

Joint comments for the Review Mechanism on the comprehensive action plan

France, Germany and the United Kingdom express our gratitude to the Review Mechanism (“Mechanism”) for the work undertaken thus far in categorising the recommendations of the IER report (“Report”) and for the open and inclusive approach adopted. We submit the following paper with a view to assisting the Mechanism in the important and challenging task of formulating an Action Plan in accordance with ASP resolution 19/7.

We remain staunch supporters of the international criminal justice system and of the ICC (“Court”). It is for that reason that we supported the Review process as a means by which to strengthen the Court and enable it to face future challenges with confidence. We share the concerns identified in the Report, including in relation to the Court’s efficiency and effectiveness. We believe that tackling those challenges will allow us to achieve greater results, build a positive environment and increase confidence in the Court. In accordance with the request for comments, the Annex to this note includes substantive submissions in relation to the matters referred to in para 4(b) of resolution 19/7. This includes recommendations which we have identified as priorities for implementation in order to live up to the Court’s full potential.

First, however, we would like to make some general comments on the process.

As the ASP has agreed in previous resolutions, the review of the ICC and of the Rome Statute system is a state-driven process. We believe success can best be achieved through active dialogue and collaboration between States Parties and the Court. The Court, of course, has a key role to play in this, most especially when it comes to implementing the bulk of the recommendations. However, it is important to bear in mind the key role of the ASP in considering, assessing and implementing the recommendations. This reflects the role the ASP enjoys under the relevant provisions of the Rome Statute. In particular, the ASP has oversight responsibilities under article 112 of the Statute as well as the duty to ensure strong actions are taking including, where appropriate, through ASP resolutions. Implementing the IER report ought to be a concern for both the Court and the Assembly of States Parties as a whole. All Working Groups and Facilitations need to do their ongoing work paying due regard to the IER recommendations. This will be the key priority for the ASP over the period ahead. It needs to “think review.”

Our strong desire is to work collaboratively with the Court as the Review process continues beyond 2021. The assessment of all recommendations and further implementing measures will require continuous and regular dialogue as well as collaboration between the Court and States Parties. This should apply across the range of recommendations, however categorised, whilst affording respect both for judicial and prosecutorial independence and the statutory responsibilities of the ASP.

We believe the Mechanism has the mandate and is well-placed to steer the discussion on key aspects of this Review. This may include bringing forward proposals or the provision of guidance to facilitators/working groups in order to ensure consistency in the process. We would support the Mechanism should they wish to fulfil a coordinating function. This could include matters such as ensuring follow-up with the Court Organs and Focal Points and with ASP mandate holders.

The Mechanism will have a major role to play in order to build a common understanding between States Parties and the Court on the way ahead. We place particular importance on the priorities related to the overall Governance and Management model of the Court. As these underpin the entire Review process, there is a need to quickly organize a forum for engagement and dialogue between the Court and States Parties in order to establish a direction, which could be set in an ASP resolution at its 20th session.

Given the transition in the Office of the Prosecutor, the incoming Prosecutor will be a critical factor in the consideration, assessment and implementation of the recommendations. We hope that he will have

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the opportunity to consider and respond substantively as part of the process for formulating the Action Plan.

We look forward to further discussions also with States in accordance with para 4(b) of resolution 19/7, in relation to the Action Plan The Mechanism will find below our contribution to the proposals of a comprehensive action plan, including in respect of the recommendations which we view as priorities. The identification of these priorities in no way excludes the possibility that we will identify, in the course of the assessment process, further priorities. While not precluding meaningful propositions, we would not see amendments to the Statute as the primary path for corrective action.

Finally, France, Germany and the United Kingdom reiterate their gratitude to the Mechanism for the work carried out so far and for its commitment to participate actively in the coming discussions.

Annex – Priorities identified

1. Improving Court Governance

1.1 Unified Governance.

As identified by the Mechanism, the IER recommendations on Unified Governance – in particular on Court Governance and Decision-making Process and Internal Legal Framework - are interlinked and fundamental to the entire Review Process (R1-11). **They must therefore be addressed as a matter of priority as they underpin and inform all other recommendations.** R 12 – 20 on content of Internal Legal Framework and Working Culture at the Court contribute to achieving the underlying aims of unified and harmonious governance of the Court.

These issues are complex and the Court, in its Overall Response, provided a nuanced view on some of the recommendations. It is necessary to reach a common understanding on these issues for the review process to move forward successfully. **It is therefore recommended that the Mechanism, acting in accordance with paragraph 4(b)(ii) of Resolution ICC/ASP/19/Res.7. as an ASP mandate holder, convenes consultations on these recommendations with the involvement of the relevant IER experts as soon as possible.** The two-fold aim of this is to 1) arrive at a common understanding of the practical application of the 3-layered Governance model and 2) enable the Court to swiftly commence the implementation of the abovementioned IER recommendations in a suitable manner and as required. The consideration of this issue should be completed during the second half of 2021.

