The Hague / Nairobi / Dakar, April 12th, 2020

Dear Justice Goldstone,

Dear eminent members of the Independent Expert Review panel,

Journalists For Justice (JFJ) is grateful for the opportunity to address you during the meeting with civil society worldwide on February 24th and the invitation to supplement our oral submissions with a written underpinning.

JFJ is mindful that since the early 1990s sister NGOs like Amnesty International, the FIDH, Human Rights Watch and the International Bar Association (IBA) have closely monitored the negotiations that led to the Rome conference, the diplomatic conference itself, and then the implementation of the treaty and the hiccups that occurred during the first cases of the ICC. Based on their knowledge of the practice of the court and on their enormous legal expertise, they have provided insightful recommendations to the IER, with which JFJ concurs on most essential points and which we shall not repeat.

We just want to highlight one remarkable convergence: during the February 24th meeting the IBA, though being an NGO very different in nature from JFJ, expressed its support for our criticism of article 70 of the Rome Statute (hereinafter: RS) and the concrete proposals we made for

improvement. We hope that this criticism that comes from observers with very different angles will convince the IER panel of the dysfunctionality of the regulation and of the need for reform.

JFJ will focus hereinafter on an angle of analysis that we have not found in the submissions of other NGOs yet. We submit that while it is the profound dissatisfaction of (large parts of) the corps diplomatique in The Hague with the functioning of the court that culminated in 2019, see f.ex. https://jfjustice.net/string-of-controversies-at-the-icc-tests-courtaes-staunchest-supporters/
that triggered the IER process, the same corps diplomatique is not very familiar with the core activity of the ICC which it is trying to reform, namely the ongoing trials.

In the 20th century we could observe that diplomats based in The Hague would closely follow proceedings at the International Court of Justice and then, after its establishment in 1993, the ICTY, in order to report back to their capitals and provide information and analysis to their governments. This traditional obligation would create a considerable workload and put an enormous strain on the legal counsellors of embassies in The Hague, for example during the Milosevic trial.

This would, however, also provide the advantage that the diplomats would know what went well and what went wrong in the cases of the ICTY, which would enable them to make meaningful knowledge-based contributions to the improvement of the system.

This tradition of trial-monitoring and cases-monitoring has been lost these days, maybe because it is assumed that the capitals can follow the ongoing cases at international courts with the modern means provided on the internet, if they so wish.

This has led to a situation where Hague-based diplomats sometimes surprise journalists, NGO experts and other professional ICC watchers with a stunning ignorance of what happens in the actual court cases and trials. Diplomats are, on the one hand, investing countless working hours during the year into preparing the next session of the ASP, discussing the budget, the revision project of the registry, the elections of new

judges and a new prosecutor etc., but will know little about the deficiencies of the RS system that appear in the concrete application of its main regulatory texts, i.e. the Statute itself and the Rules of Procedure and Evidence (hereinafter RPE), during the first trials at the ICC.

We submit that the states do not need the IER to tell them that the election of new judges and chief prosecutors should be a matter of qualifications and not of horse-trading UN and related positions during New York meetings. The states parties can figure this out themselves very well.

But the states parties to the RS could enormously profit from the experience of members of the eminent IER panel as judge or chief prosecutors at the UN ad hocs ICTY/R when profiting from their concrete experience during trials while looking at RS and RPE to see what can be done to improve the functioning of the ICC.

