

IER Presentation – 7 October 2020

Mr Nicolas Guillou (Cluster 1)

Notes drafted in preparation for the meeting. Content might slightly differ from oral presentation.

> The Three-Layered Governance Model

- *Several questions are related to the distinction between layers 1, 2 and 3*
- Layer 1 is pretty straightforward: it is judicial and prosecutorial activity: investigations, orders, warrants, judgements... This is the core of the work of the court.
- Layer 2 is less obvious. It is the organisation of judicial and prosecutorial activity: it encompasses for example how to organise the work between the chambers, determining the number of court sitting days, the recess, organizing an integrated team in the OTP, organising specific targeted training for judges or prosecutors, identifying good practices or adopting guidelines related to judicial work... the work on the Chambers manual is also a good example of Layer 2 activity. So layer 2 concerns specifically the judicial and prosecutorial function, but it is related to its management and organisation, not to particular cases.
- Layer 3 is related to the administration of the IO part of the ICC: layer 3 is comprised of activities that are not specific to the ICC, but that are common to any international organisation, such as HR, procurement, budget, or any training that is not specific to the judicial function, for example on the performance evaluation process or on gender.
- The Registrar is responsible before the ASP for activities related to layer 3, but not for activities related to layer 1 and 2. For these, he acts under the authority of the President, so there is no concern for the independence of the Court. By clearly defining what Layer 1 refers to, and that auditing by States Parties or external actors should not intervene in this layer, it also protects the independence of the Court, in its judicial function.

The idea of having a deputy Registrar whose work would focus on Layer 1 and 2, and to have a Registrar focused on layer 3, is also an attempt to organise the type of activities within the management of the Registry.

> Election of the Registrar

- *Several questions are related to the role and the selection of the Registrar*
- Because the Registrar serves the Court for Layer 1, he acts under the authority of the President for Layer 1 and 2, and is responsible before the ASP for L3, the selection process shall involve both the judges and the ASP: short listing by the ASP, after a thorough recruitment process, and vote by the judges seems to be the best process.
- But because of the broad portfolio, and the dual nature of the role (Registrar of the Court and SG of an international organisation), election by pair is a solution to ensure that the pair has all

the skills needed. This would also help for geographical and gender representation. Continuity shall be ensured with the Directors and head of sections. Developing a strategy for retaining and transferring institutional knowledge, as we recommend in another section, is also key – institutional memory should not depend on whether one individual or another remains in the organisation.

- Same model proposed for the Prosecutor and Deputy Prosecutor: very difficult to find the right candidate because many skills and experience required. The combination of experience of two candidates could allow to find all the skills and experience needed. For example, a national prosecutor with a long career in managing complex cases and large prosecution offices, and an international prosecutor with extensive experience in international litigation and diplomatic skills. This might be a useful way to address the challenges for the recruitment of the next ICC prosecutors.

> Ethics: Ad Hoc committees

- *Concerns express about fragmentation and costs of the new committees proposed*

- All our proposal are for non-permanent and mostly remote working committees: limited cost. This means that while members will be appointed in a roster, they will only incur costs when they are called on to act.

- Some of them would hopefully rarely be triggered, like the ad hoc judicial investigation panels

- Others are aimed at solving problems that are currently taking a lot of time for many stakeholders, like the ethics committee

- Staff appeal judge is a cost, but we need to bear in mind the cost of litigation at the ILOAT (just the court fees, not including the compensations). This model is the one of the STL and the KSC and is way cheaper than going to an external tribunal for all cases. We believe the use of UNAT might also assist with saving costs.

- Judicial Audit Committee shall be established when needed, and should not be permanent. Several model possible: either when there is a need for improving a specific function or procedural aspect, or when a recurring problem has been detected. This is what “inspection des services judiciaires” do in many States.

- The ad hoc investigative panels are also modelled on the inspection des services judiciaires: they are aimed at investigating any judge accused of misconduct. I understand that there are concerns from the IOM who thinks that this shall not be given to a panel when the misconduct is not linked with judicial activity. It is a legitimate question, but the problem is that it will be very difficult sometimes to draw the line between the two.

