



**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**

**Overall Response of the International Criminal Court to the  
“Independent Expert Review of the International Criminal Court and the  
Rome Statute System – Final Report”**

**Preliminary Analysis of the Recommendations and information on relevant  
activities undertaken by the Court**

14 April 2021

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## INTRODUCTION

1. The International Criminal Court (“Court” or “ICC”) submits this document pursuant to paragraph 5 of Resolution ICC-ASP/19/Res.7 of the Assembly of States Parties to the Rome Statute (“Assembly” or “ASP”), in which the Assembly requested the Court to submit to the Review Mechanism and to the Bureau and all States Parties an overall response to the “Independent Expert Review of the International Criminal Court and the Rome Statute System - Final Report”, as well as a preliminary analysis of the recommendations contained therein and information on relevant activities already undertaken by the Court. It is noted that, in response to a request from the President of the Court, the Bureau of the ASP granted an extension of two weeks for the submission of the present response, until 14 April 2021.
2. The Court welcomes the Independent Expert Review (“IER”) Report (“IER Report” or “Report”) and is fully committed to closely considering all aspects of it, with a view to identifying in particular those recommendations which are fact-based, actionable, consistent with the Rome Statute and practically targeted towards achieving measurable improvement.
3. The Court itself called for an independent expert review and has supported the process in every way. From the beginning of the initiative, the Court has viewed the independent review process as a necessary step in the life of the institution, and one that is in line with the Court’s strategy and commitment to continually enhance the effective discharge of its mandate. Accordingly, the Court has participated in the IER process without reservations, engaging with the Experts in an active and constructive manner, providing the Experts with volumes of documents and information and availing its staff the opportunity to freely provide their views to the Experts.
4. The Experts have made a genuine effort to engage with the Court at all levels and to help it chart a way forward in the interests of strengthening the Court and the Rome Statute system of international criminal justice. They did this under high expectations, extreme constraints of time and the restrictions due to the impact of the COVID-19 pandemic. That was certainly not an easy task.
5. The resulting IER Report is an extensive document that concerns a wide range of often complex substantive areas which require interaction and coordination of, as well as views and decisions by various actors, inside and outside the Court. Therefore, the Court underlines the preliminary nature of this overall response, which is also in line with the ASP resolution. The Court has prepared its overall response in parallel with its regular activities and a very active judicial and prosecutorial docket,<sup>1</sup> the transition to a new Presidency of the Court, the replacement of one third of the Court’s judges and the election of new presidents of divisions, as well as the transition preparations to a new Prosecutor of the Court. Hence in certain areas, it is imperative to leave room to further refine or even revisit the initial responses during future steps of the process.<sup>2</sup>
6. As regards next steps, the Court will intensify its internal process for a holistic review of all areas addressed in the Report where the Court has the lead, with a key objective being to identify priorities within the actionable recommendations that can be addressed in the short to medium term with tangible benefits and within existing resources, and to plan the way forward on implementation with a view to achieving concrete results.
7. Some parts of the Court’s internal process will be largely organ-specific; for instance, the Judiciary is launching a comprehensive internal review of the recommendations contained in chapters I B, VIII, IX, X and XI, consulting the Registry where necessary on human resources, IT and budget related matters. Other parts of the process will have a distinctly inter-organ nature, such as those concerning chapters II-VIII.

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<sup>1</sup> The judicial activity in the first months of 2021 has included the finalization of two major appeals judgments, two trials with busy courtroom hearing schedules, the rendering of one verdict and one reparation order, sentencing proceedings in one case, pre-trial proceedings in relation to three recently transferred suspects, including proceedings on the confirmation of charges, and the rendering of a decision on jurisdiction pursuant to a request by the Prosecutor.

<sup>2</sup> As regards the Court’s Judiciary (i.e. Presidency and Chambers), it is specifically emphasized that views expressed in the present document on matters related to the Judiciary – notably including chapters I B, VIII, IX, X and XI, as well as aspects of chapters XVII and XVIII – are without prejudice to further positions that the plenary of the Court’s judges may adopt in the future upon closer inspection, through a collective process, of the different areas of subject matter in question.

8. The Rome Statute created the ICC as a special type of international institution – a court of justice. The different administrative support mechanisms created by the Statute are all aimed at enabling that court of justice to discharge its mandate in an effective manner. Consequently, as further elaborated later in this document, the Court’s existence, activities and credibility are entirely underpinned by judicial and prosecutorial independence. These fundamental principles have guided the preparation of this overall response of the Court and will remain equally central tenets during the upcoming detailed assessment and, where appropriate, implementation of the IER recommendations by the Court.<sup>3</sup>

9. The Court is fully committed to keeping the Review Mechanism, the Bureau and the Assembly closely informed of progress made in its internal review of the recommendations in the aforementioned areas of the Report where the Court has the lead, and further action planned, in particular concerning implementation.

10. The Court notes that, possibly due to the considerable time pressure referred to above, the usual best practice in similar exercises at international courts and tribunals of requesting for an institutional comment in the draft phase did not take place in the case of the IER Report.<sup>4</sup> As a result, in its response the Court will address certain legal and factual inaccuracies. It will do so with a view to strengthening and assisting the review process, which should be based on all available facts and information.

11. The Court further notes that, in certain limited cases, where it considers that the Experts’ recommendations are not actionable as such, it has endeavoured to identify the objective sought by the Experts, and proposes an alternative solution, which is both actionable and achievable in the short to long term period.

12. The Court recalls that in its resolution ICC-ASP/18/Res.7, the Assembly decided to address a number of topics within the broader review process through facilitations of its Bureau rather than through the IER, and that these include notably the cooperation of States with the Court (as well as non-cooperation), which is a matter of crucial importance for the Court’s operations. The Court stands prepared to work together with the Assembly and the States Parties to advance this and other critical matters for the fullest achievement of goals of the Rome Statute.

13. At the request of the Board of Directors of the Trust Fund for Victims (“TFV”), in addition to TFV’s opinions expressed in some paragraphs in chapter XVIII, as indicated therein, a document containing the Board’s comments and observations on the IER Report is attached as Annex IV to the present document.

14. For ease of reference, the numbering of chapters in this overall response of the Court follows the numbering in the IER Report.

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<sup>3</sup> See also Court’s observations and comments on recommendations R1-R11 *infra*, and Annex I.

<sup>4</sup> See e.g. Special Court for Sierra Leone, Report on the Special Court for Sierra Leone - Submitted by the Independent Expert Antonio Cassese, 12 December 2006, available at: <http://www.rscsl.org/Documents/Cassese%20Report.pdf>, para. 25; UN General Assembly, Evaluation of the methods and work of the International Tribunal for the Former Yugoslavia – Report of the Office of Internal Oversight Services, 12 May 2016, Un Doc. A/70/873-S/2016/441, available at: <https://undocs.org/pdf?symbol=en/A/70/873>, para. 4.

## ***Court-wide matters***

### **I. GOVERNANCE**

#### **A. Unified Governance**

#### **The Court's observations and comments on recommendations R1-R11**

15. The governance structure of the Court, as set out in the Rome Statute, creates the foundation for the Court's activities and operations and defines the key tenets of judicial and prosecutorial independence. Accordingly, the Court lays particular emphasis on its response to this part of the IER Report, concerning recommendations R1-R11.

#### **1. Structure of the Court**

##### ***Recommendations***

**R1.** *The Three-Layered Governance Model should be used as a tool to ensure effective and efficient governance, clarify reporting lines and improve cooperation among stakeholders.*

**R2.** *ICC/Court: Layer 1, Judicial and Prosecutorial activity, is in the hands of the Presidency, the Judges, and the Prosecutor respectively, and requires absolute independence. There can be no auditing by States Parties, ASP or external actors. States Parties should not use their role in the ICC/IO to influence judicial and prosecutorial activity. In Layer 2, the Presidency and the Prosecutor are the leaders. Accountability should be achieved through judicial and prosecutorial auditing, carried out by peers. Inter-court comparisons of performance indicators on issues of administration of justice can further contribute to assessing efficiency in Layer 2. The Registry supports Layers 1 and 2 and, in this regard, the Registrar cooperates with the Prosecutor and acts under the guidance of the Court President.*

**R3.** *A non-permanent Judicial Audit Committee should be called on to carry out audits of the administration of justice activities in Chambers and OTP. The Judicial Audit Committee should be made up of current or former, national or international judges and prosecutors with relevant experience, appointed similarly to the Committee recommended in R113 (p.92).*

**R4.** *The ICC/IO should function as a unified organisation, with a vertical hierarchical structure. The Registrar is the Chief Administrative Officer, responsible for the development and implementation of administrative processes and policies, including the budget. In this regard, the Registrar should consult other Principals, but – as Chief Administrative Officer – should remain the decision-maker. The One Court principle should be in full effect in Layer 3, through the uniform application and interpretation of administrative processes, ethical standards, staff regulations, values, disciplinary processes and so forth to all staff, regardless of Organ. Uniform, Court-wide instruments and approaches should be prioritised for all aspects of the ICC/IO. There should be no duplication or parallel working groups in different Organs. All staff should be treated the same way, regardless of the Organ they work in, and should be united around the same Court-wide values.*

**R5.** *The uniform approach guided by the One Court principle should also be applied to the independent units and offices within the Court. The Court-wide efforts to assess efficiency through Key Performance Indicators should be extended to such independent offices. As units within the Rome Statute system, all such offices should develop and align their strategies to the Court's Strategic Plan.*

**R6.** *The incoming Prosecutor is encouraged to delegate to the Registry, as much as possible, the services/activities within the OTP that pertain to administrative matters (Layer 3). The OTP and Registry should consult on this issue and on the extent to which the Registry has the capacity to support the OTP's needs. States Parties are advised to discuss this matter with candidates for the role of the Prosecutor.*

**R7.** *The Registry should take the lead in further integrating offices or units within the Court that perform similar tasks, with the goal of strengthening capacity through pooling or reallocation of resources, and avoiding overlap.*

## 2. Decision-Making Process and Internal Legal Framework

### *Recommendations*

**R8.** *Each Organ should aim to focus on its core business, as prescribed by the Rome Statute and interpreted with the help of the Three-Layered Governance Model. This model should be employed to clarify responsibility areas and reporting lines, leading to more efficient and effective decision-making processes. The matter at hand will dictate who the owner of the process should be. A clear distinction needs to be drawn between who the ultimate decision-maker is and who needs to be consulted. There should be no veto from a Principal in matters that do not fall under their responsibility.*

**R9.** *The Registrar should be the sole official responsible for developing, updating, interpreting and implementing internal legislative instruments relating to internal administrative matters (ICC/IO). The Registrar should consult the Prosecutor and President in CoCo on the strategic objectives, but should not be required to obtain approval of the latter on the final language and implementation details. The approach of consulting all Organs, implying all Heads of Organs, their support staff and their legal offices, on such details should be discontinued. Where needed, clear deadlines for consultations should be employed, with tacit approval implied after the deadline has passed.*

**R10.** *The Registrar should report regularly to the ASP on the length of the inter-Organ consultation process for all Layer 3 internal legal documents.*

**R11.** *An extended Coordination Council (CoCo+) should regularly bring together the Principals and the Heads of (functionally) independent offices within the Court (OPCD, OPCV, TFV Secretariat, ASP Secretariat) to ensure strategic coordination at the highest level, enabling the Court as a whole to work in harmony and with unity of purpose.*

### *Three-layered governance model*

16. In its findings, the IER has identified a tension in the existing governance of the Court. It also observes that some States have expressed concerns at their inability to guide and shape the institution, and the Court has at times expressed concern that State scrutiny may be perceived as straying into issues that are central to the independence of the Judiciary and the Prosecutor.

17. To address this tension, the IER has made recommendations to change the governance of the Court with a view to strengthening judicial and prosecutorial independence and allowing for appropriate and effective oversight of its administrative functions by the ASP. Specifically, the IER has identified a “Three-Layered Governance Model” for the Court, and its recommendations are made in accordance with that model. The IER believes that the three-layered model and their recommendations for change are consistent with the provisions of the Rome Statute, and offer clarity about the proper place of the ASP scrutiny, reducing these tensions and, in doing so, improve the governance of the institution.

18. The Court welcomes the scrutiny of these important issues by the IER. The Court recognises the tension and believes that an initiative to strengthen the independence of the Court is timely and necessary for the long-term future. The Court equally acknowledges that effective oversight by the ASP of the Court’s administration and its efficiency is an essential pillar of ensuring a successful international organisation, its long-term legitimacy and sustainability. The Court also recognises that the Rome Statute created a complex institution and finding an effective solution requires a sophisticated solution.

