



The Rome Statute at 40

Amnesty International and T.M.C. Asser Instituut

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Introduction

On 23 – 25 November 2020, the T.M.C. Asser Instituut and Amnesty International¹ organised a three-part expert-meeting entitled ‘The Rome Statute at 40’. The expert-meeting sought to convene discussions between those who were successful in establishing the International Criminal Court (ICC or Court), who work with it today, and who aspire to contribute to its successful functioning in the (near) future.

Generally, discussions aimed to critically assess how or if, over the next twenty years and beyond, the Rome Statute’s objectives of ending impunity by holding individuals accountable for international crimes and offering redress to victims could be better realised. The discussions were held over three sessions, divided over three days, and were conducted under the ‘Chatham House Rule’, to allow for an open and frank discussion. In the three sessions, thirty-seven experts and moderators² comprising academia, civil society, staff from the ICC and other international criminal tribunals, counsel, diplomats, and other international justice practitioners, discussed the future of the ICC and the Rome Statute system more generally and considered what these may look like at the 40th anniversary of the Rome Statute in 2038.

This anonymised report aims to highlight the main issues that were addressed during the expert meeting, and in doing so, will follow the titles of the three sessions, addressing: stakeholder engagement and impact on the ICC (Session 1); the perspective of the ‘post-Rome generation’ (Session 2); and the Rome Statute system (Session 3). The thematic areas were viewed through the lens of considering, in particular, the role and impact of NGOs and academic circles in engaging with the ICC.

This report provides a comprehensive summary of the observations, discussions and general conclusions made by the experts and has been drafted by the organisers based on the discussions between those attending. However, the findings, recommendations and contents of the report should not be taken necessarily to represent the views of either the T.M.C. Asser Instituut or Amnesty International, nor necessarily of any of the expert participants or their respective affiliations.

¹ See Annex 1 for more information about the organisers.

² See Annex 2 for the list of participants, moderators and organisers.

General Findings and Recommendations

During the intensive discussions held over three days, many observations and recommendations were made which can be found in the full report. The organisers have tried to highlight instances where findings and recommendations could be drawn out, without wishing to privilege these recommendations over others made by individual participants. The discrete findings and recommendations should not be understood to be ‘agreed’ by all participants nor necessarily represent the views of the organisers.

Session 1 - Stakeholder Engagement and Impact

Summary of findings

- Recognising that the ICC and stakeholders are independent actors, the Court nonetheless depends on many different stakeholders to succeed, whose roles relate to numerous factors which contribute to the Court’s successful operations – for example, political, financial, and various other external factors.
- The ICC values the input of external stakeholders and continues to seek improvements and to build on its relationships with all stakeholders.
- In considering stakeholder engagement with the ICC, it is useful to conceptualise ‘where’ interactions take place, considering forums and places, and ‘how’ these interactions take place. In fleshing out ‘where’ engagement takes place, a distinction can be made between the ‘local’ and the ‘global’.
- It is critical to consider who has access to spaces of engagement with the ICC and to consider who sets the agenda of those interactions. Further reflection on whose voices are included (and if included, heard) and whose voices are excluded from the interactions is also needed.
- The ‘monitoring function’ played by NGOs is seen as positive - providing transparency to the work of the ICC, which is relevant to democratising the institution.
- In The Hague, and at the ICC Headquarters, the ‘unique’ relationship between the Court and NGOs could be considered ‘institutional’, or ‘institutionalised’, with regular interactions between the Court and stakeholders, including for example in annual NGO roundtable meetings or at the ASP, allowing for regular exchanges between the ICC and stakeholders.
- While stakeholder engagement may be institutionalised, it has been sometimes marked by ‘defensiveness’ in receiving feedback or criticism – on the part of both the Court and its stakeholders.
- States parties should also be considered as stakeholders in light of their engagement with the Court. This engagement was seen as very ‘heavy’ – with the constant demands and interactions between the ICC and states parties taking a lot of time and energy of the Court’s staff.
- ‘Support’ for the ICC is not the absence of criticism - informed criticism is necessary and plays a role in the improvement of the ICC and its practices.

- While engagement with the ICC may be with a view to providing ‘support’ to the Court, this is not the only reason why stakeholders engaged with the institution: nearly every stakeholder is acting in order to impact and influence the Court.
- Stakeholders (states parties, NGOs etc.) engaging within the ICC system should be accountable for their opinions and actions, and for the processes they initiate in relation to the Court.
- Stakeholders’ meaningful access to the Court could be affected by or related to the level of criticism they give to the ICC.
- It was recognised that the Court may be criticised for things that are beyond its control or in relation to issues around (often confidential) ongoing investigations and judicial activity – where the Court cannot provide full information to external stakeholders.
- If the Court does not act on demands of stakeholders, it may not mean that it is ‘not listening’, rather it may be acting pursuant to its own independent mandate, recognising that it is accountable for its own decision making.
- The ‘distance’ of stakeholders to the ICC or The Hague was likely to influence the nature and impact of stakeholder engagement with the ICC, as well as the perspectives of those concerned.
- Whether or not certain stakeholders are ‘too close’ to the ICC requires further reflection, in particular whether certain NGOs could be seen as ‘part of the system’ – which may impact perceptions of the independence of stakeholders from the ICC, and affect the ability of those stakeholders to offer critique to the Court and its organs.
- Internships (including at the ICC) are a key factor affecting who is able to stay in The Hague and work on international justice. Internships also affect the make-up of those who are subsequently recruited to the ICC more generally, given that internships are seen as a pre-requisite to being recruited at the Court. As such, internships represent structural hindrances to a more representative population in the field of international justice and The Hague.
- Generally, the final report of the Independent Expert Review (IER) should be seen as an opportunity to make progress and improvements at the Court, though follow-up and implementation of the IER’s recommendations would be equally critical (and may require resources in the Court). The issues found in the IER report were quite well known, but it is useful that certain issues are now transparently in the public domain.
- The IER is marked by a lack of engagement by the independent experts with stakeholders at the national level and a lack of involvement of people from the field, including victims’ communities and other local stakeholders.
- The engagement by the independent experts in The Hague with mainly international NGOs was manifestly insufficient for the experts to access stakeholders that work on the ICC in situation countries.

Recommendations

- Further consideration is needed by all stakeholders of *who* has access to spaces of engagement with the ICC and how the agendas of these interactions are set. Further reflection by all

stakeholders on whose voices are included (and if included, heard) and whose voices are excluded from the interactions is also necessary.

- The ICC should consider how it can provide greater clarity to NGOs in the field, and to affected communities, on the different interlocutors that may represent or work for the ICC in the field and how local stakeholders and affected communities can engage with the Court.
- Serious consideration should be given by the ICC and all stakeholders as to how more local stakeholders can engage with the ICC in The Hague.
- Stakeholders working on the ICC may wish to consider a redefinition of their own independence, and consider the degree of their (in)dependence with the ICC and each other.
- Stakeholders could consider what ‘access’ to the Court means to them, including how important it is, and how issues of (maintaining) ‘access’ to the Court may have impacted on their work.
- The issue of internships (at the ICC, in The Hague, and in the field of international justice) must be urgently addressed as a significant structural hindrance to equitable geographic representation and recruitment, and to a more representative population working on international justice issues.
- Local stakeholders should be central to future work in relation to the IER. The ongoing work on the IER and those engaged in it should urgently address the current lack of engagement of stakeholders from situation countries with the IER process and how this can be remedied.

Session 2 - ‘Post-Rome Generation’

Summary of findings

- The ‘post-Rome generation’ and those working at the ICC could be considered ‘practitioners’ who work with the Rome Statute. The increasing number of ‘practitioners’ working at and with the ICC represents ‘a shift’ in the Rome Statute project, from something that was diplomatically oriented, to something which practically ‘needs to work.’
- The move from conceptual discussions at the Rome conference in 1998 to practical implementation is demonstrated in how those presently at the ICC, and in the ‘post-Rome generation’, are working to find ‘practical, workable, and technical’ solutions to the problems that the Court is facing.
- The shift towards ‘practicality’ is also reflected in how the Rome Statute is implemented and interpreted, with the ‘post-Rome generation’ placing emphasis on giving the Rome Statute’s provisions interpretations that work in practice, while also being quicker to point out the Statute’s flaws and inconsistencies.
- The ‘post-Rome generation’ is ‘more critical’ than its ‘Rome generation’ predecessors, due to the fact that the idealistic hopes of the Rome conference have not been borne out in practice.
- Criticism may be more forthcoming from the ‘post-Rome generation’ as a means to ‘improve’ the ICC and due to the fact that the ‘post-Rome generation’ does not see itself as having ‘birthed’ the ICC.

- The early make-up of the Court's staff and officials from those who had been at the Rome conference may have affected how the Court responded to criticism, with the Court's 'architects' being less willing to listen to critiques. In contrast, members of the 'post-Rome generation' are more likely to level their critique of the ICC institution from outside of it.
- The 'Rome generation' has not prioritised the sharing of lessons-learned and experiences with future actors, this presents challenges to current stakeholders and may leave knowledge and expertise gaps within the 'post-Rome generation'.
- The 'original stakeholders' at the Rome conference should have been communities affected by atrocity crimes. Arguably, these stakeholders had been disempowered by participants in the Rome process, and purported to speak for communities which were affected by atrocity crimes, rather than empowering communities to speak for themselves.
- Within the 'post-Rome generation' of stakeholders, there is a nuanced shift in the space that each actor is taking – in particular, victims and affected communities are more empowered, becoming louder and more active in discussions, as well as intervening in the Court's proceedings.
- Some states parties appear to have changed their positions from those they had been advocating for at the Rome conference, for example, in relation the role or importance of victims in ICC proceedings.
- Some states parties' current positions seem incoherent with the 'lofty ideals' expressed at the Rome conference, in terms of providing the Court with adequate cooperation or budget to function.
- The 'post-Rome generation' is not representative in terms of gender; national and cultural diversity; and intersectionality.
- The issue of diversity is an issue for the ICC, as well as for civil society groups, academia, and other stakeholders. An example of this is a lack of diversity or intersectionality in discussions, panels, and workshops around the ICC.
- The views and participation of people who have 'lived experiences' of the ICC, in particular in states where the Court has operated, should be critical to future discussions of the ICC and Rome Statute system.
- The need for meaningful engagement and reflection on issues of under-representation and the privileging of certain regions and voices at the ICC and in the 'post-Rome generation' is urgently required.
- Structural inequalities and unequal power relations continue to colour and shape existing discourses with and about the ICC.
- The under-representation of people from situation countries at the ICC (including within the OTP, defence teams, and victims representation teams) impacts the effectiveness of the Court's work in particular in situation countries and with affected communities.
- Practical and technical difficulties (including in relation to visas, recruitment, hiring practices, qualifications) pose significant challenges to nationals from the 'global south' to work at the ICC or in The Hague.

- Inclusivity and diversity amongst the Assembly of States Parties and in participation of states parties in its meetings in New York and The Hague is lacking as well. These discussions are also marked by the dominance of certain ‘more powerful’ states parties and the marginalisation of others.
- It may be possible to identify ‘key issues’ on which stakeholders could agree and enhance cooperation between themselves. Alternatively, stakeholders may be able to ‘centre’ around ‘shared values’ which provide opportunities for solidarity and which all stakeholders can work towards, regardless of political views and where stakeholders are from (e.g. ‘global north’ or ‘global south’).

Recommendations

- The ‘Rome generation’ should consider how it can ensure knowledge transfer to participants in the ‘post-Rome generation’ and should consider the need for ‘upwards mobility’ within the ICC and other stakeholder organisations.
- Current stakeholders in the ‘post-Rome generation’ should ensure that affected communities can ‘speak for themselves’ and should urgently consider how spaces can be opened or provided for affected communities to engage directly and more assertively with the Court and in the field of international justice.
- The Assembly of States Parties should consider the incoherence of their current positions – including in relation to the resources allocated to the Court - with the Court’s growth and expectations placed upon it (including by states parties themselves).
- The lack of diversity or intersectionality in the ‘post-Rome generation’ should be urgently addressed.
- Diversity and equitable geographic representation in discussions, panels, and workshops around the ICC should be urgently considered. Participants should be considered based on the ‘connection’ that they may have to affected communities in situation countries and first-hand lived experiences that they have of engaging with the ICC.
- Issues of representation within the ICC and stakeholders should go beyond statistics or ‘box-ticking exercises’ and focus also on questions such as who is making decisions in certain spaces - which would represent a *genuine* interest in looking at inclusivity.
- Actors and institutions within the ‘post-Rome generation’ should pursue partnerships on equal terms with those situated ‘in the periphery’, so that favourable conditions for meaningful participation in the ‘post-Rome generation’ can be created.
- The ICC and all stakeholders should urgently consider the issue of structural and practical difficulties (visas, hiring practices, recruitment, qualifications) facing nationals - in particular from the ‘global south’ - to work at the ICC, in The Hague, or at international justice institutions.
- Stakeholders could identify and agree on ‘key issues’ to enhance cooperation between themselves. Alternatively, stakeholders could consider ‘centering’ around ‘shared values’ which provide opportunities for solidarity and which all stakeholders can work towards.

