not establish exactly when defence disclosure shall take place and, thus, the Court seems free to decide that this should be done even before the commencement of the trial. This is a policy decision regarding which there might be good reasons for differentiating between different situations, e.g. the level of co-ordination between the prosecution and the defence "cases".

66. It should also be noted that failure to give notice in advance does not limit the defendant's right to raise matters of alibi or grounds for excluding criminal responsibility and to present evidence. Hence, even with strict obligations of disclosure in advance, unwelcome postponements may occur. This might be an argument against

requiring very early defence disclosure and also for focussing, to the extent possible, on promoting a more coordinated approach at the investigation stage.

#### *Availability of the dossier to the judges*

67. The question of what the Trial Chamber should see prior to Trial provoked widely divergent and strongly held views during the negotiations. This controversy has not been resolved in the Statute or the Rules. Rule 121.10 envisages that a full record of pre-trial proceedings will be compiled. This record will be transferred to the Trial Chamber pursuant to Rule 130 and should be maintained by the Registrar in accordance with Rule 131(1). The Rules are silent on two points: first, as to whether the record is to be ‘up-dated’ with documents disclosed after confirmation of the charges and prior to the trial, and second, as to whether the Trial Chamber may in fact have access to the record prior to trial. Rule 131(2) does not explicitly mention the Trial Chamber as one of those who may consult the record of the proceedings.

68. The main argument in favour of the Trial Chamber not seeing disclosed material before it hears a case is that, as arbiter of the facts whose decisions must be based squarely on evidence admitted at trial, the court should be as ‘untainted’ as possible. The judges should not even be seen to be influenced before hearing the evidence. In light of the fact that this view was strongly held by many delegations, it might help the ICC to receive the widest degree of support if the Trial Chamber refrains from inspecting an up-dated record of the proceedings before the Trial.

69. On the other hand, Article 64(3)(c) and (6)(d), and Article 69(3) give the Trial Chamber broad powers, both before and during trial, in relation to disclosure and the production of additional evidence. It may be argued that to effectively use such powers, the Trial Chamber must have a thorough understanding of a case. Perusal of an updated record of the proceedings could also contribute to more effective management of the trial, including for the examination of witnesses as permitted under Rule 140 or requesting additional evidence in accordance with Article 69(3). Finally, it may be said that the ICC judges are likely to be clearly aware of the risk of real or perceived bias, and thus able to guard against it.

70. In light of the openness of the normative framework and of the weighty policy arguments pro et contra, it might be worth considering not to resort to the controversial “dossier-approach” right from the beginning of the Court’s operation. This would not exclude considering the use of this option in case the other available measures turn out to be insufficient to keep the proceedings at an acceptable length and the Court believes that the practice would indeed assist in a more effective management of the case.

71. If a “dossier-approach” is chosen, there may be the risk of confusion as to the evidence presented by the parties and material from the dossier that is not evidence, in particular since “the entire proceedings” shall be taken into account by the Chamber in its adjudication (Article 74(2)). In this regard, as the *ad hoc* Tribunals’ experience shows, it might be necessary to have a court officer, assigned to the case, included into the Chamber’s trial team. Once assigned to the case, a court officer, whereas still institutionally under the Registry, will become a member of the Chamber’s trial team and work under the co-ordination of the Trial Chamber’s Senior Legal Advisor until the case is concluded. This will ensure that the records of what has been tendered and admitted into evidence are properly kept and communicated to the Judges.

72. In the cases where the crime base comprises various geographical areas, the documents and other written material intended to be tendered as evidence at trial can be organised on an area-by-area-basis and filed in advance with the Trial Chamber.

#### *Motions and interlocutory appeals*

73. Decision on motions should be given orally when the legal issue is not complicated. In appropriate cases, entirely written proceedings should be employed.

