

Report of the Court on the development of performance indicators for the International Criminal Court

I. Introduction

1. The Assembly of States Parties¹ has requested the ICC to “[...] intensify its efforts to develop qualitative and quantitative indicators that would allow the Court to demonstrate better its achievements and needs, as well as allowing States Parties to assess the Court’s performance in a more strategic manner”.²

2. The Court already includes detailed performance indicators in its annual draft Programme Budget, and reports on these annually to States Parties in its Programme Performance Report.³ But it is generally accepted that the current system does not provide a clear picture of the Court’s performance over time in key areas that are seen as critical for its success.

3. During 2015 the Court has worked with the assistance of a *pro bono* external consultant, the Open Society Justice Initiative (“OSJI”), to develop a more appropriate methodological approach to the development of performance indicators for the institution as a whole, by identifying a limited number of key issues which might be regarded as critical for the assessment of the institution’s overall performance, and developing a plan for the initial collection of relevant data on the basis of which the Court could progressively develop specific targets against which performance could be measured.

4. The purpose of the new approach is to allow both the Court and its stakeholders to assess the progress made by the institution over time in terms of the efficiency, effectiveness, productivity and quality of its work. This involves the selection of a limited number of specific indicators relating to key areas of the Court’s functions, the establishment of a basic set of initial data as a basis for comparison over time and – once that initial data has been collected – the development by the Court of appropriate performance standards or targets for the future.

5. For the time being the focus of work by the Court has been on the development of Court-wide indicators. Once sufficient progress has been made, further work is likely to be needed on the development of additional performance indicators reflecting specific functions of the main organs. The Office of the Prosecutor has already developed a generic performance measurement framework of interrelated indicators in its updated Strategic Plan⁴. The Judiciary and Registry will be examining in due course what additional indicators might be developed at the organ level to supplement the Court-wide indicators, which are the focus of the remainder of this report.

6. It is important to underline that this report sets out the point that the ICC has so far reached in the development of performance indicators, which will require further development and consolidation over the period ahead. The Court’s objective at this stage has been to establish an initial set of potential court-wide indicators for which supporting data is either readily available or could be collected without substantial new resource requirements, as a basis for assessing the viability and reliability of the basic methodology before attempting to extend the range of indicators further. It therefore represents work in progress, which will require further development in the light of experience.

II. Court-wide performance indicators

7. The major features of proceedings before the ICC provide the obvious basis for a set of high-level strategic court-wide performance indicators. In discussions with OSJI, the Court identified the following four key goals as critical for assessing the performance of the ICC as a whole:

- (a) The Court’s proceedings are expeditious, fair and transparent at every stage;
- (b) The ICC’s leadership and management are effective;

¹ In the following “ASP” or “Assembly”.

² ICC-ASP/13/Res.5, 17 December 2014, Annex I, para. 7(b).

³ See for the latest “Report on activities and programme performance of the International Criminal Court for the year 2014”, ICC-ASP/14/8, 4 May 2015.

⁴ See *Office of the Prosecutor: Strategic plan 2016-2018*, ICC-ASP/14/22, 21 August 2015, p. 24.

- (c) The ICC ensures adequate security for its work, including protection of those at risk from involvement with the Court; and
- (d) Victims have adequate access to the Court.⁵

8. These high-level factors cannot be measured in the abstract. Instead, a number of key Court-wide and organ-specific activities need to be identified which contribute to the achievement of these goals. Measuring and reporting on these activities and the results they produce will provide data needed to evaluate the Court's performance in these crucial areas.

9. The Court has limited its initial selection of Court-wide indicators to issues which are essentially under the control of the institution itself. Issues which rely heavily on external factors (e.g. number of referrals by States, number of arrests achieved; extent of judicial or other cooperation by external partners and stakeholders in judicial proceedings; number of relevant agreements signed with external stakeholders) have for now been excluded from this initiative and will be considered at a later stage. It follows that the four key goals above address the first two major categories of goals in the Court's Strategic Plan (Judicial and Prosecutorial; and Managerial).⁶ The third category (Cooperation and Support) will be considered at a later stage.