- on risk of fragmentation, bringing some under the same umbrella (Ethics and Business Conduct Office) is also in part to ensure there is a coordinated approach, with clear mandates to avoid any duplication. When Judicial Council will be carried out, some of the ad hoc bodies recommend might no longer be needed (like first instance panel for judges and the ad hoc investigative panels).

> Budget

- *Questions about micro management of States, length of the mandate of the members of the CBF, and contingency fund.*
- The report tries to strike the right balance between fully legitimate oversight by member States, and efficiency of the budget process. Our vision is a lot of the work shall be done before the ASP. But it requires a transparent dialogue and an earlier involvement of the Member States. We do not advocate for less oversight though.
- Mandate of the CBF: non-renewable is always better when possible for independence. We do not suggest to shorten the mandate, but to the contrary to avoid having a new appointment.

> Performance indicators

- *Several questions were raised about examples of KPI*
- In the report, we introduce the distinction between efficiency and impact.
- Efficiency indicators are quantitative and measure the activity primarily, but also the risk or the pace.
- These indicators can refer to judicial activity (i.e. Layers 1 and 2): number of sitting days, average number of hours per hearing, accuracy of provisional timelines, number of legal officers dedicated to each case...
- But these indicators can also refer to the administration of the international organisation (Layer 3): time taken on average for a recruitment, for a procurement.
- Some efficiency indicators could be linked with achievement of objectives that would appear in the budget document (for example number of sitting days in total), and we understood the Court is working on this. But others are more difficult to link because the Court has less leverage on the numbers (for example when the activity depends on cooperation with states).
- The most interesting is not the data itself, it is its comparison in time and with other similar institution. For indicators related to judicial activities, it means comparison with other international tribunals. For indicators related to the administration (L3), it means comparison with other international organisations.
- For example, there shall be a comparison of the sick leave ratio between the ICC and other international organisations. It is a key indicator for the working environment, even if it has to be moderated with other factors such as age. For such an indicator, the ASP should commend the Registrar to include these indicators in his reporting and can facilitate cooperation with other IOs or ICTs they are members to enable such comparisons.
- But beyond the numbers, the dynamic is even more useful: is the Court improving or at the opposing getting worse? These tools are a very good way to monitor the risk.

Mr Mike Smith (Cluster 1)

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Human Resources

Length of service; career/non-career; tenure (questions 19, 44, 65, 57, 121)

The IER recognizes that there are some advantages in staff serving in their positions for a long time, including of course the development of greater expertise and experience. But if not accompanied by promotion and/or new challenges, the downside is that staff can become dissatisfied and lose motivation, and can become more resistant to change.

The IER does not say that the Court should be a non-career workplace. But we note that, like many other international organizations, the opportunity for career advancement in the ICC is extremely limited compared to a national service. Ambitious and energetic recruits to the Court, as well as existing staff, need to factor that into their decisions on how long they should stay there. In the absence of opportunities to move up in the organization and take on new responsibilities, staff should have at least the chance to move to different parts of the Court, including into the field as a way of developing themselves professionally, as we have recommended.

The IER has proposed a system of tenure as a way of generating change and new thinking at the management level of the Court. We have set the level where it should be applied at P5 because that is generally where management commences. We have suggested phasing this system in so that existing staff at that level do not feel that they have been personally disadvantaged and that the goal posts have been moved on them. In so doing, we would hope to head off potentially costly and lengthy litigation aimed at challenging the introduction of the scheme.

Working Culture; bullying; harassment (questions 23, 28, 29, 38, 50, 56, 106)

We have received several questions relating to the recommendations made to rebuild and reshape the Court's working environment. The IER acknowledges the difficulty of changing the culture of a workplace. But this can be done if senior management commit to it and follow it up by demonstrating zero tolerance of bullying and other forms of harassment. Mandatory training for all managers is also part of this as are the creation of mechanisms through which staff who are victimized can safely report their concerns and receive a speedy hearing, which is covered through the recommended internal justice system. A properly operating performance assessment system, including 360-degree assessment, is also helpful in this area.

On the extent to which other IOs could be used as example, In some of this, UN and other multilateral agencies could offer models but the reality is that issues of poor work culture and harassment are found in many bureaucracies, national and international, as well as in the private sector. So rather than trying to copy another organization we believe the ICC could become a leader in this area through the resolute action and follow-up of its leadership.

