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IBA/ICC Monitoring and Outreach Programme



ICC EXTERNAL COMMUNICATIONS: DELIVERING INFORMATION AND FAIRNESS

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Executive summary

Given the sensitive nature of the International Criminal Court (ICC or the 'Court') proceedings and the Court's role in promoting international compliance with the highest standards of justice, a clear and cohesive framework for external communications is essential. Reports and statements made in relation to cases before the Court can be misinterpreted given the complexity of the trials and the political dynamics surrounding them. Moreover, adverse public comments by ICC officials or by parties to a trial can mar the proceedings.

This IBA report looks at ICC external communications between January 2010 and April 2011. In March 2010, the Court's Paper on Roles and Responsibilities of the Organs in Relation to External Communications advanced the discourse in this area, as did the first ICC Public Information Strategy published in November 2010. Both documents represent an important step towards greater transparency and efficiency. At the same time they have left the issue of inter-organ coordination substantially unresolved and have failed to put in place effective coordination mechanisms to ensure that ICC communications are firmly founded on the one-court principle.

Currently, informal consultations take place among designated staff members, and court-wide messages are occasionally put forward. However, the ICC's external communications lack unity, and coordination is subordinated to the interests of individual organs. There are no established communications parameters, nor is there a clear court-wide policy on public statements. The new strategic framework does not include strict, detailed directives to govern *sub judice* reporting by the Court's organs.

During the period under review, an important issue arose concerning the appropriateness of language used by ICC officials when publicly speaking about proceedings before the Court. Statements released by Office of the Prosecutor (OTP) staff prompted the Defence in the first ICC case to submit that the Prosecutor displayed bias against the accused that is incompatible with his functions and obligations. In other instances the Defence challenged the impartiality and good faith of the Prosecutor following statements proclaiming the guilt of the Defendant.

Given the potential impact of such statements on fair trial rights and the overall impartiality of the proceedings before the ICC, a judicial determination was both timely and necessary. The Chambers seized of the matters rejected the challenges mounted by the Defence and indicated that comments made by the OTP would not result in unfair proceedings or affect the judges' decisions. Nevertheless, the judges cautioned the Prosecutor to select his words more carefully in future communication with the public.

Public information about ICC trials – if delivered with restraint and nuance – can help the Court fulfill its mandate without prejudice to the judicial process. Hazardous comments, however, can also have a negative impact on the principle of equality of arms. Misleading reports can discourage witnesses from participating in the proceedings, with obvious harmful consequences when judges do not have *subpoena* powers. Furthermore, the frequency of closed sessions in ICC trials places greater onus on the parties to be discreet in relaying information to the media.

All these are signs of the ICC's struggle to find a language that is both media-friendly and judicially apt. Absent a court-wide policy, ICC Chambers set standards for public commentary by the Prosecutor and other officials.

The role of the ICC President as the 'external face' of the Court is not without controversy. However, the IBA finds that the ICC President may perform simultaneously as judge and spokesperson without impinging on judicial independence and fair trial standards. Indeed, good public relations are key to the Court's success, and the Presidency plays a vital role in this regard.

Different is the position of the ICC Prosecutor who can speak more freely and take positions in disagreement with the Chambers as long as public comments respect the judicial process and reflect the independence and impartiality of OTP investigations. In 2010, the Prosecutor was the most visible Court official, despite the fact that the Presidency significantly intensified its own external relations efforts. Data shows that in an effort to avoid duplication and increase efficiency the OTP has diminished the number of press releases published in a year and developed new tools to convey its messages.

Importantly, public statements by Court officials, when not consistent with the Court's overall strategic objectives, can also negatively affect the Court's efforts to build partnerships with stakeholders.

In the course of 2010, the Court redoubled its external relations activity and refined its practice even without a strategic framework to guide its efforts. In particular the Presidency made considerable progress in this regard. Also the Assembly of States Parties (ASP), through the good offices of its President, has increasingly engaged with external stakeholders.

In the first half of 2010, the first ICC Review Conference presented a valuable opportunity for the Court to foster relations with states and civil society, and to increase the level and quality of dialogue between the Court and its partners. In anticipation of the Conference, States Parties, non-governmental organisations (NGOs) and Court Officials engaged in

a range of co-operative activities, resulting in a revived enthusiasm and ultimately a renewed partnership. Throughout 2010, ICC organs continued to hold regular meetings with representatives of states, international and regional organisations, and civil society groups.

Notwithstanding the need to maintain a healthy distance between the Court and States Representatives, dialogue between the two parties is the only way forward. Communications play a

key role both in setting expectations and ensuring accountability. The success of the first ICC Review Conference and the establishment by the ASP of a Study Group on Governance to facilitate dialogue between the Court and States Parties demonstrates the desire for honest and open dialogue. It is important that the Court engage with the Study Group in a constructive manner, and that states conduct their analysis without infringing on judicial independence.

IBA key findings and recommendations

On external communications:

1. The IBA welcomes the clarity provided by the Court's Paper on Roles and Responsibilities of the Organs in relation to External Communications. The document represents a step forward in diminishing the possibility of overlapping and contradictory messages issued by ICC organs. The IBA notes, however, that the impact of the document has been very limited.
2. The IBA laments that the new framework put in place at the ICC – also comprehensive of the first ICC Public Information Strategy published in November 2010 - fails to establish effective coordination mechanisms so that the one-court principle might undergird all ICC external communications.
3. The IBA urges the Court to revitalise coordination efforts and establish appropriate mechanisms to ensure that the Court's different voices are harmonised and entered into the public domain as common positions and court-wide messages. Furthermore, the IBA recommends that the issue of inter-organ coordination be further explored and discussed among the Court's principals.
4. The IBA commends the balanced approach shown by the ICC Presidency in its communications. Although the President's public role is limited by his judicial functions, ICC current practice shows that the two can coexist as long as they are implemented in a transparent manner.

On public information:

5. The IBA commends the release of the first ICC Public Information Strategy as a positive development that will increase transparency. The Strategy is ambitious in that it introduces a number of new activities and sets common operational principles for all Court organs.
6. The new ICC Public Information Strategy is to be implemented with existing resources. Implementation of the activities described in the Strategy will therefore rely primarily on external partners and occasionally on supplemental Registry resources. The IBA wishes to caution against possible shortcomings resulting from this approach, and invites States Parties to participate actively in the implementation of the Strategy.
7. The absence of an ICC Spokesperson remains a concern not only because of the need to delegate the announcement of key judicial developments to an impartial professional, but also because of the role as Head of the Public Affairs Unit of the Registry that the ICC Spokesperson is expected to play. It is the IBA's hope that the recruitment of an ICC Spokesperson will aid in the creation of synergies among the Court's organs and further develop the ambassadorial role of the President as the 'face' of the Court.
8. The IBA notes with concern the duplicative efforts that result from weekly bulletins produced at the ICC and recommends that the role of the Registry and OTP in relation to weekly updates be redefined, possibly with the aim of merging the two into one document.

9. The Registry's press releases tend to be lengthy and numerous. The IBA recommends a revision of the content and frequency of ICC press releases and suggests that new tools be used to publicise information currently disseminated through press releases.
10. Although data shows that the number of press releases issued by the OTP has diminished, the number of public statements by the Prosecutor's office has more than doubled, demonstrating that the OTP remains very active in its communications with the public. Although the IBA remains concerned that separate press releases are being issued by the Registry and the OTP at key moments of the proceedings, it is to be noted that the OTP's practice has improved over time and in 2010 only three OTP statements covered developments in judicial proceedings that were also covered by Registry press releases.
11. The IBA recommends that at key moments in the proceedings one press release be issued by the Court including quotations or statements from different organs as well as the Defence when applicable to ensure information is not one-sided and possibly prejudicial to the rights of the defendant.
14. ICC judges are also expected to refrain from publicly commenting on present and future cases before the ICC. The IBA recommends that external communications on such matters be addressed by the Presidency, which conducts its public information work with the assistance of the Public Information and Documentation Section of the Registry.
15. The IBA commends the standard-setting approach of Trial Chamber I and Pre-Trial Chamber I on adverse comments, which provided clear guidance regarding inappropriate public statements in the context of ongoing proceedings. The IBA endorses the findings of both the Pre-Trial and Trial Chamber in this regard.
16. The IBA regrets that key documents issued by the Court in 2010 on issues relating to external communications failed to provide strict directives to govern *sub judice* reporting by ICC officials.

On external relations:

On public statements sub judice:

12. The IBA wishes to caution against the negative impact that adverse public statements can have on the rights of the defendant and on the principle of equality of arms. Public statements made in relation to cases before the ICC could easily be misleading and, therefore, the IBA urges Court officials to modulate messages to ensure full respect of judicial process and of all parties in the proceedings as well as to ensure that witnesses are not dissuaded from participating in proceedings.
13. Notwithstanding the right of the OTP to speak to the press and the public, the OTP is encouraged to deliver accurate information in a moderate tone and to exercise self-restraint when commenting on matters before the Chambers.
17. The IBA commends the intensified public relations efforts of all organs of the Court and of the ASP President. In particular, it notes that the ICC President has adopted a more proactive approach and embarked on frequent country visits in keeping with its mandate to promote universality of the Rome Statute. The IBA welcomes the approach taken by the ASP President and urges him to continue using his good offices to promote states' support of and cooperation with the ICC.
18. The IBA notes the approach taken by ICC organs in widely publicising official visits of states' delegations and statements issued by elected officials at conferences, lectures and other meetings. While encouraging the Court to be transparent about its external engagements, the IBA recommends diversifying the tools used to disseminate such information. In particular, it may be appropriate for the ICC to reflect on whether the high number of ICC press releases on such matters may have the unintended effect of diluting the message.

19. The IBA urges the Court to issue a common strategic framework for external relations and to fully integrate communications initiatives of all organs. To foster exchange between the Court and diplomatic representatives, the IBA recommends that the Court's organs run a joint survey on their external relations practice with the aim of improving services and revising current practices. It is the IBA's hope that the survey findings will also aid in the task of developing a new court-wide strategy.
20. The established ASP Study Group on Governance represents a positive development, which in the long term has the potential to strengthen the relation between the Court and States Parties. It is the IBA's hope that the Study Group and the precedent it sets will shape future practices and encourage a revision of external communication practices at the ICC.

The IBA's ICC Programme commenced in 2005 and comprises two elements: monitoring and outreach. The monitoring component follows and reports on the work and proceedings of the ICC, focusing particularly on issues affecting the fair trial rights of the accused, and on implementation of the 1998 Rome Statute and related ICC documents in the context of international standards. The IBA's monitoring of both the work and proceedings of the Court may also include *ad hoc* evaluations of legal, administrative and institutional issues that could affect the impartiality of proceedings and the development of international justice.

The outreach component of the programme involves partnering with bar associations, independent lawyers and civil society organisations to disseminate information and promote debate on the ICC in different jurisdictions across the globe. Given the important role played by lawyers in advancing implementation of the Rome Statute, particular attention is paid to establishing links and synergies between practitioners at the national level and the ICC.

Methodology

The IBA's monitoring and reporting is carried out via a dual process of research and consultation. The IBA engages in high-level consultations with key stakeholders within and outside the ICC. Within the Court, the IBA periodically consults with designated persons in all three organs of the Court, as well as with senior level ICC staff. While at all times preserving its objectivity, the IBA seeks to maintain close contact with relevant ICC divisions. External consultations are conducted with NGOs, individual defence counsel, representatives of diplomatic missions and other legal professional organisations.

The IBA expresses its gratitude to all persons who graciously participated in consultations for this report, and to the IBA interns who provided research assistance.