74. In some cases a Chamber could make a determination at the outset, in the abstract, on the preliminary legal issues that are suitable for judicial determination. The benefit of such an approach would be that if applicant does not succeed in relation to the legal issues, the relief sought in the motion must necessarily be refused without consideration of the factual issues. It may also be considered whether this should only take place when the parties agree or whether the Chamber should also assume a power to proceed this way on its own motion.

75. The Rules provide for joining a challenge to the jurisdiction of the Court, or the admissibility of the case or other motions, to a confirmation hearing or to the trial (Rules 19(2) and 122(6)). By dealing with more than one issue at the same time, efficiency in the proceedings could be gained. Rules 122 and 134 includes other means aimed at an early and consolidated disposal of motions. A Chamber may also consider applying other measures to enhance the efficacy in dealing with motions other than challenges to jurisdiction or admissibility, such as quick disposal of repeated motions without new facts or legal argument and time limits for the filing of certain motions.

76. A Chamber could also consider use of video or telephone conferences for hearings, when appropriate. This could be the case, for example, for presentation of arguments or other hearings where only counsel (and maybe legal representatives of victims) are to participate. This method could be a cost-saving measure, which could also prevent unnecessary postponements. It could also, when appropriate, be applied in order to avoid transporting a detained accused where, for example, security concerns or medical reasons made this undesirable.

77. Under Article 82 the right to bring an interlocutory appeal without the leave of the Chamber is limited to decisions with respect to jurisdiction or admissibility, granting or denying release of the person, and decisions of the Pre-Trial Chamber to act on its own initiative under Article 56(3). Other interlocutory appeals are subject to a system of leave to appeal. These appeals are limited to decisions that involve issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Such decisions may be appealed only if in the opinion of the Pre-Trial or Trial Chamber an immediate resolution by the Appeals Chamber may materially advance the proceedings.

78. In order to prevent a backlog of motions and interlocutory appeals the parties should be requested to first discuss a question in dispute before filing an appeal.

79. A Chamber should consider sanctions on counsel who raise frivolous motions. In particular, a Chamber may declare a motion frivolous with a recommendation to the Registrar not to pay fees to the counsel for work undertaken on such motions. To ensure proper regulation of and transparency in application of sanctions, the Judges may consider, together with the Registrar, adoption of relevant Regulations in accordance with Article 52. The Regulations would also contain references to the Code of Professional Conduct for counsel as it is envisaged in Rules 8 and 22(3).

80. It should also be explored how far an international "Bar Association" for the ICC could assist in developing good practices and preventing frivolous motions.

81. In order to make arguments by the parties more closely focused, the Court may issue a practice direction as to a standard format, page limits, etc. for applications, responses, and replies.

#### *Change of legal counsel*

82. Change of legal counsel for the suspect or accused can disrupt the proceedings and cause substantive delays. While respecting the rights relating to legal assistance as laid down in the Statute and the Rules, the regulations and practice relating to assignment (and discharge) of legal assistance should be developed so that change of counsel causes a minimum of disruption and delay. In this regard, it may be noted that the practice of appointing more than one counsel or retaining the replaced counsel during a transitional period has proved useful in the experience of the *ad hoc* Tribunals. Other methods should also be considered. A word of caution should be expressed in respect of the link between discharge of counsel and so-called "fee-splitting", e.g. a request by the accused to change a counsel that refuses such arrangements, as experienced by the *ad hoc* Tribunals and identified in a Report by the Secretary-General on the activities of the Office of Internal Oversight Services (A/55/759 of 1 February 2001).

## **VI. Trial**

#### *Concentrated trials*

83. In some national jurisdictions, a principle of concentration applies to criminal trials, meaning that the main hearing where the parties present their cases and evidence in principle must proceed with a minimum of interruption. This is generally seen as an efficient practice whereby repetitions as well as repeated recollection and

preparations by the judges and parties can be avoided. The principle is upheld with particularly strictness where the accused is deprived of liberty.