III. Translation of Court-wide performance goals into specific criteria

10. Although many national judicial bodies apply performance management systems, the methodologies used are often difficult to apply to the ICC, given its relatively limited number of cases and the diversity of underlying country situations. In particular, the common national practice of assessing average performance levels across a large number of cases is of limited value at the ICC, at least at its current stage of development. For similar reasons, specific performance benchmarks developed at the national level will often be inappropriate in the ICC context. The experience of other international courts and tribunals may be more relevant, but even here there may be institution-specific factors which make direct comparisons difficult.

11. The Court has attempted to identify mainly quantifiable indicators which stakeholders will recognise as reflecting key aspects of the Court's performance, and which can be measured over time. Relevant data for this exercise will be collected from the beginning of 2016 onwards. Where directly comparable data is available from previous years it can provide a further basis for comparison with future performance.

12. It should also be noted that, while the Court has not at this stage tried to develop specific indicators for external factors that can affect its performance, these factors unavoidably remain relevant when evaluating performance on issues which are seen as largely under the Court's control. In particular, the duration of cases is directly affected not only by the quality and efficiency of the Court's work, but also by a wide range of external factors.

13. The fact that the Court currently operates in eight different country situations with differing operational, logistic and security-related challenges renders external benchmarking more difficult for the Judiciary, the Office of the Prosecutor and the Registry (the latter providing field-specific services through its field offices, witness protection, victims' support, etc.). External factors such as local security conditions and the cooperation of local and international partners can have a substantial impact on results-based performance and may vary significantly from one situation to another.

A. "The Court is fair, expeditious and transparent at every stage"

14. Legal proceedings inside and outside the courtroom are central to the ICC's work. The first Court-wide performance indicator addresses this core activity from the first appearance of an accused through pre-trial proceedings, the actual trial and any final appeals and reparations proceedings. All four Organs of the Court⁷ contribute to a) expeditiousness, b) fairness and c) transparency of proceedings.

⁵ The first two key factors were also identified as key performance goals based on the experience of other international tribunals.

⁶ See the Court's Strategic Plan 2013-2017 (update July 2015) at: http://www.icc-cpi.int/iccdocs/registry/Strategic_Plan_2013-2017__update_Jul_2015.pdf

⁷ See art. 34 of the Rome Statute: the Presidency, the three judicial Divisions; the Office of the Prosecutor; and the Registry.

1. The expeditiousness of proceedings

15. The expeditiousness of proceedings is not only one of the central rights of an accused (article 67(1)(c) of the Rome Statute) but is also an obligation which the Trial Chamber is required to observe at all times (article 64(2) of the Rome Statute).⁸ In addition, ensuring expeditious proceedings is a function of the Court's efficiency and effectiveness. At the same time, the speed of a trial needs to be balanced by fairness – proceedings can only be as fast as the parties' rights (and in particular those of the accused) allow.

16. The duration of cases, past and present, is a particular concern of the Court's stakeholders and is widely seen as an indicator of the Court's overall efficiency and effectiveness.

(a) *Determining the duration of a case in phases*

17. The likely duration of a case is affected by a number of factors such as:

- (a) the number of accused persons
- (b) their position(s) within a political or military hierarchy
- (c) the number and nature of the charges
- (d) the volume of evidence and likely number of witnesses
- (e) the complexity of the legal and factual arguments involved
- (f) whether the case raises significant novel legal or evidential issues
- (g) the geographical scope of the case (localised or extensive)
- (h) the scale of the victim communities affected.

18. These and any other relevant factors (eg expected levels of cooperation, or local security conditions affecting the availability of witnesses or victim representation) need to be taken into account in any assessment of the duration of individual cases. Taken together, they also amount to criteria for assessing the relative complexity of a case, which is likely to affect the overall resource needs of the parties and participants as well as those of essential Registry services and Chambers legal support.

19. While recognising the need for a case-by-case approach, based on the above factors, an *estimated* length of various procedural phases (pre-trial; trial preparation; prosecution phase; defence phase; appeal; etc.) could be established for each case as a guide to planning, and as a benchmark against which to assess the actual progress of a case. The phases will, where applicable, include a broad estimate of the number of hearing days, based on the expected number of witnesses per party and other issues requiring courtroom time (e.g. general trial management; status conferences). Taken together, these phases can provide working assumptions for the likely overall duration per case. If and where delays are incurred vis-à-vis the benchmarks set, the reasons for such delays can be documented and help the Court both to explain the reasons for changes in the progress of a case, and also over time to develop improved ways of managing such contingencies.