Background

The ICC clearly recognises the importance of disseminating information on its activities in a timely fashion. In 2005, the Court presented its Integrated Strategy for External Relations, Public Information and Outreach (the Integrated Strategy),¹ outlining a general framework to regulate communications by various ICC organs. In 2006, the ICC Registry developed a Strategic Plan for Outreach² and has since issued situation-related Outreach Strategies on a regular basis. In November 2009, the ASP encouraged the Court to develop a court-wide plan on public information and to reinforce internal coordination on communications activities. The Court was asked to report on these matters at the ninth session of the Assembly.³ The link between increased understanding and enhanced support for the Court was emphasized by the ASP at the 2010 Review Conference of the Rome Statute.⁴

The ICC Public Information Strategy for the years 2011-2013⁵ was adopted by the President, Prosecutor and Registrar on 5 November 2010 and presented to the ASP at its ninth session. Prior to that, a stand-alone paper on Roles and Responsibilities of the Organs in Relation to External Communications (the ICC Paper on External Communications) was adopted in March 2010. That paper was a byproduct of discussions that resulted in the Report of the Court on Measures to Increase Clarity on the Responsibilities of the Different Organs (The Governance Report).⁶

To date there is no strategic framework in place for external relations.

The Court's paper on Roles and Responsibilities of the Organs in Relation to External Communications

The Governance Report adopted by the Court in March 2010 proposes measures to better align the responsibilities and priorities of different organs of the Court.⁷ The ICC Paper on External Communications further elaborates the public information duties of the various Court organs.⁸

The ICC Paper provides guidance in an area of the Court's daily work that is otherwise not regulated by legal texts. The Paper reduces the number of persons responsible for delivering information to external partners and envisages a clear distribution of labour to minimise the risks associated with multiple sources of information. It also addresses the need for inter-organ coordination on issues of common concern.

Improved coordination and consultation should advance several goals including, according to the document, the adoption of court-wide messages and communications strategies by the three principals, and preparation by the Court of annual reports to the ASP and the United Nations. The Court should also present a concerted position before meetings of the ASP, the Committee on Budget and Finance (CBF), Diplomatic Briefings, NGO roundtables and The Hague Working Group of the ASP.

The Paper specifies that:

'in coordinating with the other organ(s), staff of the Presidency/Registry and the Office of The Prosecutor (OTP) should seek maximum consensus on external communications matters of mutual concern without unnecessarily restricting the ability of the organs of the Court to react effectively and efficiently to opportunities and challenges.'⁹

The ICC Governance Statement also envisages that the Court's organs have the ability to act independently 'as the obligation is to seek consensus and not necessarily to obtain consensus.'¹⁰

- 1 ICC, Integrated Strategy for External Relations, Public Information and Outreach of the International Criminal Court (hereinafter The Integrated Strategy), available at: www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf.
- 2 ASP, Strategic Plan for Outreach of the International Criminal Court, ICC-ASP/5/12, (29 September 2006), available at www.icc-cpi.int/NR/rdonlyres/FB4C75CF-FD15-4B06-B1E3-E22618FB404C/185051/ICCASP512_English1.pdf.
- 3 ASP, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/8/Res.3, (25 March 2010), para 34, available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.3-ENG.pdf.
- 4 The Review Conference, Declaration on Cooperation, RC/Decl.2, (8 June 2010), available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.2-ENG.pdf.
- 5 ASP, Report of the Court on the Public Information Strategy (2011-2013), (hereafter ICC Public Information Strategy), ICC-ASP/9/29, (22 November 2010), available at www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-29-ENG.pdf.
- 6 ASP, Report of the Court on Measures to Increase Clarity on the Responsibilities of Different Organs, (hereafter The Governance Report), ICC-ASP/9/CBF.1/12, (18 March 2010), available at www.icc-cpi.int/NR/rdonlyres/84F21CDA-047C-4660-910941AC334C0EA0/282297/GovernanceReportEng.pdf.

- 7 The related risks of 'diverging or conflicting objectives / non-alignment of priorities' and 'lack of clarity on responsibilities between different organs' were included in the comprehensive enterprise risk management (ERM) exercise carried out by the Court in 2008.
- 8 Of note matters related to outreach are left to the remit of the Registry and solely regulated by 2006 Court's Outreach Strategy; see ASP, The Governance Report, ICC-ASP/9/CBF.1/12, (18 March 2010), 12.
- 9 ASP, The Governance Report, ICC-ASP/9/CBF.1/12, (18 March 2010), 15.
- 10 Ibid, 11.

IBA comment

The IBA welcomes the Court's Paper on External Communications for the clarification it provides regarding the roles of various organs of the Court. However, the extent to which the Paper has actually improved operations of the Court is debatable. The document reflected and reinforced existing structures without resolving the real challenges posed by duplication of messages and fragmented information from different organs.

The key challenge in relation to ICC external communications remains that of coordination. As early as March 2006, the then-President, Prosecutor and then-Registrar concluded that internal divisions within the institution constituted the major risks that the Court needed to guard against. In November 2009, the ASP requested greater coordination on external communications activities.¹¹ However, the Paper contains no indication of concrete coordination mechanisms or of the objectives driving court-wide work on external communications.

In contrast, consultations conducted by the IBA indicated that the Paper's clarification of roles and responsibilities aided in the creation of an informal system of inter-organ coordination for external relations activities. Among designated staff members, informal consultations take place to reach common positions and, occasionally, to develop court-wide messages for public consumption. These consultations resulted in a more positive interaction with diplomatic representatives.¹² However, it is legitimate to question whether informal ad hoc consultations among designated persons are an effective tool to achieve full coordination. Ad hoc coordination processes have, by definition, a limited impact, and in practice, organ-specific positions may continue to prevail over court-wide messages.

Overall, the IBA finds that the Court's Paper on External Communications has left substantially unresolved the issue of effective coordination, and its impact in producing court-wide messages and positions is very limited. The standing group on external communications, which was established in the Court's early days, no longer meets. The IBA understands that the formal establishment of new coordination structures might have been beyond the scope of the Paper on External Communications, yet this very fact limits the ability to truly affect change and streamline communications practices and messages within the Court.

The IBA previously lamented that poor coordination was a matter of concern.¹³ The IBA recognises that different organs at times have different messages; however, in light of the one-court principle, the ICC should strive as much and as often as possible to project the Court in the public domain as a cohesive institution where different functions are discharged but overarching goals are pursued collectively. Whilst the Paper's clarification of the roles and responsibilities of each organ is a step in the right direction, it did not result in the Court's coming together with one voice.

The ICC Public Information Strategy

The first ICC Public Information Strategy, adopted in November 2010, introduces innovative elements by addressing issues which never before had been dealt with on a court-wide basis. For example, it recognises the role to be played by civil society and States Parties, proposes court-wide objectives, operational principles and improvements to public information tools currently in use, and also initiates new tailored programmes targeting different audiences. Annual work plans are expected to be developed in relation to targeted audiences and programmes.

The Registry is the organ responsible for implementing the Strategy, in full respect of OTP and other organs' independent but complementary responsibilities.¹⁴ The Strategy is to be implemented with the support and partnership of both States and civil society; civil society representatives are recognised as 'indispensable partners' and co-implementers.

Partnership with key institutions is indeed the cornerstone of programmes established by the Court to augment its engagement with the academic and legal communities. The Court plans to support research and ICC-focused programmes within the academic community; participation of senior staff members and elected officials in courses and seminars; and the development of a new project aimed at connecting professors and academic institutions from different countries or regions. The ICC Annual Global Moot Court Competition will also be organised with the participation of ICC officials in regional level competitions and with finals to take place before ICC judges at the ICC. Interestingly, the Strategy calls for states 'to include programmes on international law in formal curricula of "relevant faculties"'.¹⁵

¹¹ See note 3.

¹² For example, in relation to meetings of The Hague Working Group, the Court's organs have made concrete efforts to reach and to stage common positions on a variety of subjects.

¹³ IBA/ICC Monitoring and Outreach Programme, *Beyond The Hague: Forging linkages between the International Criminal Court and Key Jurisdictions*, (hereafter *IBA Report Beyond The Hague*) September 2008, 57-58, available at www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx.

¹⁴ ASP, ICC Public Information Strategy ICC-ASP/9/29, (22 November 2010), para 2.

¹⁵ *Ibid*, para 37.

The Strategy also includes a legal programme targeting judges, prosecutors, bar associations and other legal professionals in order to foster interest among these natural partners of the Court.¹⁶ Of note is the work with bar associations – at the national and international level - for stimulating interest and strengthening the capacity of external counsel who might appear before the Court.¹⁷ In this respect the Court plans training sessions, study visits and publications, and will extend its ‘Calling Female Lawyers’ campaign, a project launched jointly with the IBA in May 2010, to encourage qualified female African lawyers to apply for admission to the List of Counsel and List of Assistants to Counsel thus bringing the Court a step closer to gender balance.¹⁸

Finally, the Public Information Strategy calls for expanding the use of modern technologies. It proposes improvements in the area of accessibility and quality of information made available to the media through the production of audio-visual handbooks for journalists and the development of a web streaming capacity to enable journalists to receive training remotely. The Strategy foresees ‘support and media coaching for Court staff’ and timely information made accessible to the public through the ICC website.¹⁹

IBA comment

The IBA pointed out in previous reports that the Public Information Unit of the ICC Registry was underfunded and its work lacked a strategic framework. This, coupled with the OTP’s more visible public information campaign, adversely affected the Court’s image as a unified institution.²⁰ In October 2009, the IBA recommended that the ASP invite the Court to adopt a strategic framework for public information.²¹ Other NGOs shared the IBA’s view and actively advocated for a strategic plan for public information to complement the Court’s outreach and the external relations efforts

of its organs.²²

The IBA commends the release of the new ICC Public Information Strategy as a positive development that will enhance ICC transparency and communication. Furthermore the development of the Strategy has been accompanied by an increase of public information activities carried out by PIDS within existing resources. In light of ongoing practice the changes brought about are not daring, yet the Strategy is ambitious in that it introduces a number of new activities and sets common operational principles for all Court organs. Recognition of states and civil society representatives as ‘indispensable partners’ and co-implementers is also significant because such partnerships will further encourage transparency and hopefully more effective planning.

A point of critique is that while the Strategy includes among its operational principles ‘court-wide coordination of public information plans,’ it does not describe what concrete mechanisms will be used to ensure systematic coordination among ICC organs and with external partners.²³ By contrast, the Strategy acknowledges the existence of court-wide objectives in addition to OTP-specific objectives, as well as the possibility that the OTP will disseminate its own information.²⁴

The Strategy includes plans to improve media accessibility through the use of blogs or digital press conferences, both of which can be incorporated into normal press routines and will allow the Court to engage journalists far afield through email and Skype. Digital press conferences will be broadcast through the ICC website and include an interactive segment allowing participants to ask questions. To date, however, the ICC website remains inadequate and no information on digital press conferences is available. There is also no direct link to the web-streamed training sessions for journalists that have been organised so far. The ICC training session for Kenyan journalists, which was posted on YouTube, was viewed 1,843 times between 10 December 2010 and 16 March 2011, showing great interest around this initiative and the appropriateness of publicising it on the ICC website.²⁵

So far the ICC has only organised media training sessions in situation countries. In Kenya, for instance, in 2010, the Outreach Unit trained 87 national and international journalists of print, TV and online media and 28 radio broadcasters.²⁶

16 Ibid, para 39.

17 Ibid, para 39(d).

18 At the beginning of 2010, women and African women in particular, were noticeably under represented on the ICC List of Counsel: 59 of a total of 326 counsel on the list were women; of which 12 were nationals of African countries. The six month campaign dramatically increased the number of women registered to practice before the Court.