19. Describing the Court’s operations as consisting of three distinct layers – judicial and prosecutorial activity, administration of justice, and administration of the Court – is an interesting and useful way of explaining some features of the Court’s governance, as it does so with clarity and simplicity. However, to fully understand the governance of the Court, two fundamental additional factors must be fully appreciated. First, under the Rome Statute, the three layers were not designed to operate independently of each other. Second, the Office of the Prosecutor (“OTP” or the “Office”) was deliberately created as an independent entity.

20. In preparing its response to the IER recommendations on governance, which are based on the three-layered governance model, the Court has carried out a detailed examination of the provisions of the Rome

Statute and, crucially, its drafting history, which underpin the rationale of the current governance framework of the Court.<sup>5</sup> This analysis is attached as Annex I to the present document.<sup>6</sup>

21. As elaborated in the Annex, the drafters of the Statute clearly understood that the three layers of governance identified in the model are inextricably linked; the independence of judicial and prosecutorial activity is entirely underpinned by the administration of justice, and the administration of justice is entirely dependent on the administration of the Court. To give an obvious example: administrative actions (for example the ability to recruit and retain suitably skilled staff) have a direct impact on the realisation of judicial and prosecutorial activity. The Court's analysis shows that the creation of this essential unitary authority and accountability was a deliberate decision by the drafters of the Statute, designed to safeguard the independence of a permanent judicial institution which they presciently recognized may be subject to exceptional political pressure.

22. It is also worthwhile to emphasise that the drafters of the Statute had all the examples of corporate governance in international institutions considered by the IER before them at the time of drafting the Statute but decided to follow a different path. Evidence of this can be seen in the reporting lines for the Registrar, who is clearly placed under the authority of the President and not under the direction of the ASP. The Statute provides that the proper administration of the Court is the responsibility of the Presidency, with the exception of the Office of the Prosecutor,<sup>7</sup> and designates the Registrar as the principal administrative officer of the Court<sup>8</sup> responsible of the non-judicial aspects of the administration of the Court, and of servicing the Court, including the Office of the Prosecutor, without prejudice to the functions and power of the Prosecutor.<sup>9</sup> The functions of the Registrar are exercised under the President's authority.<sup>10</sup> The IER's proposal of creating a unique reporting line from the Registrar to the States Parties, going beyond statutory management oversight of the Court's administration, conflicts with this notion.

23. Equally importantly, the provisions of the Statute creating the independence of the Office of the Prosecutor clearly recognize that to be independent, the authority and accountability of the Prosecutor needs to extend to all three layers of the model. This was a deliberate and fundamental decision on the part of the drafters to safeguard independence. The Statute clearly provides that the Office of the Prosecutor is independent<sup>11</sup> and that the Prosecutor has full authority over management and administration of the Office, including its staff, facilities and other resources thereof.<sup>12</sup>

24. The Rome Statute, in this manner, bears a fundamental structure akin to a separation of powers, both between the Assembly and the Court and within the Court itself, through its distribution of administrative responsibility amongst its organs. The relevant legal texts, commentary and drafting history available clearly demonstrate the intention and rationale of States to create the governance system in the specific way as it is contained in the Rome Statute – and which the Court is, therefore, obligated to apply.

25. The Statute, including the fundamental precepts of judicial and prosecutorial independence, does not permit decision making primacy of one organ over most areas of the Court's administration.<sup>13</sup> Furthermore, the devolution of administrative responsibility in any single office creates significant risk of concentrating influence and authority around a single organ, particularly when combined with a bifurcated accountability structure for the Registrar, the particular challenges of which are readily foreseeable.<sup>14</sup>

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<sup>5</sup> [Report of the Court on measures to increase clarity on the responsibilities of the different organs](#), ICC-ASP/9/34, 3 December 2010.

<sup>6</sup> The practical implications of the suggested governance structure warrant close reflection moving forward. For example, if it were consistent with the Rome Statute for the Registrar alone to be exercising all responsibility for the Court's internal legal framework and the Presidency/President and Prosecutor have only a consultative capacity in this regard, this would mean that the entirety of the Court's current system of Administrative Issuances, based on the *Procedures for the Promulgation of Administrative Issuances*, ICC/PRES/D/G/2003/001, which do not reflect such situation, may themselves be considered illegal, which could have far-reaching consequences in terms of liability for the Court. This much is indirectly acknowledged at footnote 34 of the IER Report.

<sup>7</sup> Rome Statute, article 38(3)(a).

<sup>8</sup> Rome Statute, article 43(2).

<sup>9</sup> Rome Statute, article 43(1).

<sup>10</sup> Rome Statute, article 43(2).

<sup>11</sup> Rome Statute, article 42(1).

<sup>12</sup> Rome Statute, article 42(2).

<sup>13</sup> In this regard, the terms of reference for the IER were entirely clear in the following important caveat: the exercise was to be one which took due care to preserve full judicial and prosecutorial independence.

<sup>14</sup> The IER Report suggests that the Registrar acts under the guidance of the Presidency for layers 1 and 2 and is accountable to the ASP for layer 3. IER Report, paras 35-36.

26. Aided by this analysis of the fundamental construction of the governance contained in the Statute, the Court has carefully examined the recommendations put forward by the IER which are based on a textual analysis which suggests that the text of the Statute has sufficient flexibility to allow for an organisational separation of the three layers, that the independence of the Prosecutor is only confined to the first two layers and that the ASP does have a direct managerial authority over the Registrar. The Court is of the view that the text of the provisions needs to be understood in the context of the fundamental design criteria of the Statute and this leads us to conclude that the very clear wording of the Statute on such fundamental matters as independence do not afford the flexibility to embark of a radical change to the governance.

27. In accordance with the foregoing, if one wishes to analyse the Court's governance through the prism of the three-layer model, then it must be clearly understood that the three layers exist as a unified construct within the Court and separately as a unified construct within the OTP. As a result, there are two strains of authority for administrative matters within the Court: one in the OTP, and one in the rest of the Court. The Court agrees with the IER that the One Court principle applies to these two strains of the administrative layer and should function to maximise efficiency, including by exploiting synergies and reducing duplication and by ensuring necessary coordination on cross cutting matters. The Court also agrees with the IER that the proper place for scrutiny of the Court by the ASP is within and confined to this administrative realm, where the One Court principle operates.

28. The Court agrees with the IER that although the ASP should not scrutinize the first two layers of the Court, some means of independent scrutiny of these two layers would be useful. Accordingly, the Court welcomes the suggestion of establishing a non-permanent judicial audit committee in due course and when the resources can be made available for it.

29. As explained in detail further below, the Court's management in their strategic or daily activities is implementing its governance model as per the Rome Statute in a progressively successful and effective manner. At the same time, the Court agrees that there is room for improvement, including in the speed of decision-making and in further enhancing synergies, and accordingly, and as documented in reports to the ASP, it has continuously strived to further improve and streamline its processes in this regard.

30. The Court has therefore identified several actions, in compliance with the Rome Statute, which it undertakes to implement in line with its general goal of continuous improvement. Due to their action-oriented nature, some of these aspects, while raised as examples in this more general part relating to the three-layered governance model, will be further developed in the specific chapters to which they relate.

### *The management of the ICC in practice*

31. Against the background of the IER's findings, the Court considers it useful to highlight some pertinent aspects of how the Court's existing model of governance and management functions in practice, as well as to consider ways how the objectives of the IER, notably to reduce tension amongst Court organs and the Assembly and provide predictability in the governance, could be achieved.

32. The extraordinary events of 2020 have subjected the governance of the Court to an enormous stress test. Under the direction of the Coordination Council ("CoCo"), the Court has proved itself resilient and capable of responding with speed and flexibility to the challenges and enabled it to not only maintain business continuity but also to take forward to the extent possible its strategic plans to improve the Court's results and functioning. The Court has learned many valuable lessons from this experience and its governance structure has emerged stronger and more prepared for the challenges ahead.

33. In respect of the relationship between the President and Registrar, pursuant to article 43(2), and in regard to the Presidency, pursuant to article 38(3), a reading of the IER Report conveys the impression that the Registrar strains under the oversight of the President.<sup>15</sup> In reality, the authority of the President on the Registrar can be described as a light and flexible one. In accordance with the statutory provisions, it is a relationship characterised by oversight to the Registrar. Throughout such processes, each organ performs its statutorily assigned responsibilities.

34. The precise nature of the relationship between the President and Registrar may, of course, vary, depending on who holds of such office at the specific time. For many years, excellent personal relations

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<sup>15</sup> See e.g. IER Report, paras. 52-53, 56.

have prevailed at all times between the Presidency and Registrar, as well as the Prosecutor. There is *de facto* constant and productive dialogue and troubleshooting between the three immediate offices where many inter-organ matters are processed and addressed under instruction by the Principals of the Court, and weekly meetings and continuous consultations take place between the Registrar and the President/Presidency, as well as the Prosecutor, when appropriate. The Registrar usually benefits from the full support of the Presidency to his actions and initiatives. For instance, this has clearly been the case during the current COVID-19 pandemic for the work of the Crisis Management Team, where all organs are actively participating under Registry and OTP lead, as well as in the collaborative and mutually supporting response of the Court to the US Executive Order 13928 of 11 June 2020 and designations under it of 2 September 2020. These examples demonstrate the Court's capacity to function effectively with unity and urgency under the existing governance structures.

35. Although the relationship between the Presidency and Registrar is in practice a light and flexible one, characterised by oversight, coordination and cooperation, the President must nevertheless give real meaning to article 43(2)'s clear pronouncement that '[t]he Registrar shall exercise his or her functions under the authority of the President of the Court'. Yet, this must be understood in context of the very modest bureaucratic capability of the Presidency. The Presidency relies on information provided by the Registry and remains focussed on oversight and coordination which involves asking fundamental questions on matters at the core of the Presidency's responsibility for the proper administration of the Court,<sup>16</sup> *not* micro-management and a bureaucratic duplication of tasks.<sup>17</sup>

36. Much of the Presidency's oversight in this regard is exercised through well-established forums, such as the CoCo,<sup>18</sup> which ensures that such oversight is not unduly burdensome and also allows the proper coordination of some key cross-cutting matters amongst the three main organs of the Court. *Ad hoc* meetings are also held, as necessary. Through CoCo, the elected officials vested with management responsibility<sup>19</sup> have a forum for coordination and decision-making which can be rapidly mobilised as necessary. Staff with specific expertise is regularly invited to brief and address the CoCo, as necessary.

37. The Presidency, together with the OTP and the Registry, also coordinate the overall strategic and administrative leadership of the Court, with all three organs engaged on matters such as the Court-wide Strategic Plan, initial Key Performance Indicators and administrative issuances.<sup>20</sup> While improvements in working methods can always be sought and procedures, at times, may move slower than is ideal notably due to a high workload of the staff involved and limited resources rather than reluctance to make progress, it should be noted that the relevant procedures are already capable of working efficiently and regularly do so in practice. For example, in the context of the urgent action required during in response to the COVID-19 crisis, the Presidency oversaw the drafting and promulgation of a complex Presidential Directive, involving inter-organ consultation and the Staff Union Council, in only three weeks – a record time for any type of administrative issuance at the Court. Further, the Court fully supports the underlying principle of encouraging a culture of cohesiveness and consistency, including greater uniformity and Court-wide approaches when appropriate and necessary.<sup>21</sup>

38. The Court's processes and policies, including those pertaining the budget, adhere strictly to the Rome Statute and the Court's Financial Regulations and Rules. For the budget preparation, the Registry

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<sup>16</sup> Cf. IER Report, para. 53.

<sup>17</sup> The Presidency frequently seeks input and information from the Registry even for decision-making which falls within the Presidency's own remit, such as in respect of the calling to full-time service of judges in 2018. For example, prior to taking any decisions in this regard, the previous Presidency held several meetings with the Registry divisions involved to ensure that its decisions could be properly accommodated within the existing fiscal parameters.

<sup>18</sup> Regulations of the Court, regulation 3.

<sup>19</sup> The previous and current Presidencies have sought to ensure the involvement of all members of the Presidency in CoCo meetings.

<sup>20</sup> By way of example, in respect of administrative issuances, the Presidency has specific duties, consistent with its responsibility for the 'proper administration of the Court'. These include: to ensure legal quality, to take into account the broad interests of the Court and to coordinate with and seek the concurrence of the Prosecutor. For example, the nature of interventions of the Presidency in inter-organ administration have been grounded in objectives as diverse and significant as seeking to minimize the Court's potential liability before the Administrative Tribunal of the International Labour Organization, seeking to ensure consistency with equivalent administrative issuances in the UN and seeking to ensure consistent understanding of shared strategic objectives. In respect of the drafting of administrative issuances, the respective legal offices of the three organs have close and respectful relationships and consult consistently with a view to minimizing the duplication of functions. It is agreed by all that the unnecessary duplication of functions is indeed most unwelcome.