20. The Court's long-term aim is therefore to establish, based on past experience and the factors identified above, an expected duration for the stages of each new case against which actual performance can be measured and variations accounted for. As a first step, data from earlier years needs to be analysed and data on the progress of current cases needs to be collected. The Court will commence this data collection and analysis from the beginning of 2016, with the aim of developing a solid methodology for estimating the duration of current and future cases. The intention is to report progress to States in early 2017 on the basis of the first year's comprehensive data covering in particular the time taken:

- (a) between initial appearance and confirmation of charges hearing;
- (b) between confirmation of charges and start of hearing phase;
- (c) between the end of trial hearings and the issuance of the judgment pursuant to article 74 of the Rome Statute;

⁸ A similar obligation rests on the Appeals Chamber through Rule 149 of the Rules of Procedure and Evidence.

- (d) between the judgment pursuant to article 74 of the Rome Statute and, where appropriate, sentencing and reparations decisions pursuant to articles 75 and 76 of the Rome Statute;
- (e) between the closing date for appeals submissions and the appeal judgment pursuant to article 81 of the Rome Statute.

21. The eventual performance indicator would therefore be:

- (a) **The degree of variance from the expected duration for each major procedural phase per case, based on an assessment of the complexity of the case and the number of defendants.**

22. In addition, given that the duration of a trial is heavily dependent on the time taken for the examination of individual witnesses, data on this will also be collected and analysed in 2016 with the aim, at a minimum, of publishing data on the average time per witness examined together with an explanation of any general or case-specific developments underlying changes in this average form year to year.

(b) *Chambers' reaction time on filings*

23. Also influenced by the criterion of complexity, more specific factors can be identified where actual performance can be measured against set targets which will be developed over time. An obvious issue during judicial proceedings would be the average deliberation time taken by Chambers from the final submission on an issue raised by the parties to issuing a decision:

- (a) **Formal requests (eg extension of time limits/ page limits);**
- (b) **Routine matters (e.g. witness protection; provisional release; victim participation); and**
- (c) **Exceptional/complex matters (e.g. admission of additional evidence; jurisdiction; admissibility; complex procedural issues).**

24. This categorisation is potentially applicable to procedural stages in all three judicial divisions, including interlocutory appeals. Collection of relevant data will begin as soon as feasible in 2016. The Court is acutely aware that the categorisation in terms of complexity and systematic mapping of relevant data will require careful preparation and analysis of live data within the Judiciary. Meaningful measurement may therefore only become possible at a later stage in 2016.

(c) *Use of the courtroom*

25. Availability of courtrooms and supporting Registry courtroom staff directly affects the expeditiousness of proceedings. Ideally, a case in the trial hearing phase would have unrestricted daily access to a courtroom. However, for 2016 at least there will be significant resource constraints on courtroom support. It will therefore be all the more important that the available courtroom days should be used as fully and efficiently as possible, though issues such as the logistics of witness availability means that 100% usage will never be realistically achievable. In 2016 the utilisation rate of available courtroom time will be closely monitored, with a view to setting appropriate targets for subsequent years.

(d) *Registry services that contribute to the expeditiousness of proceedings*

26. Performance indicators for the Registry flow from its function as a neutral service provider for the Court. The volume of services provided is dependent on the case-related needs of OTP, Defence, victims' representatives and the Judiciary. Generally, Registry performance can be measured as follows:

- (a) **Volume of service delivered versus requested; and**
- (b) **Quality of services in line with standards (or level of satisfaction).⁹**

27. Given the range and complexity of the Registry services involved, it has not been possible so far to develop tools for monitoring performance, but work on this will continue during 2016 in developing Registry-specific performance indicators. However for the purposes of Court-wide indicators of

⁹ Provided resource constraints do not hamper service provision.