19 ASP, ICC Public Information Strategy, ICC-ASP/9/29, (22 November 2010), paras 23-24.

20 IBA/ICC Monitoring and Outreach Programme, *The Quest for a Public Face: the public debate on the International Criminal Court and its efforts to develop a vision and coherent strategy on external communications*, (hereafter *The Quest for a Public Face*), October 2009, 24, available at www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx.

21 Ibid, 11.

22 Communications Team, Coalition for the International Criminal Court (CICC), Comments And Recommendations to the Eighth Session Of The Assembly Of States Parties, 18 November – 26 November 2009, The Hague, available at http://iccnow.org/documents/Comms_team_paper_ASP8_draft_91109.pdf.

23 ASP, ICC Public Information Strategy ICC-ASP/9/29, (22 November 2010), 4-5.

24 Ibid, paras 11 -15, see also footnote 11.

25 ICC, Kenya situation - Training session, Webstream (10 December 2010), available at www.youtube.com/user/IntlCriminalCourt#p/a/u/2/ARb6iRRVpkw.

26 ICC, *Outreach Report 2010*, 73, available at www.icc-cpi.int/iccdocs/PIDS/publications/OUR2010Eng.pdf.

Reaching out to journalists outside situation countries remains a challenge. The Registry plans to tackle this by focusing on regional media and journalism associations, yet it has limited resources to invest in cultivating networks of journalists to report on ICC matters.

In general, one of the main shortcomings of the ICC's external communications efforts is that information seems to reach only a circle of professionals and others involved in matters of international criminal justice. Reaching beyond this specialised audience is at present one of the greatest challenges before the Registry. To tackle this issue the new Public Information Strategy intends to improve the use of internet-based technology and to 'expand the use of its social networking sites'.²⁷

Twitter accounts help followers keep updated on real-time news. ICC news disseminated via Twitter can include last-minute changes in the hearing schedule, activities in the field, the launching of new videos, and other matters. The ICC posted its first 'tweet' on 14 August 2009; since then 179 'tweets' have been uploaded and are currently followed by 3911 individuals.²⁸

The ICC YouTube channel was set up on 6 October 2009 but officially launched on 31 March 2010. As of 11 March 2011, 260 videos had been uploaded and viewed 119,764 times.²⁹ The Registry has also been publishing photo materials on Flickr, and the OTP launched an online forum to facilitate exchange on current issues before the Office.³⁰

Given the above-mentioned activities, it is regrettable that due to resource constraints the Court omitted the use of Facebook, which with its highly interactive tools and more than 500 million active users could be an efficient tool to disseminate information.³¹ Another problem is the limited accessibility and poor promotion of videos produced by the Court. While few audiovisual materials can be viewed on the ICC website³², the majority are posted only on the ICC YouTube channel and do not include a link to the relevant section of the ICC's website. The negligent posting is said to be due to shortcomings related to the content management system of the ICC website.

Furthermore, while the ICC YouTube channel is accessible on the ICC home page, no direct link to existing videos is posted on the relevant pages on the ICC website.

Implementation challenges

Implementation of the Public Information Strategy is not short of challenges. First, the Public Information and Documentation Section of the Registry (PIDS) is the body responsible for implementation of the Strategy, but it does not have authority to force actions of other ICC sections and organs. In other words, while the Strategy steers the overall work of the Court in relation to public information, it is not squarely in the remit of the PIDS to ensure court-wide adherence to and implementation of the Strategy. For instance, the Strategy shall serve as a framework for the OTP's public information work. In our consultations, however, the OTP's Public Information Unit stressed that although the Office fully recognises itself in the Strategy, its work is also driven by the Prosecutorial Strategy and above all reflects the specific mandate of the Office. Public information will therefore be handled solely by the OTP and may include additional activities arising from the court-wide Strategy.³³

Secondly, for public information work to be fully credible and effective, it is necessary to have a well-staffed and dedicated unit. At present, PIDS staff are simultaneously working on outreach and public information and there is no ICC Spokesperson. The Public Affairs Unit of the Registry employs four people. The media programme has at its disposal two persons: a public information assistant currently uploads all judicial filings (30-40 daily) and is also responsible for the website and layout of publications; a second assistant is responsible for basic contact with the media and for editing the Registry's publications. Other programmes and initiatives are run by the Chief of PIDS with the assistance of interns and pro-bono researchers.

The absence of an ICC Spokesperson has been a source of concern, not only because of the need for an impartial professional voice to announce key judicial developments, but also because a spokesperson could fulfill the role of Head of the Public Affairs Unit of the Registry. The position of ICC Spokesperson is currently under recruitment and expected to be filled in June 2011.

The budget (exclusive of staff costs) for the Public Affairs Unit is also minimal: a total of 281,600 euro, of which 135,000 are for printing; 25,000 for media monitoring; 20,000 for photos; 30,000 for capacity-building of African journalists in The Hague; 60,000 for satellite broadcasting

27 ASP, ICC Public Information Strategy ICC-ASP/9/29, (22 November 2010), 30.

28 As of 16 March 2011: <http://twitter.com/IntCrimCourt>.

29 www.youtube.com/user/IntCriminalCourt#p/a/u/2/ARb6iRRVpkw.

30 The Human Rights & International Criminal Law Online Forum was created in partnership with the Sanela Diana Jenkins Human Rights Project at UCLA School of Law, and can be visited at <http://UCLALawForum.com>

31 Facebook Statistics, www.facebook.com/press/info.php?statistics.

32 For example, in Bemba case, available at www.icc-cpi.int/nr/exeres/2667c8bf-a95b-4795-be34-17a54aaf019d.htm and in the Mbarushimana case, available at www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc01040110/icc01040110?lan=en-GB.

33 IBA consultation meeting with the Office of the Prosecutor, 17 February 2011, (notes on file with the IBA).

of key hearings; and 11,600 are for Spokesperson travel expenses. This budget allows little room for manoeuvre to run new programmes.

Further, the Strategy is to be implemented using existing resources.³⁴ In practice, this means that the activities described will depend on financial support from external partners and, perhaps occasionally, be supplemented by resources from the Registry. This undoubtedly is the Strategy's Achilles heel because it makes implementation vulnerable to possible funding challenges of external partners.

The fact that the Court will have to work more closely with its partners may in itself be a positive development, particularly in relation to states. According to the Chief of the PIDS, making the ICC visible among the international community is a 'shared responsibility' between the Court and States Parties. This is consistent with the expression of support adopted by States Parties in Kampala.³⁵ The Strategy invites governments to support civil society initiatives, to alert communications networks and national media, and to organise public events for the Day of International Criminal Justice.³⁶

In addition, the Strategy recommends changes regarding traditional information tools and audiovisual productions.³⁷ Most ICC press releases announce judicial decisions and are on average correct in their content and relatively well-structured. Progress could be made in relation to length and timing.

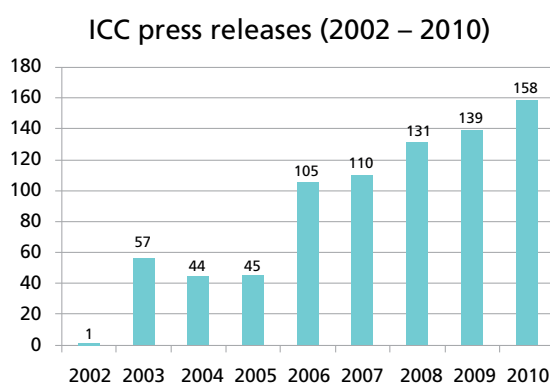


FIGURE 1: NUMBER OF ICC PRESS RELEASES PER YEAR

Over the years the number of ICC press releases has increased exponentially and these now cover a variety of topics. In 2010 the Court on average issued three press releases per week, two of them

34 ASP, ICC Public Information Strategy, ICC-ASP/9/29, (22 November 2010), para 40.

35 The Review Conference, Kampala Declaration, RC/Decl.1, (1 June 2010), para 7.

36 ASP, ICC Public Information Strategy, ICC-ASP/9/29, (22 November 2010), paras 46-48; The Review Conference, Kampala Declaration, RC/Decl.1, (1 June 2010), para 12.

37 ASP, ICC Public Information Strategy, ICC-ASP/9/29, (22 November 2010), para 29, footnote 15.

from the Registry. With so many press releases issued on a weekly basis, there is a real risk of incurring press release 'fatigue'.

In an effort to avoid duplication press releases issued by the OTP have diminished in number, from 29 in 2008 to 20 in 2010. In parallel, the number of OTP statements publicised through Weekly Briefings and the ICC website has more than doubled - moving from 14 in 2008 to 32 in 2010.³⁸ The OTP also initiated the practice of delivering video statements.

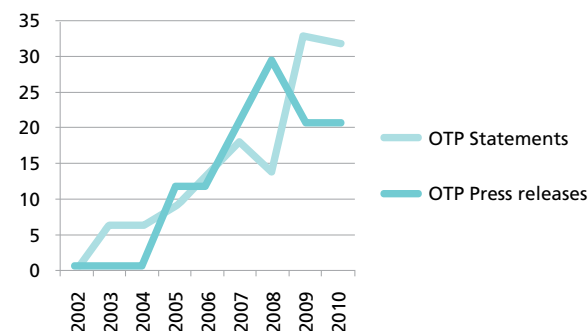


FIGURE 2: OTP'S PRESS RELEASES AND STATEMENTS

The challenges of portraying the ICC as a cohesive institution are apparent with respect to other tools currently being used to raise awareness of the Court's work. In particular, the Registry produces several informative publications such as ICC Fact Sheets, Case Information Sheets and a weekly bulletin called 'ICC Weekly Update'.³⁹ In its independent capacity the OTP also publishes a weekly bulletin called 'OTP Weekly Briefings' in which the Office presents its activities.⁴⁰ Finally, the Secretariat of the ASP issues a quarterly newsletter.

At other international courts and tribunals, only the Registry produces regular updates, thus making the ICC's production of two weekly bulletins and a newsletter a novelty.⁴¹ While there is no overlap between the ASP newsletters

38 OTP, Statements and Reports, ICC available at www.icc-cpi.int/nr/exeres/2386f5cb-b2a5-45dc-b66f-17e762f77b1f.htm.

39 ASP, ICC Public Information Strategy, ICC-ASP/9/29, (22 November 2010), para 28, footnote 14.

40 www.icc-cpi.int/NetApp/App/MCMSTemplates/Index.aspx?NRMODE=Published&NRNODEGUID=%7b425A6B5D-89C3-4ACD-B0CB-6F8EE19F1D18%7d&NRORIGINALURL=%2fMenus%2fICC%2fStructure%2bof%2bthe%2bCourt%2fOffice%2bof%2bthe%2bProsecutor%2fWeekly%2bBriefings%2f&NRCACHEHINT=Guest.

41 At the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Registry produces a detailed overview of every week's proceedings which includes a list of the latest filings and a courtroom schedule. The Office of the Prosecutor does not produce a separate overview. The Special Court for Sierra Leone (SCSL) produces brief monthly newsletters containing information on the activities of the Court. Available at www.icty.org/sid/3980.

and the bulletins produced by the OTP and the Registry, there is a degree of duplication in the latter two publications.

The structure, form and content of the OTP and Registry's bulletins have evolved over time. Today, the OTP Weekly Briefings include a summary of all situations under investigation and preliminary examination by the OTP; a 'highlights' section reporting on specific development in each case or situation as well as other matters related to the OTP and the ICC; and a calendar of events. The Weekly Updates produced by the Registry are similarly structured if less rigid, and their content is shorter and more varied. Reports on institutional and judicial developments currently constitute an area of significant overlap. Both publications are issued weekly in English and French, the two official languages of the Court.