<sup>21</sup> IER report, para. 48. For example, it was at the insistence of the Presidency in 2019 that a detailed programme for the necessary updating of the Court's administrative issuances was produced by the Registry. Further, the Presidency has led and ensured the development of certain agreed template documents which can be rapidly applied and adapted, thereby fostering uniformity and efficiency, both internally and with external stakeholders.

issues policies after consultation with the other Organs of the Court. Processes and policies specific to the budget are also discussed and agreed with the Committee on Budget and Finance (“CBF”). Through CoCo, the organs of the Court provide leadership and coordination for the setting of the High-Level Assumptions for the fiscal year and the overall financial target for the Court and each Major Programme follows the very same approach, yet maintaining the decision-making for its own budget proposal, hence applying successfully the One-Court principle.

39. This has also been recognized by the oversight bodies of the Court, such as the ASP, whose recent Resolution on the Court’s Budget “[w]elcomes the Court’s continued efforts to fully implement the “One-Court principle” when establishing the proposed programme budget, which has resulted in improvements to the budgetary process”. Additionally, the CBF, in its comments to the External Auditors’ report, noted that the “...functioning of Coordination Council and other co-ordination mechanisms for different topics and programmes indicate concrete steps taken towards implementing the One-Court Principle”, and similarly confirmed that noticeable progress was made by the Court in the preparation and implementation of the budget using the One-Court Principle. Likewise, in her brief at the end of the 35<sup>th</sup> session of the Committee on the 2021 Proposed Programme Budget, the Chair of the CBF mentioned that the One-Court Principle is being implemented.<sup>22</sup>

### ***Improving the existing arrangements in the governance and administration of the ICC***

40. The way forward in addressing the Experts’ recommendations must be one characterised by the fullest of respect for the Rome Statute and its underlying principles. Having considered the objectives reflected in the IER recommendations, the Court is able to highlight many areas of improvement that can and have already been considered.

41. The Court, under CoCo’s direction has taken significant steps in the last three years to improve the governance of the institution. It now has in place an aligned set of strategic plans which cover all the organs of the Court. It has strengthened its strategic risk management and aligned it with the Strategic Plan. It has established performance data which it has committed to publish annually and which it continues to refine and develop. In its most recent budget proposal, it has taken the first steps to bring strategic planning, risk management and budget together in a unified and coherent approach.

42. The Court recognises that CoCo in its present form does not include all the independent offices of the Court (Secretariat of the Trust Fund for Victims, Secretariat of the ASP, Independent Oversight Mechanism, Office of Internal Audit). Our experience indicates that there are benefits of the present system which provides a forum for key individuals who have the most impact on the running of the Court to have candid discussions and debates and make decisions. The benefits of having a lean focussed decision-making group were amply demonstrated during the 2020 crises. However, as strategic planning and risk management are developed, the Court sees much value in the IER’s recommendation of having extended CoCo sessions involving all the other offices to formally discuss these issues.

43. The IER also recommends that the two independent offices within the Registry, the Office of Public Counsel for the Defence and the Office of Public Counsel for Victims, are also present at such extended CoCo sessions. The Registrar presently has the responsibility to ensure that the interests of victims and the defence served by the Registry are fully considered in all the deliberations of CoCo. Nevertheless, the presence of the two independent Offices at any extended CoCo sessions would serve as an important demonstration of the centrality of victim and defence rights in the Court when we are considering strategic planning and risk.

44. In its comments to the External Auditors’ report, the CBF “...noted the efforts by the Court to establish efficient procedures within the framework of the Rome Statute through the implementation of the synergies project whose results were shared to the Assembly and the Committee.” Indeed, the Court has carried out comprehensive inter-organ synergies exercises in 2016 and early 2017, where it identified through an inclusive and thorough process of consultation, areas that work well but also duplications and

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<sup>22</sup> Report of the Committee on Budget and Finance on the work of its thirty-third session, ICC-ASP/18/15, 27 September 2019, para. 246; Briefing by the Chair of the Committee on Budget and Finance on the work of its thirty-fifth session, 8 October 2020; Report of the Committee on Budget and Finance on the work of its thirty-fifth session, ICC-ASP/19/15, 13 October 2020; Resolution of the Assembly of States Parties on the proposed programme budget for 2021, the Working Capital Fund for 2021, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2021 and the Contingency Fund, ICC-ASP/19/Res.1, 16 December 2020.

inefficiencies in its operations. It has proposed and implemented solutions to those areas in need of redress. Areas subject to these reviews were Analysis functions, Language services, Human Resources, External Relations and Public Information, Procurement, Mission Planning, Information Technology, Witness Management and the Information Management and Information Technology.<sup>23</sup>

45. Such internal review has been ongoing since the exercise concluded in 2017, while not following the same set structure and annual reporting. As situations and operations, as well as Court's workload and working methods evolve, there is a need to continue a review of certain inter-organ areas. The natural place to do this is in the context of the Court's strategic planning process, which has evolved over the years from very general or organ-specific plans into coordinated, action-oriented strategic plans as introduced in 2019. Further optimizing the strategic planning process will lead to further streamlining, integration, efficiencies and greater effectiveness in management practices. Measurable and action-oriented Key Performance Indicators ("KPIs") will be a key component in this process.

46. The priority areas identified where streamlining and improvements can be further explored, which have also been identified by the Experts, can include the following:

- a) Further optimizing operations between the Registry and OTP<sup>24</sup> by making better use of existing resources; including staff, where appropriate;<sup>25</sup>
- b) Further developing the existing use of KPIs;<sup>26</sup>
- c) Financial investigations and arrests: optimizing the growing coordination between the OTP and the Registry, including greater clarification of roles and responsibilities and provision of resources;
- d) Developing a new model of field presence for the OTP with Registry and optimizing the operations in the field between Registry and OTP;<sup>27</sup>
- e) Enhancing recruitment processes and practises, where necessary and the provision of training; building on the Leadership framework with 360 degrees evaluation. Ensuring the HR services of the Court are properly resourced; and
- f) Information management.

47. The Registry is indeed already engaging external consultants to review the processes it oversees – for instance, in the areas of Mission Planning/Travel, Procurement, Recruitment, etc. The reviews aim at re-engineering the processes and providing a suitable benchmark to establish the KPI for the affected functions (as stated by the Registry in its Strategic Plan presentation). The projects are carried out with the active participations of the functions in other Organs that are involved in the reviewed processes as contributors or clients. In some cases, the outcome may be a recommendation to change the systems supporting the process.

48. Furthermore, the Court is committed to fostering a Court-wide culture of transparent decision-making, including enhancing accountability through the development of clearly-defined procedures for consultation and the achieving of Court-wide objectives. The Court is also seeking to further streamline processes, establish more clearly defined roles for each organ in various administrative processes, as well as ensure that deadlines set for various steps of such administrative processes are more strictly adhered to. This is intended assist in reinforcing a culture of preparedness and accountability in achieving outcomes. It would encourage such processes to be addressed in a more systematic and planned manner.

49. With a view to streamlining processes, the Court intends to consider closely the IER Report, in particular those aspects which seek to address the highly resource-intensive nature of the Court's administrative processes, and would not risk further complicating an already complex governance structure or affect the delicate balance achieved in the Rome Statute.

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<sup>23</sup> See e.g. Report of the Court on Inter-Organ Synergies, CBF/28/12 (March 2017); Report of the Court on Inter-Organ Synergies, CBF/26/13 (April 2016); Second Report of the Court on Inter-Organ Synergies, CBF/27/08 (August 2016); Report of the Court on the Identification of Areas of Joint Optimisation, CBF/25/24 (30 July 2015).

<sup>24</sup> (R 7, 99, 73, 287, 330).

<sup>25</sup> (R92, 95, 101, 253).

<sup>26</sup> (R146-148, 248, 250).

<sup>27</sup> (R80, 81, 82, 83, 84, 85, 86, 94, 167, 280, 292, 293, 294, 295, 296, 297, 298).

50. Finally, while highlighting the need for full respect and adherence to the principles of accountability for its management and administration, the Court believes that an important streamlining of the Assembly's oversight mechanisms and corresponding reporting requirements would allow the Court to focus on the actual development and implementation of the envisaged improvements. The Court notes that the same officials are usually in charge of both development and implementation of and reporting on these measures, and the time spent in one area is lost in another.

### ***The way forward***

51. The Court appreciates the objective of the IER to improve and further develop the Court's governance, and in this context welcomes many ideas and recommendations presented. Yet, for the reasons explained above and further elaborated in the Annex on drafting history, the three-layered governance model proposed by the IER in Recommendation 1 does not fully fit the fundamental design criteria of the Rome Statute. The model would require radical changes and would also carry with it considerable risks. The areas of improvement identified in the IER Report are not of such magnitude as to justify such a drastic departure from the existing arrangements, which would create new challenges for the Court and the Assembly alike.

52. The Court's leadership is of the view that the benefits sought by the recommendations concerning unified governance can be equally, and in a more straightforward manner, be achieved by enhancing the good practices in managing the Court and implementing the plans for further improvement that the Court will detail in its overall response.

53. Indeed, the Court's leadership fully recognises that the governance of the Court can be further strengthened. Building on the progress made in recent years, the Court has already identified a concrete set of proposals that it intends to take forward in the next strategic planning cycle of 2022-2024, which include: strengthening governance by bringing about greater alignment of budget proposals with strategic planning and risk management and also implement the recommendations of the external auditors on streamlining the budget presentation, working on a discreet range of functions undertaken by the OTP and the Registry where we believe further synergies may be found.

54. It should also be noted that the implementation of various recommendations stemming from the IER Report as a whole will assist in improving the Court's functioning but also poses a challenge to both the Court and the Assembly in the next few years in view of their number, scale, complexity and attendant risks and costs. The Court's leadership is confident that having already strengthened the governance and having been stress tested in the most difficult conditions of 2020, it is in a position to deal with future challenges through the current governance framework, rather than embarking in the more radical change with the risks inherent that the IER recommends.

## **The Court's observations and comments on recommendations R12-R20**

### **3. Content of Internal Legal Framework**

#### ***Recommendations***

***R12.*** *The Court internal legal framework should be reviewed to identify and amend as needed outdated internal legal instruments or those that are contradictory to principles set out in ILOAT decisions against the Court. A systemic process should further be put in place to enable a review of the Court's internal legal framework's compliance with ILOAT decisions, as soon as practicable after such a decision involving the Court is delivered, to identify and implement any necessary amendments.*

***R13.*** *The Experts also recommend the Court to follow the UN administrative procedures as a starting base in developing new policies. When needed, the approaches can be tweaked to the Court's needs, taking into account the differences in size of the organisation and mission. The use of UN Common System should also lead the Court and ASP to review the decision to make use of ILOAT rather than the UN Appeals Tribunals.*

## ***Overview of findings***

55. Based on the process recommended by the Experts, the Report advises the Court to review outdated administrative issuances or those issuances that are contrary to the decisions of the ILOAT in its cases. In addition, the Experts suggest putting in place a system to review compliance of the Court's internal legal framework with any new decisions from the ILOAT on the Court. In this regard, as the Court applies the UN Common System, the Report highlights the importance of following the UN administrative procedures as a basis, only exceptionally and slightly departing from these on matters that are specific to the Court's structure or mission. This, the Experts consider, will avoid resource-intensive processes of having to design legal instruments from scratch. Finally, as the Court applies the UN Common System, the Experts recommend that the Court and the ASP review the decision to use the ILOAT instead of the UN Appeals Tribunal. As noted in the Report, this will avoid potential interpretation or implementation conflicts in ensuring compliance.

## ***Overall assessment***

56. The Court agrees with the Experts on the importance of reviewing outdated internal policies and administrative issuances. Indeed, prior to the IER initiative, the Registry, in consultation with other organs of the Court, was already engaged in reviewing key internal administrative issuances to update or promulgate them as appropriate. That work continues. Furthermore, a system is in place whereby every new ILOAT decision related to the Court is analysed to implement internally the necessary lessons learned, and identify, as appropriate, any need to update the existing policies. The Court is also in agreement with the Experts' recommendation to follow the UN administrative procedures as a starting base in developing new policies. This process is already being applied in relation to all new administrative issuances, as well as when reviewing existing ones.

57. The Court notes that the UN Common System represents common standards, methods and arrangements being applied to salaries, allowances and benefits for the staff of the United Nations ("UN"), some of its specialized agencies and a number of other international organizations. Accordingly, the UN Common System is designed to avoid serious discrepancies in terms and conditions of employment, to avoid competition in recruitment of personnel and to facilitate the interchange of personnel. It applies to over 52,000 staff members serving at over 600 duty stations. Notably, both the UNAT and the ILOAT have jurisdiction over organisations applying the UN Common System. While there may be value in the recommendation of the Experts to move to the UNAT's jurisdiction, this is complex question which will require careful study as it would have a considerable financial impact and would need extensive adjustment of the internal legal framework of the Court.