expeditiousness two aspects of relevant Registry performance can be identified, and will be measured from the beginning of 2016:

- (a) **time lapse between the crystallisation of a suspect’s right to legal representation and the assignment/appointment of counsel;**
- (b) **adherence to timelines from Chambers for Registry submissions in the proceedings.**

2. The fairness of proceedings

28. Fairness lies at the heart of criminal proceedings, whether at national or international level, but it is inherently difficult to measure. The obligation to safeguard the fairness of ICC proceedings lies in the first place with the Judiciary.¹⁰ However, the Office of the Prosecutor also has fairness obligations (see, for instance, article 54 of the Rome Statute) and the Registry plays an essential supporting role regarding fairness as a neutral service provider to all parties and participants to the proceedings. The speed, quality and comprehensiveness of these Registry services can be measured.

29. While fairness of proceedings cannot be directly measured, some potential indicators may be identified:

- (a) **% of findings by Chambers confirming fair trial violations pursuant to motions of the parties;**¹¹
- (b) **% of grounds of appeals successfully arguing fair trial violations in Chamber decisions or judgments.**

30. In addition, possible measures of effectiveness and fairness of Registry services directly relating to the means of the accused or the Office of the Prosecutor could be measured as follows:¹²

- (a) Percentage of judicial findings confirming complaints by the parties to the Court as regards service delivery.

3. Transparency of proceedings

31. Article 64(7) of the Rome Statute stipulates that the trial shall be held in public. This is mirrored in article 67(1) as one of the accused’s fundamental rights. Only in special – exceptional – circumstances may the Court depart from this general legal principle.¹³

32. Another aspect of transparency of proceedings is the accessibility of Court-related information and documentation to the public. The activities of the Prosecutor and relevant orders and decisions of the Chambers require an adequate amount of public accessibility so that the wider public can follow the Court’s activities and judicial decisions from preliminary examination to the final verdict and beyond (think of reparations).

33. General indicators of public transparency could be:

- (a) **Overall percentage of filings and judicial decisions that are kept confidential rather than made public.**
- (b) **Overall percentage of courtroom time spent in confidential hearings or closed sessions.**

34. In due course, further indicators could be developed reflecting the public information and outreach activities of the Court.

B. “The ICC’s leadership and management are effective”

35. Effective management is also a key issue for the Court, especially given the complex governance structure established in the Rome Statute. Effective management therefore constitutes the

¹⁰ Articles 64(2), 81(1)(b)(iv) of the Rome Statute.

¹¹ This includes potential defence complaints against OTP on fairness grounds (eg disclosure, exculpatory information, etc.) and *vice versa*.

¹² It is noted that regarding a number of grievances specific to the defence and Registry services, the legal review will be in the competence of the Presidency; for this reason, in the following the term ‘the Court’ is used to comprise both Chambers and Presidency, as appropriate.

¹³ See articles 64(7), 2nd sentence, 68(2) of the Rome Statute

second overarching category of goals in the Court's Strategic Plan.¹⁴ In the exercise of their respective mandates, effective communication and cooperation between the three main organs of the Court on topics of common concern, clear service level agreements, a solid risk management system and effective strategic planning are just some essential factors that need to be constantly monitored.

36. The Court's performance in these areas is mainly evaluated through its reporting to external governance bodies such as the ASP, the CBF, or the New York and Hague Working Group facilitations of States Parties. Further work by the Court will be needed to establish to what extent separate performance indicators in areas like these are desirable. As an immediate starting-point, however, the Court intends to measure its performance in two areas of particular concern to States Parties:

- (a) **Gender and regional balance: tracking of both factors in the overall staffing and in recruitment processes;**
- (b) **Annual rate of approved budget implementation by organ, accompanied by explanation of significant variances.**

37. On b) it is important to note that forward budgeting and expenditure forecasting remain subject to the impact of unforeseen investigative, judicial or case developments, so that year-end variances are always to be expected.