The IBA finds that the existence of two publications dedicated to providing an update on ICC matters yet issued by different organs of the Court leads to fragmented and overabundant information. It is also inconsistent with the Integrated Strategy for External Relations, Public Information and Outreach, which requires that the Court 'avoid duplication and fragmentation in the activities of organs'.⁴²

IBA recommendations

The IBA commends the 'shared responsibility' approach adopted by the Court in relation to public information. Although public information is the primary responsibility of the Registry, States Parties also have a role to play and can intervene individually and collectively in the public debate to show support for the ICC and dispel misperceptions. Thus, the IBA calls on States Parties to proactively support implementation of the ICC Public Information Strategy.⁴³

Ultimately, however, implementation will be the daily job of the Spokesperson/Head of the Public Affairs Unit of the ICC Registry. There is a real need for an experienced person with seniority and excellent media contacts who could take the lead on public information at the ICC. The IBA hopes that the ongoing recruitment process for this position will be concluded successfully. Moreover, the IBA recommends that the ICC Spokesperson adopt a proactive approach to external communications, strive to create synergies among the Court's organs, and cultivate communications with the Presidency as the 'face' of the Court.

The IBA recommends a revision in the content and number of press releases issued per week. The ICC website shall be used to publicise information

currently disseminated only through press releases. This will help to streamline information and reach a broader audience. The IBA again recommends that the Court improve internet accessibility by upgrading its content management system and website search engines.

The IBA reiterates its general recommendation to ensure accuracy and consistency of information disseminated to the public. In particular, the 2009 IBA Report, *The Quest for a Public Face: the public debate on the International Criminal Court and its efforts to develop a vision and coherent strategy on external communications*, warned about the risk of delegating to the Prosecution the task of explaining Court proceedings.⁴⁴ As a positive development the IBA notes that, in 2010, no OTP press release dealt with judicial proceedings. At the same time, only few statements issued by the Prosecutor in 2010 overlapped with the Registry's press releases on judicial developments. During the same period, however, no public statements by the defence were disseminated through ICC channels.

The IBA recommends that statements from different organs of the Court and parties to the proceedings be included in ICC press releases where appropriate. From consultations held by the IBA, it emerged that OTP messages are perceived as more media-friendly and often overlay other messages coming from other organs of the Court. Consultations with the PIDS have highlighted the fact that ICC news is only occasionally interesting for journalists, due to the character of the news and the slow pace of proceedings. On the other hand, news related to the OTP's work seems to spark much interest in the media. To some extent this is intrinsic to the type of news produced by the OTP *vis-à-vis* other organs of the Court. Nevertheless, synergies among ICC organs may significantly increase the impact of its public statements.

Furthermore, the IBA notes with concern the duplicative efforts and information overlap that results from having two weekly bulletins produced at the ICC. The IBA strongly recommends revising the scope of information provided in each bulletin with a view to merging the two into one. A single bulletin could be organised into organ-dedicated sections and each organ would retain full responsibility for the content. A single weekly document would maximise the impact of information about the Court without negatively affecting messages specific to its various organs. Alternatively, the IBA recommends that the ICC delegate sole responsibility to the Registry to report on institutional and judicial developments at the Court, and maintain a separate monthly publication to promote additional messages and activities carried out by the OTP. Finally, the IBA cautions against the risks associated with fragmented information and invites the Court to develop a coordinated policy on public messages to ensure consistency and complementarity.

⁴² ICC, ICC Integrated Strategy, 5.

⁴³ See also IBA Report *The Quest for a Public Face*, (October 2009), 34.

⁴⁴ *Ibid*, 25.

Conclusion

The first ICC Public Information Strategy was adopted in November 2010 by the President, Prosecutor and Registrar of the ICC. The Strategy revises existing public information tools and promises greater use of internet-based technologies. The document also introduces a series of new activities organised in four main programmes. Because implementation is expected within existing budget parameters, it is questionable whether the Strategy will achieve a level of success equivalent to the 2006 Strategic Plan for Outreach. While that plan was supported by a significant increase in personnel and financial resources, the current Public Information Strategy is not. Implementation of the 2010 Strategy will depend on external partners and occasionally on additional resources from the Registry.

To counter-balance the apparent lack of resources, the IBA welcomes the 'shared responsibility' approach adopted by the Court and recalls its previous recommendations in this regard.⁴⁵ Although the Court's organs bear primary responsibility for disseminating public information, States Parties, individually or collectively, may participate in public debate on the ICC. This can be an effective way to foster support and dispel misperceptions.

The IBA is concerned by the number and length of Court issued press releases, as well as the duplication of weekly bulletins and public statements produced by the Registry and the OTP. The IBA cautions against fragmented messaging, and stresses the importance of coordinating public information roles and activities.

While the adoption of the ICC Public Information Strategy is a welcome development, the document does not discuss concrete coordination mechanisms or suggest a court-wide approach to public statements. Similarly, the ICC Paper on External Communication adopted in March 2010 fails to establish any formal procedure or mechanism for coordination and admits that organ-specific messages may take precedence over court-wide ones.

Overall, the new framework for external communication will increase transparency at the ICC but is not expected to bring about much change in the way messages are developed and conveyed by various ICC organs. The risk of delivering fragmented and inconsistent messages still exists.

⁴⁵ Ibid, 34.

During the period under review, an important issue arose concerning the appropriateness of language used by ICC officials when describing or discussing proceedings before the Court. Given the potential impact of such statements on the fair trial rights of defendants and on the overall impartiality of the proceedings, judicial determination of the issue was both timely and necessary. Nonetheless the IBA remains concerned about the lack of a court-wide policy governing appropriate public statements by ICC officials.

ICC jurisprudence on adverse statements

In March 2010, a senior OTP staff member was interviewed by the media concerning intermediaries in the *Lubanga* case, the ICC's first ongoing trial, during which she voiced certain conclusions on matters under consideration by the Trial Chamber.

The matter was discussed in open court at the 17 March hearing.⁴⁶ The Prosecution requested to respond in writing to the Chamber's concerns and submitted that the Prosecution has a general right to speak publicly about a case and - in light of its position as a party to the proceedings - to assert in public the position it defends in court.⁴⁷ At the 23 March hearing, the Defence argued that comments made by the OTP representative were prejudicial to the accused and misrepresented the facts of the case. The Defence criticised the OTP interview as 'part of a deliberate policy on the part of the prosecution, amounting to interference with justice' and accused the Prosecution of resorting to propaganda to establish its case.⁴⁸ The OTP filed a rebuttal on 1 April arguing that the Office has the right to publicly clarify its methods of investigation and to confirm that it is prosecuting only persons it genuinely believes are guilty of the charged offences.⁴⁹ Finally, the Prosecution affirmed its ability to speak publically,

'to address public accusations so long as it (a) fully respects the other participants and the process and (b) abstains from comment

on the credibility of witnesses or evidence, the correctness of judicial decisions, or other matters under consideration by the Chamber'.⁵⁰

The Chamber concluded that misleading and inaccurate remarks by the parties will not influence its decision, but it nevertheless found that the OTP remarks breached the respect owed to the Chamber, the judicial process and other participants.⁵¹ In its decision, the Chamber emphasised that no comments should be made on matters still under analysis and to be decided by the judges. Moreover, the Prosecution must not give the impression that it can determine the outcome of a trial, nor suggest that the judges failed to 'protect witnesses from the alleged improper behaviour of the accused'.⁵²

The Defence subsequently filed an application for abuse of process, stating, among other things, that 'in certain public statements made on his behalf and relevant to this issue, the Prosecutor through its representatives displayed a bias that is incompatible with his statutory duties'.⁵³ Again, the Chamber confirmed that statements by prosecution officials would not have any adverse influence on the determination of the guilt or innocence of the accused, nor would it impede proper administration of justice in the case.⁵⁴

On 15 July 2010, three days after a Pre-Trial Chamber decision regarding a second arrest warrant against President Al-Bashir of Sudan for three counts of genocide, the ICC Prosecutor published an article in the *Guardian* commenting on the decision and the crimes allegedly committed by President Al-Bashir. The article prompted several immediate reactions. First, the Sudan Workers Trade Unions Federation and the Sudan International Defence Group immediately requested *amicus curiae* status in order to petition the Chamber to review the matter. The request was dismissed by the Chamber as being outside the ambit of Rule 103 of the ICC Rules of Procedure and Evidence (RPE). Ad hoc counsel for the Defence also requested that measures be taken in relation to the *Guardian* article, but the request was

46 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04/-01/06-T-264-CONF-ENG ET, Transcript of Hearing, (17 March 2010).

47 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2363, Trial Chamber I, Prosecution's Submissions in Response to Trial Chamber's Oral Request of 17 March 2010, (19 March 2010), para 11.

48 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-268-ENG ET or ICC-01/04-01/06-T-268-Red-ENG WT 23-03-2010 1-74 VR T, Trial Chamber I, Transcript of Hearing, (23 March 2010), 43, line 10 to p 45, line 14.

49 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2389, Trial Chamber I, Further Submissions of the Prosecution Regarding the OTP Representative's Press Interview, (1 April 2010), para 5.

50 *Ibid*, para 15.

51 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2433, Trial Chamber I, 'Decision on the press interview with Ms Le Fraper du Hellen,' (12 May 2010), 16, 19 – 20.

52 *Ibid*, para 14. See also *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-264-CONF-ENG ET, Transcript of Hearing, (17 March 2010) 4, line 15 to p 5, line 7.

53 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2657-Conf, Trial Chamber I, *Requête de la Défense aux fins d'anêt définitif des procédures*, (10 December 2010). The English translation was made available on 4 February 2011, ICC-01/04-01/06-2657-Conf-tENG, Trial Chamber I, 'Defence Application Seeking a Permanent Stay of the Proceedings'.

54 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2690-Red2, Trial Chamber I, Redacted Decision on the Defence Application Seeking a Permanent Stay of Proceedings, para 222.

rejected as being outside the Counsel's mandate. Finally, the Office of Public Counsel for Defence (OPCD) filed a request for authorisation to submit observations, concerning the impact of the 15 July newspaper article on the fairness and impartiality of the proceedings. The Pre-Trial Chamber, citing Article 71 of the Statute, also denied authorisation to the OPCD. In all three instances, the Chamber declined to comment on the substantive issue of unfairness raised by the applicants, and dismissed the applications *in limine* on procedural grounds.

A third instance in which adverse statements by the Prosecution were at issue was in the case against Mr Callixte Mbarushimana. Defence Counsel challenged the content of a press release issued by the OTP on 11 October 2010, a few hours after Mr Mbarushimana was arrested at his residence in France. Defence Counsel submitted that the Prosecutor's statements in the press release violated the presumption of innocence, infringed on Mr Mbarushimana's right to a fair trial and ultimately defamed him.⁵⁵ The OTP submitted that the Defence application was frivolous.⁵⁶

On 31 January 2011 the Pre-Trial Chamber seized of the matter expressed concern about the wording of some passages in the OTP press release. The judges recalled the jurisprudence on adverse statements by the European Court and Commission of Human Rights, but concluded that the actual risk of prejudice to the presumption of innocence and to the evaluation of the facts by the Chamber was not of such gravity as to require the remedy requested by the Defence.⁵⁷

The broader legal framework

The Rome Statute does not regulate public statements made outside the courtroom, and there is no provision to address the relationship between parties and the media. There are, however, lessons to be learned from the extensive jurisprudence of the European Court of Human Rights ('European Court') and other human rights bodies, which have established clear standards for media activity to protect the fairness of proceedings.⁵⁸ The jurisprudence is consistent in indicating that public authorities should refrain from potentially prejudicing a trial outcome with comments that could either lead the public to believe that the accused is guilty before a trial is concluded, and/or interfere with the judicial process.⁵⁹

In the landmark case *Alenet de Ribemont v France*⁶⁰, the European Court concluded that statements by public authorities breached the presumption of innocence since 'high-ranking officers referred to Mr Alenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder'. In the view of the European Court this 'was clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority'. Similarly, under the African Charter on Human and Peoples' Rights, the right to be presumed innocent until proven guilty was found to be violated in a case where top representatives of the Nigerian Government asserted during various press conferences, as well as before the United Nations, that the accused were guilty of crimes before the trial had

55 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-14, Pre-Trial Chamber I, Defence Request for an Order to Preserve the Impartiality of the Proceedings, (18 October 2010).