Session 3 - The Rome Statute System

Summary of findings

- The Rome Statute has influenced and provided model legal frameworks to many emerging international justice mechanisms, which can be seen as a positive legacy of the Rome Statute.
- There is an increasing understanding that the ICC ‘cannot do everything’. This means that it may be time to move ‘beyond the ICC’ and identify different justice options and avenues in order to meet stakeholders’ aspirations and international justice needs.
- Stakeholders continue to face questions of what role the ICC should play within a broader Rome Statute system, and what the ICC’s complementarity role should be within a broader ‘system’ of international justice.
- While the OTP can take certain actions to assist complementarity on the national level, it is important to recognise the capacity limitation on what the OTP can do in terms of encouraging complementarity at the national level.
- States parties have the primary responsibility to investigate and prosecute Rome Statute crimes, as well as the primary obligation to realise the rights of victims including providing reparations to victims of crimes under international law. States parties who are willing and able to undertake investigations and prosecutions of Rome Statute crimes at the national level have a role in relieving expectations and pressure from the ICC.
- While the ‘domestication’ of the Rome Statute within states parties’ legal systems and legislation is a positive legacy of the Rome conference, some states parties have also taken measures or adopted laws which would make national level investigations and prosecution of international crimes more difficult.
- The Rome Statute and ICC has had a ‘catalytic effect’ on states parties and regional bodies adopting legal frameworks to investigate and prosecute international crimes and establishing justice mechanisms or processes.
- The ‘catalytic effect’ also has limitations which should be explored, including in relation to its motivation or disincentivisation of key policy makers on the national and regional level.
- How states parties and actors in the Rome Statute system can harness the Rome Statute to undertake international justice processes, or establish international justice mechanisms will be critical in future international justice developments.
- Alongside considerations of ‘complementary’ mandates of international justice mechanisms, it is also crucial to discuss *cooperation* between mechanisms and international organisations. This is also necessary due to the increased likelihood of confusion and overlap between mechanisms and the different actors interacting with them.
- Recent developments demonstrate the importance of the ICC considering its engagement in situations where international justice mechanisms may be established, including considering - at an early stage - the role the ICC can play within or in relation to mechanisms being established.
- A mix of ‘intrinsic’ and ‘extrinsic’ factors may serve to encourage states to investigate and prosecute crimes under international law domestically. This may include external political

pressure on states to undertake domestic level investigations and prosecutions ('extrinsic'), or for example, legislative changes to domestic law ('intrinsic').

- 'Political will' is critical in order for states to undertake domestic investigations and prosecutions of international crimes and can be 'generated'. However, it is very difficult to provide a uniform answer to how this might occur, with political will largely being dependent on the unique context of each country.
- In order to be effective, efforts to increase domestic capacity and political will must represent long-term 'consolidated efforts'.
- Expectations in the ICC will nearly always be higher than what the ICC can achieve in practice.
- Improving the management of expectations of the public and media in the ICC is the responsibility of all stakeholders.
- Highlighting to those affected by international crimes the boundaries, limitations and possibilities of different mechanisms and processes may play an important role in managing expectations in the ICC. Expectations may be better managed if the ICC is discussed as one justice option among others in a more inclusive and complementary way.
- The Court has a political dimension - it is a political actor that operates in a political world. How the Court organises itself to engage with political questions will be a huge determining factor, as to how the ICC will be able to respond to future challenges.
- Internal reviews and reform within the ICC are critical to the Court's ability to meet future challenges.
- While the IER offers a 'key chance' for reforms, the IER did not consider a number of key questions related – for example - to race and racism, and further internal reform is needed in relation to accusations of sexual harassment, racial harassment, discrimination and bullying within the ICC.

Recommendations

- The ICC and stakeholders should consider how the Court can work with other international justice mechanisms and what role the ICC would play in a broader concept of the Rome Statute system.
- Alongside complementarity, a 'comprehensive framework' of cooperation between international justice mechanisms and organisations could be developed by states, international justice mechanisms, and interested stakeholders.
- The ICC should consider how it will engage in transitional justice situations, and - where international justice mechanisms are being established - it should consider the role that the Court can play within or in relation to mechanisms or transitional justice processes.
- International partners, international organisations, and institutions should continue to provide support and capacity to actors and stakeholders at the national level to improve capacity and generate domestic political will.
- The ICC and relevant stakeholders should provide greater clarity in communications and engagement with victims and affected communities, so that expectations can be better

managed through explicit information about forms of participation for survivors and survivor communities, including in clarifying the roles that victims of crimes under international law may play in a criminal justice process.

- Relevant stakeholders should consider providing information to affected communities on the role and functions of other international justice mechanisms and processes (if they are available) without privileging the ICC.
- In order to manage expectations ‘up-front’, the Court could consider realistically setting out what the role of the ICC is, or what it intends to do in a specific situation. The Court should not restrict itself to providing information only on the Court’s mandate, but also discuss what the Court will do to complement the other transitional justice processes that are taking place in relation to the situation country.
- In setting out its agenda for a situation country, the ICC Trust Fund for Victims should be candid about its abilities and limitations of its work and mandate, and base its communications to victim groups on a ‘realistic alignment’ of those.
- The ICC and all stakeholders should urgently act upon accusations of sexual harassment, racial harassment, discrimination and bullying at the ICC.
- The question of race and racism within the ICC and the Rome Statute system in general requires further consideration by all stakeholders.

Session 1: Stakeholder Engagement and Impact

Introduction

The first session aimed to assess the current strategy for stakeholder engagement with the ICC, evaluating how well it works and how it could have greater impact on the Court and its specific organs.

Key guiding questions were how NGOs and academia can better and more critically engage with the ICC and consider current strategies in relation to ICC engagement and desired impacts, as well as addressing the impact this engagement has on the Court as well as if or how it can be improved.

In advance of the meeting, on 30 September 2020, the Assembly of States Parties (ASP) published the 'Independent Expert Review of the International Criminal Court and the Rome Statute System'.³ The terms of reference of this Independent Expert Review (IER) had provided for 'consultations with States Parties, Court officials, and civil society'. To follow up on this process, participants were given the opportunity to discuss – if applicable – their own experience of engagement with the IER, or reflections on the nature of the consultations as mandated in the review.

Discussion

Stakeholders within the Rome Statute System

The first issue addressed was the role and position of stakeholders within the Rome Statute system and at the ICC. At the outset, a number of participants highlighted that there are many different stakeholders within the Rome Statute system, including: states; states parties; states parties who are part of the UN Security Council; the ASP as a whole; the Bureau of the ASP; NGOs; academia; victims' organisations; legal counsel; and many others. One participant remarked that the stakeholders represented an 'endless world where everyone plays a role' depending on their constituency. However, it was generally considered that, although independent, the ICC depends on many different stakeholders to succeed, whose roles relate to numerous factors which contribute to the Court's successful operations – for example, political, financial, and various other external factors. One participant asked, 'would the ICC exist without the support of its stakeholders?'

Another participant noted that to answer the questions posed by the organisers related to stakeholder engagement with the ICC, it is useful to conceptualise first '*where*' interaction takes place, considering forums and places, and thereafter '*how*' it takes place. In fleshing out '*where*' engagement takes place, a distinction could be made between the 'local' and the 'global'. In the present context, the 'global' could be considered as The Hague, where interactions take place at ASP meetings, or meetings are held with ICC representatives, or with states party representatives. The 'local' level could be understood as situation countries. It was also remarked that a space which is often overlooked is the online or virtual spaces where stakeholder and ICC interaction takes place. One could also distinguish between formal and informal places where interactions take place, especially in The Hague but also situation countries. Further, in considering the 'global' and the 'local' it is very important - in considering issues around stakeholder engagement - to consider *who* has access to all of these spaces. Finally, after considering *where* the interaction takes place, it is crucial to talk about *how* it takes place and most importantly perhaps *who sets the agenda of the interactions* on what premises those interactions take place? Another participant stated that related to these questions was one of *access*, and who has access to the different forums of engagement and interactions. Lastly, in thinking about interactions between stakeholders and the Court, it was crucial to reflect upon *whose voices are*

³ https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

included (and if included, heard) and whose voices are excluded from the interactions. One participant asked, ‘who do we hear, who don’t we hear, and who isn’t asked?’

On the evolving role of NGOs from 1998, to the present, one participant discussed a ‘shift’ in the practice of NGOs. It was noted that, ‘having pushed through the creation of the ICC through the Rome conference’ in the early life of the ICC, NGO experts had been involved in many of the foundational aspects of the ICC, assisting the Court and states parties in the development of its foundational institutional policy framework and institutional rules and regulations. In this early institutional development, the expertise of NGOs was important to a ‘very nascent institution’. However, as the ICC has ‘become an expert of its own trade’, the Court may consider it more useful to resort to NGOs for more specific input which was relevant to the specialised work or expertise of certain NGOs, for example on gender-related or victims’ issues, as well as issues relating to intermediaries. One participant mentioned that – at present - NGOs may not be so much involved in specific institutional policy development, but rather holding the institution accountable to its policy principles, as well as the direction that the Court is taking. Generally, the monitoring function played by NGOs was seen as something positive, as providing transparency to the work of the ICC, which was relevant to democratising the institution.

In The Hague, and at the ICC Headquarters, it could generally be recognised that the relationship between the Court and NGOs could now be considered ‘institutional’, or ‘institutionalised’, and in this regard the interactions and relationship between the ICC and civil society (both national and international NGOs) was ‘quite unique’. One participant reminded that the institutionalised meetings and dialogue should not be ‘taken for granted’ - as the level of institutionalised interaction with stakeholders remained ‘quite remarkable’ - in particular, the continuous access that NGOs could have to different officials and parts of the Court, as well as the recurring opportunities for dialogue between NGOs and ICC staff and at times, senior officials.

In discussing the role and work of NGOs in relation to the ICC, it was apparent that that this probably took too many forms to discuss in the timeframe of the expert meeting. However, it was noted that formally, within the Rome Statute, a role for NGOs was found in Article 15, which provided for NGO submissions to the Office of the Prosecutor. In this regard, it was noted that some NGOs may provide information to the Court, where others may ‘facilitate and assist’ in the provision of information. NGOs had also taken advantage of Rome Statute provisions to provide *amicus curiae* briefs on the Court’s proceedings. Another participant remarked that provisions in the Rome Statute related to the victims’ rights provide for victims’ participation as a form of stakeholder engagement. It was also noted that NGOs have assumed an institutionalised role at the ASP annual meetings.

However, at the situation country level, it was stated that the Court’s relationship with NGOs continues to depend on the specific situation as well as the stage of the ICC’s proceedings and activities in relation to each specific country. Within situation countries, interaction between stakeholders and the Court may take place through the field office and through outreach activities.

NGOs in situation countries have undertaken training activities and worked to promote the ICC in the particular situation country. A number of participants provided that victims of Rome Statute crimes may hear about the ICC for the first time through the work of NGOs in situation countries, as NGOs ‘on the ground’ are able to speak about the ICC to citizens in a country through the media, as well as interact directly with victims about the ICC. National NGOs were also able to organise visits of ICC staff members to their country to train national authorities, including for example training national prosecutors, as well as facilitating high-level visits of ICC officials.

Participants who had experience of working in NGOs in situation countries stated that the overwhelming focus of their work was geared towards ‘benefitting victims’. Local NGOs help the ICC from the beginning of situations, to explain every aspect of the national context, including, for example, cultural and linguistic requirements for outreach. It was remarked that the ICC’s understanding of regions and of cultures was often very low at the outset of its work. Local NGOs therefore had to ‘explain literally everything’: ‘who was who’ in the country; geopolitical regional issues; and the likely impact of the Court’s intervention on victims and society as a whole. These same NGOs also assisted investigators and arranged meetings between the ICC and national level stakeholders, including victims. The relationship of national NGOs with victims and stakeholders made them ‘natural partners’ for the Court.

However, a number of participants also mentioned that there was sometimes an ‘overreliance’ by the ICC on local NGOs who in fact fulfil the Court’s role in undertaking outreach for example. This has – at times – put local NGOs in a very difficult position, as they find themselves ‘doing work that the Court is supposed to do’ in terms of public information and outreach, which may leave the NGOs being seen as representing the ICC and lead to difficulties and threats from parties – on all sides - who are subject to the Court’s investigations in the country. In a similar vein, one participant stated that – in relation to many international justice mechanisms operating in the field – ‘the burden is not being shared, or not being shared enough by international institutions.’ This may leave victims groups or advocates within the community, who may be victims themselves, having to provide information on justice processes and ‘bear the burden’ of undertaking work that the justice mechanisms may be expected or better placed to do. Another participant stated that victims groups or NGOs ‘on the ground’ may also be expected to explain to their communities which ICC interlocutor the communities have been dealing with (investigators, outreach staff, victims’ representatives). This confusion could be compounded if those NGOs themselves did not know who they were dealing with within the Court. One participant stated that to solve this problem would require ‘information, understanding, or people invested enough in showing communities how to engage with the Court.’

On the Court’s interaction and engagement with academics, it was stated that the Court engages with academics in different ways, but often ‘quite constructively’. For example, the ICC would often provide speakers to academic conferences, lectures, or events. However, the engagement by academics with the ICC was easier for those physically close to the Court, for example in the Netherlands. Academics are also increasingly approached to provide their expert opinion on specific questions where the ICC may not have its own specific institutional expertise or capacity.