Multilingualism (question 7)

On the question of why the issue of multilingualism has not been included in the list of prioritized recommendations: We agree that promotion of multilingualism in the Court is important and a priority. But the measures to implement it suggested in the report, notably changes to recruitment, training etc., will take some time to have a full impact. It is for this reason that the issue was not placed amongst the priority recommendations which sought to identify actions that can deliver early positive returns.

Diversity; secondments (question 115,116)

We received questions on the impact of secondments in reaching more balanced gender and geographical representation. It is true that secondments from national governments may not have an impact on geographical and other areas of diversity, which is why the IER recommended these only be considered in a limited range of circumstances and be confined to requests from the Court itself and focused on areas of particular technical expertise. We also recognize that some of the suggestions to address the issue of gender imbalance could also be contemplated for other areas of imbalance in staffing profiles. The Report contains specific recommendations specifically targeted at improving geographical representation such as the joint election of the Registrar and Deputy Registrar and measures in terms of recruitment.

External Relations

Outreach strategy (question 24)

On the IER's recommendation for outreach to begin from the preliminary examination phase - The importance of starting an outreach strategy early is that it can help to win over an affected community who could otherwise be influenced by powers hostile to the Court's activities. This has also been formally asked by the ASP in several resolutions. The IER recognizes the procedural limitation on commencing outreach before Pre-Trial authorization that might require amendment, but this would not prevent the relevant parts of the Court from discussing potential approaches with each other so the outreach program can be commenced in the field at the earliest possible time. The recommendation for preliminary examinations to be limited to two years, save for exceptional circumstances, also makes it more feasible to have an effective outreach program during this phase already.

Role of the NYLO (questions 55, 108)

On the Recommendation to review the mission of the Court's NYLO - The NYLO could play a number of roles as set out in the report, including liaising with UN offices, state party missions, relevant NGOs and the press, as well as conducting public information activities and supporting the NYWG's meetings. It is really for the Court and the ASP to decide what they wish the Office to do and then staff it appropriately. The recommendation to identify a focal point in the Hague to deal with the UN system is not at all inconsistent with the role of the NYLO. After all in a national foreign ministry, there is a desk in the capital dealing with multilateral affairs even

though there is also a national mission to the UN in New York. The two offices work closely together as should the Court NYLO and its counterpart in The Hague.

Strategy for Attacks on the Court (questions 32, 49)

As far as political measures against the Court are concerned, we were asked whether the recent response from the ASP responded to the Experts' recommendation and to elaborate on what the recommended strategy would entail. The IER notes and commends the prompt responses by the ASP Presidency and certain States Parties to recent attacks on the Court. At the same time it believes there is room for development of an on-going strategy involving coordination of responses between different parts of the Court and the ASP, the advance preparation of talking points and other media material for use by spokespersons, and the activation of diplomatic strategies to minimize the impact of such attacks. Similarly, for efforts to be carried out on a national level not only in response but pre-empting criticism of the Court. In short there is scope for consultations between the ASP and the Court to ensure that responses are timely and appropriate when the next attack occurs.

External Governance

SASP (questions 45, 52, 107, 113)

Finally, a few questions concerned the recommendation made regarding the Secretariat of the ASP. Under the Three Layered Governance Model, the Registrar is the senior official who answers to the ASP for the performance of the Court as an international organization. In the view of the IER it is both inappropriate and inefficient for there to be another layer between the Registry and the ASP, notably the SASP. Inappropriate as it sets up potentially competing bureaucratic interests and inefficient because it adds an additional layer of bureaucracy where this is not needed. Of course, absorption of the SASP into the Registry would mean exactly that, notably the staff would be redeployed into the relevant part of the Registry which would perform the tasks currently the responsibility of the SASP, with no loss of staffing positions.

IER Presentation – 7 October 2020

Mrs Mónica Pinto (Cluster 1)

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Bullying (No.48)

In response to questions regarding the concrete means to address instances of bullying - The Ombudsperson we recommend is conceived to be dealing with disputes and conflicts of all sorts in an informal, friendly and effective way together with the Mediation Services, as a preliminary, non-compulsory instance.

At the same time, in the EBCO structure, within the IOM there are several focal points including the one dealing with harassment/bullying.