84. However, such practice does require adequate facilities and human resources (court rooms, judges and other staff, etc.) and exceptions are often necessary with respect to very long trials. Fragmented trials have also been the experience of the *ad hoc* Tribunals. While a certain degree of fragmentation of trials will almost certainly be inevitable in ICC as well, this should preferably be kept to a minimum. Awareness and planning may go a long way. A rigid formal scheme for adjournments will create unnecessary complications and be difficult to follow in practice. It should therefore be avoided, but the judges might want to consider concentrated trials as one priority (among others) when planning the court schedule.

#### *Time limits for the presentation of a case at trial*

85. Various means for simplifying and expediting the presentation of evidence at trial may be considered (see further below). One method that has been utilised in ICTY is to impose time limits for the parties' presentation of their respective cases. The main benefit is that the parties are forced to thoroughly consider the scope of their cases and the evidence to be submitted. The method provides for manageable cases that can be concluded within a reasonable and calculable time. The major draw-back, however, is that the shortening of the trial proceedings might result in incomplete or flawed descriptions of the events to the court by the prosecution. In order to avoid such negative results, this method may have to be combined with exceptions from the principle of best evidence.

#### *Form of adjudication*

86. The relationship between adversarial and inquisitorial principles for the trial proceedings is not entirely clear from the Statute and the Rules. Hence there is a need for policy decisions to be made by the Court. This is particularly true in respect of Article 64(8)(b) and Rule 140 which primarily leaves it to the presiding judge to give directions for the conduct of the proceedings. In doing so, the presiding judge should ensure that they are conducted in a fair and impartial manner.

87. By entrusting the trial procedures to the presiding judge, there is a risk that the trial will be shaped in fundamentally different ways in different cases. While this to an extent may be motivated by different circumstances, for example the degree of defence involvement at the investigation stage, exercise of very extensive discretion in deciding the trial procedures to be followed in the particular case will lead to uncertainty. This uncertainty will also spill over and have repercussions for the earlier phases of the proceedings. One important example is the effect that uncertainty regarding examination of witnesses may have on the strategies of and preparations by the parties. For the prosecution, problems of uncertainty will already begin when collecting evidence during the investigation. It thus seems highly advisable to compensate the lack of precision in the Statute and Rules with judicial regulations (practice directives).

88. In addition to this, the character of the trial proceedings may also affect the structure and staffing needs of the Office of the Prosecutor. Adversarial trial teams will normally involve more staff (senior trial attorneys, co-counsels, legal officers, case managers, trial support assistants, etc.) and, therefore, be more expensive. The same would also be true regarding defence teams.

89. But for a few principles (however important), the Court seems to be relatively free to choose and blend such procedures. Primarily, considerations regarding how fairness and impartiality as well as other interests and rights set forth in the Statute and Rules – such the role of the judges as active seekers of truth (e.g. Article 69(3)) and victims' participation in the proceedings in their own right (Article 68(3)) – are better served will play a dominant role in the determination. It could be argued, for instance, that the right of victims to participate in the proceedings would be easier to facilitate when the trial is conducted in a less adversarial form. On the other hand, submission and presentation of evidence appears primarily to be a task for the parties, which may be held in favour of more adversarial trial proceedings. Rule 140(2) includes some minimum requirements in respect of the questioning of witnesses.

90. It ought to be repeated, however, that the operation of objective investigations – in general or *in casu* – may motivate variations in the trial proceedings. The defence may have no – or only very limited – evidence to present in "its case" because of its involvement in the objective investigation. However, such coordination does not *per se* prevent the defence from presenting additional evidence. On the contrary, this is a right of the accused (Articles 67(1)(e) and 69(3)), which must be upheld irrespective of the character of the trial proceedings.

