

## SIDE EVENT

# ASSEMBLY OF STATES PARTIES OF THE INTERNATIONAL CRIMINAL COURT

*It's About Time –  
Revisiting the Timing and Duration of Decision-Making at the ICC*



**THE HAGUE, NETHERLANDS | 3 DECEMBER 2019**

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*This year's Wayamo side event at the Assembly of States Parties of the International Criminal Court focused on the real and perceived costs of ICC decision-making, in terms of its efficiency, timing and duration.*

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# EXECUTIVE SUMMARY



On 3 December 2019, the Wayamo Foundation held its yearly side event at the Assembly of States Parties of the International Criminal Court (ICC).

The event was generously supported by the governments of Austria, Finland, Germany, The Netherlands, Norway and the United Kingdom (UK). Entitled, *It's About Time - Revisiting the Timing and Duration of Decision-Making at the ICC*, the panel featured: **Christian Wenaweser**, Permanent Representative of Liechtenstein to the United Nations; **Elizabeth Evenson**, Associate Director, Human Rights Watch; **Lorraine Smith Van Lin**, Post-conflict Justice Advisor at REDRESS; and **Shehzad Charania**, Director of the UK Attorney-General's Office and International Law Advisor to the Prime Minister's Office.

**Mark Kersten**, Senior Consultant, Wayamo Foundation, acted as moderator. Over the course of 1.5 hours of moderated conversation, in which both panellists and audience took part, the participants discussed and debated the timing and duration of decisions and procedures at the ICC, including the preliminary examination phase, investigations and judicial determinations.

All the panellists agreed that there were important issues to tackle with respect to the real and perceived costs of ICC decision-making, in terms of its efficiency, timing and duration. Addressing these concerns was crucial to future efforts targeted at reforming and strengthening the Court.

## OPENING REMARKS



**AMBASSADOR WENAWESER**

Permanent Representative of Liechtenstein to the United Nations



Following a short introduction by **Angela Mudukuti**, Senior International Criminal Justice lawyer at the Wayamo Foundation, **Ambassador Wenaweser** made some brief opening remarks. He described the event a “timely”, and stressed that, whether one chose to call the process review or reform, change was called for and that, as an institution, the Court needed to perform better. He also stressed that addressing the length of proceedings has been a long-standing challenge and a question on the minds of many. It would therefore be in the Court’s (and indeed in everyone’s) interests to address this in a professional manner which takes into account resources and efficiency on the one hand, and the rights of defendants on the other.

## PANEL DISCUSSION



**MARK KERSTEN**

Senior Consultant, Wayamo Foundation

At this point, **Mark Kersten** proceeded to introduce the panellists and the topic. He listed a series of dates pertaining to the Court’s interest and intervention in Afghanistan, and asked the audience whether, as a whole, these dates had any strategic coherence or logic. It was not clear, he said, whether the timing of and the periods between the various decisions really made sense. Moreover, if they did not make sense, it might well be a problem for the ICC’s various constituencies, ranging from victims and survivors to states, defence counsel, interested public, etc. He then asked the panellists a series of questions about the timing and duration of ICC decision-making with respect to specific challenges facing the Court:

- I. **What are some of the reasons given and concerns expressed over the duration of decision-making at the ICC?**
- II. **How does the timing and duration of ICC decision-making affect the legitimacy of the Court and how does it affect people on the ground?**
- III. **In the spirit of reform, what can the ICC do to improve the efficiency and effectiveness of its decision-making?**





**LORRAINE SMITH VAN LIN**

Post-conflict Justice Advisor at REDRESS

In opening the discussion, **Lorraine Smith van Lin** focused her observations on the underlying causes of delay in ICC proceedings and the impact of that delay. She observed that there were structural, institutional, and procedural issues which unnecessarily prolong decisions at the Court. This included the novel phenomenon of victim participation and its impact both on the proceedings and on the defence; the role and function of the Pre-trial Division; and the diverse legal backgrounds of judges which influenced their approach to decision-making. **Smith van Lin** noted that there is an “*evident and unfortunate*” lack of collegiality among judges, which has an impact on the perceptions of the Court and the overall legitimacy of the institution. In her view, “*the reason that we focus on collegiality is because the judges are the central hub of the Court’s efficiency*”. She considered that it was appropriate to focus on judges because of their role as managers of the judicial process and because, ultimately, they were the ones who were expected to show the lead in improving the efficiency of proceedings.

Similarly, the need to harmonise conflicting legal approaches was also a challenge for the Court’s other organs. Collegiality was thus not only a matter for judges, but was also relevant for other staff members who came from different legal traditions. How, she



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asked, can the ICC ensure that its decision-making processes reflect diverse approaches from different legal traditions without compromising its uniqueness?

Victims too are concerned about the length of time taken by ICC proceedings. As a tangible example of just how delays can contribute to or exacerbate the suffering of victims, **Smith van Lin** pointed to the impasse between the Trust Fund for Victims and the Trial Chamber, which had caused a significant delay in the issuance of reparations in the case of Thomas Lubanga. She noted that it was important to view procedural and other systemic issues of delay, not in

the abstract but rather in terms of “*brass tacks*” and the way in which they affect the wellbeing and lives of victims on the ground. It is for their sake and for the sake of those concerned with the Court, that moving concretely to address the efficiency of the ICC is so crucial.