On the Court’s interaction with states parties, it was recognised that ‘states are also stakeholders’ and that the level of states party engagement was very ‘heavy’. A number of participants discussed the constant presence of states parties representatives in and around the ICC. This may be at meetings of the ASP’s Bureau and Hague Working Groups which take place in the premises of the Court. However, it was also remarked that ‘diplomats are coming and going in the premises all the time,’ and other participants discussed the frequent access that diplomats have to principals of the Court. This means that during the ASP’s intersessional work there is constant dialogue and discussions going on between the Court and states parties. It was mentioned that while there may be many ‘good reasons’ for the constant presence, by comparison, the ICTY was left much more to do its work as an independent institution. Participants subsequently discussed whether the Court spends ‘too much time’ on this constant dialogue. One reason given for the dialogue was the constant turnover of diplomats in The Hague, which means that discussions and topics with the diplomatic community sometimes repeat themselves year-after-year, or in cycles depending on the length of diplomat postings. It was recognised by participants that the Court enters into dialogue with diplomats as it may not want to

alienate states parties, recognising that the Court does need the support they offer, but it was observed that constant demands and interactions with states parties take a lot of time and energy of the Court's staff.

Support and Criticism

In discussing the question of engagement, and whether it is, or should be 'supportive' or 'constructive'; a number of participants provided that it was difficult to have a discussion in the abstract, or to agree on a common definition of what may constitute 'constructive' engagement or criticism. This was due to the multiplicity of different stakeholders and the diverse needs, points-of-views, and concerns that they may have. The diversity in stakeholders and their needs and motivations also made the idea of 'support' or 'supportive' engagement difficult to define. Generally, actions which were geared towards enabling the Court to undertake its mandate could be said to be 'supportive' - for example this could be providing technical expertise, or political support to the Court.

However, a number of participants stated that whether something was 'critical' depended on whether what was said was welcomed by the Court. In this regard, some participants remarked that, in their view, certain statements may be seen by Court officials as 'criticism' if they 'did not meet with the Court's own narrative.' Other participants mentioned that stakeholders were seen as 'critical' if they 'did not support what the Court wants us to support'.

It was generally agreed that 'support' was not the absence of criticism. Indeed, one participant stated that 'support could be criticism', and most participants agreed that criticising the way that the ICC works, or the way that the Court is engaging, is both necessary and a form of 'support', especially if criticism is informed and geared towards improvement of the ICC and its practices. In this regard, participants agreed that those who support the ICC may often be its fiercest critics, and that the Court should accept 'well-intentioned' criticism in the same way as, and perhaps due to, the support that it is given.

However, it was also mentioned that those who hold the ICC and its staff accountable, should themselves be held to justify or account for the criticism they provide. In this regard, one participant stated that all stakeholders (states parties, NGOs etc.) engaging within the ICC system should be accountable for their opinions and actions, and for the processes they initiate.

One participant stated that even those who are 'supportive' of the Court may feel unable to give criticism to the Court, as any criticism could be seized upon by the Court's opponents, at the national and international level. It was mentioned that this fear of criticism being used by the detractors of the Court may have led to NGOs not being critical enough of the Court, where in hindsight they felt they should have been.

In this regard, a number of participants stated that while stakeholder engagement may be institutionalised, it has been sometimes marked by 'defensiveness' in receiving feedback or criticism – on the part of both the Court and its other interlocutors. One participant referenced 'defensiveness' as described in the IER report as a 'contentious institutional culture' at the Court – 'where people perceive themselves as 'us' versus 'them' and that manifests itself in different sections or organs and translates to the dynamics with external actors in the same way'. Other participants described how 'defensiveness' may have a detrimental effect on the discussions between stakeholders, as stakeholders are 'not really listening to each other' but defending themselves.

Some participants stated that criticism is not really welcomed by the Court, and that in their experience, when ICC officials perceive stakeholders as critical, those stakeholders are marginalised.

One participant stated that ‘I have always felt that when you criticise the Court, you actually lose meaningful access.’

The issue of criticism and its relationship to access at the Court was then discussed, with some participants stating this may have led to some large international NGOs and those who interact with the Court acting ‘more as diplomats rather than watchdogs.’ This was seen as unfortunate, because international NGOs may have more power (to criticise and in the impact of their criticism) and, as one participant mentioned, could therefore offer support to local NGOs when they voiced national-level concerns about the Court. One participant also discussed the issue of criticism on funding for NGOs, and stated that some NGOs, including international NGOs, may be less critical because criticism has an impact on the availability of funding from states parties or others, and this was perhaps due to issues of perceptions of NGOs being critical or offering criticism as being ‘unwelcome’ or somehow negative to funders.

Some participants noted that, in their view, the Court is open to receiving constructive criticism, and one participant stated that there had been a marked improvement in the Court’s approach to receiving criticism, particularly in the Office of the Prosecutor under Ms. Bensouda. A number of interventions also reflected that the Court values the input of external stakeholders and continues to seek improvements and to build on its relationships with stakeholders.

Nonetheless, it was recognised that the ICC is always likely to be subject to criticism due to the nature of its work and the different expectations and results that different stakeholders want to see. It was also recognised that the Court may be criticised for things that are beyond its control or in relation to issues around (often confidential) ongoing investigations and judicial activity – where the Court could not provide full information to external stakeholders. One participant stated that, in their view, the Court may unfairly be accused of being ‘defensive’ when it was unable to provide information related to ongoing confidential proceedings, or if it took decisions which were not agreed with by certain stakeholders. In this regard, a participant remarked ‘just because the Court does not do what it is asked to do, does not mean that it is not listening’. Further, it was mentioned that there should be a recognition that the Court has to take responsibility for the things that it does, and the decisions it takes. With this in mind, the Court as an independent institution had to act pursuant to its own decision-making capacity – in implementing its policies, for example. One participant stated that there should be a ‘balance where criticism is welcome – recognising that there are times when discussions need to happen behind closed doors’. However, where decisions were made by the ICC, stakeholders should also have recourse to ‘mechanisms that allow for follow up.’

Impact and Influence

Participants provided that while engagement with the ICC may be about providing support to the Court, this was clearly not the only reason why stakeholders engaged with the institution: indeed, nearly every stakeholder was acting in order to *impact* and *influence* the Court. In that respect, all stakeholders - including the ICC itself - are interacting and trying to lead or influence each other in certain directions. With this in mind, one participant stated that it may be worthwhile considering the concept of *impact* beyond simply the impact that different stakeholders have on the ICC as an institution, but rather how each stakeholder impacts the other. However, this approach, which may be a more accurate description of engagement within the ICC system, makes the measurement of *impact* difficult, as each stakeholder has different aims and desired results which they wish to see from their interactions with each other.

It was mentioned that it may be valuable to consider stakeholder engagement with the Court not only through the lens of ‘impact’ but also through *experience*. In this vein it was important to consider the different experience of NGOs based in The Hague and local organisations. For example, local NGOs may not specialise on the ICC *per se*, due to the fact that their work may focus on many different issues within their country. This may mean that local NGOs may not be able to follow developments at the Court so closely, and furthermore, local NGOs may have less experience of engaging with the Court and its staff. One participant mentioned that a visit by local NGO actors to The Hague once or twice a year was not sufficient to engage meaningfully with the officials. Perhaps more crucially, it was stated that if local actors were only able to come to The Hague infrequently, and may not have the same level of institutional knowledge, this may leave them feeling dis-empowered or less inclined to criticise the Court during the limited timeframe or opportunities they have for meeting with officials at the Court. On the other hand, international organisations (including those in The Hague) were very different from local NGOs, not only due to their knowledge and experience of working with the ICC, but also in relation to their ‘power, resources and greater influence.’

Finally, some participants discussed the impact of ‘criticism’ on the Court. One participant mentioned that improvements and reviews are not a one-time process and that they have to be ongoing, and that in order to be effective, all stakeholders - including the Court - had to be open to self-reflection and to accept criticism, and ‘have leadership who want to lead exemplary organisations.’ Another participant stated that, in their view, a lack of accountability for performance was a major issue at the ICC, and that when unfavourable evaluations were made by a number of different stakeholders (at The Hague and local level), these rarely led to change or were followed up.

‘Distance of Stakeholders’ and ‘The Hague Bubble’

The participants discussed the question of ‘distance’ of stakeholders to the ICC and whether stakeholders ‘should be close and supportive, or distant and more critical’ – and whether in fact such a simple correlation could be made. As one participant stated, ‘being ‘distant’ does not mean not being supportive’, similarly, being ‘too close to power’ could be an ideological as well as geographical question.

Throughout the discussions, reference was made to ‘The Hague bubble’ of stakeholders who interacted and engaged with each other, and the ICC, in The Hague. One participant stated that, in their view, many of those who live and work in The Hague have never really experienced ‘war and struggle’ or issues within situation countries. This was ‘not something you can learn by reading books or visiting a country once or twice, it is really something you have to experience to understand.’ In that participant’s view, people who come to The Hague from situation countries may have different perspectives and act differently in their work because of their experiences. Another participant stated that the idea of ‘bubbles’, or a Hague-centric bubble, is ‘completely problematic with the idea of universal justice, and the need to actually engage with the local authorities’. One participant added that ‘more locals were needed in The Hague – in the Court and also in civil society.’ It was suggested that one way which may improve the representation of views from situation countries in The Hague would be to bring NGO ‘focal points’ to The Hague to act as a liaison between civil society in a given situation country and the Court. This may be useful for the Court and civil society and victims groups in a situation country.

Another participant stated that ‘The Hague bubble’ should be considered as an ‘industry sector’ and one should consider ‘what kind of people work there, who gets to speak there, who gets to do advocacy there and who gets to be in the bubble of ‘justice making’’. This was seen a critical issue to be addressed and ‘have a constant focus on.’

Another element of ‘The Hague bubble’ which was raised related to the ‘issue of class’ and *who* was working on international criminal justice issues. In discussing *who* gets to speak, one participant stated that there was a struggle with the ‘dilemma between the idea of universal justice, and universal justice needing local dynamics, inclusion, and local ownership, and having one location for the ICC in The Hague.’

The issues of ‘bubbles’ in terms of the work of the ASP was also mentioned, with the Assembly’s work taking place in The Hague and New York, and the observation that sometimes these ASP bubbles had ‘fights’ between them in terms of mandates and work.

However, it was also mentioned that while ‘the ICC is something of a gravitational centre and attracts specific NGOs’, every ‘bubble’ has certain practitioners and experts within it. For example, the ‘New York bubble’ had different experts and practitioners from those working in The Hague and other ‘bubbles’. It was discussed that perhaps it may be better to recognise that there is a ‘The Hague bubble’, with its own practitioners and expertise, but more importantly, as a result, to insist on reaching outside of it.

The issue of a ‘bubble’ within academia was also mentioned, with the ‘academic bubble of international criminal justice being far from representative.’ In this regard, conferences and panels on ‘global’ international justice may not be representative in terms of geography or gender (see also session 2).

One participant mentioned that the Rome Statute system ‘needs a multiplicity of actors who stand their own ground and play different roles [and that] there needs to be a space for civil society actors who work very closely with the Court, but also civil society actors that take a much more ‘external perspective’.

In this regard, some participants stated that certain stakeholders, including NGOs, may have become ‘too close to power’ and ‘too close to the ICC and the system’. In their view, this has led to NGOs being seen as *part of the system* – which may cause problems, including of perceptions of the independence of NGOs and stakeholders from the ICC, and stakeholders who are ‘too close’ as ‘being seen to represent the power they have to critique’. This was also mentioned in relation to the closeness of some stakeholders - including NGOs - to states, which may lead to stakeholders perhaps unwillingly ‘getting pulled into a relationship of power, and geopolitical power, including through receiving funding from certain states’.

In discussing the nature of NGOs and other stakeholders working at the ICC and within the ASP, some participants remarked that an emphasis on ‘diplomacy’ had led to NGOs ‘acting more as diplomats than watchdogs.’ Another participant stated that, in their view, stakeholders should not have to choose to either work closely with the Court or to criticise it.

However, other participants also discussed that being ‘close’ to the ICC was useful, and sometimes – rightly or wrongly – being part of ‘The Hague bubble’ appeared essential to interact with the Court and states party representatives and have impactful engagement with the Court. Generally, it was recognised that the Court and stakeholders were independent actors. Nonetheless, one participant stated that ‘the Court, whether we like it or not, is a very inward-looking institution, so in order to influence the Court, you really need to understand where they stand internally.’ It was stated that this required working closely with ICC staff in different organs and sections, in order to build a relationship and to understand how things are working in practice and how to engage and provide input to the Court most effectively.

Rather than thinking solely in terms of ‘distance’ between stakeholders and the ICC, one participant stated that NGOs may need to reconsider their ‘independence’, which in their view, some NGOs had ‘lost’ in their interactions with the Court and in their eagerness to support the Court and to get the Court to act. It was stated that over time, in interactions with the Court, there is a risk that some NGOs may lose their objectivity. The IER Report was also mentioned, with reference to its statement that ‘NGOs can become a ‘very strong partner’’. In the view of one participant, the ‘partnership’ should be further reflected upon, as for NGOs it is often ‘not a balanced relationship’.

Another question posed by a participant was, what kind of ‘posture’ do NGOs need to have to with the Court to ensure that they work effectively and actually create impact? Going further with this discussion, another participant proposed that the response, for NGOs, may not be to merely be more critical or distance themselves from the institution. Rather, it was proposed that ‘what needs to happen is a *redefinition of independence* of where each stakeholder and each institution lies.’ This was because ‘boundaries have been blurred in practice over the last few years, and where NGOs have played such a significant role in the creation and the development of the Court, they may now need to redefine where they stand’. It was proposed that stakeholders needed to consider what ‘access’ to the Court means to stakeholders, how important it is, and whether thinking about questions of ‘access’ would lead to a redefinition or recalibration of the role of NGOs and of the relationship between NGOs and other stakeholders, and the Court.