91. If, on the other hand, the defence chooses not to coordinate “its case” with the prosecution case and a more adversarial form of presentation of evidence is adopted, there may be a possibility, after presentation of the prosecution evidence, to “purge” the case, dropping those charges and incidents that have not been sufficiently substantiated by the evidence (the so-called, “no case to answer” test in common law jurisdictions, leading to an advanced judgement of acquittal). Application of this procedural device will shorten the presentation of evidence by the defence, since the defence need only respond to charges that have passed a “no-case-to-answer” test. This is not explicitly provided for in the Statute or the Rules but would probably still be a possible tool for the Court to employ. It may be, however, that there will not be much room for using this device due to the test conducted when the charges are confirmed.

92. Whatever the outcome of the establishment of trial proceedings, it appears important that both the prosecution and the defence know how the trial will be conducted, maybe with different options, before they enter into investigations and set their respective strategies as to how to proceed with a case. Experience of the *ad hoc* Tribunals has proved that preparing the presentation of evidence in international criminal tribunals is a complex task, since the witnesses generally reside far away from the seat of the court, and the documentary evidence is also obtained from archives located in distant places, and must be scrutinised and compiled for the purposes of its presentation at trial. Certainty in advance as to how the trial will be conducted will foster an efficient preparation, and accordingly an orderly and timely presentation of evidence.

#### *Judicial Regulations*

93. According to Article 64(8)(b), a Trial Chamber shall confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.

94. There may be a need for some judicial regulations (practice directions) to compensate for the lack of precision in the Statute. Otherwise, there is a risk that too much time will be taken to decide *how* to deal with such matters as victims’ participation, etc., instead of addressing the substance of the issues. Furthermore, the lack of a practice direction and a “case-by-case” approach may result in confusion and parties’ uncertainty in preparation cases by the parties to the proceedings. For the prosecutor the problems of uncertainty will begin already when collecting evidence during the investigation.

95. Practice directions seem also advisable in order to avoid different Chambers taking completely different approaches. At the same time, in some circumstance a room for differences might have advantages. For example, the degree of defence involvement at the investigative stage may differ and so that might have repercussions as to how the trial is conducted most expeditiously.

#### *Admissibility of evidence*

96. Like the *ad hoc* Tribunals, the ICC will operate with a relatively liberal law of evidence which is burdened by very few technical rules on admissibility of evidence (e.g. Article 69(4) and 7). This indicates a preference for discussions related to the weighing of evidence at the end of the trial rather than to the excluding of evidence beforehand. This could be a straightforward order where little time would be spent on issues of admissibility of evidence (leaving aside the question of irrelevant or repetitive evidence), similar to what is the case in some domestic legal systems. However, for those who are used to a more formal law of evidence with extensive technical rules, this lack of guidance may create some confusion and also leave ample room for numerous objections and challenges. Thus, this order, which is meant to simplify the proceedings, could instead lead to disruptive and time-consuming processes.

97. It should in the context be noted that certain procedures that have been developed for a swift resolution of admissibility issues in some legal systems might not be acceptable to lawyers with other backgrounds. For example, *voir dire* proceedings that are known in common law jurisdictions, whereby the admissibility of evidence is tested and decided in a separate proceeding within the trial by the same judges that will also adjudicate the case, could be perceived by civil law lawyers as an unacceptable pre-evaluation of evidence before whole case have been heard. Thus, simplifying measures that would counterbalance exclusionary rules domestically may not be available in an international jurisdiction. As a result, admissibility issues may take more time and resources to resolve than is normally the case in national trials.

98. Leaving the advantages and disadvantages of the various approaches aside, the ICC Chambers will also have to apply exclusionary rules relating to relevance or admissibility and, hence, challenges will be made. To

the extent possible, such issues should be sorted out before the commencement of the trial. Moreover, by showing a clear general preference for evaluation (weighing) of evidence at trial instead of excluding it on admissibility grounds, the number of challenges may be reduced. In light of the fact that the Trial Chamber has broad discretion without having to fear reversal, the remaining admissibility issues should be determined speedily after proper argument.

