

Report on “It’s about time: Revisiting the timing and duration of decision- making at the International Criminal Court”

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The 18th Assembly of States Parties (ASP) to International Criminal Court (ICC), which took place from 2 to 7 December 2019 in The Hague marked the beginning of the ICC Review Process. This far-reaching process aims at identifying and implementing measures to strengthen and improve the performance of the ICC and the Rome Statute system (here).

With an eye on this ongoing process, this post aims at contributing to the important discussion surrounding avenues for improvement for the Court, and will specifically discuss key aspects that emerged from a side event that took place in the margins of the 18th ASP. On 3 December 2019, the

Wayamo Foundation co-hosted a side event entitled “It’s about time – revisiting the timing and duration of decision-making at the ICC.” Panelists included Elizabeth Evenson, Associate Director of Human Rights Watch, Lorraine Smith van Lin, Post-conflict Justice Advisor at REDRESS, and Shehzad Charania, Director of the UK Attorney-General’s Office and International Law Advisor to the Prime Minister’s Office. The discussion was moderated by Mark Kersten, Senior Consultant at the Wayamo Foundation.

During this session, participants addressed several key issues surrounding the duration of the decision-making process at the ICC, including the impact of lengthy delays at various stages of the proceedings. It was argued that such delays have concrete effects both on the victims, the rights of the accused, and the legitimacy of the Court itself.

Impact of the proceedings’ duration on victims

The duration of ICC proceedings impacts victims’ lives and their right to benefit from reparations. As highlighted by Lorraine Smith van Lin, many years often pass between the issuance of a restitution order and the moment when victims actually benefit from it. For instance, in the Lubanga case, victims have waited more than a year only for the Trial Chamber and the Trust Fund for Victims to come to an equivalent comprehension of their particular roles. In the Bemba case, the victims have waited for more than 10 years as the proceedings took place, and now that the accused has been acquitted, no reparation order can be issued.

Importantly, Ms. Smith van Lin explained that from a victims’ perspective, the length of the proceedings is often experienced as a justice denial. For victims, a reparation order issued sometimes more than a decade after the beginning of the judicial proceedings tends to be perceived as disconnected from their lived experience, hardly legitimate, and of limited relevance with respect to their healing process.

Impacts on the rights of the accused

Panelists further explained that the duration of the proceedings is problematic not only for victims, but also from a defense perspective. Lengthy proceedings impact the rights of the accused, such as the right to a fair trial. Similarly, delays may hinder the evidence gathering process, as the passage of time may lead to evidence becoming unavailable or less reliable or being destroyed.

It was also emphasized that individuals can be detained for years during the ongoing judicial proceedings against them. Further, no compensation is given to them in the event of an acquittal. Former Congolese vice president Jean Pierre Bemba sued the ICC without success for millions following his acquittal for war crimes after 10 years of detention.

Impacts on the Court’s legitimacy

As explained by Elizabeth Evenson at the side event, lengthy proceedings also have a negative impact on the ICC's legitimacy. Indeed, the slowness of the proceedings is often perceived as a failure of the Court to deliver justice in a manner that is respectful of the rights of the accused and the victims. Such delays are also widely criticized as a waste of the Court's already limited resources, when considering the costs of bureaucracy.

That said, as argued by Ms. Evenson, duration cannot be the only measure to assess the success of a preliminary examination (PE), as its goals are not necessarily related to its length. Rather, it's main goal is to determine whether an investigation should be opened or not, based on the criteria provided in the Statute (see the Policy Paper on Preliminary Examination).

"*We should maybe shift the issue and look at the role of the PEs. Timing isn't a proxy that can answer the question*." – Elizabeth Evenson, Associate Director of Human Rights Watch.

A key issue is to ensure transparency and coordination between the national authorities and the Office of the Prosecutor. Political issues should not be used as a pretext to extend preliminary examinations; rather, they should terminate as soon as there is enough evidence allowing for ICC procedures to continue. However, some critics accuse the Court of being politicized. In the side event entitled *Prospects for opening a formal international criminal court investigation in the Palestine situation in 2020*, one of the guest speakers, John Dugard, explained that the duration of the PE of the situation in Palestine, which started in 2015, is not due to the lack of relevant evidence, but rather to political games. He pointed out the: "[…] *fear of retaliation from Israel and the United States*."

On the other hand, in some contexts, a lengthy PE is not necessarily negative. For instance, with respect to the ongoing PE in Guinea, the preliminary examination can still play a transformative role by considering the positive complementarity. The Rome Statute (see Articles 17-20 and 53) defines the complementary role of the Court as a principle, and therefore, the primary responsibility to prosecute international crimes relies on the States parties.

Furthermore, the Report on Prosecutorial Strategy from the OTP in 2006 reiterates this idea by stressing the particularity of the "positive" approach:

"[…] *the Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation*."

Shehzad Charania, Director of the UK Attorney General's office, mentioned that the length of ICC proceedings is linked to structural issues, including the absence of a time limit for preliminary examinations. He notably suggested to draw on the International Criminal Tribunal for the former Yugoslavia's *completion strategy*, which would increase the accountability of the Office of the Prosecutor (OTP) for any bureaucratic or procedural irregularity.

Time isn't the only issue

Panelists agreed that even if the duration of the proceedings at the ICC is a crucial issue, it is not the only criteria to look at when assessing the efficiency of the Court. As stressed by Elizabeth Evenson, dialogue is key to improving issues related to the duration of the decision-making process at the ICC. Pursuant to the principles of cooperation and complementarity, the OTP has to deal with national authorities, and must be transparent in its information-sharing. Shehzad Charania invited States to present highly qualified judges, as the quality of the judgements largely impacts the credibility and legitimacy of the Court. Finally, Lorraine van Lee expanded on the idea of a responsible Court that fosters a culture of efficiency among judges. To that end, the ICC should, inter alia, encourage harmonization and collegiality of work, assign judges with different levels of experience to work together, and offer them specialized training on management.

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About the author

Ismehen MeloukaIsmehen Melouka is a Ph.D. candidate in criminology at Université de Montréal under the supervision of Professor Jo-Anne Wemmers. Having obtained a bachelor's degree in criminology, Ismehen pursued graduate studies in victimology. She focused on the perceptions and emotions of non-indigenous people surrounding the process of reconciliation with Indigenous peoples in Canada. Her doctoral studies now allow her to explore the recognition of victimization in the same non-native population. She is also a teaching assistant for the International Justice and Victims’ Rights Summer School in collaboration with the Canadian Partnership for International Justice. Her interests in criminology and human rights also allowed her to get involved with the NGO Amnesty International – UdeM, of which she was president in the past years. Ismehen is also assistant to the Special Adviser on Equity, Diversity and Inclusion (EDI) for the Rector of the Université de Montréal.

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