Access to ‘The Hague Bubble’

Throughout the discussions, the issue of ‘internships’ at the ICC was raised by many participants as a key factor affecting access to ‘The Hague bubble’ and to recruitment to the ICC more generally. A number of participants discussed the requirement of ICC and Hague-based staff to have undertaken internships as a pre-requisite to being recruited. This posed significant challenges to those who wanted to pursue careers at the ICC or in The Hague, in particular for those who could not afford - whilst undertaking an internship - to live in The Hague for a year and work for very little, or no payment. Other participants also raised challenges for interns to obtain visas to work in the Netherlands.

Generally, participants agreed that the issue of internships in The Hague, and in the broader field of international justice, had to be urgently addressed. One participant stated that internships had become critical indicators of ‘who gets to stay in The Hague and work on international justice.’ In this regard, ‘when reflecting on *who* is part of the bubble, it’s important and critical to ask who is *not* part of it, and what are the structural hindrances to a more representative population to be involved in these issues.’

In agreeing that issues of internships should be further examined, one participant highlighted the practical challenges that the Court faces in relation to agreements on privileges and immunities, which meant that interns would have to be based in the Netherlands (rather than working remotely) or in another country which had acceded to the Agreement on Privileges and Immunities of the Court, due to the sensitive nature of the work of the Court.

A number of participants also discussed recent changes in work-practices to ‘remote working’, mainly due to the Covid-19 pandemic. It was observed that these practices could increase access to the ICC and the ASP, as well as to organisations working in The Hague.

Independent Expert Review

A number of participants discussed the IER exercise, and their experience of engaging with it, in more detail.

In discussions, the issue of ‘The Hague bubble’ also surfaced in relation to the IER, which – a number of participants mentioned – was defined by a lack of engagement by the independent experts with stakeholders at the national level and the lack of involvement of people from the field, including victims’ communities and other stakeholders. One participant stated, in relation to the IER: ‘where are the local voices, where are their interactions, where are their views?’

A number of participants also discussed the issue of consultations by the Independent Experts with interlocutors from situation countries, and generally the ‘lack of consultations’. One participant stated that the Independent Experts had been requested and invited to visit situation countries and to conduct consultations within those countries – with a view to meeting the communities ‘who have been affected by and have dealt with the ICC’. While the impact of the Covid-19 pandemic was raised as a reason for the Independent Experts being unable to consult with those in situation countries, some participants stated that in their view ‘there was never an interest from the Independent Experts or impetus to do it.’ A number of participants described that the Independent Experts met with international NGOs, in The Hague, with some participants joining the meeting ‘online’, but that this was manifestly insufficient for the Independent Experts to access those groups ‘that *actually* do the work’ in situation countries.

One participant stated that the report of the Independent Experts was a good example of a common effort of the ICC, states parties, and other stakeholders strategically working together towards a mechanism which would allow a conversation (‘which had become very ‘toxic’’) to channel through a constructive set of recommendations.

The issue of ‘follow up’ to the IER was also mentioned. While participants generally stated that the issues which came up in the final report of the experts were quite well known, it was useful that certain issues were now transparently in the public domain. However, participants also stated that while a number of good reports are written on the ICC, generally they are not well followed up. One participant stated that while the experts’ report was critical, it should be seen as an opportunity to make progress and improvements at the Court, though follow-up and implementation of the IER’s recommendations would be equally critical (and may require resources in the Court).

Session 2: 'Post-Rome Generation'

Introduction

The second session considered the current constituents and stakeholders involved in the discourse surrounding the ICC and international criminal justice, comparing perspectives from when the Rome Statute was adopted in 1998 to today.

Key questions related to a 'new generation' of stakeholders who were not yet active in (the years leading up to) 1998, including what this 'post-Rome generation' looks like and how the views of the 'post-Rome generation' may differ from those of the ICC 'founding fathers'?

Participants were asked to consider whether the 'post-Rome generation' and discourse surrounding international criminal justice is representative, both geographically and in terms of gender diversity, and how the perspectives of those who are *not* amongst 'traditional' stakeholders or closely involved in day-to-day work on the ICC be factored into discussions on the ICC? Finally, participants discussed whether considering those currently 'outside' current discourse may provide greater insight into the expectations of the international community of the Court and how to formulate and manage the expectations of all involved.

Discussion

The 'Post-Rome Generation'

At the outset, it was stated that, before answering questions related to the 'post-Rome generation', it was worth considering the 'Rome generation' and the difficulty in establishing who this generation of stakeholders was and is. In particular, the observation was made that the Rome generation was not monolithic. One participant stated 'while those who were at the Rome conference think that they know what was discussed and decided 'in Rome', in reality many of those who attended the conference have 'different memories and perspective from those that were sitting next to them!'

In discussing the differences between the 'Rome generation' and present stakeholders, one participant stated that the Rome conference and 'Rome generation' was composed by a large number of diplomats (as opposed to 'practitioners') who had 'a diplomatic view on how the institution as such would fit into the confines of the universe as it existed in 1998'. In contrast, the 'post-Rome generation' and those working at the ICC are now considered 'practitioners' who work with the Rome Statute. One participant stated that while what was achieved in Rome in 1998 was 'extraordinary', what followed represented 'a shift' in the Rome Statute project, from something that was very diplomatically oriented, to something that is now 'in practice' and which 'needs to work.' In this regard, it was remarked that discussions in 1998 were largely *conceptual* on how the ICC could work 'in the future'. This move from 'conceptual' to '*practical*' has been demonstrated in how those working at the ICC now, and in the 'post-Rome generation', are working to find 'practical, workable, and technical' solutions to the problems that the Court is facing. It was added that this was not to say that the 'post-Rome generation' was not 'idealistic'. As one participant stated, 'we are still dreamers, but we are confronted with the reality of what the ICC is.'

The sentiment of moving from concept to reality was echoed by a participant who remarked that when the Rome statute was adopted, it marked a period of 'euphoria' and when the Court was first opened, its staff enjoyed a 'honeymoon period' - in and around the ICC, 'people felt that they were part of something historic, and exceptional – and were privileged to be part of it.' It was remarked that the reality of the Court having to live up to its mandate in a changing geopolitical climate soon became

more difficult, as the Court had to meet practical investigative and prosecutorial challenges, including the hard reality of obtaining evidence with - at times - reluctant cooperation.

One participant discussed that the shift towards practicality was also reflected in how the Rome Statute was implemented and interpreted. In this regard, another participant provided that the 'post-Rome generation' 'shows little reverence and respect towards the legislative history of the statute while the Rome-generation dwells on it and insists on the continuing relevance of legislative intent of those at the Rome conference.' On the other hand, 'the 'post-Rome generation' places emphasis on giving the statutory provisions interpretations that really work, and are quicker to point out the Statute's flaws and inconsistencies, which the Rome generation has been more readily forgiving of, because they can always point to the oddities, the heated debates with delegates, and less than ideal conditions in which those provisions were drafted.'

One participant discussed that, compared to 1998, the 'post-Rome generation' also includes a group of 'ICC practitioners,' who have lived and practised through the ICC's trials. It was stated that this group, which includes a number of counsel who have practiced at the Court, 'is well positioned to comment on or critique the ICC's approach to criminal procedure or evidence, or complementarity, or the protection of fair trial rights,' as well as to reflect on practical work within the Court.

Participants largely agreed the change of generations of stakeholders from 1998 to the present would 'inevitably affect the character and the tone of the communications between the stakeholders and the Court'. This was because the 'post-Rome generation' was largely not present during the Rome Statute drafting process, and therefore 'does not really share with its predecessors the sense of a unique and ground-breaking historical moment or the lived experience of 'making it all happen''. One participant stated that the 'post-Rome generation' is 'less likely to think of the ICC in terms of historical contingencies – 'what if Rome had not happened' – and it tends to perceive the Court as a habitual part of the international and institutional landscape'. This perhaps leads to the 'post-Rome generation' growing impatient with references 'to the heady and wonderful days of summer 1998'. One participant stated that the 'sentimentalities of the Rome generation can appear as completely irrelevant or even standing in the way of a long overdue renewal,' especially as the present generation is facing serious challenges at the ICC which require solving and are more interested in answering questions such as 'what to do now that the Court *is* there? 'Does the ICC really work as it should?' In this regard, another participant added 'the young folks who are joining the Court believe that what was built is not strong enough, and there is a need for us to look at the whole architecture again to see what can be done to help it to stand the test of time.' One participant stated that a 'defence organ' – which had been overlooked in the Rome conference - would be a critical element to add to the overall structure of the Court.

It was generally observed that the 'post-Rome generation' was 'more critical' than its Rome generation predecessors. One participant stated that this was always likely to become the case, as the difference between the idealistic hopes of the Rome conference were not borne out in practice. Another participant provided that the 'post-Rome generation' may be able to 'improve' the ICC because they did not view the ICC as 'their baby' and were therefore more critical and 'open to changes'. It was also mentioned that the 'post-Rome generation' was 'very active' in its criticism and could provide commentary with increasing authority, and this was perhaps due to ever increasing access to information about the ICC, including online and in social media. One participant stated that where – at its opening - the Court was in a honeymoon period, 'now the pendulum has swung to the opposite'. One participant stated that criticism is now more prevalent, and more easily published, including from organisations and stakeholders which were the strongest supporters. It was said that this may reflect

the disappointment in the (perhaps) excessive and unrealistic expectations that early ‘supporters’ had in the Court.

A number of participants observed that some of those present at the Rome conference in 1998, or who had come as attendees to the early ASP meetings, as well as other key figures of the Rome generation had subsequently become staff or officials at the ICC and occupied, or occupy, important positions in various organs, as well as becoming victims’ advocates and defence counsel. One participant stated that this gave these staff members and senior officials a measure of authority to talk about how to improve the ICC ‘as they were the founders’.

However, the ‘Rome conference make-up’ of the Court’s staff and officials may also have affected how the Court responded to criticism. One participant stated that this had created ‘a sort of besieged fortress effect which makes a productive dialogue quite difficult.’ In this regard, it was stated that the migration of Rome conference participants to become ICC staff could also be seen by the fact that many members of the ‘post-Rome generation’ level their critique of the ICC institution from outside of it. Conversely – and perhaps more so at the outset of the ICC’s operations - those who were the ICC’s ‘architects’ were or are ‘locked up within that institution’. This may have affected the ICC’s response to critique, as those within the institution who had been ‘in Rome’ were not always willing to listen to critiques, due to their belief that – as former participants at the Rome conference - it is ultimately them who *really know* what the statute means and what the Court should be like’. It was said that this may have led to the retort that the ‘outside’ ‘post-Rome generation’ simply ‘has no clue’ as to what the Court is doing.

One participant also provided that, in their view, the Rome generation had not ‘passed on the baton’ to the ‘post-Rome generation’ and had not prioritised the sharing of lessons-learned and experiences with future actors. Similar criticism was made that ‘upwards mobility’ had not been facilitated within the ICC and other stakeholders, and that this presented major challenges to present stakeholders and may leave knowledge and expertise gaps within the ‘post-Rome generation’ - at the ICC and more broadly.

A number of participants discussed the emerging challenges and threats to the ICC and Rome Statute system, which the Rome generation had not prepared for or had now to be dealt with by the current generation of stakeholders, despite the fact that ‘push-back’ to the Court’s activity began in its early situation countries almost immediately.

In terms of stakeholders in the ‘post-Rome generation’, one participant stated that since the Rome conference, there had been a recognition of ‘power dynamics,’ specifically around civil society, which more critically reflected on discussions on what ‘came out of Rome’ which had largely been guided by international NGOs and diplomats. One participant stated that in Rome ‘there was the sense of a relationship that the international NGOs spoke, the national NGOs followed.’ It was remarked that this relationship had slightly changed in more recent years, and ‘while it’s not perfect, today you have a more collaborative relationship based on mutual respect between international and local NGOs closest to the victims of mass atrocities.’ In this vein, a number of participants provided that they did not believe that the ‘post-Rome generation’ was made up of new stakeholders, rather ‘the original stakeholders should have been communities affected by atrocity crimes’ and these stakeholders had been disempowered by participants in the Rome process, and purported to speak *for* communities which were affected by atrocity crimes, rather than *empowering communities to speak for themselves*. One participant stated that ‘everybody has a voice; the point is that some voices were not empowered.’ A number of participants reflected that, today, communities affected by atrocity crimes are becoming more assertive in speaking for themselves - not only through NGOs or through legal

representatives for victims, but as communities – for example Rohingya or Palestinian groups – or, as one participant provided: ‘Everywhere the court is engaged, groups and communities are assertively engaging: they are saying that they are not voiceless, we do not need people to speak for us, we can speak for ourselves, so the role that we need you to play as the old guard of stakeholders, is to break down the barriers for us which have prevented us to speak for ourselves – we are no longer going to sit back and let you speak for us.’ A question was also posed as to *how* spaces could be opened or provided for affected communities to speak for themselves and engage directly and more assertively with the Court.

Another participant agreed that the question which should be asked was not whether there were new stakeholders, but what roles have changed and what space does each stakeholder take? It was stated that ‘we are seeing a nuanced shift in the space that each actor is taking – victims are becoming louder and more active, they want to have a say and intervene in the Court’s proceedings’.