#### *Evidence by witness testimony*

99. In the experience of the *ad hoc* Tribunals, witness testimony at trial is an (if not the most) important form of evidence in trials of this nature. This will probably also be the case before the ICC. Witness testimony is, however, also a time consuming and resource demanding exercise. Problems in bringing witnesses before the court may lead to postponements and, thus, to delays.

100. Article 69(2) seems to advance a best evidence principle in the sense that live testimony is the primary option. The requirement of testimony “given in person” should not, however, be seen as also a requirement that the witness be present in the courtroom. On the contrary, live testimony can also be taken by using a live video-link or a live telephone conference (see Article 69(2)). Such measures may prove particularly important due to the unfortunate fact that states are under no obligation to enforce an ICC court order for a witness to appear (cf. Article 93(1)(e)). They may also be useful for the purpose of witness protection (Rule 87(3)(c)). There are no limitations to the use of these measures except that they must not be prejudicial to or inconsistent with the rights of the accused. The technology must permit the witness to be examined by the parties and the judges (Rule 67(1)). In some instances, the nature of the evidence or other circumstances might lead to the conclusion that the measures would fail the test. However, due to the cooperation regime there may also be instances where these measures are the best means available to the Court and the parties.

101. Witness testimony could also be taken before a national court by means of international legal assistance (Article 93(1)(b)), whereby the ICC in its request must make sure that the requirements for admitting the testimony into evidence at trial are observed.

#### *Written statements and testimonies in lieu of oral testimony*

102. In accordance with Article 69(2), a Chamber may also permit the introduction of documents or written transcripts. This measure must not be prejudicial to or inconsistent with the rights of the accused. It includes evidence in the form of a written statement from a witness as well as a transcript of evidence given by a witness in proceedings before the Court. By this means, the presentation of evidence at trial could be substantially shortened.

103. However, according to Rule 68, written statements and prior testimony are admissible only if the opposing party has or has had the opportunity to examine the witness, unless measures under Article 56 (unique investigative opportunity) have been taken by the Pre-Trial Chamber. Besides the possibilities to comply with Rule 68 in a coordinated effort by the prosecution and the defence, it is also important to utilize the Article 56 mechanism to ensure an efficient and complete presentation of evidence.

104. Bearing in mind the limitations set forth in Article 56, the Prosecutor and the Pre-Trial Chamber should explore the possible use of measures under that Article in order to obtain evidence that can later be presented at trial. It may, for example, be desirable to be able to hear witnesses, e.g. very young children, out of trial and later introduce the video-taped interview as evidence at trial, as is the practice in some national jurisdictions. Another example could be the declared or at least very likely unwillingness of a witness to come and testify before the Court at trial in combination with the Court’s lack of compelling powers to secure the attendance of the witness, possibly reserved for cases when other options such as testimony by video-link or the taking of testimony before a national court with power to secure attendance are not available. A third example of when the Court may want to have recourse to Article 56 could be when a particular war zone has only recently become accessible but there are serious doubts as to whether such accessibility will remain. What is crucial is the interpretation of “a unique opportunity [...] which may not be available subsequently for the purposes of trial” and whether this requirement could cover situations as the ones mentioned, something that is up to the Court to decide. In any event, proper weight should be given to the general principle, laid down in Article 69(2), that witnesses shall testify before the Court in person.

105. Article 56 also shows the intention to protect the rights of the defence. In this context, it should be noted that the Pre-Trial Chamber can appoint a counsel to represent the interests of the defence. This is indeed crucial since, depending on the nature of the evidence, it may be that only the presence and participation of a representative for the defence makes it legitimate to transfer the evidence taken to the trial, at least if that evidence goes to the proof of the conduct of the accused. This would especially be the case when the relevant investigative step consists in obtaining testimony of a witness who may be subsequently unavailable for trial. A more lenient standard should only be considered with respect to facts of a general nature, such as historical or political background, the existence and nature of an armed conflict, or when the evidence in question is of a forensic or scientific nature, or does not otherwise involve securing the evidence of witnesses that may not be available for trial purposes.