1.2 OTP Governance.

R 48: OTP Management and Leadership Structures

We are conscious that the incoming Prosecutor indicated during the Prosecutor election that he wished to move to two Deputy Prosecutors. Given the incoming Prosecutor was subsequently elected we hope this aspiration will be supported.

R 49 – 52: OTP Management and Leadership Structures / Role of ExCom

The OTP is currently transitioning from one Prosecutor to another. The Court notes in its Overall Response that it will be up to the new Prosecutor to configure the ExCom in the way he desires upon taking office, and the Review Mechanism has categorised these issues as belonging to the Court. We invite **the OTP/Prosecutor, as a matter of priority, to consider and implement the recommendations concerning the Role of ExCom and to keep inform States Parties informed about this work.** Given the managerial nature of the recommendations and their relevance for the Court's overall governance, it is recommended that the Mechanism acts as a platform for engagement and dialogue between the OTP and the Assembly on these issues as a matter of priority. This should be done with a view to completing the assessment of these recommendations in the second half of 2021, and the subsequent commencement of implementation.

1.3 Ethics and Internal Grievances.

R 106, 112 and 113: Ethics Charter

A comprehensive ethics charter, and the enforcement of and compliance with it, is a necessary element for both ensuring a healthy and well-functioning work environment as well as reinforcing the perception of a well-managed organization and dispelling misconceptions about inappropriate conduct. **The Court should, as a matter of priority, undertake its consideration of a Court-wide ethics framework as proposed in R106 and as set out in paragraph 246 of the Court's Overall Response.** This

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consideration should involve the Assembly and other stakeholders and should be completed by the end of 2021 in order to commence with the implementation, as decided, in 2022. The involvement of the Assembly and other stakeholders could take place in the framework of the IOM-facilitation, or the Mechanism may take on this cross-cutting function. This consultative process should also involve the broader review of the Court's regulatory framework concerning the conduct of officials and staff.

In accordance with the Mechanism's categorization of recommendations, the Assembly and the Court should begin consideration of R112 and R113 in the first half of 2021, building on the consideration of R106. Careful consideration of the proposal put forward by the IER is needed, including the possible impact on existing mechanisms and rules/regulations. Possible alternative solutions should be assessed with a view to avoiding overlap. This consideration could possibly take place within the IOM-facilitation or be conducted by the Mechanism itself.

R115 – 124: Internal Grievance procedure.

Allegations of sexual harassment, bullying and other unacceptable behaviour in the workplace has, whether well-founded or not, been numerous and public. It is imperative that these issues are addressed as a matter of urgency both with respect to staff well-being and the reputational damage inflicted on the Court. Both in terms of ensuring an effective and efficient regulatory framework and the appropriate sanctioning of offences. Zero-tolerance must be expressed both in words and actions. R115 – 120 should be assessed in accordance with the categorization of the Mechanism as a matter of priority. Whilst the Assembly and the Court have different roles to play concerning these recommendations, as a first step consultations between the Court and the Assembly, with other stakeholders, should take place in the second half of 2021. Subsequently, based on the findings on R115-R120, the remaining recommendations up to R131 can be considered in 2022. This assessment could most appropriately be done in the framework of the IOM-facilitation, but this is subject to resources and the views of the IOM-facilitator. Alternatively, the Mechanism may take on this function.

As noted by the Court in its Overall Response ,paragraphs 255, 257 and 258, work is already undertaken with respect to a number of recommendations, and in assessing them due attention must be paid to the impact of any one recommendation on others, as well as on the existing procedures and mechanisms. Full consideration should be given to alternative solutions, in particular regarding R121 – 131, and a holistic approach should in general be applied, as the issues will ultimately be a coherent package of measures.

A final observation: R106, 112 and 113 as well as 115 – 120 directly impact on the overall objectives of R1 – R11, and thus should be considered in their broader context.

1.4 A more flexible, professional and streamlined management of the Court

1.4.1 Renewal of skills and professionalization of teams

R 101, 102 and 103: flexibility, scalability and mobility in staffing.

The IER report recommends further steps to facilitate movement between organs. We would welcome steps in the second half of 2021 and first half of 2022 to identify the practical obstacles to such moves and options for facilitating such moves in future. The Court note a number of possible issues in their response including the possible need for ASP agreement under the terms of the Financial Rules and Regulations and the possible promulgation of a Learning and Development Administrative Instruction. Given the role for both the ASP and the Court the SGG or the Mechanism should facilitate efforts to reach a common understanding on the steps required with a view to implementation in 2022.