56 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-21, Pre Trial Chamber I, Prosecution Response to Defence Request for an Order to Preserve the Impartiality of the Proceedings (9 November 2010).

57 'The Commission held that the presumption of innocence 'protects everybody against being treated by public officials as being guilty of an offence before this is established according to law by a competent court.' The Commission further emphasized that public authorities, in particular those involved in criminal investigations and proceedings, 'should be careful when making statements in public, if at all, about matters under investigation and on the persons concerned thereby, in order to avoid as much as possible that these statements could be misinterpreted by the public and possibly lead to the [person]'s innocence being called into question even before being tried.' Both, the Commission and the European Court have specified which statements are permissible. The European Court ruled that '[a] fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question' (No ICC-01/04-01/10).

58 Article 21 of the Rome Statute establishes the hierarchy of applicable law in adjudicating cases mandating that sources of law other than the Statute 'can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria provided in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and Article 21 (3) of the RS.'

59 See Spielmann, D, Freedom of the Press Protection, Protection of Privacy and Presumption of Innocence: Balancing Competing Rights, in *Annales du droit luxembourgeois: Revue de droit luxembourgeois paraissant tout les ans*, 2006, vol 15, pages 23-64, p 43.

60 *Alenet de Ribemont v. France*, ECtHR, Judgment of 10 February 1995, Series A, no 308, para 35. The approach taken in the case referred was followed by the ECtHR in subsequent cases. The right to be presumed innocent until proved guilty, under Article 7(1) (b) of the African Charter on Human Rights and People's Rights was violated in the case *International Pen and Others (on behalf Ken Saro-Wiva Jr and Civil Liberties Organizations) v Nigeria*, Communications Nos 137/94, 139/96 and 161/97, decision adopted on 31 October 1998, paras. 94-96 of the text of the decision published at the following website www1.umn.edu/humanrts/africa/comcases/137-94_139-94_161-97.htm.

concluded.⁶¹ Finally, in *Gridin v Russian Federation* it was claimed before the UN Human Rights Committee that the presumption of innocence was violated when the Head of Police Forces announced, the day after the author's arrest, that he was sure the author was the murderer. Allegations were broadcast on television. The Committee found that the authorities failed to exercise the restraint required in order to preserve the accused's presumption of innocence.⁶²

In the case *Khuzhin and others v Russia*, three prosecution officials discussed the case in detail on a television talk show, referring to the suspects as hardened criminals and stating that the 'crime' they committed was characteristic of their 'cruelty and meaningless brutality'.⁶³ The European Court considered this a breach of the presumption of innocence since the prosecution officials stated as an established fact that the applicants had committed a crime; they further neglected to say that the applicants denied their involvement. Similarly, in *Butkevičius v Lithuania*, two days after the applicant's arrest, the largest national daily newspaper published that '[t]he Prosecutor General confirmed that [he had] enough sound evidence of the guilt of A. Butkevičius'.⁶⁴ The European Court held unanimously that there had been a violation of the presumption of innocence, *inter alia*.

Adverse comments in the public domain can clearly jeopardize fair trial guarantees. The jurisprudence of regional and international courts and tribunals demonstrates that judicial authorities, law enforcements officials, and especially the Prosecution, are expected to exercise restraint in their comments in order to preserve the presumption of innocence and to avoid undermining the impartiality of the court or tribunal in question. For those reasons, prosecutors are expected to avoid speaking to the media about the merits of a particular case or the guilt or innocence of the accused before the Court has given judgement, and also to avoid commenting in public on the character, credibility, reputation, or record of an accused.⁶⁵

IBA comment

Under the Rome Statute, the ICC Prosecutor can engage independently with communities, governments and other stakeholders, including the media and the public. In fact, such engagement is essential to fulfilling the OTP's mandate and securing cooperation and support for its work.

As a party to the proceedings with the burden of proving the case against an accused, the Prosecutor is intrinsically partial. However, international prosecutors in general, and the ICC Prosecutor in particular, do more than simply confront a party at trial. Furthermore, when the Prosecutor speaks s/he does so in the name of an organ of the Court. The Special Court for Sierra Leone, responding to Defence Counsel complaints that the Prosecutor, the former Prosecutor and other members of the OTP had made statements to the media that appeared to prejudge the 'character and culpability' of former President Charles Taylor, found that 'the Prosecutor has a duty towards the interest of justice which transcends any obligation made to any Party, and that includes ensuring that trials are not rendered unfair through prejudicial pre-trial publicity emanating from his office'.⁶⁶

The IBA has previously highlighted the importance of ensuring that information on judicial proceedings is conveyed to the public in a manner consistent with the mandates of the different offices, and recommended that the OTP refrains from publicly commenting on ongoing judicial proceedings and decisions.⁶⁷ Although data shows that the OTP issued fewer press releases on judicial developments in the course of 2010/11,⁶⁸ the OTP also engages with the media through press conferences, statements, articles and opinion pieces. The IBA is concerned that the OTP's practice of making frequent public statements about ongoing cases may harm the public appearance of impartiality and eventually undermine the credibility of the OTP.

The impartiality and integrity of the OTP have been recognised by the Office as key factors in sustained cooperation with its investigation and

61 ACHPR, *International Pen and Others (on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisations) v. Nigeria*, Communications Nos. 137/94, 139/94, 154/96 and 161/97 (decision adopted on 31 October 1998), in UN/IBA HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A Manual on Human Rights for Judges, Prosecutors and Lawyers (New York and Geneva, 2003) at page 220-221.

62 *Gridin v Russian Federation*, Human Rights Committee, UN doc. GAOR, A/55/40 (vol. II), p 176, para 8.3, Communication No. 770/1997 (Views adopted on 20 July 2000).

63 *Khuzhin and others v Russia*, ECtHR, Judgment of 23 October 2008, Application No 1370/02.

64 *Butkevičius v Lithuania*, ECtHR, Case No 48297/99, Judgment 26-03-2002. Available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=BUTKEVICIUS&sessionid=64756220&skin=hudoc-en>.

65 Secretariats of the International Association of Prosecutors and the Coalition for the International Criminal Court, Draft Code of Conduct for Prosecutors of the International Criminal Court, (2002) available at www.amicc.org/docs/prosecutor.pdf.

66 *The Prosecutor v. Issa Hassan Sesay*, SCSL, Appeals Chamber, Case No. SCSL-04-15-CCC32, (20 February 2006), paras 10 and 32, available at www.sc-sl.org/LinkClick.aspx?fileticket=RaFIqNqILQ0%3D&tabid=155.

67 IBA Report, *The Quest for a Public Face*, (October 2009), 25.

68 On the arrest of Mr Mbarushimana: New ICC Arrest: Leader of Movement involved in massive rapes in the DRC is apprehended in Paris, 11.10.2010, ICC-OTP-20101011-PR582 cfr: www.icc-cpi.int/NR/exeres/769E2333-D2AE-46B8-BDCD-651BF5A67CD3.htm; On the surrender of Mr Banda and Mr Jerbo: As Darfur rebel commanders surrender to the Court, ICC Prosecutor 'welcomes compliance with the Court's decisions and with Resolution 1593 (2005) of the Security Council.', 16.06.2010, ICC-OTP-20100616-PR548; And on the request for summonses to appear in the Kenya situation: Kenya's post election violence: ICC Prosecutor presents cases against six individuals for crimes against humanity, 15.12.2010, ICC-OTP-20101215-PR615; 2010 – 2011.

prosecution efforts.⁶⁹ Furthermore, Article 54 of the Statute requires the Prosecutor to investigate incriminating and exonerating evidence equally with the aim of establishing the truth. Undoubtedly, this task is to be performed zealously and independently, but also with full awareness of the need for upholding impartiality and due process.

Statements released by OTP staff have prompted the Defence in *Lubanga* to submit that the Prosecutor displayed bias against the accused.⁷⁰ The OPCD in *Al Bashir* raised the issue of ‘whether the defendant or the international community has faith that the Prosecutor will execute his duty in good faith if he has issued statements which proclaim the guilt of the defendant.’⁷¹ Finally, in the *Mbarushimana* case, Defence Counsel contended that ‘it is quite clear that the Prosecutor is wilfully oblivious to his assigned role of an impartial functionary tasked with assisting the Court in determining the truth.’⁷² The Chambers seized of the cited matters have rejected the conclusions advanced by Counsel and unmistakably indicated that, though they might lead to misinterpretation, comments made by the OTP will neither result in unfair proceedings nor influence the judges’ decisions.⁷³ However, these are concerning signals of the OTP’s struggle to find a language that is friendly to the media and the public yet appropriate and judicious.

The IBA is cognisant of the OTP’s prerogative to speak to the press and the public; at the same time the IBA urges the OTP to modulate its message to ensure full respect of the judicial process and of other parties in the proceedings. This includes delivering accurate information in a moderate tone and exercising self-restraint when describing or discussing proceedings before the Chambers.

Furthermore, the IBA wishes to caution against the negative impact of hazardous comments in the media on the rights of defendants and the principle of equality of arms. Such comments can discourage witnesses from participating in the proceedings, with obvious harmful consequences for a court like the ICC where judges do not have *subpoena* powers. In a March 2010 interview released by an

OTP official, the ICC Trial Chamber I reminded the Prosecution that investigations were ongoing and that ‘creating the false impression that an accused is intimidating witnesses could well serve to discourage others from participating in the Court’s cases, thereby damaging the legitimacy of the institution, and its ability to function’.⁷⁴

Secondly, there is an evident disparity between the presence of the Prosecution and that of the Defence in the media. Commentators have pointed out that ‘it is absolutely essential for the Defence to be considered on an equal basis to the Prosecution from the very start, in terms of legal capacity, administrative support, investigations, public relations, media coverage and outreach.’⁷⁵ Media coverage of ICC cases only sporadically features the Defence and arguments put forward by the Defence are usually less known by the public than the charges. While PIDS endeavours to cover defence issues on an ad hoc basis, and notable progress has been made in giving Defence Representatives the opportunity to speak at Court organised press conferences, the quantity and quality of media work produced by the Prosecution and the Defence at the ICC is not even comparable. It is to be noted that the OTP has a broad mandate for external communications, and it has a public information staff that is unmatched by either the Defence teams or the OPCD. The IBA recommends that the Registry take all necessary measures to promote equal access to media and outreach by the Defence. The IBA further recommends that such measures be taken in the context of a court-wide communications strategy and not simply to augment reporting on individual cases.