106. It may be noted that measures under Article 56 do not necessarily mean that a judge must participate when the testimony is taken. Recommendations and orders regarding procedures and participation of counsel for the defence could be sufficient (Article 56(2)), whereby the requirements of Rule 68 could also be met. It is, however, important that a witness makes a solemn undertaking in accordance with Rule 66 before testimony is taken by or with participation of the judge of the Pre-Trial Chamber. Special recording requirements should also be observed (Rule 112(4)).

107. Similarly, in the stage prior to the Pre-Trial Chambers authorisation for an investigation pursuant to Article 15, evidence can also be collected and preserved. When the Prosecutor considers that there is a serious risk that it might not be possible for the testimony to be taken subsequently, the Prosecutor may request the Pre-Trial Chamber to appoint a counsel or a judge from the Pre-Trial Chamber to be present during the taking of the testimony in order to protect the rights of the defence (Rule 47(2)). Such evidence is also subject to the general admissibility provisions of Article 69(4).

#### *Overview witnesses*

108. Summary evidence is explicitly provided for in respect of confirmation of charges (Article 61(5)). There is no equivalent provision for trials. In light of the prospect of very long trials concerning complex situations and possible countermeasures such as imposed limitations of evidence or the time for the trial, the Court may want to consider whether summary evidence relayed by an “overview witness” could be admitted.

109. The practice of so-called “overview witnesses” has been debated in respect of the ad hoc Tribunals. This practice should, however, be distinguished from other methods of providing a general background to a case, i.e. the same function that a prosecutor performs in outlining the evidence in an opening statement. Nothing precludes the prosecutor from being assisted in this task by, for example, an investigator making parts of the presentation or using documents such as maps, time-tables, etc. This would of course not go into evidence of the case and the information would, if disputed, have to be proved by submitted evidence.

110. Instead, “overview witnesses” relate to statements proffered as evidence, for example as a comprehensive overview of the investigation conducted in the relevant sites and may include reference to a number of sources. What is put in evidence is only the statement of the “overview witness”, who could be cross-examined, and not any underlying witness statements or other material. However, both the opposing party and the Chamber could be provided with original statements of witnesses, as well as any other material analysed or referred to by the overview witness, to be able to verify the accuracy of the overview. In addition, a testimony of an “overview witness” should only be considered admissible to the extent it goes to proof of a matter other than the acts and conduct of the accused, *stricto sensu*, as charged in the document containing the charges.

111. The Statute and the Rules leave room for the practice of overview witnesses, but this means of evidence is controversial. It could include hearsay, at least in part, which may be difficult to assess both for the parties and the Court. And even if information that relates to unavailable sources is easy to challenge, limited possibilities to test the evidence by way of cross-examination may by some be seen as unfair. Any judgement where facts are based on such evidence alone would be considered unsafe. So if admitted, the practical use and evidentiary value of overview witnesses would be limited. Considering the difficulties and potential controversies, however, the Court may decide not to accept “overview witnesses”.

*Some documentary evidence*

112. Article 69(2) also allows documents to be introduced as evidence, as long as this is not prejudicial to or inconsistent with the rights of the accused. The view as to how documentary evidence may be introduced, i.e. whether it must be made through the maker as an intermediary or not, varies in different legal traditions. The *ad hoc* Tribunals have treated different kinds of documents differently. For example, investigative reports, which the Prosecutor may receive from various organizations and institutions, have been presented as documentary evidence through the makers of the reports. Various official public documents, on the other hand, have been admitted from the bar table. The former approach, which is of course more time-consuming than the latter, is motivated by the right of the accused to examine (i.e. cross-examine) evidence against him or her.