Finally, one participant commented that difficulties that the Court is facing were not just a result of a shift from conception to reality, but rather also a change in states parties attitudes (including those who were in the Rome conference) whose approach after the opening of the Court changed over time, perhaps as states parties’ interests changed or realigned ‘without the ICC coming out on top’. Another participant stated that some states parties appeared ‘to have changed their position from what they had been advocating for at the Rome conference, for example, in relation to their positions on the role or importance of victims in ICC proceedings.’ A number of participants made similar observations that states parties’ positions – at present - seemed ‘incoherent with their lofty ideals’ expressed at the Rome conference, in terms of providing the Court with adequate cooperation or budget to function. For example, it was mentioned that a ‘zero-nominal growth’ budget approach that a number of states parties have adopted, including the Court’s major funders, is incoherent with the Court’s growth and expectations placed upon it – including by those same states parties. It was mentioned that while States established the ICC as a ‘never-again Court,’ ‘it really became an international low-cost court’ or ‘an EasyJet court!’ and that while states parties continued to be very demanding, on the OTP for example, the Court was not properly provided with enough means to operate in the field and to carry out investigations. Ultimately it was said that there ‘is a difference between those who have built the Court with lots of expectations and those who are financing or holding the budget who are trying to limit the means of this Court.’

In this regard, one participant stated that, in their view, having established the Court, ‘states parties have shown that they will do whatever it takes to protect their agents and make sure that they are never investigated by the ICC’ including in their engagement with the Court and in fulfilling their ‘oversight’ mandate within the ASP. It was observed that ‘self-interest’ marked the reality of states parties’ engagement on the Court, and that this was a reality which should be more keenly recognised by current stakeholders.

Inclusivity, Participation, and Representation in the ‘Post-Rome Generation’

The vast majority of participants agreed that the Rome generation was not sufficiently representative, and neither is the ‘post-Rome generation’, in terms of gender; national and cultural diversity; and intersectionality. At the ICC this was exemplified in the ASP’s own reports on gender and geographic balance which starkly laid out the under-representation of women at senior levels in the ICC, as well as the under-representation of certain global regions. One participant also stressed the need to ensure ‘language balance’ at the ICC, which may be relevant to the goal of achieving proper geographic representation.

However, the issue of diversity was seen generally as not only an issue for the ICC, with civil society groups, academia, and other stakeholders facing similar challenges. One participant remarked that ‘while it’s easy for us to point at international institutions and organisations as not having a geographic or gender balance, if you look at the leading NGOs, big, small, international, there is a gender diversity issue and a race diversity issue as well.’

Moreover, participants discussed the lack of diversity or intersectionality in discussions, panels, and workshops around the ICC. An observation was made that participants should be invited not because of their nationality, but ‘the connection they have to the communities on the ground.’ In this vein, a number of participants discussed the opportunity that twenty years of ICC operations presents to ensure the participation of stakeholders and views of those who have lived through an ICC process. This participation should extend beyond ‘affected communities’ to larger communities – who may not have been victims or witnesses in a specific case – but who have lived through; been the subject of; or the object of an ICC process, including trials - and where appropriate – reparations phases. In this regard, it was proposed that the views and participation of people who have ‘lived experiences’ should be critical to future discussions of the ICC and Rome Statute system, and serious consideration given to ensuring that these diverse stakeholders are at the centre of discussions. One participant agreed that this issue was vital, because while discussions among ‘experts’ in The Hague ‘may relate to practical matters of the Court, we shouldn’t forget that at the end of the day, what we should pay attention to is how all of that trickles-down to decisions which have real life implications for individuals.’

Some participants also undertook a critical assessment of the present expert meeting, remarking that even in seeking diversity, the meeting had many of the same people who are invited to conferences on the ICC and Rome Statute. It was mentioned that if new actors are not introduced to the ICC and Rome Statute system, we ‘will end up talking to ourselves’.

In terms of inclusivity and representation within the ‘post-Rome generation’, it was stated that ‘not much has really changed from one generation to another.’ One participant stated that institutions continue to evade issues of inclusivity and diversity because ‘people do not ask very blunt questions [...]; it is time that new stakeholders ask these blunt questions and do not ‘skirt around the issues’ with rhetoric and euphemisms. If we keep doing that, we will maintain the same situation.’ Another participant stated that, in their view, while issues of under-representation may be more recognised in the ‘post-Rome generation’, there was still a danger that measures to address the issue could become ‘tokenistic’. In this regard, it was stated that issues of representation should go beyond statistics or ‘box-ticking exercises’ and focus also on questions such as ‘who is making decisions in certain spaces’ which would represent a ‘genuine interest in looking at inclusivity’. One participant stated that there was a need for ‘discussions around how everything is designed and who is included in the decision making, who can be part of the Court and under what circumstances, to make it a more accessible and just institution that really works on behalf of the people its work concerns.’

Other participants also highlighted the impact that the representation of certain views and groups within certain spaces had on the nature of discourse within the Rome Statute system as well as norm-development within it, including perhaps, which crimes or cases were given more prominence or focus. One participant reflected that, in their view, the over-representation of actors from the global north in the Rome Statute system or ‘post-Rome generation’ may reinforce existing hierarchies of power, which many actors in the Rome Statute system claim to be working against.

The need for meaningful engagement and reflection of issues of under-representation and the privileging of certain regions and voices at the ICC and in the ‘post-Rome generation’ was reflected on

by a number of participants. One participant stated: ‘what actors in the global north and west should do is not just talk about the need to look inward, and the need to reflect on their privilege in order to score some PR points and appear progressive’. One participant stated that, in their view, ‘most engagement with the Court and most impactful interactions actually take place from the vantage point of the ‘centres’. This is to say ‘global centres’, with financial power and expertise in the West, where international NGOs and reputable universities are located - and not from the positions of what can be regarded as a periphery, that is NGOs and academics from the global south.’ In a similar vein to discussions in Session one, one participant stated that ‘where actors from the global south are heard and listened to, it’s still the actors in the global north who serve as ‘gate-keepers’ – they decide whether or not to amplify those voices from the periphery and who or not to engage. In this sense the structural inequalities and the power relations continue to colour and shape the existing discourses, with and about the Court. These power relations lack equality amongst stakeholders at a more structural level, and this contributes to a more exclusive, impoverished and thinned out conversation about the Court and about its problems.’ In this regard, it was said that actors and institutions within the Rome Statute system and ‘post-Rome generation’ from the global north ‘should practice what they preach’, which goes beyond rhetoric or performative actions. It should ‘involve partnerships on equal terms’ with NGOs and academics situated in the periphery, so that favourable conditions for their *meaningful participation* can be created.’ This would involve actions such as ‘co-drafting’ agendas on equal terms in a genuine fashion. One participant provided that ‘what is necessary is a radical change of mentality that governs the very terms of engagement.’

Participants also discussed the impact of under-representation of people from situation countries at the ICC⁴ and the impact that this may have on the effectiveness of the Court’s work. In particular, this issue was raised in relation to OTP (and defence) teams working or investigating in particular situation countries. It was stated that this under-representation may impact on the level and nature of engagement that the OTP and other ICC staff operating in situation countries have with the local communities. In this regard, some participants provided that affected communities may identify more readily with ICC investigators or staff from their own situation country, and it was also discussed whether a lack of staff from situation countries at the Court or interacting with affected communities ‘in the field’ may alienate communities the Court is engaging with. In this regard, having ICC staff from situation countries working directly with affected communities in respective situation countries may positively impact the effect the Court has on such communities and ‘bridge the gap’ between the ICC’s practice and expectations of local communities. One participant stated, ‘if the ICC situation country team (including at senior levels) is made up of foreign nationalities, it’s not logical to expect communities to identify with you, and this creates a disconnect’.

The issue of proper representation was also raised in relation to defence teams and victims counsel, where some participants observed that counsel and team members (including interns) may not represent the nationality or region of the defendants or victims.

Some participants also raised the issue of the under-representation and hiring of ICC staff from non-states parties, which in their view was relevant to encouraging universality of the Rome Statute system. Another participant provided that ‘if we want to enrich the law and the jurisprudence, it’s good to have people coming from all over the world.’

A number of participants discussed the impact of the linking of financial contributions of states parties with the representation of their nationals at the ICC. This included the position of the Court’s biggest financial contributors insisting that their nationals occupied senior positions in the ICC. One participant

⁴ See also a similar discussion in Session 1 on ‘The Hague Bubble’.

stated that in their view, the linking of financial contribution to the proportion of nationals employed by the ICC led to ‘discrimination even before recruitment has taken place’. It was also stated that states parties’ focus on equitable geographic representation was not coherent with their insistence that their own nationals be hired by the Court. One participant provided that the position taken by states parties that the financial contribution should be reflected in the proportion of states’ nationals ‘comes at the detriment of *genuine* and *sincere* representation’ and needs to be addressed by the stakeholders of the ‘post-Rome generation’.

The issue of technical difficulties facing nationals from the global south to work at the ICC or in The Hague was also raised by a number of participants, for example related to obtaining visas to the Netherlands. One participant highlighted that some nationals from global south countries may have documentation from their home state which is not recognised in the global north. The issue of geographic under-representation at the ICC was also said to be caused by hiring and recruitment processes. In this regard, a number of participants described difficulties faced in the context of recruitment at the ICC, where certain education histories, qualifications, or education establishments were not recognised in the (sometimes automated) recruitment processes. One participant provided that difficulties in geographically representative recruitment ‘gives the impression that the Court is being controlled by a certain elite, who want to bring people of their own level and status into the Court, who are graduated from known international universities’.

One participant also highlighted the issue that the ICC was hiring persons from within ‘the UN sector’ or from within the international tribunals ‘sector’. This practice was supposedly followed to ensure that those at the ICC ‘already knew the system’. However, it was remarked that this practice also has a negative effect on the representation of certain nationalities and persons at the ICC. A similar critique was made of the 2020 process for electing a new ICC Prosecutor, which was notable in its composition of ‘familiar names.’ One participant also remarked that some criticism which was levelled at the ‘short-list’ of candidates was due to the fact that it contained names which were perhaps relatively unknown, and that criticism dissipated slightly when recognised names were added to the ‘long-list’.

The issue of inclusivity and diversity amongst the ASP and its meetings in New York and The Hague was also discussed, with the observation that there was a lack of diversity in states party participation, which led to the dominance of certain ‘more powerful’ states parties and the marginalisation of others. One participant stated that while the Rome Statute and ASP system had ‘a one state one vote system, some votes do not really have a great impact’.

Relationship Between Stakeholders in the Post-Rome Generation - Cooperation and Solidarity

In opening discussions, it was generally agreed that the different actors cooperate with, or indeed, require cooperation from other actors and different groups within the Rome Statute system in order to be effective. In this regard, some participants indicated that enhanced cooperation was more attainable than ‘transformational solidarity’.⁵

Some participants agreed that solidarity might be difficult to achieve in light of the diversity of stakeholders and interests in the Rome Statute system and at the ICC. One participant provided that the interests of stakeholders (states parties, non-states parties, NGOs, academics, and so on) were

⁵ ‘Transformative solidarity – standing in solidarity with people taking their agency as a starting point, rather than acting for people – looks at how human rights can be domestically, cross-regionally, and transnationally reinterpreted as a language of liberation, ensuring that it does not reproduce the hierarchies that it stands against.’ S. Jackson, ‘Towards Transformative Solidarity: Reflections From Amnesty International’s Global Transition Programme’, *Emory International Law Review*, Vol. 34 (2020), p. 706.

‘more divergent than convergent.’ It was stated that ‘people have different interests why they support the Court, people have different interests why they are against the Court, people have reasons why they believe the Court should be ‘shut down’, and people have reasons why they believe the Court should have been established’.

Another participant stated that to achieve solidarity in the Rome Statute system, requires that all stakeholders will have to ‘pull their weight’. In their view, aspiring to solidarity between stakeholders, before stakeholders were effectively pulling their weight within the Rome Statute system, would be to create ‘an illusion that steps have been made before they have’. It was stated that solidarity within the Rome Statute system would be difficult while, just within the ICC, ‘the organs of the Court were working at cross purposes.’

A number of participants outlined how stakeholders within the Rome Statute system could enhance cooperation between each other. One participant stated that stakeholders could aim to identify ‘key issues’ which could be agreed amongst various stakeholders as a basis for enhanced cooperation. In their view, these issues were: the protection of the ICC’s prosecutorial and judicial independence – which went to the heart of the Court’s efficient and effective functioning; the prioritisation of ensuring political and financial support for the Court from states parties and; issues relating to gender diversity, inclusivity, language balance, tackling bullying and harassment, which were very important for the wellbeing of the staff who work in international justice institutions.

Similar to the proposal that ‘key issues’ be identified or coalesced around, other participants proposed that ‘opportunities for solidarity’ existed if stakeholders ‘centre’ around ‘shared values’ which ‘all’ can work towards, regardless of political views and where they stakeholders are from (global north or global south). Notably the ‘shared values’ proposed by one participant were different from the ‘key issues’ of another. However, in relation to ‘shared values’ it was proposed that common agreement could be found in a broad aim to ‘fight against impunity.’ With this in mind, the participant outlined certain factors which may lead to solidarity. These included: ensuring that affected communities, victims, and NGOs were able to be heard; ensuring that there were adequate resources for these stakeholders at the international, national level, or regional level and; engaging those who can offer ‘technical support’, expertise, and capacity at these levels.