Judicial standard-setting welcomed

In the litigious challenges to public comments by OTP staff and officials, the Prosecution consistently asserted its right to speak publicly about a case, although it recognised that it should not comment on issues still under consideration by the Chamber.⁷⁶

Under Article 64 of the Rome Statute, the Trial Chamber has the duty to ensure full respect of the rights of the accused during the course of proceedings. This standard was endorsed in an early decision of Pre-Trial Chamber I when the single judge in the *Katanga* case held that ‘according to Articles 55, 57 and 67, one of the functions of the Chamber is to be the ultimate guarantor of the

69 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2389, Trial Chamber I, Further Submissions of the Prosecution Regarding the OTP Representative’s Press Interview (1 April 2010), para 15.

70 As reported in *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2690-Red2, Trial Chamber I, Redacted Decision on the Defence Application Seeking a Permanent Stay of the Proceedings, (7 March 2011), para 219.

71 *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Pre-Trial Chamber I, OPCD Request for Authorisation to Submit Observations Concerning the Guardian Article Dates 15 July 2010, (3 September 2010), para 2.

72 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-14, Pre-Trial Chamber I, Defence Request for an Order to Preserve the Impartiality of the Proceedings (18 October 2010), para 6.

73 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10, Pre-Trial Chamber I, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings (31 January 2011), para 17.

74 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2433, Trial Chamber I, Decision on the press interview with Ms Le Fraper du Hellen, (12 May 2010), para 51.

75 See Rupert Skilbeck, Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone, *Essex Human Rights Review* (2004), Vol 1, No 1, 66-86, p 86.

76 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2389, Trial Chamber I, Further Submissions of the Prosecution Regarding the OTP Representative’s Press Interview, (1 April 2010), para 5.

rights of the Defence' including of course, the right to be presumed innocent until proven guilty.⁷⁷

The recent jurisprudence on adverse statements has created some welcome precedents. Indeed, while stressing that any prejudicial statements were isolated events, the OTP also welcomed the guidance offered by the judges in this respect.⁷⁸ The IBA commends the pro-active and standard-setting approach of Trial Chamber I, which provided clear guidance as to public statements that could be deemed inappropriate in the context of ongoing proceedings. The judges indicated that 'it is important that in media statements there is a clear and accurate description as to whether issues that are reported have been decided or are still unresolved. Most important, and as a matter of professional ethics, a party to proceedings is expected not to misrepresent the evidence, to misdescribe the functions of the parties or the Chamber, or to suggest or imply without proper foundation that anyone in the case - including the accused - has misbehaved.'⁷⁹ Finally, the Chamber added that 'respecting the Chamber, the judicial process and the other participants involves speaking publicly about the proceedings in a fair and accurate way, and avoiding any comment about issues that are for the Chamber to determine'.⁸⁰

The Trial Chamber had previously cautioned that the frequency of closed sessions in the course of Mr Lubanga's trial placed greater onus on the parties to be precise and balanced in their interviews with the media.⁸¹ Thus, the Chamber proactively warned the parties against prejudicial press reports, noting that a satellite debate launched in the press as opposed to the Courtroom was an unacceptable risk and constituted 'inappropriate activity, particularly for the Prosecutor to undertake.'⁸² The IBA endorses the findings of the Chamber in this regard, particularly given the fact that countervailing information is rarely available in the public domain.

Significantly, the Pre-Trial Chamber decision in the *Mbarushimana* case helpfully applied the jurisprudence on adverse statements developed by the European Court to the ICC context, pursuant to Article 21 of the Statute. The Chamber underscored the danger of creating faulty impressions and held that 'a clear indication that these are only allegations made by the Prosecutor would have been

desirable'.⁸³ The judges suggested more suitable wording for the OTP press release, specifically the use of expressions such as 'reasonable grounds to believe' and 'is alleged' when referring to the defendant's criminal responsibility.⁸⁴

Statements by other Court officials

While the discussion above cites infringements by the Prosecutor, the issue is no less important for judges and other Court officials. It is clear from international instruments and established jurisprudence that adverse statements by public authorities can infringe upon both the presumption of innocence and fairness of the proceedings. Public statements made about cases before the ICC could easily be misleading due to the complexity of the proceedings and the political dynamics surrounding them. Hence, in light of the ICC's role in promoting respect for and compliance with the highest international standards of justice, the threshold of what can appropriately be said in the public domain should be higher than in domestic proceedings.

A systematic approach to external communications at the ICC is therefore crucial. ICC judges are expected to refrain from public comment on present and future cases. External communications on such cases are best addressed by the Presidency, with the assistance of the Public Information and Documentation Section of the Registry.

Absence of a Court-wide policy on public statements

Regrettably, much of the Court's external communications policy has been determined in an ad hoc fashion by judges' rulings. Neither the Court's Paper on External Communications nor its Public Information Strategy has advanced the discourse or set parameters for public statements.

Apart from general statements, there are no strict directives to govern *sub judice* reporting by all of the Court's organs. The Public Information Strategy indicates that 'at all times the Court's public information activities shall reflect the Court's independent and judicial nature and safeguard the integrity of proceedings'.⁸⁵ The OTP clarified that although bound by the Strategy its public information output also serves Prosecutorial

77 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-330, Pre-Trial Chamber I, Decision on the powers of the Pre-Trial Chamber to review proprio motu the pre-trial detention of Germain Katanga, (18 March 2008), 8.

78 IBA consultation meeting with the OTP, 17 February 2011, (notes on file with the IBA).

79 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2433, Trial Chamber I, Decision on the press interview with Ms Le Fraper du Hellen, (12 May 2010), para 39.

80 *Ibid.*, para 40.

81 *Ibid.*, para 38.

82 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-264-Red-ENG CT WT, Trial Chamber I, Transcript of Hearing (17 March 2010), 5, lines 20 – 21.

83 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-14, Pre-Trial Chamber I, Defence Request for an Order to Preserve the Impartiality of the Proceedings, (18 October 2010), para 12.

84 *Ibid.*, para 17.

85 ASP, ICC Public Information Strategy, ICC-ASP/9/29, (22 November 2010), para 11.

strategy objectives.⁸⁶ Indeed, the Court's Paper on External Communications vaguely suggests that the Court's organs should seek consensus on matters of mutual concern, and when consensus cannot be reached, individual organs may pursue independent action. Regarding forthcoming judicial decisions it states: 'care must be taken to avoid being seen to make promises as to the content or timing of judicial decisions which have not been handed down'.⁸⁷

Conclusion

The IBA is aware of the inherent challenge in shaping the Prosecutor's speech in a way that is commensurate with his independence, yet safeguards the rights of defendants. It is unfortunate that the question of appropriate limitations on public statements had to be settled by litigation, given the ongoing inter-organ discussion concerning the Court's governance and public information strategies.

The IBA commends the standard-setting approach followed by Trial Chamber I and Pre-Trial Chamber I in January 2011. The direction offered by the Chambers regarding statements that impinge on the presumption of innocence is a welcome corrective for the Prosecution as well as judges and other Court officials.

The IBA regrets that a Court-wide policy on public statements is absent at the ICC. The IBA notes the recent establishment by the Assembly of States Parties of a Study Group on Governance with the mandate to address issues considered by States Parties concerning the efficiency and effectiveness of the Court.⁸⁸

⁸⁶ Ibid, 3, footnote 11.

⁸⁷ ASP, ICC Paper on External Communications, ICC-ASP/9/CBE.1/12, (18 March 2010), 15.

⁸⁸ ASP, Establishment of a study group on governance, ICC-ASP/9/Res.2, (10 December 2010).

Since its inception the Court has been committed to providing timely, accurate information on its activities and engaging in dialogue with interested partners.⁸⁹ Although there is no document outlining a strategic framework for external relations, standard practices include regular meetings with representatives of states, international and regional organizations, and civil society. Each organ of the Court has a specific mandate and coordination is important in order to ensure that the Court's messages and priorities are understood and endorsed by its partners. During the period under review the Court has intensified its efforts and refined its practice on external relations; the Presidency in particular has made considerable progress in this regard. Also the ASP - through the good offices of its President - has actively engaged external stakeholders.

In the first half of 2010 efforts toward improved dialogue between the Court and its partners centered around the first Review Conference of the Rome Statute. Many activities - including field missions - were undertaken by States Parties, NGOs and Court officials resulting in a revived enthusiasm and renewed partnership. The Review Conference was therefore a great opportunity for the Court to foster relations with states and civil society.

Mandates and practice at the Court

The Integrated Strategy and the ICC Paper on External Communications loosely define the role of each organ: 'the Presidency acts as the "external face" of the Court...; the OTP builds support and cooperation for OTP activities...; the Registry provides basic information on the Court, makes proceedings public and accessible'.⁹⁰ Little is said in these documents about the individual organs' policies and strategic objectives. In 2010, the OTP and the Presidency were the main organs of the Court involved in external dialogue.

Bilateral meetings (2010)

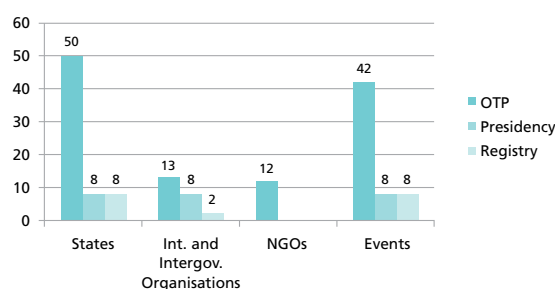


FIGURE 3: PUBLICITY GIVEN BY ICC ORGANS TO BILATERAL MEETINGS WITH EXTERNAL PARTNERS

The Office of the Prosecutor

According to publicly available information, the most visible Court Official during 2010 was the Prosecutor, who held at least 38 meetings with representatives of States Parties and other states. Furthermore, the Prosecutor held approximately 13 meetings with representatives of intergovernmental organisations (eg, United Nations (UN), European Union (EU), African Union(AU)), attended 24 events including conferences, movie screenings and lectures, and participated in ten meetings with NGO representatives.

In 2010, the Deputy-Prosecutor participated in 18 events, held at least 12 official meetings with states' representatives and one meeting with the Pan-African Parliament, and also participated in two NGO meetings.⁹¹ The OTP also institutionalised its communications with national authorities in the form of the Law Enforcement Network (LEN), which has been described as 'a network of specialised organisations and national law enforcement agencies investigating conduct constituting either a crime within ICC jurisdiction or a serious crime under national law'.⁹²

While it is difficult, due to the confidential character of the OTP's work, to assess how meetings of the OTP helped to 'build support and cooperation' for its investigations, prosecutions and analysis, IBA consultations indicated that transparency is instrumental to increasing support for the OTP's work. The Office also indicated that during the reporting period, efforts intensified and were organised in a more structured manner; indeed feedback on the OTP's interaction with

⁸⁹ ASP, *Option paper by the Bureau on the establishment of a New York Liaison Office*, ICC-ASP/4/16, (24 August 2005), para 21.

⁹⁰ ICC, *The Integrated Strategy*, 5-6.

⁹¹ OTP weekly Briefings, various editions.

⁹² OTP, *Prosecutorial Strategy 2009-2012*, (1 February 2010), 9.

diplomats has been positive.⁹³ OTP meetings with diplomats are planned on a more regular basis and new and old practices, such as briefings to different target groups, have been institutionalised to the extent possible. For example, the OTP initiated the practice of hosting high level meetings with Ambassadors of States Parties and representatives of other states in The Hague, as well as in New York.⁹⁴ These meetings were well attended, showing that diplomats have a high level of interest in engaging with the Court.