## **4. Working Culture at the Court**

### ***Recommendations***

***R14.*** *The Court, and senior management specifically, need to make efforts to rebuild and strengthen internal trust and re-shape the working culture at the Court. Specifically, the Court should aim to move away from a highly litigious, adversarial atmosphere in a human resources management context. This can be achieved, for example, through more transparent and regular communication from leadership to staff. In practice, this would include communicating quickly and effectively CoCo decisions to concerned staff/Organs, and prioritising opportunities for staff to engage in a constructive meaningful dialogue with the leadership, on office-, unit-, section-, Organ- and Court-wide levels.*

***R15.*** *Decisive action needs to follow the ASP's and Court's commitment to achieving gender equality and ensuring the dignity, wellbeing, safety and inclusion of all individuals affiliated with the Court, regardless of gender or sexual orientation. Targeted interventions for gender equality should be complemented by gender mainstreaming.*

***R16.*** *Recruitment processes for managers should place more emphasis on the required managerial and leadership skills. Capacity building should also be employed as needed to support the further strengthening of Court managers' leadership skills.*

***R17.*** *The Leadership Framework project, as well as the Wellbeing Survey should be effectively supported by the Court and its Principals.*

**R18.** Sick leave rates should be compared with data from other international courts and international organisations to clarify whether the situation at the Court is similar to, or better or worse than at other similar institutions.

**R19.** Regularly carrying out the Staff Engagement Survey, Wellbeing Survey, and comparing sick leave rates through a consistent methodology would also enable monitoring the evolution of results. Such comparisons in time would offer an indication of progress and should guide relevant actors' decisions.

**R20.** The Staff Union Council can and should play an important role in supporting the process of strengthening trust within the Court and re-shaping its culture, by advocating for and practicing a collaborative and cooperative approach.

### **Overview of findings**

58. Based on observations received from staff at all levels, the Experts have found that the Court appears to suffer from internal distrust, as well as an antagonistic approach between Organs not conducive to cooperation and cooperation. In their consultations, the Experts identified a perception of the Court being too bureaucratic, inflexible, lacking leadership and accountability. The Report highlights the need for decisive action to ensure gender equality following the commitment expressed by both the ASP and the Court. It is noted that findings to this effect have been included also elsewhere in the Report. The Experts stress the need for targeted interventions for gender equality, including the use of dedicated focal points on gender issues, sexual and other forms of harassment following best practices from for example UN Women. The Experts emphasize the need to ensure the dignity, wellbeing, safety and inclusion of LGBTIQ+ individuals, and welcome in this regard the ICCQ, an informal sexual and gender diversity network at the Court. The Report addressed that recruitment for managers should focus more on managerial and leadership skills, and further underscore the need to build capacity among managers to strengthen these skills. In this respect, the Experts commend the Court for the recently initiated Leadership Framework project. The Experts further report on concerns regarding the wellbeing of staff who, in light of the perceived internal dynamics, might be subject to stress leading to extended sick leave, including for burnout. The Wellbeing Survey was noted as a welcomed initiative and its follow-up, the Experts further add, should receive suitable support. The Experts underline that senior management need to make efforts to rebuild and strengthen internal trust and re-shape the working culture, with an aim to move away from a litigious and adversarial atmosphere. This, according to the Experts, could be achieved through open communication and engagement with the leadership, including by communicating relevant CoCo decisions. The Report emphasizes the role of the Staff Union Council in bridging the gap between staff and leadership.

### **Overall assessment**

59. The Court is fully committed to strengthening internal trust and improving the working culture at the Court, this indeed has been identified as a strategic objective in the current Strategic Plan of the Registry (2019-2021),<sup>28</sup> and the OTP has taken a number of initiatives under the incumbent Prosecutor's term towards building a positive office culture. These have included, inter alia, instituting a Working Group for this purpose, adopting a Code of Conduct for the OTP and organisational Core Values of "Dedication, Integrity, and Respect" with mandatory trainings, messages from the Prosecutor to OTP staff on conduct expected of ICC personnel, as well as a number of gender related projects. The OTP organisational values are to guide all aspects of the Office's work and set expectations for all OTP personnel. The OTP has strived to create a work culture that is accountable at all levels, both in terms of performance and professional conduct. As an important priority, the OTP is fully committed to continue on this trajectory and benefits from the IER Report in the implementation of such efforts.

60. Better communication with staff is an important aspect of what needs to be done in order to achieve this goal, improvements in this respect can build, for example, on the strength of the Court's management of recent crises, both in terms of the COVID-19 pandemic, and with regards to sanctions against the Court and some of its officials by the US administration. To this end, communication with staff and participation of staff were integrated as part of the Court's strategy in responding to the crisis. This included frequent messages to all staff, Q&As, town-hall meetings, and creation of cross-sectional, multi-disciplinary inter organ bodies. In addition, there are a number of strategic initiatives underway with potential for improving

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<sup>28</sup> This is in addition and complementary to the Court-wide strategic goal of ensuring a safe and secure working environment in which staff wellbeing and continuous improvement are at the centre. (Court's Strategic Plan 2019-2021, Goal 7.)

the working culture at the Court, such as the Leadership Framework and Development, Staff Engagement Survey, Staff Wellbeing and Engagement Committee, anti-harassment training, unconscious biases training, among others.

61. Furthermore, the Court is fully committed to achieving gender equality and ensuring the dignity, wellbeing, safety and inclusion of all individuals affiliated with the Court, regardless of gender or sexual orientation. The leadership of the Court has a key role to play in this regard and confirms its high-level commitment to gender-mainstreaming in respect to an overall, strategic approach from the organisation. A number of initiatives were already taken at the Court, including at the OTP where gender awareness training has been conducted, and gender parity targets for higher level posts have been set as a specific priority and performance target for the organ. More work will be done building on the strengths of the initiatives taken and underway. The Court further highlights the recent appointment of a Focal Point for Gender Equality, a project jumpstarted a few years prior. The incumbent who was selected from a pool of qualified internal candidates will assist the Principals as they look at gender initiatives in a holistic manner, as well as the newly established Gender Platform, which allows for the coordination of all internal actors, from formal units and sections to grassroots groups and initiatives that are and will be developing actions and contributing to these efforts. The Court's objective is to create an established position to serve as the Focal Point for Gender Equality in the coming year. Targeted gender equality interventions will permeate from that overall approach to various parts of the Court, such as HR, Legal, disciplinary measures and the Occupational Health Unit ("OHU"). The Court highlights that adequate resources will be required in support of such efforts, in particular, to fund an established position for the post of a Focal Point for Gender Equality at the necessary grade, including support services as necessary.

62. The Court sees value in the Experts' recommendation for recruitment processes for managers to focus more on managerial and leadership skills building on the steps taken to date. Notably, the Court's Leadership Framework is now embedded as part of the performance appraisal policies as "Core Competencies". A review of the recruitment process will soon be initiated through an external consultant. The review will consider how leadership competences can be best assessed in recruitment practices. Internal implementation and ASP could play a role on endorsing eventual priorities established during the process. In this respect, the Court will also consider how both recruitment processes and improving the skills of managers can better integrate a gender perspective. This could be achieved by enhancing training of staff involved in recruitment processes on unconscious bias, develop or modify recruitment tools, processes and policies to prevent bias based on gender (and other identities) and further promote recruitment of women for senior positions. Furthermore, consideration will be given to strengthening managers' knowledge of disciplinary mechanisms so as to advise staff, as well as their capacity to deal, as appropriate, with conflictual situations within their teams and act effectively to prevent and resolve issues related to bias, discrimination, bullying, harassment (including sexual harassment) and abuse of power.

63. The Court notes the Experts' recommendation to compare sick leave rates with data from other international courts. To this end, the Court has put in place a detailed analytical Sick Leave dashboard. Benchmarking with other organisations is currently in progress and the first analysis will soon be available.

64. Finally, the Court fully agrees with the Experts that the Staff Union Council should and indeed does play an important role in supporting the process of strengthening trust within the Court and re-shaping its culture. The Court is committed to identifying, as appropriate, opportunities to enhance collaboration on strategic efforts to strengthen trust with the Court, and in this context, recalls the comprehensive Recognition Agreement it has entered into with the Staff Union in July 2020 with a view to reinforce coordination.

## **B. Chambers Governance (Working Environment and Culture, Structure, Management and Organisation)**

65. The Judiciary has taken note, with appreciation, of the recommendations presented by the IER in the subchapter titled "Chambers Governance". The Presidency, in consultation with the plenary of judges, will be giving due consideration to all these recommendations in the context of the reviewing the Chambers management and staffing structure and related administrative arrangements. This is a priority matter for the Presidency. As always, the Registry's Human Resources Section ("HRS") will be consulted, where necessary.

66. At this point, taking into account in particular the change in the composition of the Court's Presidency as of 11 March 2021, and the turnover of one third of the Court's judicial bench on the same date, it is not possible to give a timeline as to the next steps in the Judiciary's internal review of the issues discussed in this chapter. However, the Presidency is fully committed to taking these matters up as soon as practically possible, and keeping the Review Mechanism and the Assembly of States Parties apprised of developments in this regard. In particular, any contemplated steps that would have budget implications would be brought to the attention of the CBF at the earliest opportunity, as per usual practice.

67. The comments below on specific recommendation in this subchapter are organized in a number of thematic bundles.

## **1. Structure of Chambers and policies on recruitment and assignment of legal staff**

*R21. The Presidency should consider formally adopting an integrated case team organisation, with in-built flexibility, for all Chambers and Divisions.*

*R22. To enhance the efficiency and effectiveness of the Court and management of the judicial workload, the Presidency should consider the establishment of a specialised Pre-Trial legal support team, headed by a senior legal officer, and available to assist and service the Pre-Trial Division exclusively. Similar static teams should be employed in the Appeals Division to ensure consistent and coherent jurisprudence.*

*R23. The Presidency should rename the position of team coordinator as 'référéndaire', in line with the key roles and responsibilities assigned to this position. Référéndaires should be recruited specifically for the role, at a P-4 level. They should be attached to a Chamber or a case, not a judge, and have a limited maximum duration of nine years in the role (tenure).*

*R24. The Presidency should give consideration to the propriety and sustainability of the continuous assignment of a case team from the Pre-Trial stage of proceedings to the end of the Trial.*

*R25. The Presidency should consider developing and issuing guidelines on the assignment of legal officers to individual Judges in accordance with the demands of their official responsibilities.*

*R26. The Presidency should consider an organised scheme on the inter-divisional transferability of legal officers.*

68. The Judiciary has taken note of these recommendations, and they will be given due consideration in the context of the reviewing the Chambers staffing structure, as discussed above.

69. Certain elements of the recommendations have already been incorporated in the steps taken by the Chambers to optimise its functioning. By way of example, in October 2019, the judges adopted "Guidelines for ICC Judgment Drafting" at their annual retreat. The guidelines, *inter alia*, note the imperative that legal officers assigned to a Trial Chamber work as a single coordinated unit and contemplate the place of sub-teams in the drafting process. Further work on team structure could incorporate the recommendations of the Experts.

70. This work on the team structure and composition currently works within the existing staff complement. However, any changes to the staff complement that would entail the reclassification or creation of posts would, in practice, inevitably entail an increase in budgetary resources required.

71. Going forward, the Presidency's consideration of these matters will take into consideration the existing human resources rules and framework (particularly in light of the UNCS), as well as how large the increase to the Court's budget would be. Furthermore, these recommendations would need to consider the forecast life cycle of cases at the Court to ensure optimal use of resources.

72. A number of criteria are currently used when considering the legal support staff assignments to Divisions, Chambers and cases, taking into account the specific expertise of the judges in those Divisions and Chambers with a view to complementing those judges' skills and expertise. The Chambers could indeed benefit from developing established criteria for the assignment of staff that could be systematically applied. These criteria could include, in no particular order:

- Geographical representation and gender balance.
- Language skills.
- Experience (both in the Division/Chamber concerned and within the Chambers as a whole).

- Experience in a particular case.
- Experience in legal systems - representation of the principal legal systems of the world.
- Legal expertise on specific issues, including, but not limited to, sexual and gender-based crimes and violence against children.

73. Since 2009, the Judiciary has implemented a system of flexible assignment of staff in Chambers, which allows for inter-divisional transfer of staff, including legal officers, and the flexible use of resources which ultimately makes the Chambers more economical. The Presidency will continue to enhance this policy by refining the criteria by which staff may be assigned to other Divisions.