Indeed, the conversation about the length of decision-making at the ICC was nothing new, and several recommendations had been made in previous reports by different expert bodies. Here she conceded that, in some areas, the Court had in fact made some progress on issues of efficiency. Nevertheless, she considered

that, having reached the milestone of 20 years of the Rome Statute, it was the right time for a review of the Court’s record and for effective reform aimed at improving its functioning, both overall and specifically in terms of the duration of decision-making. The need for this was obvious, as a mere glance at the ICC’s results and the clear gap between expectations and performance would show. **Smith van Lin** concluded by saying that meaningful reform in this area was possible but would require the setting of specific benchmarks and measurements for progress, as well as ensuring the inclusion of all stakeholders in the process.



**SHEHZAD CHARANIA**

Director of the UK Attorney-General’s Office and International Law Advisor to the Prime Minister’s Office

**Shehzad Charania** noted that the Court was consistently criticized for the duration of its proceedings. While there were a myriad of reasons which affected the length of trials, the role of states was often overlooked. One key factor for the duration of certain trials was the lack of cooperation of states

parties. It was noteworthy that the Court has made over twenty findings of non-cooperation, referring the offending state to the UN Security Council or the ASP. Yet neither body has ever taken any action in response. **Charania** noted that the Security Council has been blocked on a number of occasions by one or two

states even from acknowledging a notification of non-cooperation from the Court.

Another key factor affecting the length of proceedings related to the cumbersome procedures as set out in the Rules of Procedure and Evidence (RPE). The Court through its Working Group on Lessons Learned had sought to remedy some of these inefficiencies by proposing to states various amendments to the RPE. But while in some cases states had agreed to do so, on more recent occasions, supported by certain NGOs such as Amnesty International, a very small handful of states had blocked the establishment of a consensus to agree an amendment.

In his remarks, **Charania** also covered the recent decision of the judges of the Court to self-impose deadlines for their decisions; for example, they have agreed that a trial judgment should be issued within ten months of the parties' final submissions, and that a decision responding to a request from the Prosecutor

to authorize an investigation should take four months. He referred to the development as a radical one, and noted that the timelines themselves were commendably ambitious, and welcome. While such deadlines would deal with only one aspect of the problem relating to the duration of trials, it would hopefully dispense with the types of situations seen at the ICTY where multi-accused trials with very similar facts took vastly different amounts of time.

**Charania** also referred to the work done to identify performance indicators and talked about how their adoption could be used as a means to boost efficiency within the ICC's organs. He also addressed the issue of the apparent lack of collegiality among some of the Court's judges, saying that when infighting filtered out into the open through Court judgments, in the eyes of the watching public it undermined the institution's legitimacy. There were particularly acute examples of this, such as one judge referring to another in a decision as 'threatening', 'deplorable', and 'devious'. **Charania** suggested that this reinforced the idea of a 'Hague bubble', an insular community of ICC practitioners and proponents, overriding the interests of victims and affected communities.

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**ELIZABETH EVENSON**

Associate Director, Human Rights Watch

**Elizabeth Evenson** took up the subject of preliminary examinations (PEs). She began by making the point that more relevant than a preliminary examination's length is its goals and whether the processes in place are well adapted to those goals. Due to the OTP's engagement with national authorities, PEs can present unique opportunities to encourage and catalyse credible national proceedings. To **Evenson's** way of thinking, the most successful example of this is Guinea, where a PE was opened just a few days after a massacre that took place in 2009, and where the OTP's engagement has been a real factor in the establishment of a national panel of investigating judges, a steering committee, and the recent announcement of a trial date.

While this approach would not work with and should not even necessarily be applied to all PEs, one cannot afford to be "cavalier" about any possible opportunity

to try and bring about credible national proceedings. One is talking about a very difficult landscape in terms of justice, limited capacity at the ICC, and limited willingness on the part of States Parties to provide the resources. Where the approach is applied, the degree of engagement and the time required to secure credible national proceedings is a process that would be undercut by having an "arbitrary, one-size-fits-all deadline" for the length of PEs.

Nevertheless, caution must be exercised when the ICC's role is providing legitimacy to governments' inaction. While the OTP should consider whether, in a given PE, it should explore a strategy of prompting national authorities to carry out their primary responsibility consistent with the principle of complementarity, there is at the same time the danger of "getting hung up in that space". National authorities may be doing just

enough to make it seem like it is reasonable for the OTP to continue to engage with the authorities, but not enough for these actions to translate into justice.

**Evenson** continued, saying that this is why communication is so important, because “*the unexplained length does have legitimacy costs*”. It is important for the OTP to have benchmarks and to communicate them clearly to government officials. If the OTP is engaging with national authorities with a view to catalysing proceedings, that goal has to be clearly articulated.

In terms of making PEs more efficient, the OTP should move faster to the point where it decides whether it wants to engage more explicitly with national authorities to encourage domestic proceedings, or alternatively whether it is going to proceed to a determination on admissibility and a decision about whether the ICC should take up the case.

Speaking from the floor, senior OTP trial lawyer, **Ben Gumpert**, shared insights from his recently published blog on the duration of Court proceedings and decision-making, and the measures available to improve the institution’s efficiency. Judges, he felt, should show a bit more “civility”, refrain from being rude to each other and display more collegiality. He noted that turning internal judicial guidelines, e.g., with respect to protecting vulnerable witnesses and dealing with expert evidence, into enforceable Regulations of the Court would go some way to ameliorate matters. Lastly he suggested that sentencing guidelines would also be useful for the purpose of enhancing the efficiency and fairness of proceedings.

*Finally, Evenson stressed the unique leverage and pressure that can be brought to bear by the PE framework to catalyse national proceedings, thanks to the OTP’s innate ability – in a case where national proceedings do not go forward – to determine that the Court has jurisdiction and to ask for an investigation to be opened.*



## CONCLUDING REMARKS



The session concluded with a lively and engaging Q&A session with members of the audience, including ICC staff, international law scholars, journalists, and members of the diplomatic community.





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