The Presidency

During the period under review, the President, who represents the Court at the highest level,⁹⁵ was less visible than the Prosecutor. In 2010, and according to publicly available information, Judge Sang-Hyun Song held meetings with high ranking officials of six States Parties, met on eight occasions with representatives of the UN, AU, EU and the European Council, held two ceremonies at the seat of the Court to welcome new States Parties, and participated in five academic, professional and UN sponsored conferences. Furthermore, in the process of encouraging global ratification of the Rome Statute, the President met twice with officials of states who are not party to the Statute. The First Vice-President of the ICC met with the Minister of Justice of Montenegro in The Hague,⁹⁶ and participated in a Regional seminar on the ICC held in Yaoundé (Cameroon).⁹⁷ The Second-Vice President also attended the Fourth International Humanitarian Law Dialogs in New York.⁹⁸

According to official data made available by the Office of the President the actual number of official visits hosted by the Presidency is much higher than the numbers inferred from the ICC website, indicating that they have chosen not to broadly publicise all meetings.⁹⁹ In 2010 the President and the Vice-Presidents hosted about 115 official visits in total. In contrast, a much larger number of speeches and statements delivered by the ICC President at various occasions in 2010-11 are now available on the ICC website compared to previous years, which surely helps to increase transparency and diffuse messages to a larger audience.¹⁰⁰

In meetings with State Officials and intergovernmental organisations, the President expressed gratitude for support given to the ICC,¹⁰¹ discussed avenues for further cooperation,¹⁰² provided updates on the work of the Court,¹⁰³ reported on the results of the Review Conference of the Rome Statute,¹⁰⁴ discussed the establishment of

93 IBA Consultation meeting with the OTP, 17 February 2011, (notes on file with the IBA).

94 OTP, OTP Weekly Briefing 11 - 17 January 2011 – Issue #70, (17 January 2011).

95 ASP, Report of the Court on Measures to Increase Clarity on the Responsibilities of the Different Organs, (hereafter ‘Report on Measures to Increase Clarity’), ICC-ASP/9/34, (3 December 2010), 12-13.

96 Public Affairs Unit, ICC, ICC Vice President Meets with the Minister of Justice for Montenegro, ICC-CPI-20101206-PR609, (6 December 2010), available at [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/icc%20vice_president%20meets%20with%20the%20minister%20of%20justice%20of%20montenegro](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/icc%20vice_president%20meets%20with%20the%20minister%20of%20justice%20of%20montenegro).

97 Public Affairs Unit, ICC, ICC Weekly Update #50, ICC-PIDS-WU-50/10, (11 October 2010), available at www.icc-cpi.int/NR/rdonlyres/D302941F-E881-4BD7-BFBB-8C09A5ED9158/282530/Ed50Eng.pdf.

98 Presidency, ICC, Address by Judge Hans-Peter Kaul, Second Vice-President of the ICC, at the 4th International Humanitarian Law Dialogs, (30 August 2010), available at www.icc-cpi.int/menus/icc/structure%20of%20the%20court/presidency/statements/address%20by%20judge%20hans_peter%20kaul%20at%20the%204th%20international%20humanitarian%20law%20dialogs.

99 The 2011 proposed budget for example indicates as one of its performance indicators that the Presidency will host 50 official visits; see ASP, Proposed Programme Budget for 2011 of the International Criminal Court, ICC-ASP/9/10/Corr.1, (18 August 2010), 16, available at www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-10-Corr.1-ENG.pdf.

100 See generally the ‘Statements’ page of the ICC Presidency, available at www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Presidency/Statements/.

101 Public Affairs Unit, ICC, ICC Weekly Update #62, ICC-PIDS-WU-62/11, (24 January 2011) available at www.icc-cpi.int/NR/rdonlyres/BDCA8F7-AD74-4FC9-96DE-773BFD4068AC/282902/Ed62Eng.pdf; Public Affairs Unit, ICC, ‘President Song met with Juan Manuel Santos, President of Colombia,’ ICC-CPI-20101208-PR611, (8 December 2010) available at [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/pr611](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr611); Public Affairs Unit, ICC, ICC President meets with Foreign Minister of the Netherlands, ICC-CPI-20101124-PR599, (25 November 2010) available at [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/icc%20president%20meets%20with%20foreign%20minister%20of%20the%20netherlands](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/icc%20president%20meets%20with%20foreign%20minister%20of%20the%20netherlands).

102 Public Affairs Unit, ICC, President Song meets with Secretary-General of the United Nations, ICC-CPI-20101209-PR612, (9 December 2010), available at [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/president%20song%20meets%20with%20secretary_general%20of%20the%20united%20nations](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/president%20song%20meets%20with%20secretary_general%20of%20the%20united%20nations); Public Affairs Unit, ICC, ICC Weekly Update #28, ICC-PIDS-WU-28/10, (6 April 2010), available at www.icc-cpi.int/NR/rdonlyres/66246BE8-CDCB-4895-80FF-F10B2CFF73ED/281720/ed28_eng1.pdf.

103 Public Affairs Unit, ICC, ICC Weekly Update #53, ICC-PIDS-WU-53/10, (2 November 2010) available at www.icc-cpi.int/NR/rdonlyres/DF41FB22-507B-4658-A05E-DDA17E26BFBB/282624/Ed53Eng1.pdf; Public Affairs Unit, ICC, ICC President addresses European Parliament Sub-Committee on Human Rights, ICC-CPI-20100427-PR517, (27 April 2010) available at [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/pr517](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr517).

104 Public Affairs Unit, ICC, ICC Weekly Update #46, ICC-PIDS-WU-46/10, (13 September 2010) available at www.icc-cpi.int/NR/rdonlyres/443C333F-6A1F-4B62-973A-4461811356D9/282460/Ed46Eng.pdf.

a liaison presence in Addis Ababa,¹⁰⁵ and provided information in support of joining the ICC.¹⁰⁶ In addition to providing general information about the Court, particularly its judicial mandate and independence,¹⁰⁷ the President addressed issues such as complementarity¹⁰⁸ and the work of counsel at the ICC.¹⁰⁹

The President's priority is to convey the universality of the Rome Statute and to raise awareness about the Court at the highest levels. The President has maintained a keen focus on Asia, the region least represented at the Court. As allowed by the ICC budget, the President has travelled to a select number of countries and made efforts to establish strategic cooperation with civil society.

The Registry

In comparison to the Presidency and the Prosecutor, the Registrar's engagement with state representatives was less frequent, reflecting the Registrar's subordinate role in this area. Even so, the Registrar is concerned with a broad range of issues requiring interaction with external partners. According to the Integrated Strategy and the Court's Paper on External Communications, the Registrar's duties are limited to 'those activities inherent in the performance of the Registry's other functions'¹¹⁰, namely

'[provision of] basic information on the Court, [making] the proceedings public and accessible, [facilitating] access of victims to the Court, [conducting] relations with counsel and [providing] services to the organs in the dissemination of information.'¹¹¹

105 Public Affairs Unit, ICC, President Song ends a two days visit to Addis Ababa, Ethiopia, ICC-CPI-20100712-PR558, (12 July 2010) available at [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/pr558?lan=en-GB](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr558?lan=en-GB).

106 Public Affairs Unit, ICC, ICC Weekly Update #21 ICC-PIDS-WU-21/10, (15 February 2010), p 3, available at www.icc-cpi.int/NR/rdonlyres/8C255929-62EC-431C-8D36-8E8BF1CB183A/281551/Ed21_eng.pdf; Public Affairs Unit, ICC, 'ICC Weekly Update #19,' ICC-PIDS-WU-19/10, (1 February 2010), p 4, available at www.icc-cpi.int/NR/rdonlyres/EA17A5D3-C04F-45FE-9114-DF70D80B028/281500/ed19_eng1.pdf.

107 Public Affairs Unit, ICC, The ICC President opens Commonwealth meeting on the ICC, ICC-CPI-20100510-PR578, (5 October 2010), available at [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/pr578](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr578).

108 Public Affairs Unit, ICC, ICC Weekly Update #54, ICC-PIDS-WU-54/10, (8 November 2010) available at www.icc-cpi.int/NR/rdonlyres/D2065952-A51B-4F39-837E-2508E3AC18C7/282633/Ed54Eng.pdf.

109 Public Affairs Unit, ICC, ICC Weekly Update #35, ICC-PIDS-WU-35/10, (31 May 2010), available at www.icc-cpi.int/NR/rdonlyres/1402461C-1E78-47D2-B3A2-7532E345A16A/282008/ED35ENG1.pdf.

110 ASP, *Report on Measures to Increase Clarity*, ICC-ASP/9/34, (3 December 2010), 13.

111 ICC, *The Integrated Strategy*, sVI(1).

During 2010 the Registrar participated in eight events, including the regional seminar on the ICC held in Yaoundé (Cameroon); met with representatives of states on six occasions; conducted two meetings with officials of several non-States Parties, and met with the UN Legal Counsel and Under-Secretary-General for Legal Affairs. In Kenya she met 'with the relevant national authorities to discuss the operational and legal framework needed to conduct Registry activities.'¹¹²

During the reporting period the Registrar's official meetings were consistent with the Registry's mandate and focused on victims, witnesses, complementarity and defence issues. The Registrar also signed an agreement and received a donation for relocation of persons at risk.¹¹³

Joint events

Court organs also met collectively with States Parties at regular diplomatic briefings and meetings of The Hague Working Group of the ASP. Diplomatic briefings are normally held two or three times per year and follow a set format which includes remarks by the highest representatives of the three organs and the Secretariat of the ASP. Presentations are occasionally accompanied by supporting documents depending on the issues discussed at the meeting.

The Court has given 19 diplomatic briefings to date. The content, though not the format, of the briefings has evolved over time. To avoid repetition, the presentations are now coordinated between the organs in advance. Rather than covering all activities conducted since the last briefing, presenters now deliver thematic briefings and, in the case of the OTP, often include visuals. It is encouraging to note that the Court's organs have demonstrated a high level of coordination in this area.

There is significant room for improvement in the extent and quality of debate that happens at the diplomatic briefings. It is not clear whether this aspect of the meetings is neglected as a result of the format or lack of interest in the issues presented. It is important, however, that while the briefings do not feature much discussion, lively debates often take place at the meetings of The Hague and New York Working Groups, indicating that States Representatives may prefer those settings over those at which non-state parties and other stakeholders are also present.

The IBA understands that progress has been made in relation to the Court's participation in meetings of The Hague Working Group. There is evidence of increased consultations between designated representatives of each organ who

112 Public Affairs Unit, ICC, ICC Weekly Update #45, ICC-PIDS-WU-45/10, (6 September 2010).

113 ICC Weekly Update, various editions.

prepare the Court's intervention; this reportedly has resulted in a more positive and productive interaction with diplomats. The Court's organs have made concrete efforts to reach and present common court-wide positions on a variety of subjects. The IBA has also been informed that more effort has been made to coordinate preparation of the Court's annual reports to the ASP and the UN, as well as to define a common position for meetings with the Committee on Budget and Finance of the ASP and to a lesser degree for the bi-annual meetings with NGOs.

Notwithstanding major efforts at internal coordination, the establishment of a Study Group on Governance with a one-year mandate to address the efficiency and effectiveness of the Court and 'to conduct a structured dialogue between States Parties and the Court' is quite significant.¹¹⁴ Despite the many existing opportunities to meet and discuss matters of common interest with the Court, states felt the need to create a mechanism to facilitate in-depth dialogue with the Court. The establishment of the Study Group suggests that discussions currently taking place between the Court and states do not necessarily result in a constructive dialogue or bring about real change.