In the run-up to last year's session of the ASP, JFJ made concrete proposals to improve RS and RPE, also to help to get out of the mood of frustration described above. This was the introduction to our series of articles:

https://jfjustice.net/first-concrete-steps-might-create-positive-momentum-for-necessary-review-process-at-the-icc/

We analysed i.a. the disfunctioning of article 70 and made concrete proposals based on the good ICTY experience, as the wheel does not have to be invented afresh:

https://jfjustice.net/how-borrowing-from-yugoslavia-tribunal-could-resolve-headache-with-icc-contempt-procedures/

We explained how the judges chose to violate article 74 RS in order not to keep two men in jail for half a year whom they considered innocent, which would have been an affront to justice, and how the article can be formulated better to be in accordance with the natural sense of justice:

https://jfjustice.net/article-74-of-rome-statute-goes-against-the-natural-sense-of-justice/

We explained the necessity of the charges being available in writing for professional court observers, who are part of the process, to be able to do their necessary and precious work, and thus proposed an amendment to rule 121 of the RPE:

https://jfjustice.net/charges-in-writing-a-precondition-for-meaningful-icc-proceedings/

Finally, we supported the Swiss starvation amendment to the RS, as the traditional distinction between IACs and NIACs can lead to absurd practical consequences that have the potential to harm the general public's understanding of and support for the work of the court:

https://jfjustice.net/starvation-of-civilians-is-a-war-crime-no-matter-the-type-of-conflict/

Unfortunately, only the Swiss proposal made it at the December 2019 session of the Assembly of States Parties.

Switzerland, with some allied small countries like Austria, had to lobby for months to achieve this victory, though one might argue that most reasonable and sensitive observes will agree that starving a child during a civil war is as reprehensible and as criminal as starving a child during an international armed conflict.

But there was hesitation and resistance against the very idea of amending the RS and the RPE, maybe inspired by the fear of a repetition of the difficult process which led to the adoption of the Kampala amendment on the crime of aggression, or fear of a repetition of the internal infighting in the ASP about accommodating the Kenyan requests or nor for amendments of the RPE when the Kenya situation still showed important cases activity concerning very high-level suspects.

There seems to be a fear to open a Pandora's box as far as amending RS and RPE is concerned. The IER advice should help the states parties to overcome this fear. We sincerely hope the IER panel will endorse our proposals for reform of articles 70 and 74 RS and rule 121 RPE.

The IER panel should also reflect upon the very mechanism of amendments of the RPE and how future reforms should be initiated. IER

panel members will recall that at the UN ad hocs reforms of the RPE were in the hands of the judges, after consultations with the parties. The very practitioners of the RPE could improve the system themselves, based upon their own first-hand experiences.

At the ICC, improving the RPE is in the hands of the ASP, which, as explained above, is at a considerable distance from court practice.

In this constellation, it is unclear whose responsibility it is to initiate reforms if necessary. Some diplomats say the court should come up with the amendments of the RPE it needs. Some practitioners like judges say that the ASP is the legislator of the system and it is up to the states parties to initiate the necessary reforms.

The IER should encourage the relevant stakeholders to clarify their respective responsibilities for future reforms of the RPE.

Finally, the absence of the media from the so-called situation countries is a shocking reality during most of the ICC proceedings, which is in sharp contrast with good practices developed at ICTY, ICTR and SCSL.

THE IMPORTANCE OF COURT REPORTING AND THE CRISIS AT THE ICC

WHY PUBLIC TRIALS

Criminal trials are traditionally public in principle - for justice to be seen to be done and to protect the rights of the citizens. In the Stalinist era there were secret political trials in the Soviet Union, where the prosecution was not obliged to present convincing evidence publicly.

Public trials give victims the satisfaction of being heard publicly if they so wish, as witnesses or, in certain legal systems, as *partie civile*.

Perpetrators of crimes being tried publicly serves as deterrence for future crimes.

The sentence gives society a sense of vindication.

PRESS COVERAGE OF NATIONAL TRIALS

Not every shoplifter's trial will be followed by the press. But journalists will follow cases of a certain importance. Journalists of national media will know their own national justice system. They will often have had court reporting as part of their vocational training at journalism schools. The trials to be covered will take place in the same country or even the same city as where the media house is based.

PRESS COVERAGE OF INTERNATIONAL TRIALS

In international criminal trials, there is the additional factor of the importance of the accused, who may be a former head of state or high-ranking military commander. The crimes to be dealt with have often been committed in the aggravating context of war, internal armed conflict or civil strife. They may be about atrocities that have led to concern worldwide, so the importance of deterrence and retribution is felt stronger than in national cases.