## **2. Updating Job Descriptions for Specific Positions**

*R27. The Presidency and the Registrar should consider updating the job description and commissioning a job reclassification of the position of legal adviser to the Divisions (Pre-Trial, Trial and Appeal).*

*R28. The Presidency and the Registrar should consider reviewing and harmonising the job descriptions of the Chef de Cabinet, Head of Chambers Staff, and divisional legal advisers, and developing a job description for Référéndaires.*

*R30. The Presidency and the Registrar should consider updating the job description of the Head of Chambers Staff, by prescribing the relevant reporting lines on administration matters to the Registrar and on judicial matters to the Presidency, through the Chef de Cabinet. The Head of Chambers should report to the Presidency on all matters relating to Layers 1 and 2, and to the Registrar on issues related to Layer 3.*

*R31. The Presidency should consider measures aimed at enabling and empowering the Head of Chambers Staff, including through further delegation of some of their administrative, human resource and other responsibilities.*

*R36. The Registrar should update the job description of administrative assistants to Judges. It should be clearly specified that they are administrative and not personal assistants. Consideration should also be given to the designation of appropriate reporting officers for administrative assistants for the purposes of supervision and performance appraisals.*

74. The Judiciary has taken note of these recommendations, and they will be given due consideration in the context of reviewing the Chambers staffing structure, as discussed above. It should be emphasised that the administration and job descriptions of staffing positions in the Judiciary are the responsibility of the Presidency, with the support of the Registry's Human Resources Section. In this respect, reference is made to the discussion above in Chapter I concerning the three-layered governance model.

75. Any harmonisation of key roles in the Judiciary should be undertaken as part of a broader rationalisation of the staffing structure that would focus on duties and responsibilities, performance review and supervision. To commence by focussing on individual positions would pre-empt and undermine any broader harmonisation process.

## **3. Recruitment and performance appraisal related matters**

*R29. The Presidency and the Registrar should ensure proper cultural diversity, including proper geographical representation from regions other than Western Europe, of legal officers in Chambers.*

*R32. The Court should consider adopting a policy or an appropriate directive specifying that Judges should neither be involved with the recruitment of Chambers legal support staff, nor with their performance appraisal. The Judges should be appropriately consulted, by the Head of Chambers on managerial matters, matters concerning recruitment in Chambers, assigning individuals to teams and for performance appraisals.*

*R37. As mentioned above, decisions on recruitment should not fall on Judges. The recruitment process must be an open and competitive process that allows for equal opportunities for former Court interns and non-interns alike.*

76. The Judiciary, in close consultation with HRS, has long strived to improve the diversity of the staff in Chambers. This work has consisted of the use of methods such as sourcing panels with as much diversity as possible, and working in cooperation with the Human Resources Section to encourage applications by

the strongest possible candidates, while incorporating GRGB imperatives. The Presidency, together with all other Court organs, will endeavour to strengthen this through a comprehensive policy on staff recruitment. In the Judiciary's case, a strengthened GRGB should translate, among other things, into enhanced legal and cultural diversity across the Chambers staffing structure.

77. The Judiciary works closely with HRS to ensure that all recruitment and performance appraisal processes are fully compliant with the Court's legal and human resources frameworks. Accordingly, all recruitment processes are conducted bearing in mind the need for the Court to recruit highly qualified persons for each position, while at the same time remaining mindful of relevant GRGB considerations.

78. There is already a practice in place in the Judiciary whereby the presence of judges on recruitment panels is rare and exceptional, usually limited to the most senior staffing positions. That said, this recommendation will be given further attention going forward.

#### **4. Entitlements and professional development of legal staff**

*R33. The ASP, the Presidency and the Registrar should improve the contractual arrangements of Chambers legal staff, in particular those at P-2 level and on STA; align realistic staff levels with Chambers staff needs and with the budget programme; and award contracts based on Chambers workload requirements.*

79. The Judiciary remains fully engaged with the Registry and ASP (particularly through the CBF), as appropriate, to explore the optimal contractual arrangements for its staff, mindful of budget considerations as well as workload requirements, and, importantly, the requirements of the UN Common System, which determines the conditions of service for the different contract types that are in at the Court. At present, the Chambers makes use of the different contractual modes found in the Court's human resources framework to ensure that there are adequate resources for the discharge of its mandate.

*R34. The Presidency should consider developing and implementing a tailor-made professional development programme for legal staff.*

80. The Presidency, in consultation with relevant parts of Chambers, will continue its work to arrange ongoing professional development activities that enhance the professional skills of the legal staff of Chambers. The Presidency of the Court is fully committed to devoting strong attention to this matter going forward.

#### **5. Miscellaneous**

*R35. The Presidency and the Registrar should immediately fill the position of Administrative Coordinator of Chambers.*

81. The recruitment of this position is under way; the aim is to have the position filled in the second quarter of 2021.

### **C. OTP Governance**

#### **1. The OTP Structure (paras. 117-125)**

82. The **Findings** present an accurate picture of the overall structure of the OTP, but the following modifications are necessary:

- Paragraph 117: While the Deputy Prosecutor post has been left allocated to PD for accounting and budget purposes (a hold-over from the previous Prosecutor), the incumbent, reporting to the Prosecutor, oversees the operations of the three Divisions, the Jurisdiction, Complementarity and Cooperation Division ("JCCD"), the Investigation Division ("ID") and the Prosecution Division

(“PD”) under the leadership and guidance of the Prosecutor. The *Organisational Manual of the International Criminal Court, 2020*, accurately reflects this structural feature of the Office. The Deputy Prosecutor has a personal assistant, but has not been assigned a special assistant.

- Paragraph 117: Note that IKEMS is the acronym for the Information, Knowledge *and* Evidence Management Section (emphasis added). (This correction should also be reflected in the List of Abbreviations on page 5 of the IER Report.)
- Paragraph 122: The Legal Advisory Section (“LAS”) has most of the responsibilities described; however, it does not take a leading role in the development and implementation of OTP Strategic Plans. Under the current Prosecutor, the Director of ID has undertaken the lead in developing Strategic Plans under the Prosecutor’s leadership and guidance, and coordinating the contributions to their drafting of other members of management and staff. Implementation of strategic plans falls to the responsibility of all levels of management.
- Paragraph 124: There is a typographical error respecting the date since integrated teams have been performing core OTP tasks; the creation of integrated teams, as opposed to joint teams, was a significant innovation adopted under the current Prosecutor, who took office in June 2012, and this is more accurately reflected in paragraph 162, footnote 88, of the Report.

83. Why “the objective of delegation by the OTP to the Registry of as much responsibility for administrative services as possible,” mentioned in paragraph 125, is neither desirable nor necessary, is explained elsewhere in this Response (see chapter I A. above on the issue of Unified Governance, and also with particular reference to IER Report, R6, R89 and R90). A high level of synergy has been achieved between the OTP and the Registry (these are documented in reports to the ASP and resolutions adopted), a development that the CBF and the ASP have recognized and praised. Such coordination can still be improved, nevertheless, and how this may be done is also addressed elsewhere in this Response (see the Court’s Response on Governance, just mentioned).

## **2. The OTP Regulatory Framework**

### **(1) Current OTP Regulatory Framework (paras. 126-133)**

84. The **Findings** acknowledge significant efforts the OTP has made to structure its operations, but identify problems that the OTP accepts it must continue to address.

### **(2) Areas Not Addressed Under the Current Framework (paras. 134-137)**

85. The **Findings** identify aspects of its governance that the OTP recognizes as requiring further improvement.

86. A recent audit by the Office of Internal Audit (“OIA”) on the Lessons Learned process in the OTP will assist, with reference to paragraph 136, in the implementation of compliance mechanisms, including, among other components, much better use of the Lessons Learned Portal (LL Portal) that the OTP established in 2014.

87. Note the following necessary modification:

- Paragraph 137: A small point perhaps, but there is no Prosecution Coordinator post, this post having been subsumed by that of PD Director; the paragraph is otherwise accurate.

### ***Recommendations R38-R45***

**R38.** *The Prosecutor should consider constituting an OTP-wide working group on the Regulatory Framework tasked with considering the most efficient way to implement the recommendations that follow.*

88. This actionable recommendation is under ongoing consideration at the level of the Executive Committee (“ExCom”).

**R39.** *The Operations Manual should be updated and consolidated, and incorporate the Policy Papers, Standard Operating Procedures, and Internal Guidelines of the OTP. Inconsistent regulations in different Divisions should be avoided.*

89. This actionable recommendation could be implemented through reactivation, as a priority, of the consolidation project that was being led by LAS, once the new Head of LAS is recruited. Consideration could be given to how Policy Papers, Standard Operating Procedures, and Internal Guidelines might best be incorporated in the Operations Manual, perhaps through a modular system linking such documents to the Manual.

**R40.** *There should be explicit clarity with regard to which of the OTP regulatory documents are mandatory and which are optional. Provision should be made for a mechanism to monitor the compliance with regulatory requirements.*

90. This actionable recommendation will be brought to the attention of the incoming Prosecutor. Its implementation could result in the Divisions and Sections taking responsibility for monitoring compliance with regulatory requirements, but with some corporate regulatory mechanism being set up by the new Prosecutor to oversee this and other management functions to ensure compliance across the Office. In the past, a concept paper on compliance, with an implementation plan, was developed; this could be reviewed for its current relevance. Compliance oversight could also be reflected in the Office's KPIs.

**R41.** *The Operations Manual should clearly specify the roles and responsibilities of staff and management structures. It should provide for clarity with regard to the roles, functions, and decision-making responsibilities at each management level (P-4 and above). It should also provide for clear reporting lines from staff to the management and vice versa.*

91. The roles and responsibilities of the integrated team members and OTP management, including ExCom, are well established at the Office. The Operations Manual could achieve greater clarity on the roles and responsibilities of staff and management structures. This process might, in some cases, require expertise in work surveys and classification of posts, so that flexible and adaptable definitions of roles and responsibilities are devised, bearing in mind other recommendations made by the Experts, relating, for example, to reclassification of posts (R92), movement of staff between work units (R101), and internal staff exchanges (R253). The assistance of OTP-HR, working in cooperation with the Registry's HRS, could help, where necessary, to accomplish this goal.

92. The OTP has also suffered from a lack of a solid pyramid of grade layers, as well as from chronic resource deficits, all of which thrusts undue workload burdens on individuals within units. Addressing such issues would help improve working climate and productivity.

93. The OTP's current strategic plan recognises the need to streamline decision-making.

**R42.** *A consistent induction package for new staff should be developed, in line with Court-wide efforts on the matter. It should contain both OTP-wide documents (Operations Manual, Regulations, legal texts), and section-specific guidelines. The induction package should explain the relevant management structures and reporting mechanisms that apply to the staff member concerned. It should also contain details of the internal grievance procedures.*

94. This is a sound, actionable recommendation that can be pursued building on what is already in place which includes a programme of training on professional ethics and the provision of relevant OTP documents to incoming staff. What is needed is a more comprehensive and structured induction process than exists now, although there are examples of good practice in the Office. An initiative was started to develop an induction package; this could be revived. The induction process could include e-learning modules, the development of which would be coordinated by IKEMS.

**R43.** *Consideration should be given to the Head of LAS being made responsible for the overall quality of the management of the OTP and compliance with its regulatory framework. Training in, and*

*compliance with, the regulatory framework of the OTP should be included in the Key Performance Indicators.*

95. But see R40 above. Assigning such a role to the Head of LAS may push LAS outside of its current role unnecessarily. It will be for the incoming Prosecutor to determine what sort of compliance oversight mechanism he wishes to set up. In the current structure of the OTP and the division of responsibilities, there are multiple necessary layers of responsibility for quality control and compliance with the Office's regulatory framework, starting with the Prosecutor and ExCom.

*R44. As provided in the programme budget for 2020, the LAS should be tasked with monitoring the development of new SOPs and Internal Guidelines, and their incorporation in an updated Operations Manual and OTP Regulations.*

96. This is an actionable recommendation, with the emphasis on a *monitoring* role for LAS. The development of SOPs and internal guidelines by definition will require the input of relevant Divisions, Sections and services of the Office. Note that many features of a revised Operations Manual relate to integrated team functions. Guidelines on integrated team functioning are in development, based on identified best practices that draw on the experience of the teams; an early draft of elements of these guidelines was shared with the Experts.

*R45. LAS should be tasked with quarterly communications to staff regarding the development of new or amended regulatory provisions.*

97. This is an actionable recommendation, which would relate specifically to OTP operations.

98. LAS could disseminate within the OTP new AIs emanating from the Court, although this may be an unnecessary duplication of what the Registry is already doing; links to relevant documents in the OTP intranet page, as is the case currently, would avoid clogging the Court's email system with heavy files.