The President of the Assembly of States Parties

Although not mentioned in either the Integrated Strategy or the ICC Paper on External Communications, the Assembly of States Parties also plays a significant role in ICC external relations. States receive information from the Court but they also have a responsibility to empower the Court. The ASP's external relations activities are ultimately related to the difficult question of how the ASP can best use the political and diplomatic tools at its disposal to foster and enhance cooperation with the Court.¹¹⁵

The 'external face' of the ASP is its President. According to publicly available information, between January 2010 and 2011, HE Ambassador Christian Wenaweser, the current ASP President, was quite active in driving debate around the ICC, particularly around the first Review Conference which was the largest states' conference since Rome. In 2010, Ambassador Wenaweser conducted official visits to Uganda, the Democratic Republic of Congo (DRC), Guatemala, Kenya, and Ethiopia where he met with African Union representatives as well as several African and European States Parties

representatives.¹¹⁶ Against a backdrop of tension over the ICC's investigations in Kenya and the non-enforcement of the arrest warrant for Sudanese President Omar Al-Bashir, the ASP President had the most frequent contact with representatives of the African Union and Kenya whom he officially met twice last year. With the exception of DRC and Uganda, where the ASP President also engaged with local communities, NGOs, religious leaders and students,¹¹⁷ his visits primarily involved meetings with high-ranking state representatives. The ASP Vice-President also attended several events including the IBA roundtable of 19 January 2010.¹¹⁸

The First ICC Review Conference

During the reporting period, the first Review Conference of the Rome Statute took place between 31 May and 11 June 2010 in Kampala, Uganda. The Conference was attended by approximately 4,600 representatives of governments, international organisations, NGOs, academics, media, and officials from international courts and the United Nations.

The decision to hold the first ever ICC Review Conference in Africa increased the visibility of the Court, whilst offering an opportunity to reach out to East Africa - the region where the ICC is currently most active. This reportedly had a positive impact on the Court's relationship with African civil society and governments.¹¹⁹

The Court, the ASP and civil society groups invested considerable energy in making sure the Conference would not be a missed opportunity to enhance the ICC's public exposure. A communications strategy document was prepared by the ICC and the Secretariat of the ASP and shared with key stakeholders. The strategy identified the main target audience and expected media work around the event. It was agreed that the Court would have no role in the discussion of substantive legal amendments to the Statute, as this was solely the responsibility of States Parties.

Prior to and during the Conference, Court officials and the ASP President held press conferences, issued several press releases, undertook interviews with the media, conducted trips to Africa to engage with diplomats and affected communities, uploaded clips about the Conference to the ICC YouTube channel, and created a Conference webpage.

114 ASP, Establishment of a study group on governance, ICC-ASP/9/Res.2, (10 December 2010).

115 ASP, Report of the Bureau on Stocktaking: The Impact of the Rome Statute system on Victims and Affected Communities, ICC-ASP/8/49, (18 March 2010), 5.

116 Public Affairs Unit, ICC, ICC Weekly Update #63, ICC-PIDS-WU-63/11, (31 May 2010).

117 Public Affairs Unit, ICC, ICC Weekly Update #20, ICC-PIDS-WU-20/10, (8 February 2010); Public Affairs Unit, ICC, ICC Weekly Update #19, ICC-PIDS-WU-19/10, (1 February 2010).

118 Public Affairs Unit, ICC, ICC Weekly Update #54, ICC-PIDS-WU-54/10, (8 November 2010).

119 ASP, Review Conference: Scenarios and Options, ICC-ASP/6/INF.3, (4 December 2007), 6; ASP, Venue of the Review Conference, ICC-ASP/7/Res.2, (21 November 2008).

Across the globe, representatives of States Parties participated in a number of activities to enhance public and diplomatic support for the Conference. Leading up to the Conference, individual member states organised roundtable discussions and conferences on the issues before the Conference. In Mexico for example, the Ministry of Foreign Affairs and the ICC held a seminar on the first Review Conference of the ICC Rome Statute. Participants in the discussions were members of civil society, academics and government officials.¹²⁰ In Malaysia, the governments of Malaysia, Japan and the Asian-African Legal Consultative Organisation (AALCO) organised a roundtable meeting of legal experts on the Review Conference.¹²¹ Finally, for several months in advance of the Conference, various NGOs organized expert roundtable discussions¹²² and university lectures,¹²³ while local NGOs discussed their positions on the ICC and the Review Conference.¹²⁴ A special programme was arranged by the Outreach Unit of the ICC in partnership with NGOs to bring delegates and the ASP President closer to the affected communities.

In Kampala the Conference was attended by a number of high-ranking officials including two Heads of State,¹²⁵ United Nations Secretary-General Ban Ki-moon, and his predecessor Kofi Annan, who delivered opening remarks.¹²⁶ The daily side events were also important. Several Court Officials, including President Song and the Registrar, actively took part in a series of parallel activities.¹²⁷ The

daily interaction between delegates, Court Officials and civil society representatives spurred increased dialogue and renewed partnership, which were among the greatest achievements of the First Review Conference.

The IBA's perspective

Overall, the first ever ICC Review Conference was a unique opportunity for the Court to garner worldwide publicity, and particularly to strengthen its position in Africa. However, publicity was not the greatest achievement of the Conference: the most important outcome was the dialogue established between the ICC and its partners, and the lessons learned about external relations and coordination.

Efforts undertaken prior to and in Kampala made the Review Conference a turning point in galvanising states to shape the ICC and its policies beyond budget discussions.

The IBA commends all organs of the Court and the ASP President with respect to their external relations efforts. In particular, it notes that the ICC President has adopted a more proactive approach and embarked on more frequent country visits in keeping with its mandate to promote universality. Both the OTP and the Presidency have strived to increase transparency and intensify the frequency and content of their meetings. In parallel, the Registry maintained good working relations with States Representatives and other partners concerned with its mandate. During the reporting period the major development has been the proactive engagement – prompted by but not limited to the Review Conference – of the President of the ASP with the ICC partners including regional organisations. In relation to the latter, the IBA welcomes the approach taken by the ASP President and urges him to continue using his good offices to promote state support for and cooperation with the ICC.

The role of the ICC President as the 'external face' of the Court is not without controversy. It is argued that his position as a judge impedes his ability to speak in public. It seems possible, however, for the ICC President to act simultaneously as a judge and spokesperson for the Court, without impinging on judicial independence and fair trial standards. In fact, the practice of the current Presidency shows that the President's speech is a powerful public relations tool that can be used without prejudice to ongoing proceedings. Furthermore, external relations are a key element of the Court's success; if the President is unable to take a stand in the public domain, it could damage the institution he represents. Thus notwithstanding the risks posed, public statements by the ICC Presidency, if delivered with restraint, can ultimately assist the Court in fulfilling its mandate without prejudice to judicial independence.

Although the actual impact of the ICC's external relations is difficult to assess, there are

120 Foreign Ministry of Mexico (Secretaria de Relaciones Exteriores), The Foreign Ministry and the ICC Hold a Seminar on the First Review Conference of the ICC Rome Statute, (26 February 2010).

121 Asian African Legal Consultative Organisation, 'Round Table meeting of Legal Experts on the Forthcoming Review Conference of the Rome Statute of the International Criminal Court: jointly organised by the Governments of Malaysia, Japan and the AALCO to be held at The Attorney General's Chambers, Putrajaya, Malaysia, on 30th and 31st March 2010.

122 For example, on 19 January 2010, the IBA hosted a experts' round table discussion in The Hague on Reflections on the 2010 Review Conference: legacy, impact and sustainability of the Rome Statute System, see www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ExpertsRoundtableDiscussions.aspx.

123 Sabine Klein, Uganda and the International Criminal Court Review Conference - Some Observations of the Conference's Impact in the 'Situation Country' Uganda, *Goettingen Journal of International Law* 2 (2010) 2, 669-688, 682.

124 For example, a workshop for representatives of several victims' related NGOs took place in February in Gulu (Northern Uganda) to come to a common position during the conference; see ASP, Report of the Bureau on Stocktaking: The Impact of the Rome Statute system on Victims and Affected Communities, ICC-ASP/8/49, (18 March 2010,) 11.

125 Uganda and the United Republic of Tanzania.

126 See ASP, Newsletter Special edition #5, ICC-ASP-NL-05/10, (December 2010), 3.

127 Public Affairs Unit, ICC, The ICC President interacts with affected communities in northern Uganda, ICC-PIDS-20100531-PR531, (31 May 2010); Public Affairs Unit, ICC, Registrars of international tribunals meet at ICC field office in Kampala (Uganda), ICC-CPI-20100608-PR542, (8 May 2010). Furthermore the Registrar together with delegates from 13 States Parties travelled to Bunia, DRC on 5 June 2010.

indications that Court practices have improved. Meetings of The Hague Working Group are more effective thanks to advance informal consultations with designated representatives of the Court. As mentioned, diplomatic briefings organised at the seat of the Court are quite well prepared, but hardly spark discussion. This is an area where there is significant room for improvement. States Parties might beneficially provide feedback to the Court on the reasons for low attendance and engagement. To improve consultation and collaboration between the Court and diplomatic representatives, the IBA recommends that the Court organs run a joint survey on their external relations practices with the aim of improving services and revising current methods of engagement. It is the IBA's hope that the findings of the survey will also help define a common strategy on external relations.

The IBA further notes that the majority of reported activities are bilateral meetings and events. It would appear that the Court - with the exception of the OTP's initiative to host high level meetings with Ambassadors of States Parties and other States Representatives - has not been proactive in setting up consultative meetings similar to its biannual NGO roundtable discussions. Such an initiative might have assisted in establishing a frank dialogue with states while providing them with a forum to exchange views. The Study Group on Governance, which was established by the ASP to facilitate structured dialogue between states and the Court, will to some extent fill this gap. The Study Group represents a positive development with the potential to strengthen relations between the Court and States Parties.¹²⁸ The IBA hopes that the Study Group will set a precedent that might shape future external relations and foster communication between ICC elected officials and states.

The IBA welcomes the approach taken by the ICC organs in publicising official visits with states' delegations as well as statements issued on the occasion of conferences, lectures and other meetings. While greater transparency is in itself a positive development, the IBA questions the means used to disseminate information, specifically the high number of press releases. The IBA understands that issuing press releases to announce visits of elected officials may have a multiplier effect by alerting local stakeholders of upcoming events. This is particularly relevant when ICC press releases are disseminated through regional and local networks as well as the general mailing list. However, given the high number of official visits in The Hague and abroad it may be appropriate for the ICC to reflect on whether or not the frequency of press releases may have the unintended effect of diluting the message. The IBA recommends that the Court diversify the tools used to disseminate information.

Conclusion

It is for States Parties and the ASP to take the lead in making the ICC system work. This leadership role can be played by states without infringing on judicial independence if it is carried out in good faith and in a consultative manner. While the Court must maintain a healthy distance between itself and States Representatives, the ICC needs states to function. Being a judicial body and not a political entity, the key question is how actively the ICC may seek political support without compromising perceptions of its neutrality. Frank dialogue is the only way forward.

Experience shows that outreach and public information indirectly influence state behavior by raising awareness and support for the ICC among domestic actors. Integrated external communication strategies such as the one put in place for the Review Conference show how external communications in all forms can enhance cooperation and support.

The success of the first Review Conference and the recent establishment of the Study Group on Governance demonstrate the desire for an honest and open dialogue between the Court and states to complement current practices. As stated by the Vice-President of the Assembly 'the study group will seek concurrence of the Court. It will investigate changes in the operational structures of the court with the court being comfortable.'¹²⁹

The IBA urges the Court to maintain its transparency and to issue a court-wide strategy for external relations.

128 IBA Report Enhancing Effectiveness and Efficiency of ICC proceedings: a work in Progress (January 2011).

129 IBA consultation meeting with the ASP Vice-President, 4 March 2011, (notes on file with the IBA).



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