It is also hoped that holding to account the main culprits of atrocities in ethnic or religious conflicts will contribute to reconciliation. These trials also play a role in the history-writing of the country or countries concerned.

But international criminal trials are often held far away from the place where the crimes took place, in another country or even another continent (ICTY, ICTR, ICC, Charles Taylor case at SCSL, STL). This is often for security reasons or reasons of organizational efficiency.

For the press of the countries concerned, it means that journalists will often not be able to attend trials that are most important for their nation, for two main reasons:

- As a consequence of the conflicts in which the crimes have been committed, the war-torn countries will often be poor, and so will be their media houses. But the international community tends to dislocate international trials to a peaceful and rich country like The Netherlands because it is safe. It was impossible for journalists from countries the first ICC trials dealt with (Democratic Republic of

Congo, Central African Republic) to afford to come and stay and live in the expensive city of The Hague. At one instance, the Association of Journalists at the ICC (AJICC-AJCPI) received a call for help from a group of journalists who work for community radio stations in the region of the east of the DRC where the crimes charged in the Bosco Ntaganda case were committed. (Community radio stations are the best way to reach affected populations and victims in rural areas in Africa.) The journalists wanted to cover the Ntaganda trial from The Hague for the benefit of their listeners. They said they had no money to come to The Hague, they asked their traditional leaders who regretted to have no means to finance a stay in The Hague, they asked the ICC registry to provide paid internships which it could not, and the AJICC does not have means to help them either.

- The Dutch immigration authorities tend to look with a strict eye at visa applications from poor countries – and war-torn countries the ICC deals with are mostly poor. The Foreign Ministry of The Netherlands has made good and successful efforts to improve the position of African journalists who are in the special situation that they have to travel to The Hague for coverage of the ICC.

Journalists, especially when they are trained court reporters, will know how the judicial system in their own country works. The ICC, however, adopts a procedure *sui generis* which is the outcome of a complex negotiating process in Rome among representatives of different legal systems, like common law and civil law. The procedures, the organs and the organisation of the court are often not well understood by journalists, which leads to incorrect reporting.

JOURNALISTS FOR JUSTICE TRAININGS AND STUDY AND REPORTING VISITS

JFJ tries to at least partially remedy the problems mentioned above by looking for donors to finance study and reporting trips to The Hague for journalists from "situation countries", i.e. the countries the ICC trials are about. Those trips are preferably organized at key moments, like the start of a new trial.

The visiting journalists can not only attend court sessions on the public gallery – they also get training on the Rome Statute, the organs and procedures of the ICC etc., and, last but not least, get opportunities to meet / interview relevant actors in the process, like judges, prosecutors, defence, victims representatives, trust fund, diplomats, academic "ICC watchers" etc.

This allows visiting journalists not only to hear about institutions in the ICC system they sometimes never heard of before, like OPCD and OPCV, but also to gain trust in the human beings who are tasked with carrying out the difficult ICC work – trust in their professionalism, motivation and independence.

JFJ always builds a long term coaching and mentoring relationship with the visiting journalists, to ensure a lasting positive effect. Years after we brought f.ex. Ugandan and Ivorian journalists to The Hague for the Ongwen and Gbagbo cases respectively, we remain in touch, advice on choices of topics, help prepare for press conferences and interviews and provide proofreading, to ensure accuracy on the international law level.

STOCKTAKING EXERCISE ORGANISED BY JOURNALISTS FOR JUSTICE

On Oct. 4th, 2018, Journalists For Justice organized a stocktaking debate on the theme "20 years of Rome Statute and the media". Journalists from several situation countries came together: Kenya, Uganda, Democratic Republic of Congo, Ivory Coast and Burundi. The debate was attended, amongst others, by the presiding judge of the Laurent Gbagbo trial, the ambassador of The Netherlands to the ICC, other diplomats, and NGO representatives.