### **3. OTP Management and Leadership Structures (paras. 138-144)**

99. The **Findings** concerning the OTP in paragraph 138, which refer to allegations of bullying behaviour amounting to harassment, a hierarchical working culture, lack of gender balance in senior positions, frustration at bureaucratic processes that slow down operations and lead to a lack of empowerment at lower staff levels, inability of senior management to address staff complaints and concerns, and a sense that initiatives relating to staff wellbeing were at times more a formality than actively implemented, are presented in the IER Report in broad brushstrokes. Such perceptions, impressionistic and reported uncritically by the Experts, are nevertheless important to address. Their underlying causes have to be remedied. This the OTP commits itself to do.

100. There has been a genuine effort by senior management, notably the Prosecutor, to deal fairly and effectively with allegations of bullying behaviour amounting to harassment, the documentary evidence bears out this fact; but more may still have to be done. In other sections of the Court's overall response, Court-wide initiatives and efforts of the OTP to further enhance working climate and address harassment have been referenced (i.e. from instituting Working Groups at the OTP on working climate to gender related projects and strategic priorities as set in the Office's Strategic Plan to Court-wide initiatives aimed at improving staff wellbeing). It may have been helpful to all stakeholders for the IER Report to make reference to these facts and initiatives. Suffice it to restate here that the Prosecutor and the OTP have a zero-tolerance policy for bullying and harassment and consider ethics and upholding the highest standards of conduct as foundational bedrocks on which the OTP mandate must be carried out. This has been the OTP philosophy and institutional standard under the current Prosecutor's term and lived in practice. When official complaints of unsatisfactory conduct are filed at the OTP, they are duly processed as per the existing legal framework, and where warranted, disciplinary sanctions imposed in accordance with the applicable governing framework and recorded. The Office will look to see how it can further communicate internally to achieve greater awareness of the institutional response to such matters without breaching confidentiality and due process guarantees, and to further facilitate an empowering environment where staff can resort to the Court's formal disciplinary mechanisms as appropriate, while ensuring informal mechanisms for dispute resolution are bolstered so that they can systematically respond to the needs of

management and staff alike. The Prosecutor and the Office have been working closely with the other Organs of the Court on a number of pertinent initiatives aimed at addressing the important matters highlighted by the IER. That work will continue to be given priority.

101. The Office is aware of the need for improved gender balance; however, there is hope: while the gender imbalance is glaring, it is perhaps too much to say “there is almost a complete absence of women in senior positions”, when two of the four P-5 positions in ID are held by women; before the post became vacant, the Head of LAS (P-5) was filled by a woman; and the Senior Appeals Counsel (P-5) is a woman.

102. However, only one of eight Senior Trial Lawyers (P-5) is a woman, although this could change when a post that has become vacant is filled. While the Prosecutor (USG) is a woman, her Deputy (ASG) is not. None of the current Directors of Division (D-1) is a woman.

103. The situation is better at the P-4 level, although still in need of much improvement: currently, 30% of P-4 posts in the OTP are filled by women (of 44 posts, 27 are filled by men, 13 by women, and four are vacant, two of which were filled by women who have left the ICC).

104. The current mentoring and gender mainstreaming programs in PD and the activities of the ID gender working group, as well as other initiatives, may ultimately help address the issue of gender imbalance at senior management levels. The Deputy Prosecutor is also chair of an Office-wide gender awareness working group, which has created a gender awareness program, the roll-out of which has been hindered by COVID-19 restrictions.

105. As stated in the Office’s Strategic Plan (2019-2021), gender equity is an important cross-cutting topic, which involves different areas such as values/respect, recruitment /development, leadership, *inter alia*. The Office has made important efforts in all these areas. In this regard, it bears noting that gender parity targets in recruitments constitute KPIs set and monitored by the Office, in particular for higher level positions; an issue to which the Prosecutor and ExCom attach great importance. The Office has also supported and made important contributions to relevant Court-wide efforts, including the initiative to establish and recruit a Focal Point for Gender Equality at the Court. These efforts will continue to be built upon and given institutional priority.

106. With regard to the working culture of the OTP generally, as stated, a number of initiatives at the Office were undertaken to create a new, more open and inclusive culture. These initiatives included implementation of recommendations made by the Task Force on Working Climate, which the Prosecutor set up at the beginning of her term in office, and reforms, such as the creation of a statement of the OTP Core Values of Dedication, Integrity and Respect, with staff being trained on those values, and the implementation of a Code of Conduct for the Office, regular communications by the Prosecutor to all OTP staff concerning ethics and conduct expected of international civil servants, including the Office’s zero tolerance for harassment. Improving the OTP’s working culture remains a work in progress, to continue to ensure the Office as a whole *lives* its values and its reforms take deep root.

107. The OTP is also examining how it can streamline decision-making more effectively without compromising quality control and accountability.

108. The OTP thus approaches the recommendations below on management and leadership structures in a progressive spirit.

## **(1) Prosecutor and Deputy Prosecutor**

### ***Roles of Prosecutor and Deputy Prosecutor (paras. 139-140)***

109. In the past nine years, the Prosecutor and the Deputy Prosecutor have led the Office hands-on and have been deeply invested in its success.

110. The observations that the Experts make may overlook the frequent informal interchanges and email correspondence (especially the latter in these times of COVID-19 restrictions) that occur between the Prosecutor and Deputy Prosecutor and team leadership, but the OTP recognises that the practice of “managing by walking around” is a valuable tool, especially as it affects more junior staff, which lifts morale and enhances communication.

111. The Prosecutor’s travel is exclusively related to the work of the Office. Her schedule is demanding. The Prosecutor has access to the highest echelons of government and her diplomatic missions have a significant operational impact, especially in situation countries. Her attendance at international meetings, such as the annual United Nations General Assembly, or the Munich Security Conference, also greatly supports the work of the Office where high level meetings with UN officials and State representatives to advance OTP mandate and activities are secured, very much in line with IER’s own recommendation for the Court’s Principals to ensure regular interaction at the highest levels of the UN, *inter alia*. The Prosecutor is required to report twice a year to the UN Security Council on each of the situations in Darfur and Libya, which were referred to her by the Council, and she uses these occasions (when in-person travel was still possible pre-pandemic and pre-US Executive Order travel ban – latter now lifted as of 2 April 2021) for productive bilateral meetings in New York. These are but examples, yet they illustrate the added difficulty the Prosecutor faces maintaining the sort of regular personal contact with her staff that she enjoys.

112. The Deputy Prosecutor travels far less, and almost always on work-related missions in support of OTP core activities. During the period of restrictions made necessary by the pandemic, the Deputy Prosecutor will look to virtual means to “manage by walking around” and, to the limited extent staff are able to reintegrate the ICC premises, by visiting the floors of the OTP towers.

113. It is also fair to state that both the Prosecutor and Deputy Prosecutor are known to be open and accessible to staff. The Prosecutor and the Deputy Prosecutor interact with the Integrated Team leadership and other OTP staff in scheduled ExCom meetings, bilaterally where required, in evidence reviews, *inter alia*. Since assuming her term in 2012, the Prosecutor has maintained an open door policy, encouraging all OTP staff to contact her directly and to meet with her. Many staff have done so and continue to interact frequently with the Prosecutor. The Prosecutor, assisted by her Immediate Office (IOP), has in place the practice of organising OTP specific Town Hall meetings where all staff are invited to openly and freely interact with her and the Office’s Senior Management, to pose questions and express any concerns. In addition to OTP Town Halls, the Prosecutor fully supports and participates in Court-wide Town Halls, again with a view to interacting directly with staff, and making herself available to staff. While not a substitute for direct interaction, the OTP Intranet page is a tool designed to keep staff informed of the activities of the Office including those of the Prosecutor. In addition to the Prosecutor’s email messages to staff, discussions have taken place at the Office to further enhance the OTP Intranet pages to make them more interactive, enabling staff to make use of the platform to communicate with the Prosecutor and ExCom (anonymously where desired or otherwise).

114. The concerns identified by the Experts will, however, be brought to the attention of the incoming Prosecutor.

#### ***Issue of two Deputy Prosecutors (paras. 141-144)***

115. The view that the Experts take on the matter of two Deputy Prosecutors accords with the view of current OTP senior management. The role of the Deputy Prosecutor, which has developed organically over time, is well understood, certainly at the senior management level, but it could benefit from more formal clarification.

116. Note, however, the following necessary modification:

- Paragraph 144: The Deputy Prosecutor post remained, as a relic of past dispositions, allocated to PD for accounting and budget purposes, but the incumbent, reporting to the Prosecutor, does oversee the operations of the three Divisions, JCCD, ID and PD under the leadership and guidance of the Prosecutor. The *Organisational Manual of the International Criminal Court, 2020*, accurately reflects this assignment of responsibilities as does the amended regulations of the OTP.

#### ***Recommendations R46-R48***

***R46.*** A weekly meeting should be held for the leadership of integrated teams with the Prosecutor and/or Deputy Prosecutor and thereby reduce the distance between the Prosecutor, Deputy Prosecutor, and staff. Such meetings should also reduce the appearance, if not the fact, of over-reliance by them on the Directors.

117. This would be, ideally, an actionable recommendation, but it may be unrealistic to suggest a weekly meeting, in light of the relentless demands upon the Prosecutor and the Deputy Prosecutor, not to mention the incessant operational pressures on the teams. Nevertheless, improved communications between the Prosecutor, the Deputy Prosecutor and the leadership of integrated teams is a desirable goal.

118. The issue has already been addressed, to a degree, insofar as the Deputy Prosecutor is concerned, since he endeavours regularly to attend the weekly virtual meeting of PD Senior Managers, which includes the Senior Trial Lawyers and Trial Lawyers assigned to the integrated teams.

119. The implementation of this recommendation, however, to whatever degree it may be achieved, should not diminish the important role of the Directors, who have active management responsibility for their respective Divisions, and interact frequently with the Deputy Prosecutor and the Prosecutor, as well as with team leadership.

*R47. The Public Information Unit should devise an internal communications strategy for the OTP, beyond email communications and an annual Town Hall meeting, to ensure that staff who are not members of team leadership (lower level staff, as well as staff from support Sections who are not part of integrated teams) can have regular and meaningful contact with the Prosecutor and Deputy Prosecutor.*

120. This is an actionable recommendation, which could be considered by the OTP's Working Group on Communication with consultation and input by the Immediate Office of the Prosecutor. The need identified can also be met in part by improved "management by walking around", when COVID-19 restrictions permit, by the Prosecutor and Deputy Prosecutor. Reference is also made to para. 113, *ff.*

*R48. The Prosecutor should not reinstate the structure of two Deputy Prosecutors. A more efficient and effective use of the single Deputy Prosecutor can be achieved by defining clear roles and responsibilities. In particular, the Deputy Prosecutor could be assigned the following functions:*

*(i) Ultimate responsibility for the three Divisions and their work;*

*(ii) Overseeing and coordinating the work of the Directors;*

*(iii) Reviewing and approving internal team work products, such as investigation and cooperation plans. They should not be the concern of the Executive Committee (ExCom) save in exceptional circumstances;*

*(iv) Responsibility for issues related to human resources and administrative matters;*

*(v) Responsibility for regularly updating the Prosecutor on the work, progress, and problems of the Divisions.*

121. The OTP agrees with the recommendation not to reinstate the structure of two Deputy Prosecutors. For the rest, this is an actionable recommendation, which reflects what is in part already the case in practice; the recommendation should, of course, be brought to the attention of the incoming Prosecutor for consideration and decision.

## **(2) Executive Committee (ExCom) (paras. 145-152)**

122. The current Prosecutor wished ExCom to be a more inclusive body, so that she could benefit from a range of perspectives, which may explain its present composition. It is an advisory body, nonetheless, with the Prosecutor having ultimate responsibility for decisions. It has always worked this way.

123. The perception among some staff members that ExCom is a decision-making body may simply be the result of the shorthand use of the term "ExCom" in relation to decisions taken at ExCom by the Prosecutor. It is also true that the Prosecutor tries to have ExCom reach consensus on the advice it gives her.

124. Pushing operational decision-making down to levels below ExCom, in order both to empower teams and other units within the OTP and to make them accountable for outcomes, has been an active trend that should be enhanced.

125. Due to the many pressures placed on the Prosecutor, ExCom members, the Integrated teams, inter alia, securing the availabilities of all OTP representatives required for a specific ExCom meeting is an arduous task, despite best efforts. The policy of the Office is to ensure that ExCom takes places at least once every week (usually on Wednesdays), and if that is not possible, to do so at the first opportunity. The IOP keeps track of items required for discussion and liaises with ExCom members and all required to attend specific meetings. Given the realities and pressures on the schedules of the Prosecutor et al., ExCom may not take place every week, but all efforts are exerted – and will continue to be exerted – to ensure to maintain regular meetings, or *ad hoc* ExCom meetings where urgent decision making is required in response to specific items that arise.