In discussing solidarity other participants considered that to achieve solidarity in the Rome Statute system, would require going beyond working only on ICC issues but rather on ‘accountability writ large through the process’. In this vein, partnerships could be forged which recognised a ‘hierarchy of needs’ and ‘broader conceptions of accountability’ for victims and various stakeholders - which vary throughout a comprehensive justice process, from seeking prosecutions, to identifying missing persons, and considering different concepts of reparations. It was mentioned that ‘transformational solidarity may be possible, if different stakeholders could work ‘alongside those who are most affected and consider these persons’ interconnected needs’ rather than each stakeholder’s ‘own needs’ of international criminal justice. In this regard, one participant agreed ‘there could actually be a convergence of ideas, of cooperation, of interests, where we feel that we have the understanding that the bulk of the ICC’s work is not in The Hague.’

Picking up on an earlier discussion, one participant discussed the issue of ‘solidarity’ between international NGOs and national NGOs, and whether this would require a change in behaviour of international NGOs and a ‘move from speaking *for* people to speaking *with* people and recognising what that collaboration may look like’ or being more astute in considering ‘when to speak up for certain issues and when to step away from the table and give the opportunity to local NGOs or affected communities to access spaces for engagement within the Rome Statute system’. In addition, it was

mentioned that to achieve solidarity may require prioritising knowledge transfer from the ‘global south’ to the ‘global north’, where those who have interacted first-hand with the ICC and other international justice mechanisms have more experience and expertise to offer to discussions than those in the ‘global north.’ Moreover, the possibility of ‘solidarity’ between affected communities or NGOs in situation countries was discussed, where local NGOs could share experiences and lessons learned from facing similar challenges, including threats from very powerful states, or experiences gained from dealing with the ICC.

Concluding the discussions, one participant indicated it was important that, through each generation, the ‘absolute pillars’ solidarity within the Rome Statute system were broadly maintained, despite the differences that different stakeholders may have.

Finally, participants discussed stakeholders who may be overlooked in the ‘post-Rome generation’ and current engagement. One participant stated that the ‘post-Rome generation’ should consider the effects of its decisions on future generations. In this regard, discussions could take place which put emphasis not so much on the present but rather on how the Court could be more effectively an institution which focussed on the prevention of future crimes and non-recurrence. A number of participants urged that discussions already look to the future. One participant observed that there was a need to consider *future victims* with a view to constructing a Rome Statute system which would be ‘significantly stronger and more responsive to those most affected in 20 years’ time’. Another participant observed that the ‘post-post-Rome generation’ should already be discussed, and that if one were to think of the ‘ICC at 60’ it would be important to consider and already include in discussions youth groups and students, and emerging activists and actors – who were already engaging in different forms and methods of advocacy, including with new technologies, for example.

Session 3: The Rome Statute System

Introduction

The third session considered the Rome Statute principle of ‘complementarity’ and how it should be interpreted in the ‘Rome Statute system’. Participants discussed whether broader notions of complementarity within the Rome Statute system may redirect the present institutional focus on the ICC towards a more comprehensive approach to international criminal justice and effect the expectations of the Court as an institution.

In this regard, participants discussed what the most effective role for the ICC might be in comprehensive international criminal justice strategies which were characterised by national level and/or international level actions.

In considering the ‘Rome Statute system’ more holistically, participants considered the feasibility of distributing roles and responsibilities for the enforcement of international criminal law among several actors and considered the role of states as primary enforcement pillars in the Rome Statute system.

Discussion

Going ‘Beyond the ICC’

At the outset of the discussions, one participant remarked that ‘the ICC still remains the ‘superstructure watch dog over the basic norms of international criminal law and international humanitarian law found in the Rome Statute, and its presence alone sends the message that impunity is not allowed’. However, in line with discussions in previous sessions, participants generally agreed that there was an increasing understanding that the ICC ‘cannot do everything’ (which was ‘not a criticism of the Court, but a reality’). This meant that it may be time to move ‘beyond the ICC’ and identify different justice options and avenues in order to meet stakeholders’ aspirations and international justice needs. One participant stated that indeed ‘the ICC could be much more effective if it worked closely with other mechanisms’. If this were the case, it was critical to consider what role the ICC would play in a broader concept of the Rome Statute system.

Building on this sentiment, one participant discussed the over-aspirations of the Court, ‘which could be traced back to the moment of ‘euphoria’ when it was created, and which were based in a liberal-cosmopolitanism context where certain atrocities would be prosecuted.’ This had naturally led to present criticism of the Court in terms of not meeting these expectations, as ‘the success of the ICC is now meant to represent the success of international justice and on the flip-side, the failure of the ICC means failure of the international criminal justice system’. Further, over-expectations may have affected how the Court could play its role in a system of international justice, as the Court perhaps was unable to ‘curtail its ambition’ or ‘take a backseat in certain instances and let other mechanisms emerge and take the lead.’

Traditional and ‘Positive’ Complementarity

Generally, participants agreed with the observation that the states parties and national systems had the primary responsibility to investigate and prosecute Rome Statute crimes. Recognising the Court’s limitations, how states parties and actors in the Rome Statute system could harness the Rome Statute to undertake international justice processes, or establish international justice mechanisms, featured in many participants’ interventions.

A number of participants discussed the ‘catalytic effect’ that the Rome Statute and ICC has had on states and regional bodies adopting legal frameworks to investigate and prosecute international crimes and establishing justice mechanisms or processes.

On a broader level, one participant stated that ‘the ICC and Rome Statute had been key in creating national laws that can deal with Rome Statute crimes’. However, beyond that, the Rome Statute’s effects could be seen in the increasing establishment by states of war crimes units (WCUs) at the national level, to investigate and prosecute Rome Statute crimes domestically. However, another participant cautioned that in considering the role of the Rome Statute in promoting national legislation, and establishing WCUs, it should not be seen that this was ‘enough’. Even if national level Rome Statute implementing legislation was adopted, States ‘still tended to resort to ‘ordinary’ crimes or a national counter-terrorism framework.’ Therefore, while the catalytic effect was recognised, one participant stated it would be wrong to assume that as a consequence there was no need for the ICC to intervene in certain national situations. However, there was a general agreement that – in relation to national-level developments – the ICC had increasingly engaged with established WCUs and networks, and that there is ‘increasing value in the ICC ‘entering State spaces’ such as (national-level) ‘Joint Investigation Teams’ and in exploring collaborative roles.’

On the national level, a number of country situations were discussed, including in relation to Ukraine, Colombia, and other states parties. In relation to Ukraine, participants observed that despite Ukraine not having ratified the Rome Statute, the ICC and the Rome Statute were two ‘stimulating elements’ in Ukraine. In this regard, it was remarked that developments in Ukraine, including intentions to undertake national level proceedings, had been as a consequence of Ukraine’s two article 12(3) declarations accepting the ICC’s jurisdiction – and ultimately due to the existence of the Rome Statute. Further, it was stated that the ICC is ‘a pioneer and standard setting element in the system of international justice’ and that in Ukraine, the ICC had set or should set the standard to be used and followed in the domestic justice system. Referring to the Colombia situation, it was stated that Colombia had been labelled by the OTP and ICC as having ‘all the features of interaction between national jurisdictions and ICC’ and was often held up as the archetypal example of ‘positive complementarity’. One participant observed that ‘the impact of the ICC could be seen in the adoption of Colombia’s Special Jurisdiction for Peace which had very particular features and was greatly in line with the Rome Statute’s rules, procedures and values.’

One participant observed how experiences with the ICC had been reflected on in discussions steered by the ‘Panel of the Wise’ within the African Union mechanism which had led to conversations around mechanisms which can push ‘broader justice goals’ such as redistributive justice and ‘how to put reparations at the front-end of issues’ and make sure that you have justice mechanisms which are more responsive to victims’ needs. These discussions had ultimately led to the African Union’s Transitional Justice policy.

However, it was also discussed that while the very existence of the ICC has a catalytic effect on fragile transitions - in terms of how it has motivated or disincentivized some of the key policy makers in the decisions they make - this effect also had limitations which should be explored. For example, while the ‘fear of the ICC’ may provide some pressure on states parties to domesticate the Rome Statute or commence national-level proceedings, if the Court subsequently did not effectively undertake cases, motivation for establishing domestic mechanisms may ‘disappear’. Similarly, while the ‘Malabo Protocol’ may have been adopted in response to the ICC, it was done so with a provision which allowed immunity for heads of state.

One participant discussed the idea of complementarity at the ICC as a ‘two-way process’ in the sense that the ICC or OTP could discuss complementarity or aim to pursue a complementary justice strategy, but if the OTP did not have states (or ‘partners’ within states) to engage with, then complementarity could become ‘artificial and superficial.’ It was said that the Court could undertake a number of actions to pursue ‘positive complementarity’ including trainings and sessions for sharing best practices, but if a State’s national authorities or the international community did not engage with that process, then complementarity would become an ‘empty slogan.’ In this regard, one participant stated that ‘after a certain period of time there has to be an ‘end point’, where ‘enough is enough’ and a time to take a decision is reached. In this regard, one participant highlighted that the differences and discrepancies in when and how the OTP had made its ‘end point’ determination had led to criticisms of the OTP’s complementarity practice – and may have led to recommendations in the IER that the OTP should not engage in positive complementarity, and should give a two-year time-limit to open investigations or close preliminary examinations.

In relation to the IER recommendations on complementarity, it was observed that the Experts’ recommendation on a time-limit would have led to a number of existing or long-running preliminary examination situations being opened, which ‘would not necessarily have been the best outcome’ for those states parties involved. Another participant discussed the possibility that the OTP continues to work with national authorities and encourages them with much stricter time limits. In this regard, the possibility of making public information around time-limits was proposed, which could ensure that all stakeholders are aware of the limits set – thereby increasing pressure on the states party involved and adding transparency to the process.

Another participant discussed the IER proposal for ‘benchmarking’ at the preliminary examination phase, which pointed towards a crucial question related to complementarity - when will the OTP decide that a state party has ‘done enough for the OTP to step back’ and to close a preliminary examination in deference to a state party? It was noted that the OTP had implemented measures akin to ‘bench-marking’ in situations including Colombia and Guinea. It was proposed that ‘benchmarking’ could act to ensure that states parties fulfil their complementarity obligations, or continue to fulfil their obligations, with the pressure that if the state failed to meet the benchmarks within a certain timeframe, then the OTP would consider opening an investigation. Another participant observed that ‘bench-marking’ may also allow the OTP to close preliminary examinations due to successful ‘complementarity’ efforts, but also ensure that the OTP could ‘reopen’ its preliminary examinations if certain ‘red-lines’ (which had been set out to the states party concerned in the original decision to close the preliminary examination) were crossed.

During discussions, a number of participants agreed with each other that it was important for stakeholders to highlight the capacity limitation on what the OTP can do in terms of complementarity. In this regard, one participant observed that the OTP ‘is not a development agency’. However, it was noted that the OTP can assist states with a limited number of things, and that it has done so, for example in providing evidence or specific information to states that it may have ‘in its files’ or has gathered in its investigations. In this regard, one participant stated that it was in the OTP’s ‘self-interest’ to engage with national actors and share information and evidence when it was possible or appropriate. This was because if the OTP was able to share its information, it may increase its impact (beyond the few cases it could do itself) and the OTP may be able to ‘get more returns on its investment in a situation by rolling out and sharing information with stakeholders.’ One participant noted that in the ‘early days’ of the Court, there may have been an impression that the OTP was somehow hesitant to share information because of ‘some kind of ‘competition’’. However, it was stated that this could

no longer be said to be the case - indeed 'at this stage it is the opposite', as the OTP is overwhelmed with situations and is therefore keen to engage with partners.

A Broader Conception of Complementarity and the Role of the ICC in Relation to Other International Justice Mechanisms

Most participants generally agreed that the Rome Statute had influenced and provided model legal frameworks to many emerging international justice mechanisms. On the one hand, the emergence or 'proliferation' of international justice mechanisms could be seen as a positive legacy of the Rome Statute, or on the other hand, resulting from the ICC 'not being the panacea of international justice or be the magic pill that a lot of people thought it would be'. Other participants discussed that the Rome Statute's limitations and non-universal membership would inevitably 'leave space for other mechanisms and initiatives to come up.' In this regard, mechanisms in Syria and Iraq were recognised as 'truly unique in their engagement and work' and can be seen 'as an offshoot of the so-called "failure" of the ICC.'

One participant stated while it was generally recognised that many international justice mechanisms that have been established since the Rome conference in 1998, (for example, 'hybrid courts' or national mechanisms such as the International Crimes Division in Uganda), took their inspiration from the ICC or the Rome Statute, it shouldn't be overlooked that the ICC and the Rome Statute was itself 'a mimic of the International Military Tribunals (IMTs) of Nuremberg and Tokyo.' This was important to recognise, as it could be said that features that were intrinsic to the design of the IMTs (for example, emerging from 'inter-state' wars and marked by one-sided prosecutions) were also elements behind the ICC's design. In the participant's view, these 'design' issues had implications for how the ICC might be able to operate in broader contexts or situations (Africa was given as an example) where 'intra-state' conflicts were more common, or where suspects may be heads of state or remain in power as accountability is being pursued. Further, it was stated that the intrinsic design features of the ICC (which were based on the IMTs) may also affect how the Court could interact in regions or states, for example, in contexts where restorative justice and reconciliation forms a larger part of jurisprudence, or where the ICC's practice of prosecuting 'most-responsible' perpetrators does not translate to certain regional or national conceptions of justice where prosecuting only senior commanders would be considered as representing 'selectivity'.