Internal Grievance Procedures - ILOAT/UNAT (No.22/25)

Decisions given by administrative tribunals require implementation in the given case and sometimes also require adjustments in procedures, rules and that needs to be done in order to prevent recurrent cases of the same kind. We were asked about how R12 and R13 are reconciled, one recommending ensuring the Court's internal legal framework respects principles established by ILOAT in decisions against the Court; and the other (R13) recommending the Court to explore the possibility to transition to UNAT. R12 is to be understood as needing to be implemented until the Court would transition to UN AT.

We suggested that ICC studies the convenience of moving to UNAT as it is currently using the UN Common system. We assume that both the institution and its staff appreciate an internal justice system able of settling conflicts and disputes in a timely and efficient manner. IF there is a change of jurisdiction, it will only affect cases from a given date.

Defence and Legal Aid (No.26,34,35,36,37,41,60,61,27)

Re Defence

We have received a number of questions regarding the suggested Defence Office, which would be achieved by strengthening and empowering the current OPCD to take on additional responsibilities.

Article 34 of the RS does not mention the Organ for the Defence among the Organs of the Court (the Presidency, the Chambers, the OTP and the Registry). We believe the new Defence Office, offering a strengthened voice to the Defence on an institutional level, together with the ICCBA's recognition by the ASP and its reporting to the Assembly, redress what could have been perceived as an institutional imbalance regarding the Defence. As such, the Experts believed this imbalance can be achieved through a Defence

Office and would not require transformation into a fifth organ, with the additional strain that that would place on the governance process of the Court.

The proposed new Defence Office, which will make OPCD responsible for governance of legal aid services, currently under CSS, would retain functional independence, as the OPCD currently has, and represent Defence interests within the Court, as for example through attendance in CoCo+ meetings and representing the Defence in the ACLT.

The Defence Office would further be responsible for oversight, capacity building and strategic development for defence representatives before the Court. The possibilities are open to the Court to decide how to implement.

It is further recommended that the PIOS enables Defence-generated press releases on the Court's website, in the spirit of institutional equality of arms.

In terms of representation of the Defence Office towards the ASP, the 'upgraded' Defence Office and its functional autonomy have no impact on the Registry's role of representation of the Court towards oversight bodies.

As regards the recommendation for the Defence Office to be responsible for legal services for defence teams and the implication of this for legal aid for victims' teams – no explicit recommendation has been made in the Report as regards the management of legal aid services for external victims' teams. We note such responsibility would not ideally be delegated to the OPCV nor OPCD. It will be for the Registry to review how best to organize these responsibilities and resources, as legal aid is under the authority of the Registrar.

Re Legal Aid (No.42,43,59)

The aim is to finalise the reform of the legal aid policy. To have a full reform and not only updating numbers and to finalise it with the help of a working group composed of individuals with specific experience working with defence and victims and legal aid policies before international courts, nominated by the Registrar, OPCD, OPCV and ICCBA. The opportunity is to rethink the LAP globally and not starting within the margins of budgetary limitations.

The Court should consider elaborating scales of professional fees for legal staff working in external victims' teams, especially young professionals and women. Currently there are only maximum levels set, leaving the possibility to lead counsels to set very low remuneration levels in the interest of taking on more support staff.

As regards tracing, seizing and freezing accused's assets, we do believe that States Parties to the Rome Statute have a role to play in ensuring that declarations of indigence by prosecuted persons are honest and that assets, including property of the prosecuted persons are secured pending the result of the trial. In the next step, we also recommend closer scrutiny in granting indigence requests, considering the recommendations/assessment of the Financial Investigator's.

It is for the Court to decide on who will manage legal aid for victims. In any case, in the past, VPRS managed legal aid for victims. It could not go to OPCV as they are 'competing' in a way with external victims representatives. It might of course be for the Registry to evaluate what the best way to go about it would be.

Victims, Reparations and Assistance (No.33 on TFV)

When it comes to the TFV and its Secretariat, we were asked about the IOM Evaluation of the TFV. We worked on the grounds of the Recommendations put forward by the IOM on its 2019 Evaluation, as can be seen from the report itself that cites the Evaluation on several occasions. The Experts identified core structural issues in the way the TFV has evolved, that would need to be addressed to ensure both effective reparations and assistance for victims, as well as most efficient and impactful use of resources.