126. By redesigning the format and related processes, the IOP has recently made a concerted and successful effort to speed up the final recording and dissemination of decisions taken by the Prosecutor at ExCom; this is usually accomplished now within 24 hours.

127. The observations of the Experts will be of value to the incoming Prosecutor, who will have to decide how ExCom should be configured and how it can further optimize its functioning.

### ***Recommendations R49-R52***

***R49.*** *ExCom should be regarded solely as an advisory body with the responsibility of advising the Prosecutor. Decision-making within the OTP rests with the Prosecutor. The regulatory framework should be consistent in recognising the advisory role of ExCom, and references to ExCom as a decision-making body should be avoided.*

***R50.*** *In order to improve the speed of its advisory functions, membership of ExCom should be restricted to the Prosecutor, Deputy Prosecutor and Division Directors. The Chef de Cabinet or a Special Assistant to the Prosecutor may attend the meetings for record-keeping. When the members of ExCom wish to consult with other managers or team members, such a consultation should not be regarded as a meeting of ExCom itself.*

***R51.*** *The issues that are required to be brought for ExCom's advice should be clearly defined. Likewise, the authority of Directors and team leaders should be clearly defined. In general, operational issues such as mission plans, investigation plans or filings should be the responsibility of the Directors, subject to the overall supervision of the Deputy Prosecutor.*

***R52.*** *There should be more efficient communication of the decisions taken by the Prosecutor. There should be weekly communication of decisions taken by the Prosecutor to relevant members of the OTP staff. The Chef de Cabinet should be responsible for keeping a detailed record of decisions made on the issues considered by ExCom.*

128. The above recommendations, R49-R52, are actionable, but will have to be submitted to the incoming Prosecutor for his consideration. It will be up to him how he wishes ExCom to be configured and how it should function, always recognizing that decisions ultimately fall to the Prosecutor to make. In the Office's experience, the existing configuration of ExCom has not been an impediment to decision making but quite the contrary; it has allowed for open and rich discussions facilitating the Prosecutor's informed decisions, including by ensuring greater gender representation and participation<sup>29</sup> at the level of ExCom.

129. ExCom is an advisory body to the Prosecutor and this has always been the case and that should be clear to all staff.

130. IOP practice, under the authority of Chef de Cabinet, has always been to keep an accurate account of ExCom discussions and related decisions taken by the Prosecutor. With reference to R52, improvements, such as the more efficient communication of decisions based on the detailed record made by the IOP, have been implemented (see paras. 122-127).

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<sup>29</sup> Senior Appeals Counsel (P5) and Investigations Coordinator (P5) are both women members of ExCom.

### (3) Immediate Office of the Prosecutor (IOP) (paras. 153-161)

131. While the IOP has performed critical functions for the Prosecutor and Office more broadly, it suffers, as the **Findings** state, from the lack of adequate resources. This serious resource gap applies to all services provided by the Immediate Office, including its OTP-HR services and support. Simply shifting the workload around within the IOP will not address this chronic lack of sufficient depth.

132. The IOP by definition deals with a myriad of internal, inter-organ and external matters in support of the Prosecutor's mandate and functions. Recognizing the concern over delays in decision making when that may occur, which are sometimes due to factors outside of the IOP's sphere of influence, against the volume of other decisions that are promptly addressed, the Office is nonetheless streamlining decision-making in the IOP, where required, while preserving its accuracy and quality, as well as the Prosecutor's management and quality control over the Office.

133. The observation made by the Experts concerning the functions of the Chef de Cabinet will have to be assessed by the incoming Prosecutor.

#### *Chef de Cabinet (paras. 155-157)*

134. The description of the existing duties and responsibilities of the Chef de Cabinet offered by the Experts is generally accurate. What the Experts may have overlooked is how fundamentally important is the role of the Chef de Cabinet and the Immediate Cabinet to facilitating and empowering the Prosecutor in the fulfilment of her or his functions and overall management of the Office. Moreover, the close collaboration between the Chef de Cabinet and JCCD is to be highlighted: more specifically, the level of support that the International Cooperation Section ("ICS") of the JCCD, and notably its small General Cooperation and External Relations team, provides to the Prosecutor and the Deputy Prosecutor, respecting the organisation of meetings, preparation of briefing notes, speeches and other public interventions, and attendance with the Prosecutor and Deputy Prosecutor at diplomatic and other stakeholder meetings. The Chef de Cabinet carefully reviews, revises and finalises these materials for the Prosecutor's consideration.

135. Nevertheless, whether and how the Chef de Cabinet's functions should be re-aligned or redistributed will be a matter for the consideration of the incoming Prosecutor.

136. Whatever functions will define the post of Chef de Cabinet, it should be recognized that they will necessarily include tasks and staff supervisory responsibilities appropriate to the P-5 grade level; this is the case for the equivalent positions in the Registry and the Presidency of the Court.

#### *Public Information Unit (PIU) (paras. 158-161)*

137. The Office agree with the observations of the Experts respecting the importance of communication for the OTP and the current resource shortages of PIU. The Office, however, clarifies that contrary to the observations of the IER, PIU is not responsible for internal communication to staff, nor is it suited for that purpose. While PIU may, from time to time, be asked to contribute to draft internal communications depending on the nature of that communication, that is not the role or work product of PIU, nor should it be. PIU is rightly focused on public information needs of the Prosecutor and the Office, and to assist in 'outreach' efforts. The Office welcomes the recognition of the IER that PIU and the Office more broadly could benefit from the injection of additional resources to meet important public information needs, while at the same time recognising ends and means: arguably, even with the injection of additional resources, the Office cannot on its own meet the great demands placed upon it for public information in over 20 situation countries and raise greater awareness of its activities to the world at large. PIU benefits from close collaboration with the Registry in the fulfilment of its functions in a continuum of services. The Office also sees a role by States Parties, NGOs and other stakeholders in the Rome Statute system to support the Office's efforts to disseminate accurate information concerning the Office and its activities.

138. Public statements issued by the Office are carefully prepared through a process of internal consultation with the Prosecutor and relevant stakeholders within the Office, as required. Press statements and press releases of the Office are not circulated to ExCom for review and approval in every case. In practice, that is the exception, not the norm and is done only when the subject matter requires consultation at the level of ExCom as per the instructions of the Prosecutor. Most drafts are prepared through a

collaborative process with input from relevant staff as necessary, and then carefully reviewed and finalised by the Chef de Cabinet who fulfils an important filtering function to ensure that the drafts are to the Prosecutor's satisfaction and of the quality and standard required and expected of the Office, before public release.

139. While a dedicated spokesperson is not a panacea, and that position will also have to seek guidance and instructions to ensure messaging is calibrated and approved internally and of the necessary standard, the Office welcomes the suggestion for a dedicated spokesperson or senior media adviser to be added to Office's limited PIU resources. Once again, however, hiring a senior media officer has run up against budget constraints. It will also be a matter for the incoming Prosecutor to determine. Close collaboration and management of public messaging of the Office fit neatly within the functions and responsibilities of the front office under the Prosecutor's guidance and leadership (which is the existing practice).

### ***Recommendations R53-R56***

***R53.*** *The functions and responsibilities of the Chef de Cabinet should be considerably reduced. They should correspond to those of the senior executive secretary of the Organ, responsible for administrative matters. Strategic and policy related advice should rest with ExCom, the Legal Advisory Section, and the Senior Appeals Counsel. All communications related responsibilities should rest with the PIU and the Special Assistants to the Prosecutor.*

140. This recommendation will be for the incoming Prosecutor to consider and act upon to the extent appropriate and consistent with his needs. However, the suggestion that the functions and responsibilities of the Chef de Cabinet "should be considerably reduced" may, in practice, prove unrealistic, given the demands of the Office and the Prosecutor, as well as ILOAT jurisprudence given the prior recommendations of classification experts in relation to this position. It will be for the incoming Prosecutor to consider what realignment of duties may be appropriate taking into account all relevant considerations. The Office reiterates relevant observations in the preceding sections concerning this recommendation.

***R54.*** *The appropriate functions and responsibilities of the Chef de Cabinet should align with the current professional grade attached to this position.*

141. The current professional grade (P-4) of the Chef de Cabinet does not reflect the responsibilities of this post. Nor is it practical to attempt to squeeze the work of the Chef de Cabinet into the P-4 grade level. This post has been recognized as requiring reclassification to the P-5 grade level, but this reclassification has yet to be accepted by the CBF and ASP. Whatever functions properly define the post of Chef de Cabinet, they will necessarily include tasks and staff supervisory responsibilities appropriate to the P-5 grade level; this is already the case for the equivalent posts in the Registry and the Presidency, and there is no defensible reason for it to be otherwise in the OTP. The post is equally at the P5 level in similarly situated organisations with comparable complexity of mandates and functions.<sup>30</sup> Moreover, it bears emphasizing that the post of the Chef de Cabinet to the Prosecutor has been repeatedly recognised to be at the level of P5, scoring high on the requisite classification criteria, by both the internal mechanism for classifications at the Court following the relevant procedures and criteria set by the applicable AI, as well as external classification experts for three consecutive years. These are well documented. As the Office has already mentioned, change must strengthen prescribed mandates under the Statute, including support services provided to the Principals in the discharge of their respective multi-faceted mandates, and result in actual improvements and good governance, and not go in the other direction. The Office agrees with the IER where it states elsewhere in its report that administrative decisions of the Court/Office, including with respect to human resources, have to be aligned with ILOAT jurisprudence and standards, and will have this in mind when considering this recommendation.

***R55.*** *The capacity of the PIU should be enlarged. A senior media officer (P-4) should be recruited by the OTP to head the PIU and, as requested, act as the OTP spokesperson.*

142. This is an actionable recommendation that would find support within the OTP, but will, due to budget constraints, be a matter for the incoming Prosecutor to consider and, if so advised, take up with the

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<sup>30</sup> See also Dan Ciampa, "The Case for a Chief of Staff", Harvard Business Review (May-June 2020), available online <https://hbr.org/2020/05/the-case-for-a-chief-of-staff>.

CBF and ASP. However, the added value of having a senior media officer wholly dedicated to the role of OTP spokesperson is obvious.

*R56. The PIU should fall outside the IOP and function directly under the Prosecutor.*

143. See comments provided by the Office under the subheading PIU, *supra*. In practice, in the existing system, all public information of the Office is done under the supervision and guidance of the Prosecutor. To place PIU outside of the IOP will however result in inefficiencies, unduly tax the Prosecutor's heavy schedule and take an important managerial, oversight and quality control function out of the equation.

#### **(4) Integrated Teams (paras. 162-166)**

144. The **Findings** recognize the significant steps that the OTP has taken to improve the functioning of teams through the shift from the "joint team" structure to the current "integrated team" structure and the constitution of "advance" teams during the preliminary examination phase of situations that are likely to result in investigations.

145. As the Experts appear to acknowledge, the OTP is currently engaged in developing Guidelines for Integrated Team Functioning based on best practices that draw on the experience of the teams. This will provide for the regulatory framework that the Experts see as necessary. The OTP shared its thinking on this matter with the Experts, as well as a draft of elements of the Guidelines that are in preparation.

146. Some clarification is necessary, however, with respect to the views expressed in paragraph 166: despite the concern expressed by the Experts, matrix management structures are common in complex organisations and are capable of providing clear reporting lines.

147. Integrated teams draw together team members with complementary skill sets, under the overall leadership of Senior Trial Lawyers. In any high performance team, however, leadership roles may be distributed, so that, for example, the Investigation Team Leader, who is the senior ID member of the team, will use his or her skills to lead investigation activities.

148. Team members are free to consult colleagues in what may be called their "home rooms" outside the team – for example, the International Cooperation Adviser embedded in the team may seek ideas and problem-solving advice from the ICS – as long as they bring their ideas and initiatives back inside the team and remain answerable to the overall team leadership. The same is true of analysts embedded in the teams, whose home room is the Investigative Analysis Section (IAS) in the ID.

149. Respecting performance evaluation, it is thought that performance appraisals of staff are better done by supervisors having a similar professional background; so, for example, the work of investigators on the teams should be appraised by the Investigations Coordinator and reviewed by the Director of ID, but with essential input from the Senior Trial Lawyer and Investigation Team Leader on the team.

150. The matrix management system that functions concerning integrated teams, however it may be improved or clarified, does work in practice.