In discussing the interaction between the ICC and other mechanisms (hybrid mechanisms, regional and national), one participant provided that this issue could be looked at in two ways – 'direct and indirect.' In their view, 'indirect interaction' refers to norm creation, norms of international law, and how the ICC may influence issues such as atrocity prevention, accountability, and deterrence. 'Direct interaction' could be referred to in three ways. Firstly, 'judicial dialogues', which were 'direct judicial dialogues between the ICC and international justice institutions [...]; not quite the same as complementarity but something akin to that.' The second 'direct interaction' considered the role of national constitutional courts and their relationship with the ICC. An example was given of a constitutional challenge which was instituted before the Philippine supreme court challenging the Philippines' withdrawal from the Rome Statute, 'which might have been an opportunity for the ICC to engage in some way' as it 'centred around domestic law as it related to the Rome Statute and considered issues of complementarity in the Philippine context'. The third example of 'direct interaction' concerned the litigation in South Africa, which considered the ICC arrest warrant of Omar Al-Bashir.

A number of participants discussed international justice 'options and avenues' which had emerged in recent years (and since the Rome conference) which it could be said made up a broader 'Rome Statute

system’ of justice mechanisms. A broad question addressed by participants generally was ‘what role the ICC should play within this broader Rome Statute system?’ and ‘what should the ICC’s complementarity role be within that broader ‘system’?’

In considering the make-up of an expanded ‘Rome Statute system’ some participants described the system as comprising ‘a patchwork of mechanisms’ or – as Kathryn Sikkink had discussed - an ‘interactive system of global accountability’.⁶

Although the ‘nuances’ between different mechanisms were recognised,⁷ a number of participants used recent ‘international justice’ developments in relation to Myanmar, as an example of the ‘panoply of different actors working on the same situation.’ In this regard, participants discussed developments including: the ICC’s opening of an investigation into the situation in Bangladesh/Myanmar in 2019; the establishment in 2018 of the Independent Investigative Mechanism for Myanmar (‘IIMM’); developments at the International Court of Justice in the *Myanmar v Gambia* case; as well as universal jurisdiction cases, including in Argentina.

Using the example of the Myanmar situation, one participant observed that the developments exemplified ‘a need to focus on complementarity going beyond positive complementarity and to see the different efforts, which included the ICC, as *complementary* in a broader understanding of the word.’ Another participant stated - recognising that the ICC’s cases in the Myanmar situation may be quite limited in terms of subject-matter and number of cases which could be brought – that the Myanmar situation was a good example pointing towards the need to identify the ICC’s role within a broad system of international justice mechanisms and processes. In this regard, the Court could consider where, within a system of justice options, it would have most impact, and perhaps also be most ‘cost-effective’ in relation to other mechanisms’ work.

One participant noted that, related to ‘complementary’ mandates, it was also crucial to discuss *cooperation* between the ICC and other mechanisms (as well as cooperation between mechanisms and organisations). It was mentioned that cooperation could be ‘enhanced’, and that it was increasingly recognised that the possibility of cooperation and issues related to facilitating cooperation should be included in new international justice mechanisms’ mandates. The example was given of emerging cooperation between the OPCW and IIMM for Syria, where different mandates, as well as practical issues (such as the consent obtained from witnesses by the different bodies), had created challenges to cooperation. It was recommended – alongside complementarity – that a ‘system of cooperation’ could be strengthened through the development of a ‘comprehensive framework’ of cooperation between international justice mechanisms and organisations. Another participant recognised that while cooperation between mechanisms was generally welcome, the increased number of similar or related mandates also increased the likelihood of confusion and overlap between the different actors and their efforts. This could be seen in practical issues, for example related to ‘overdocumentation’ of witnesses.

Taking the idea of a broader conception of ‘complementarity’ further, participants discussed moving beyond concepts of complementarity as ‘states or the ICC’, to look at the ICC’s engagement with emerging mechanisms. For example, the ‘hybrid’ Special Criminal Court in the Central African Republic would require the ICC to examine its complementary role vis-à-vis the hybrid mechanism and national authorities. Another participant observed that while the ICC had to open investigations when states

⁶ K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W.W. Norton: 2011).

⁷ A number of participants recognised that there are nuances and differences between each of the mechanisms (in relation to their aims, the nature of responsibility each pursues, and more specific distinctions in terms of mandates).

parties are unwilling or unable to undertake them, this may not always lead to an ‘either/or’ situation, and the Court should consider ‘long-term comprehensive and complementary justice strategies’ with a division of responsibilities and judicial activities between national authorities and the Court. These strategies could involve agreements on where certain perpetrators (lower level-more senior) could be tried, or agreements could be made that the politically sensitive or most challenging cases, which could not be undertaken domestically, would be tried by the ICC.

Some participants also discussed how the ICC engages in situations where international justice mechanisms were in the process of being established, or once new mechanisms were established, what role the ICC would play within those mechanisms. The example of recent developments in Sudan was given, where extremely complex transitional justice issues were being addressed, with ‘hybrid’ international justice mechanisms being proposed. Given the ICC’s outstanding arrest warrants against Omar Al-Bashir and other Sudanese nationals, one participant observed that the ICC would likely be involved in discussions around future justice developments, but if these latter moved beyond strict criminal accountability (and perhaps focused also on truth and reconciliation, as well as restorative and reparative justice), in these circumstances, the question of what the ICC’s complementary role would be remained uncertain.

The ICC’s engagement with regional justice mechanisms was discussed as well, including the possibility of the ICC engaging with the African Court of Justice and Human Rights (ACJHR). A number of participants stated that while the Malabo Protocol had included immunities for heads of state, this did not mean that the ICC could not work at all with the African Court. One participant discussed provisions within the Malabo protocol which ‘go beyond the ICC core crimes and include crimes which are of grave concerns to African people such as military coups or trafficking in hazardous waste.’ It was remarked that ‘if the ACJHR can effectively work on these kinds of crimes then it could work in coordination with the ICC.’

A number of participants also highlighted that the Rome Statute does not include provisions on complementarity with regional mechanisms or courts, but that this did not preclude these mechanisms and the Court finding ‘common ground’. A similar proposal was made by other participants, who stated that, given emerging international justice developments, there is an increasing need to ‘streamline the relationship’ between the ICC and other mechanisms and justice processes. Another participant raised the relationship of the ICC with truth and reconciliation mechanisms, and the need for clarity on how the ICC would consider indictments for people who are also part of truth and reconciliation processes.

One participant recommended that the ICC develop policy guidelines on how it will operate in support of, or relate to, other mechanisms. In this regard, it was highlighted that a number of issues needed to be addressed by the ICC and within the Rome Statute system, including whether the ICC and states parties *should* undertake investigations and prosecutions at the same time or whether they should be *sequenced* in terms of which one should come first. Another participant agreed that ‘if the ICC is the only accountability player at the outset, down the line it should try to make way for others with hope for a more rounded way of accountability.’

It was also observed that, more broadly, a ‘management protocol’ could be developed setting out legal relations between national and international mechanisms and how they should be managed and coordinated properly. This was necessary, as ‘there is a need for better management of concurrent jurisdiction’ given that emerging developments had shown that often ‘the same perpetrator and the same crime’ could be tried or dealt with in many different mechanisms, such as international justice mechanisms, truth and reconciliation mechanisms, or traditional justice mechanisms. It was observed that while all of the mechanisms were ‘pulling in the name of justice’ they were marked by different

procedures and outcomes, as well as principles – for example focussing on retributive or restorative justice. One participant remarked that the earlier-mentioned ‘management protocol’ would ensure that efforts, such as those related to information gathering, are clarified and harmonised and not counterproductive. It was also critical to ensure that - with the proliferation of justice options - answers could be provided to questions of why different perpetrators or cases would be tried in certain mechanisms or others.

One participant agreed that the ICC could look into ways to formalise issues regarding complementarity, but that complementarity (in terms of sharing information) was more an ‘operational challenge’ which the Court had faced since its early investigations in engagement and coordination – for example in DRC and Uganda. It was also recognised that the ICC does exchange information with national and local prosecution authorities on its cases. One participant recalled an earlier comment that to exchange information on national proceedings was a ‘matter of interest’ for the ICC because it influences the OTP’s case selection and prioritisation. It was also said to be ‘in the interest of the ICC’ to know what is happening in situation countries, in terms of investigations, so that the OTP could decide what activities and cases it would undertake in light of its functional limitations - as well as to coordinate and avoid overlap with national level proceedings.

One participant reflected that the ‘over-lapping’ of jurisdictions and mandates was not unique to the ICC, and that also the ICTY had engaged with hybrid and localised courts, as well as the ICJ, and other initiatives including Commissions of Inquiry, or the ICRC’s efforts with missing persons.

Finally, one participant observed that, in talking about the future of the ICC, it would be crucial to continue to consider ‘*complementarity not just as reactive but also preventive*’, which lay behind continuing efforts to domesticate international criminal legislation in states’ national legal systems and to establish domestic international criminal law mechanisms.

States as Enforcement Pillars of the International Criminal Justice System

A number of participants discussed the ‘domestication’ of the Rome Statute within states’ legal systems and legislation, which – as one participant stated – ‘we are told is one of the greatest successes of the Rome conference’. Further, in light of states parties having domesticated the Rome Statute, participants broadly discussed developments in relation to states parties investigating and prosecuting Rome Statute crimes at the national level, and their willingness and ability to do so. Participants also discussed if or how states could be moved to investigate and prosecute at the national level, in particular the question was posed ‘how can you ensure that states have the political will to investigate cases domestically, including into their own nationals?’ It was also mentioned that if states parties were willing or able to undertake investigations and prosecutions of Rome Statute crimes at the national level, this ‘may take some of the expectations and the pressure off the Court’. One participant highlighted the primary obligation of states towards realising the rights of victims as well, in particular, the primary obligation of states to provide reparations to victims of crimes under international law, as opposed to reparations being the sole domain of the ICC.

However, participants also recognised that, while the adoption of the Rome Statute had led to a number of states adopting ‘implementing legislation’, some states parties had taken measures or adopted laws which would make national level investigations and prosecution of international crimes in fact more difficult. In this regard, an example was given of the recently passed UK ‘Overseas Operations Bill’ which would effectively limit investigations of war crimes committed by the military after five years of their commission. In a similar vein, one participant noted that, ‘states *have* been very willing and eager to investigate and prosecute their enemies (including rebel leaders or political

opponents) within their own state, however the challenge is to get states to investigate and prosecute their own agents and their own military forces.’ This ‘cynical view’ was relevant in considering political will, because – as one participant observed – ‘states are not moral beings but are calculating bodies and do what is within their own interests (including in protecting their own agents).’ This was important to recognise, as encouraging states to prosecute their own agents would consequently require ‘convincing them that it is in their best interest to do so.’

One participant discussed that ‘a complicated mix of intrinsic and extrinsic factors’ may serve to encourage states to investigate and prosecute crimes under international law domestically. ‘Extrinsic factors’ may include withholding aid (used for example in South Asia); a range of sanctions and; consistent internal and external pressure – including from the international community at large, victim groups and civil society organisations. One of the principal ‘intrinsic factors’ mentioned was legislative changes to domestic law. This is an important factor in terms of compliance with the Rome Statute, as national legislation would be required foremost to define the international crimes domestically. Training and increasing domestic capacity to prosecute was also mentioned as a critical intrinsic factor. Finally, it was mentioned that ‘political will is the most important intrinsic factor’. It was observed that without domestic ‘political will’, it would be very difficult for states to undertake domestic activity - even if the other ‘intrinsic factors’ are in place.

In discussing domestic ‘political will’, one participant stated that ‘political will can be generated’, but how this could happen would largely depend on the unique context of each country. For example, in some states ‘the concept of ‘international justice’ may be seen as ‘foreign’ to national concepts of values that have been instilled and nurtured throughout the history of the country and the events that it has gone through. One participant mentioned that in some states, where ‘human rights concepts have been, or had been, suppressed’, there was a need to look at elements of ‘international justice’, ‘human rights’ and ‘international humanitarian law’ and to ‘transfuse’ these concepts into the domestic legal system, including through (practical) domestic capacity and institution building measures. It was mentioned that the ‘transfusion’ could require support from international partners, international organisations, and institutions. However, it was also noted that – in order to be effective - efforts to increase domestic capacity and political will had to represent a ‘consolidated effort’ and ‘not just a one off, but a long-living project’.

A number of participants discussed the difference between the rhetoric and pronouncements of states parties on the international level, including within the ASP, and the undertaking by states parties of investigations and prosecutions at the national level. One participant provided that a state’s commitments on international justice at the international level could be ‘instrumentalised’ at the national level and used to hold the same state accountable – on the national level – to those same commitments. It was observed that using a state’s own ‘theoretical’ commitment on the international stage and translating it ‘practically’ on the national stage had led to national level investigations and prosecutions ‘gathering traction’ and to national authorities expanding their work on national level investigations. The ‘instrumentalisation’ approach could be used practically to encourage governments to increase the capacity of national WCUs, and ultimately - if international rhetorical commitments could be fully realised on the national level - could lead to national level investigations into ‘situations that are overlooked and crimes committed by the state’s own forces.’