The debate reconfirmed earlier observations of JFJ and AJICC:

- The ICC is often misunderstood in the situation countries.
- Apart from the lack of knowledge on matters like the Rome Statute, there are also deliberate misrepresentations and manipulations.

- Deliberate manipulations are often inspired by political considerations and affiliations. Often, journalists are not independent, but their employers ask them to engage into "propaganda".

- Journalists who try to do their work independently, professionally and objectively can be exposed to threats, intimidations, imprisonment or worse. F.ex. in the Burundi situation, many journalists felt they had to go into exile.

- Media houses who want to send a journalist to cover the ICC don't have the money to let someone live in The Hague.

- Study/reporting visits to The Hague do not only allow journalists to tell a correct narrative as far as facts and law are concerned. Meeting the key actors in the process also helps to build trust on what happens at the ICC on a human level.

REMEDIES PROPOSED

Study visits to The Hague of a couple of days are only a first step to enhance the understanding of and support for the court. Ideally, journalists from the countries concerned must be able to be in The Hague during the whole duration of a trial, especially when top suspects like former presidents are concerned.

In the past, this was realized at the ICTY with SENSE news agency. With the financial support of a.o. the European Union and countries like The Netherlands, Germany and Luxembourg, Bosnian, Croatian and Serbian journalists could be in the ICTY courtrooms at any given time, reporting back to their audiences at home in the former Yugoslavia in an objective and independent way, a product that could therefore be used by all media in the region.

Journalists from international media like AFP or The New York Times also profited a lot from the presence of journalists from the former Yugoslavia at the ICTY, because of their in-depth knowledge of history of the conflict, culture and language.

At the ICTR, Swiss-funded agency Hirondelle allowed Rwandan journalists to be present in Arusha and report in French; US-funded Internews hosted Rwandan journalists who wrote in English. When the SCSL dislocated the Charles Taylor trial to The Netherlands, the BBC Trust allowed at least one Liberian and one Sierra Leonian journalist to be present.

The ICC is the only international(ised) court where trials are held without the possibility for journalists from situation countries to be present. Lots of messages which JFJ and AJICC have received over the years clearly indicate that the wish to cover the court for the own national audience is present.

CONCLUSION: A SENSE AGENCY FOR THE ICC

Study visits for journalists from situation countries are only a first step, but should also be a first priority.

JFJ organized them in 2019 when the ICC's engagement with a country had matured to the stage of court hearings on the merits:

- In May 2019 for 5 journalists from Mali, when the confirmation of charges hearings in the Al Hassan case were held,
- In September 2019 for 2 journalists from the Central African Republic, when the confirmation of charges in the Alfred Yekatom / Patrice-Edouard Ngaïssona case were held.

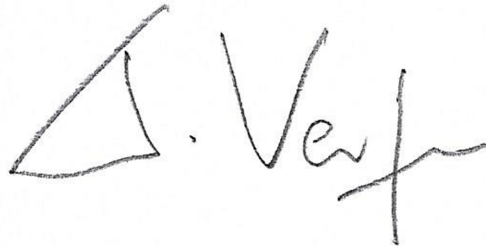
Based on the SENSE experience at the ICTY, countries could join forces once again to make it financially possible to insure a minimum presence in The Hague for journalists from the countries concerned. Stocktaking exercises like the Oct. 4th 2018 debate could be repeated annually.

Based on the SENSE model, there could be permanent and rotational staff. The permanent SENSE journalists had many years of ICTY experience. They coached journalists from the Balkans who would come to The Hague for three month periods and would then return to their media houses with the benefit of the experience and knowledge acquired in The Hague. And they would have notebooks filled with email addresses and phone numbers of relevant actors, like defence lawyers.

The IER process should encourage states to make the means available that are necessary to ensure the continuous presence of situation country journalists in The Hague.

We hope these thoughts are of assistance, we remain, of course, available for any further query and wish you lots of inspiration and wisdom for your difficult task.

Yours sincerely



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