113. The opinion whether the accused persons' right to examine evidence ought to require the appearance of the maker of a report as witness may be answered differently. It is generally accepted, however, that the accused has the right to call the maker of a report as a witness if he or she so wishes. This is not to be seen as a reversed onus of proof or an onus of rebuttal (cf. Article 67(1)(i)). Moreover, the Chamber may also call the maker of the document as a witness, if necessary for ascertaining the truth (Article 69(3)). No provision explicitly hinders the Court from choosing either of the methods and, as noted, any admission that does not actually lead to the appearance of the maker of the document as a witness would expedite the proceedings.

*Judicial Notice*

114. Article 69(6) grants the Court the authority to take judicial notice of facts of common knowledge. This is an avenue that could be explored by the Court in manner consistent with the right of the accused, in order to shorten proceedings. In the age of information, the concept of "facts of common knowledge" may be properly expanded in some cases to cover issues such as the existence of an armed conflict or, in indisputable cases, even the nature of that conflict, hence saving the need for a lengthy presentation of evidence to cover those issues. Use of this device could also prove effective to counter defence attempts to delay proceedings by disputing issues that could never be reasonably in dispute.

*Unsworn statements of the accused*

115. Pursuant to Article 67(1)(h) an accused has the right to make an unsworn statement in his or her defence. The Chamber may invoke this means by applying Article 64(8)(b).

116. Such an oral statement may bring out the essence of the defence at the beginning of the trial and, as a result, streamline the proceedings.

117. At the commencement of the trial, after the charges have been read, the Trial Chamber could ask the accused not only whether he enters a plea of guilty or not guilty, but also a few key questions about the lines of his defence – which he is not obliged to answer. This could, if the accused is prepared to answer the questions, have a useful effect in focussing the trial on the essential issues.

**VII. Victims' participation**

118. It will be very important to form views at an early stage as to how the participation of victims should operate in practice, in particular rules 89 to 92. This is primarily a task for the judges and the Prosecutor's obligations in this regard relate mainly to submission of relevant information at certain stages of the proceedings according to Rules 49, 50, 59 and 92. Such notifications are subject to explicit restrictions and, in general, relate to victims or their representatives who have already participated in the proceedings or communicated with the Court in the case in question.

119. Although it is the Registrar who keeps the register of victims who have communicated (Rule 16(3)), the Prosecutor may retain the right to deal with the notifications (which may also be given orally).

120. Regulations on the participation of victims in the proceedings would be useful, both for the Court and for the victims and their representatives. It should be noted that the scheme set forth in Article 68(3) and Rules 89-91 provides not only a right of participation but also a very wide discretion for the Court to establish how and when this right is to be exercised. In this sense, it cannot be denied that the existence of an additional actor in the proceedings can easily have an impact on the overall length. Each Chamber of the Court will have to balance

all these factors while determining the right to participate in the instant stage of the proceedings, and the modality of its exercise.

### **VIII. Reparations proceedings**

121. According to Article 76, representations concerning reparations could be heard at trial (if a unified trial is held or in case of an admission of guilt), at a sentencing hearing or at an additional hearing. Interim measures aimed to secure, *inter alia*, claims for reparations could also be ordered by the Pre-Trial Chamber at an earlier stage of the proceedings (Article 57(3)(e)). Procedures additional to those set forth in Rules 94 to 99 will have to be established by the Court.

122. Very probably evidence, including testimony by witnesses and expert witnesses, will also be submitted in respect of reparations. In many cases, this evidence will be the same as that presented in the criminal proceedings. It seems preferable that the Chamber should be able to hear such evidence (and the witnesses be obliged to appear) only once in the entire proceedings. Rule 91 could provide for such a solution in respect of the examination of witnesses.

123. As to the practical system for preparing and initially handling claims for reparations (and perhaps also investigations as to the most appropriate ways of providing reparations in collective forms), the Court could consider the use staff of other than judges, and possibly even external expertise. At least in some cases, extensive preparations can be envisaged.