The report further encourages exchanges and secondments between the Court and other international courts and organisations and the contemplation of secondments from national governments. Such secondments can allow for the sharing of best practice and the cross-fertilisation of ideas. The Experts note reports that existing rules constrain the possibility for secondments. We would welcome an assessment of what these barriers are as well as an assessment of any changes that may be needed to the Draft Guideline on the Selection and Engagement of Gratis Personnel. This will allow consideration to be given in to what changes should be considered for implementation, with appropriate safeguards, in 2022.

R 105: Tenure

Recommendation 105 of the IER is welcome and a particular priority for assessment and consideration this year. The introduction of a tenure policy can ensure that an organisation remains agile by ensuring there is a consistent flow of new people and new ideas. The ICC already has set tenure limits for elected officials which provides a relevant precedent within the Court. The implementation of such a policy, as recommended by the IER, is likely to involve assessment of the administrative framework including the relevant Staff rules and regulations. The scope of application and the applicable term limits are further matters for consideration. Noting that recommendation 105 has been identified by the IER report as a priority recommendation, in our view it ought taken forward as a matter of priority in the second half of 2021 with the objective of arriving at a common understanding as to how the policy may be implemented in practice. This will enable the Court to proceed to implement the policy thereafter. We would support the Review Mechanism in assisting in coordinating this assessment and working with the Court to present options for further action. Also, mobility and tenure are critical issues with regard to intensifying exchange and cooperation with States Parties. As the required changes to the system and structure of the Court's human resources are of a long-term nature, work and reflection on the relevant parameters need to start early.

Training (R67, 99, 174-175)

The experts recommend **mandatory initial training** on the basic principles applicable to the Court (R65), as well as a regular assessment of the training needs of the Court's staff (R67). Furthermore, they recommend a centralisation of the training function by the Registry (R99). For judges, the experts recommend the design of an initial and ongoing training programme for judges by the Presidency (R174 and 175).

These recommendations are a priority in order to better prepare the various actors of the Court by familiarising them with the Court's practices and the implementation of the hybrid system of the Rome Statute, which combines Romano-Germanic law and common law, and also to develop a common judicial culture.

As a means of implementation, the Registry could prepare a draft model for initial and continuing general training.

Languages

Strengthening the respect for, and practice of, the two working languages within the Court is a priority objective for which the Court should make proposals in the course of 2022. In view of the decline in the use of French at the Court, one of the two working languages, the strengthening of multilingualism is nevertheless essential for: the dialogue with the countries of situation and the efficiency of the investigations, for the promotion of universality, for the fairness of the procedure and the respect of the rights of the defence, but also for the communication of the Court.

Recommendations formulated in that regard, including carrying out targeted recruitment (R100), or ensure that staff working in the field have a good command of the language of the situation country and ensuring the linguistic diversity of recruitment panels should lead to concrete proposals by the Court

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which could be addressed either in the framework of an ASP facilitation (SGG?) or through a channel of discussion established by the Mechanism itself.

1.4.2 More accountable and efficient management of the Court

Introducing more flexibility and rationality in the allocation of resources, as well as eliminating the duplication of functions in the different organs, are objectives that should be addressed as a matter of priority. The main idea is that each organ should focus its resources on its core judicial function/mandate. The arrival of new leadership in some of the elected positions of the Court could lead to new commitment in that regards, for instance, for the 2022 budget implementation period.

The recommendations aiming at transferring administrative and HR competences and activities to the Registry (standardisation of HR and finances policies), deleting duplicate functions and services in the different organs, particularly in logistics, risk assessment and management, human resources management fields should be considered. This relates to R6, R89-90.

While in its overall response the Court contests the applicability of the principle of transferring all administration responsibilities to the Registrar, we believe there are actually avenues for rationalisation of administrative and management activities in the Court that in no way infringe on judicial and prosecutorial independence nor undermine the role of each Head of Organ. Such changes can be achieved through a commitment of all Organs to the actual realisation of the “One Court” principle in all its dimensions, including the management dimension, under the Rome Statute framework. Particular efforts are needed to rationalise the organisation of the OTP in that regard. The Court in their response, recognize improvements and further streamlining can be further explored to optimize and make better use of the resources between the Registry and OTP. We believe that ambitious changes are needed, for instance by changing from a “business partnership model” between the OTP and the Registry to a “delegation of administrative processes model” (while insuring that the final decision making power remains in the hands of the Prosecutor).

Related to the aforementioned points, R132, 133 and 134, deal with proposals for a more centralised budget process, an enhanced role for the Registrar (including in possible resources transfers across Major programs). These recommendations should be assessed in conjunction with the recommendations referred to above.