One participant made a number of proposals ‘to move states to take action and comply with their obligations under the Rome Statute’. The first proposal was that ‘to create a regime of international humanitarian law and international criminal justice, governments should be required to report - to provide periodic reports - on what they have done to implement the ideas of the Rome Statute and

other conventions they have signed'. It was observed that establishing procedures and reporting requirements would serve to 'mainstream' international criminal justice and Rome Statute implementation, 'just as human rights as a norm have been mainstreamed in the UN through established procedures that require states to periodically report.'

Secondly, it was proposed that the ICC and its states parties should 'pursue propagation' and 'the spread of international criminal justice at the national level, through national level civil society organisations, as well as individuals.' It was suggested that 'propagation' would ultimately lead to governments' legitimacy being tied to meeting their international justice obligations in the minds of their citizens. Consequently, a state's 'international justice' obligations could become domestic norms to the extent that they may also become 'election issues'. In this regard, the role of national and community-level civil society organisations and citizens was critical, as these could 'act as watchdogs over the rights of the respective communities and lead in holding their governments accountable' and citizens could be 'activated to demand accountability and understand that international criminal justice is also part of their human rights'.

Some participants discussed the role of external political pressure on states to undertake domestic level investigations and prosecutions. This pressure would likely come from other states, and – as one participant stated - given how states operate 'that pressure will be ad hoc, inconsistent, and opportunistic – and it will probably never be a principled answer.' Another participant remarked that the political will of some states to undertake domestic activity may rely on those same states observing other states carrying out investigations. If this was observed, it was proposed that there could be a 'domino effect', with some states demonstrating that they are willing to carry out investigations - for example into war crimes by their own forces committed abroad - which could potentially lead other states to start undertaking similar investigations in their own state.

Managing Expectations of International Justice and the Role of Stakeholders in that Process?

Generally, participants agreed that improving the management of expectations of the public and media in the ICC was 'the responsibility of all stakeholders.' A general observation was also made that expectations in the ICC would nearly always be higher than what the ICC could achieve in practice. One participant stated that, in their view, 'the faith that was placed on the ICC was too overbearing – it was tasked with an impossible mission. It would be useful to try to see how the Court could reduce or curtail its ambitions, in order to manage expectations'. However, another participant observed that 'we can try to lower our expectations, but really we need to lower our expectations in being able to manage expectations.' This was echoed by other statements that managing expectations in the ICC was 'an impossible job'. Another participant observed that translating expectations in the ICC driven by sweeping concepts of freedom and justice into reality was a major challenge, and led to 'hopes being quickly shattered.'

One participant discussed the effect of the 'privileging and prioritisation of the international criminal law process' over other justice processes, such as other transitional justice processes – truth commissions, apologies, reparations – and the effect that, in their view, this has had on the management of expectations. It was observed that diverse affected communities and victim groups have multiple and diverse expectations which may be influenced and affected by a lack of clarity of what certain legal and judicial mechanisms can realistically offer or result in. Another participant stated that 'while there is a call for justice and accountability from most victim groups, the understanding of 'justice and accountability' for many people is that these concepts are linked to statelessness and citizenship and other daily and practical concerns that these victims (for example, refugees) may have'. Echoing this observation, another participant stated that increased clarity was necessary in the

engagement of victims and affected communities, so that expectations could be better managed through explicit information about forms of participation for survivors and survivor communities, including in clarifying the roles that victims of crimes under international law may play in a criminal justice process. In this regard, increased clarity should be sought from the ICC in its communications with affected communities, as well as in information provided to affected communities by stakeholders on the role and functions of other international justice mechanisms and processes.

Another participant discussed the importance of highlighting other justice mechanisms and options to those affected by international crimes, with the result that ‘if the boundaries, limitations and possibilities of different mechanisms and processes are communicated, this would open up the fact that the ICC does not work in a silo but can be complementary to other efforts.’ In this way, expectations could be managed if the ICC was discussed as one justice option among others in a ‘more inclusive and complementary way.’ Taking participants back to discussions from earlier in the session, another participant agreed that expectations in the ICC were related to ‘how the court situates itself in the ‘broader tapestry of transitional justice processes’ in a specific country context it intervenes in’. In this regard, it was proposed that, in order to manage expectations ‘up-front’, ‘the Court should lay out what the role of the ICC is, or what it intends to do in a specific situation. It should not restrict itself to providing information only what the Court’s mandate is, and what crimes it deals with, but talk about what the Court will do to complement the other processes that are taking place in the country’. It was observed that, if the ICC was able to position itself and communicate in a way that is ‘strategically cohesive’ with other justice processes, this might positively impact the ‘overloading of expectations on the Court process itself.’

Another key aspect of managing expectations which was raised by participants related to both the ICC’s situational strategies and communications. In particular, one participant remarked that ‘going forward the OTP and the ICC need to project more humility in relation to what they can achieve given the difficulties of certain environments and the political, operational, and security challenges they face’. In this regard, one participant highlighted the issue of the ICC’s communications around its ‘exit strategy’ or ‘completion strategies’ for a specific country situation. It was stated that ‘exit strategies’ need to be clearly explained to affected communities and to victim groups, perhaps at the beginning of the ICC’s intervention. Related to this aspect, participants highlighted the link between expectations of stakeholders and the need for the ICC to realistically describe its role in the situations it enters. The ICC could also manage expectations through effective communications both at the outset of the Court’s work and once cases have been completed, or when cases are terminated without prejudice to future trials. However, it was also recognised that communications could be a challenge for the Court in ‘hostile and chaotic contexts’ (for example ‘when the ICC’s message can be buried in ‘alternative facts’’) or when national stakeholders have different views on the ICC.

One participant specifically highlighted the role of the ICC Trust Fund for Victims (TFV) in creating and meeting expectations. It was noted that the TFV (particularly through its ‘general assistance mandate’) had the possibility to undertake operations in situation countries alongside OTP investigations and prosecutions, but that if ‘general assistance’ was not undertaken with more effective communication - in terms of what its abilities and capacities are going to be, what ‘reach’ the TFV will have, and how the TFV will execute their plans of intervention – then the TFV could ‘create a lot of disillusionment in the ICC processes as a whole’. One participant went on to state that, in their view, ‘the TFV also needs to manage its own expectations internally in setting out its agenda.’ While it was recognised that ‘there is pressure on the TFV to intervene in different contexts’ the management of expectations of affected communities required the TFV ‘to be candid about its abilities and shortcomings, and to base its communications to victim groups on that ‘realistic alignment’.

It was also mentioned that discussions around expectations in the Court should galvanise discussions around states parties not meeting expectations placed in them within the Rome Statute system, and vis-à-vis their obligations in the Rome Statute to enable the Court to meet its expectations. An example was given of the non-enforcement of arrest warrants, where the Court may be unable to meet expectations in a given situation because suspects in that situation were not arrested by states parties, or only arrested a long time after the arrest warrant was issued.

New Challenges to the ICC and an Environment of Challenges to the ‘Rules Based International Order’

At the outset, one participant observed that ‘human weakness is always absorbed by the immediate moments that we are in’. In their view, it was ‘more important to recognise that the international order ‘ebbs and flows’ and - for the ICC – it was critical that it is able to adjust (in terms of resilience) to changing contexts - so that the Court and other key multilateral institutions do not fall by the wayside.’

One participant discussed the issue of ‘leadership’ in the Court as a key aspect to the ICC being able to meet challenges from a forward-looking perspective. In their view, the election of the new Prosecutor would be critical as – in order to meet future challenges – the Prosecutor would have to be ‘introspective about where the OTP has been and how it can do better’ as well as having to ‘reformulate a vision of the OTP that all stakeholders will be able to rally around’.

A number of participants raised the issue of the Court ‘engaging with the politics associated with international justice’, with one participant observing that ‘the Court needs to recognise it does have a political dimension, that it is a political actor that operates in a political world. As long as the ICC refuses to see that, there will continue to be limits and challenges to what it can accomplish’. It was mentioned that ‘how the Court organises itself to engage with these political questions will be a huge determining factor, as to how the ICC will respond to the challenges moving forward.’ The example was given of the need for ‘constructive engagement’ between the Court and states parties, as well as regional groups of states, on the issues they consider pertinent, including within the context of ongoing reform discussions of the Rome Statute.

Participants also discussed the importance of internal reviews and reform within the ICC to the Court being able to meet future challenges. While it was generally observed that the IER offered a ‘key chance’ for reforms, participants also referenced issues where internal reform was still necessary. For example, it was remarked that ‘an ICC that currently faces accusations of sexual harassment, racial harassment, discrimination and bullying would be unlikely to be very successful in prosecuting gender-based crimes or persecution on racial grounds’.

Another participant stated that the ‘question of race and racism cannot be ignored’ within the ICC and the Rome Statute system in general – with the omission by the IER in discussing this issue a ‘big problem’.

The final intervention of the three sessions provided a fitting conclusion to the expert meeting:

‘The ultimate question is whether the international justice system needs an institution like the ICC? My opinion is yes, but it needs a lot of effort to develop it, perfect it and make it better. It requires a lot of work and dialogue and communications with different stakeholders that may not necessarily involve the most pleasant communications, but unless we put that effort in, we will not achieve what we want to achieve.’

Annex 1: about the organisers

Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.

The T.M.C. Asser Instituut is an internationally renowned centre of expertise in the fields of public international law, private international law, and European law. It fulfils an important role in undertaking fundamental and independent policy-oriented research and providing a platform for international cooperation and partnering in fields of law at the cutting edge of academia and practice. With its strong convening power the institute attracts legal scholars from around the world to present and test cutting edge ideas in their respective fields of expertise. It is the natural place for critical and constructive reflection on international and European legal developments.

Annex 2: list of participants, moderators and organisers

Participants:

Nada Kiswanson – Legal Representative for Victims, ICC
Sergei Vasiliev – Associate Professor of (International) Criminal Law, University of Amsterdam
Nika Jeiranashvili – Executive Director, Justice International
Rosemary Tollo – Programme Director, Journalists for Justice
Eugene Bakama – President, Club des Amis du Droit du Congo
Kjersti Lohne – Postdoctoral Fellow, University of Oslo
Marieke de Hoon – Assistant Professor of International Law, VU University Amsterdam; Senior Counsel Public International Law & Policy Group
Mariana Pena – Senior Legal Officer International Justice, Open Society Justice Initiative
Ana Cristina Rodriguez Pineda – Chef de Cabinet and Principal Legal Advisor, UN International Residual Mechanism for Criminal Tribunals
Matias Hellman – External Relations Advisor, Presidency, ICC
Horia Mosadiq – Afghanistan Transitional Justice Coordination Group
Osvaldo Zavala Giler – Senior Special Assistant to the Registrar, ICC
Angela Mudukuti – Associate Advocacy Officer, Open Society Justice Initiative
Anjali Parrin – Associate Director, Project on War Crimes and Mass Graves, Human Rights Clinic and Institute, Columbia law School
Sharon Nakandha – Program Officer, Open Society Initiative for West Africa
Sareta Ashraph – International Criminal Law Counsel; Co-Founder, Atlas Women
Kate Gibson – International Criminal Law Counsel
Benson Olugbuo – Executive Director, CLEEN Foundation, Nigeria
Yasmine Ullah – President, Rohingya Human Rights Network
Philipp Ambach – Chief, Victims Participation and Reparations Section, Registry, ICC
Reinhold Gallmetzer – Prosecution Appeals Counsel, ICC
Xavier-Jean Keita – Principal Counsel, Office of Public Counsel for the Defence, ICC
Owiso Owiso – Doctoral Researcher, University of Luxembourg
Nadia Volkova – Director, Ukrainian Legal Advisory Group
Priya Pillai – International Lawyer; Head, Asia Justice Coalition Secretariat
Andrew Songa – Lawyer; Human Rights Advocate
Oumar Ba – Assistant Professor, Morehouse College Atlanta
Nynke Staal – Policy Officer, Netherlands Ministry of Foreign Affairs
Lily Rueda Guzman – Judge, Colombian Special Jurisdiction for Peace
Lydia A. Nkansah – Associate Professor and Dean at the Faculty of Law, Kwame Nkrumah University of Science and Technology
Alexandra Lily Kather – Legal Advisor, International Crimes and Accountability Program, European Center for Constitutional and Human Rights
Bonyan Jamal – Accountability Specialist, Mwatana for Human Rights
Rod Rastan – Legal Advisor, Office of the Prosecutor, ICC
Claus Molitor – Analyst, Preliminary Examination Section, Office of the Prosecutor, ICC

Moderators:

Caroline Fournet – Professor of Comparative Criminal Law and International Justice, Rijksuniversiteit Groningen

Wouter Werner – Professor of International Law, VU University Amsterdam

Geoff Gordon – Senior Researcher, T.M.C. Asser Instituut

Organisers:

Janne Nijman – Chairperson of the Executive Board and Academic Director, T.M.C. Asser Instituut

Matt Cannock – Head, Centre for International Justice, Amnesty International

Christophe Paulussen – Senior Researcher, T.M.C. Asser Instituut

Lars van Troost – Senior Policy and Strategy Adviser, Amnesty International Netherlands

Solomon Sacco – Head of International Justice, Amnesty International

Dagmar Oudshoorn – Director, Amnesty International Netherlands

Marta Bo – Researcher, T.M.C. Asser Instituut

Sofia Stolk – Researcher, T.M.C. Asser Instituut

Siham Ali – Volunteer, International Justice Team, Amnesty International

Shraddha Dubey – Legal Intern, T.M.C. Asser Instituut

Eva da Costa – Project Manager, Education & Events, T.M.C. Asser Instituut

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