C. "Security, including protection of those at risk from involvement with the Court"

38. Security is an important indicator since it is essential for the effective operation of the Court and is one of the key items in the Court's risk management, strategic planning and day-to-day operations at headquarters and in the field. The Court has obligations to protect not only its own staff but also to ensure the safety of victims, witnesses and others who may be at risk because of their involvement with the ICC. The Court has to constantly monitor how risks evolve, often in response to the specific risk levels of the situations it handles on its docket, in-country security situations, etc. Relevant performance indicators always have to be measured against the number of witnesses in Court protection programmes at any given time. Relevant indicators are:

- (a) **% of security incidents with witnesses, staff or information that led to actual harm compared to the total amount of incidents**
- (b) **For the incidents that led to actual harm, % due to the Court's error.**

D. "Victims have adequate access to the Court"

39. Victims' access to the Court's proceedings at many different stages and in a variety of different manners including reparations, where appropriate, is one of the Court's most prominent distinguishing features. Due to the sheer number of victims of mass criminality, expectation management is a crucial element of the Court's communication strategy. Since the application to participate as a victim in ICC proceedings is a matter of personal choice, and is potentially affected by a wider range of external factors beyond the Court's control, it is difficult to design a meaningful indicator of the Court's performance. However some indication of how far the Court is successfully facilitating victims' access to the proceedings can be measured as follows:

- (a) **Average time lapse per case between application and a decision on acceptance or otherwise, also considering the number of participating victims per case**
- (b) **Percentage of affected populations that are reached in practice through the Court's outreach activities or others involved (e.g. assisting NGOs, Trust Fund for Victims).**

40. In particular the latter has to be measured against the amount of dedicated resources the Court will be able to deploy both at Headquarters and in the field, which in turn depends on the budgetary situation of the Court in 2016 and thereafter.

¹⁴ See above.

IV. Organ-specific indicators

41. A number of essential Judiciary-specific indicators are already included in the Court-wide performance indicators above, since fairness and expeditiousness are two main drivers of the Judiciary's work. Further organ-specific indicators could be developed, for instance relating to the Presidency-led 'lessons learnt' process or workflow improvements in Chambers leading to a higher output. However, the definition of these will require further work, and will also be influenced by the degree to which Court-wide performance indicators will turn out to work in practice.

42. The Office of the Prosecutor has developed a generic performance measurement framework of interrelated indicators. As part of the development of its new Strategic Plan (2016-2018),¹⁵ the OTP identified altogether 14 indicators that cover the performance areas over which it has sufficient control.¹⁶ The implementation (*information collection, frequency of reporting, evaluation of results*) and the alignment with the Court's performance reporting system is being presently undertaken so that measurement can start in 2016.

43. Mindful of the fact that the Registry is an impartial service provider to the entirety of the Court and all parties and participants to the proceedings, performance here needs to be measured regarding:

- (a) Quantity of specific services: whether Registry able to meet the demand adequately;
- (b) Quality of services: whether appropriate standards met (e.g. response time for VWS)

44. While some of the Court's overarching performance indicators include elements of Registry-specific services, more detailed performance indicators for the Registry would need to relate to services performed by each of its Sections. Since many of these services carry out back-office functions, they are not visible in the Court-wide scheme of investigative, prosecutorial and judicial activities, yet they are essential for the Court's effective and efficient functioning (e.g. IT and information management; facilities management; human resources; Budget; Finance).

45. In conclusion, while all three major Organs of the Court are in the process of further elaborating their own sets of performance indicators, further work on these will be needed, also taking account of experience gained in measuring the initial Court-wide indicators set out in this paper.

V. Next steps

46. The Court's aim is to develop over time a comprehensive set of performance indicators as outlined above at both the Court-wide and the organ-specific levels, on the basis of which the Court would declare its targets and justify deviations from them.

47. As the first step in this process, the Court intends to create a generic framework covering the potential Court-wide indicators outlined above, and where possible to start collecting relevant data with effect from the beginning of 2016. As indicated earlier, existing data from earlier years, where available, will also be analysed as an additional basis for comparison over time.

48. The Court will report on progress to the 15th session of the Assembly of States Parties. Data for 2016 on the initial Court-wide indicators will be made available to States Parties in the early months of 2017.

¹⁵ *Office of the Prosecutor: Strategic plan 2016-2018*, ICC-ASP/14/22, 21 August 2015.

¹⁶ *Ibid.*, p. 24.