We are of the view that the **accountability framework of the Court**, including in respect of the budget process, needs to be rationalised. Furthermore, reporting lines ought to be clarified. Therefore, there should be a process within an ASP mandate (either Budget oversight management or channelled by the Review Mechanism itself) to reform the current system. This relates to R135 to R138. These recommendations can be assessed and considered during the course of 2022, including by taking into account the results of the former Independent Auditor’s study on that issue.

2. Refocusing the Office of the Prosecutor’s operation and means on core functions

Parts 12 and 13 of the IER report contain a number of recommendations for the incoming Prosecutor to consider (see recommendations 226-267). We would welcome the active consideration of these recommendations during the second half of 2021 and first half of 2022. Consideration or recommendations with regard to OTP Situation and Cases should be advanced as they are at the forefront of States Parties’ and situation countries’ interaction with the Court. The ASP should endeavour to discuss relevant IER recommendations in a wider context within its relevant Working Groups. Questions of complementarity and cooperation should be considered in the context of the review.

The report recommends that the OTP publish an updated Policy Paper on preliminary examinations (R226). We commend this proposal to the Prosecutor. A comprehensive review of the preliminary examination process is timely. This would allow for clarity in respect of the criteria to be applied during

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preliminary examinations. In formulating this updated Policy Paper, consideration ought to be given as to how to give effect to a number of the recommendations. These include, in particular, the proposals for:

- the development of a Policy on the criteria relevant to opening of a PE based on article 15 considerations (R226);
- applicable gravity thresholds (R227);
- the adoption of strategy plans for PEs (including benchmarks and provisional timelines) and related recommendations (R254-261);
- the provision of clear criteria to be used in making article 17 assessments (R263); and
- an updated approach to positive complementarity in light of R262-265.

The IER report further recommends that the OTP should develop a policy on the prioritisation, de-prioritisation and hibernation of Situations (R243-246) as well as on Situation Completion (R247-249). We would welcome the active consideration of these proposals. In respect of Situation Completion, we are conscious that a draft Policy Paper has been promulgated. It may be that further assessment of the issues and consultations with stakeholders are appropriate over the period ahead before finalising the Paper.

A collaborative and active dialogue between the ASP and the Court should form part of the policy formulation process in relation to all of the recommendations referred to in this section.

Finally, we stress the need to **review the communication strategy of the Office of the Prosecutor related to Situations**. Recommendations aimed at improving the communication strategy of the OTP should be addressed as a matter of priority by the new Prosecutor in order to make sure that “preventive communications” do not lead to unfounded expectations or to misunderstanding on the actual role of the OTP.

Recommendations regarding inter-organ communication strategy (R163) or the recruitment a senior media officer (P-4) to head the Public Information Unit (PIU) and act as the OTP spokesperson (R55) need to be addressed in that context.

3. Improving the efficiency and the speed of judicial proceedings

3.1 Greater collegiality and consistency in ICC jurisprudence are needed (R185, R188).

There should be an open climate for discussion amongst the Judges, which could be included in the Induction Program at the beginning of their mandates (R186). There should be a genuine deliberation practice (R219). Also, it is welcomed that a reference to collegiality has been included in the Code of Judicial Ethics (see R187). The implementation of these recommendations should take place as soon as possible, in particular in light of the current on boarding of the newly elected Judges.

3.2 Streamlining the judicial process through guidelines on timeframes should also be a priority.

To that end, provisions in the Chambers Practice Manual, which are not binding, should be elevated to Regulations (R194, R195): For instance, having regard to the purpose of confirmation of charges proceedings, inadequately supported charges should be filtered out (R191); application of timelines, unless there are compelling reasons not to (R192); the decision on the confirmation of charges should be in a format as indicated in the Manual (R193). The implementation of these Recommendations should be achieved within the second half of 2021 in order to contribute to the efficiency of the proceedings as soon as possible.

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In order to enhance the predictability of the jurisprudence and facilitate the work of Chambers, the Court should only depart from established practice when it is based on exactly specified grounds in the decision/judgement (R217, R218). The implementation of these Recommendations is an ongoing task for the Judges that should start with immediate effect and continue in the future.

Judges should be encouraged to arrive at unanimous decisions, and the Regulations should be amended to require all decisions and judgements on conviction or acquittal and all related individual opinions to be issued in writing at the same time (R220-222). Guidelines on the length and content on individual opinions should be included in the Chambers Practice Manual (R224). As the substantial work on these Recommendations has also been done when setting up the Guidelines, the inclusion in the Chambers Practice Manual should be done as soon as possible.