#### ***Recommendations R57-R63***

*R57. The division of functions and responsibilities of the members of integrated teams should be clarified and circulated to all staff. These should be incorporated in an updated Operations Manual.*

*R58. The separation of strategic leadership (PD, Senior Trial Lawyers) from operational/functional leadership (ID, Team leaders) of an investigation should be clarified and implemented.*

*R59. The working methods across teams should be harmonised. The best practices for routine activities and processes of integrated teams should be defined, including the use of databases and tasking tools, meetings and communications. At the suggested weekly meetings with the Deputy Prosecutor, inter-team sharing of practices should be encouraged.*

151. The above recommendations, R57-R59, reflect current OTP planning and will be implemented.

**R60.** *The recent establishment of core integrated teams at Phase 2 of PEs should be institutionalised. The size of the integrated team at this stage should depend on the situation and its complexity, but should, at a minimum include a member from each of the ID, PD, and JCCD. Each team should be headed by a Senior Trial Lawyer (PD P-5), supported by appropriate core staff from the relevant Divisions and Sections.*

152. This recommendation reflects current OTP practice. However, sustaining the practice is becoming more difficult, as the OTP strives to manage an increased workload with limited resources. The practice could, however, be formally recognized via the revised Operations Manual.

**R61.** *If possible, at the time of opening an investigation, a PES analyst should be assigned to the IAS (exchange of staff) for a limited duration.*

153. This recommendation reflects current OTP thinking and is a logical extension of the “hand-over” process from PE to investigation. The idea of rotating members of PES staff into IAS, and *vice versa*, is also under active consideration.

**R62.** *The role of ICS in the integrated teams should be standardised and fully explained to and discussed with the whole integrated team.*

154. This actionable recommendation will form part of the Guidelines for Integrated Team Functioning that are in preparation.

155. The work of the OTP carries with it important diplomatic dimensions, such as the need for it to enter into memoranda of understanding with situation countries and others to facilitate operations and ensure cooperation; this is a core responsibility of the JCCD.

156. The International Cooperation Advisor embedded with the integrated team serves as a resource person, advising on the parameters of the understandings reached with governments, helping with requests for assistance, contributing to the maintenance of sound diplomatic relations and understanding with local authorities, among other tasks.

157. Expressed in its simplest terms, the fundamental role of the ICS remains to “open the door” in situation countries, through which investigators can pass, so that they may cultivate their own operational contacts on the ground and do the work for which their particular skill and experience fits them. The key to successful team operations in such complex environments is clear communication, as well as mutual support and accountability among team members.

**R63.** *The relationship between integrated teams and support units (Gender and Children Unit (GCU), Language Services Unit (LSU), Operational Risk and Support Unit (ORSU), Protection Strategy Unit (PSU)) needs to be clarified and standardised. They should be consulted early in the operation planning cycles, in order to avoid delays and additional expenses.*

158. This actionable recommendation reflects OTP thinking and will be implemented more successfully. It is already the practice to involve support units in the planning stage of operations, even during the PE phase.

#### **4. OTP Staffing**

##### **(1) Staff Qualifications (paras. 167-175)**

159. The **Findings** of the Experts are generally sound and underscore issues that the OTP is addressing, but which require further concerted effort. The need for a mix of skills among staff members, whether in ID or PD, makes sense, given the nature of the OTP’s core activities. One size, so to speak, does not fit all. Complementary skill sets are what is needed.

160. The OTP is endeavouring to improve country knowledge, though retaining country experts and, as addressed elsewhere in this response, local investigative capacity in the person of Situation Specific Investigative Assistants (“SSIAs”), an operational feature that was pioneered with great success in Uganda and is now more widespread across investigations. The OTP also relies on staff briefings by acknowledged experts on the historical, cultural and political background of situations, as a way of improving the operational effectiveness of teams.

161. The Office of Internal Audit recommended that ID recruit a training officer, a suggestion the Experts would appear to favour. The OTP took the view that it would be preferable to have a training officer with Office-wide responsibility. However, current budgetary constraints have severely curtailed OTP training initiatives, which are generally managed by the human resources component of the IOP.

162. There is currently within IKEMS an eLearning Officer, who is the focal point for the creation and management of online training courses for the OTP, but this role is based on expertise in training and creation of online training material (interactive eLearning) rather than substantive subject matter knowledge. The OIA recommendation, however, related to an ID training officer, who would have subject matter expertise. Budgetary constraints aside, the OTP could improve its management of training requirements by having IOP OTP human resources join forces with the IKEMS eLearning Office to co-manage these needs.

163. The OTP views the recommendations below as constructive and actionable (with the only reservations being those respecting delegation of functions to the Registry).

### ***Recommendations R64-R70***

***R64.*** To ensure that all newly recruited staff have sufficient expertise, consideration should be given to a review of the requirements for future recruitments that include the skills that the OTP is lacking.

***R65.*** A compulsory, Court-wide induction training on the core documents and principles of the Court should be considered.

***R66.*** The roles of trial lawyers and legal officers within the Prosecution Division should be separated and reflected in recruitment.

***R67.*** A regular assessment of whether staff members require follow-up training should be introduced.

***R68.*** Professional development should be consistently included in the performance appraisal, and given appropriate attention.

164. The above recommendations, R64-R68, are actionable in theory, but it must be recognised that the Office has cut its training budget for two years running, given the need to meet operational resource demands; the recommendations do, however, reflect current thinking within the OTP (for example, R64 and R68), or should receive careful consideration with a view to potential implementation (for example, R66 and R67). R65 would engage a Court-wide responsibility to which the OTP could contribute.

***R69.*** In cooperation with Registry’s Human Resources Section, transparency should be increased regarding developmental leave and special leave without pay by defining the rules and regulations surrounding such requests. Leave-related human resources functions are an example of responsibilities that could be delegated to the Registry’s Human Resources Section (HRS).

165. This is a sound and actionable recommendation, which reflects current OTP thinking, although transparency and the processes regarding the granting of developmental and special leave without pay can be improved. Given the specific operational needs of the OTP, which the Prosecutor is best positioned to assess, leave-related human resource functions should be retained by the OTP and not be delegated to the Registry.

***R70.*** In order to address the training needs within the available budget of the OTP, consideration should be given to delegating certain training-related responsibilities to the Registry.

166. Certain training needs of the OTP are already supported by the Registry. Synergies in this field work well. There is no need for further delegation. However, in the current budget situation, there is no funding for training within the OTP, beyond what can be done in-house or obtained free of cost.

## (2) Quantity of Staff (paras. 176-184)

167. The **Findings** made by the Experts accurately describe in vivid detail the chronic under-resourcing that affects all of the Divisions and Sections of the OTP, with consequent serious operational risks. They also describe the efforts the OTP has made to convey an understanding of its real needs to the CBF and ASP. This shortage of resources hits ID with particular ferocity. The situation is unsustainable over the long run. It will have to be addressed at some point in the future, if the Court is to succeed in its mission.

168. However, the Court, recognizing the seriousness of the financial impact upon States Parties of the COVID-19 pandemic, presented for 2021 a zero-nominal-growth budget proposal, which was accepted with only slight modifications by the CBF and ASP. Thus, the obvious remedy to the grave problem identified by the Experts, which would be a further investment of resources in the ICC, is unlikely to occur in the near future, and this may explain why the IER Report remains largely silent on the need for States Parties to make a greater investment of resources in the Court.

169. The OTP takes the view, however, that such future investment will have to be earned, through a demonstration of financial responsibility and discipline by the OTP and the Court, the careful management of available resources, and positive results. Achieving results, however, requires the deployment and application of adequate resources, so the current situation of the OTP, and the Court generally, presents serious challenges. To meet these challenges, the OTP, for its part, sets priorities, applies resources as efficiently as possible, and deploys its staff to meet the most urgent needs, with continuous re-assessment of necessities.

### **Recommendations R71-R75**

*R71. The current situation prioritisation practices should be reconsidered in order to adapt to the dwindling capacity of the Office to take on new situations/cases.*

170. This recommendation merely underscores the hard reality that the OTP's current planning must accommodate.

*R72. In the absence of an increase of staff in the ID, the OTP should consider assigning staff from other Divisions and Sections to ID, to improve the balance between the ID/PD numbers of staff.*

171. This is an actionable recommendation, which is sound for many reasons, but can only serve as a stop-gap for current resource deficits. It also does not cater for the current workload situation: with five trials on-going or in preparation, PD, for example, is more stretched with the resources it has available than ever before.

*R73. The OTP should consider the possibility of delegating certain translation/ interpretation responsibilities to Registry's LSS, where confidentiality requirements allow for it.*

172. As a feature of the synergies achieved between the OTP and Registry, this "possibility" has long been the actual practice. Some situation languages are outside the capacity of the Registry's LSS, however, especially at the investigation stage before any case has moved to trial. Outsourcing translation services, with confidentiality requirements in place, has also long been the practice of the OTP's Language Services Unit ("LSU").

*R74. The compatibility of current human resources requirements with the LSU's requirement to recruit specific-language staff in a timely manner should be assessed.*

*R75. A review of the number of posts for administrative support the OTP requires should be prepared for the ASP, together with the specification of the required skills.*

173. R74-R75 above are actionable recommendations that the OTP supports.

## **D. Registry Governance**

### **1. Election of the Registrar and Deputy Registrar**

#### ***Recommendations***

**R76.** *The process of electing the Registrar should be more thorough. The ASP, in accordance with its responsibilities under the Three-Layered Governance Model, should carry out a selection process with the assistance of an expert committee that would vet candidates, perform background checks, carry out interviews, and present a shortlist to the States Parties. The ASP would then vote to confirm a shortlist of candidates before it is transmitted to the Judges for their decision. The same procedure would be followed in the case of a Deputy Registrar, if one is to be elected.*

**R77.** *The Experts recommend making use of the possibility of instating a Deputy Registrar, to enable the Registrar to focus on administration of the ICC/IO (Layer 3). The role would coincide with the Chief of Judicial Services (D-2) position, which would make the decision practically cost-neutral. The Deputy Registrar should be elected in the same manner recommended for the Registrar, and if possible, simultaneously. The ASP could consider having candidates apply jointly, as a pair, for the positions of Registrar and Deputy Registrar, and electing them as such, to promote gender and geographic diversity. A similar approach should be considered by the ASP for the joint election of the Prosecutor and Deputy Prosecutor.*

**R78.** *In the long-term, States Parties are recommended to consider amending the provisions referring to the Registrar's term to limit it to a 7 - 9 years non-renewable mandate.*

#### ***Overview of findings***

174. The Report identifies that, in accordance with the Rome Statute, the Registrar is elected by the judges, taking into account any recommendation by the ASP. The Experts note that in the past, ASP recommendations to the Judges have mostly consisted of guidelines and principles to be considered by the judges in their selection. The Experts report on concerns received that the current system is inadequate considering the high-level responsibilities placed on the incumbent. Accordingly, the Experts recommend a stronger role for the ASP in a manner consistent with the Statute. This role would consist of the ASP carrying out a selection process with the assistance of an expert committee that would propose a short list to States Parties. The ASP would then transmit a final shortlist to the judges for their decision. Concerning the re-election of Registrar, the Experts considered that these create a potential for politicisation, placing Registrars in a difficult position of prioritizing between accountability towards the judges and towards the ASP. Thus, the Report recommends that in the long-term the mandate of the Registrar be revised to a non-renewable 7–9-year term. Finally, the Experts considered the position of the Deputy Registrar, which in their view should be reinstated at the D-2 level with responsibilities as a Chief of Judicial Services. This, in their assessment, would make the change cost neutral and enable the Registrar to focus on the administration of the Court. The Report also suggests that Registrar and Deputy Registrar could be elected together to ensure complementary profiles, gender balance and more diverse geographical representation.

#### ***Overall assessment***

175. The Rome Statute vests the election of the Registrar in the judges of the Court, which properly reflects the functions of the Registrar as the principal administrative officer of the Court who exercises her or his authority under the authority of the President of the Court. At the same time, the Statute also stipulates that in electing the Registrar, the judges must take into account any recommendation by the Assembly of States Parties. Accordingly, while the primary power in electing the Registrar rests with the Court – including the shortlisting of candidates by the Presidency pursuant to rule 12 – the ASP has a role to play in the process as well in providing recommendations to the Court's judges in accordance with article 43(4) of the Statute. That is the stage of the process the Court sees the Experts' recommendation R76 as relating to.

176. As reflected in the IER Report, the ASP's recommendations to judges in the context of past Registrar's election have been very general in nature, providing limited concrete guidance. Whether the ASP should modify its approach in this respect, adopting a more robust process and providing more

concrete recommendations to judges is a matter for the States Parties to consider. Naturally, the ASP's role should at all times be consistent with the relevant provisions of the Statute and the Rules of Procedure and Evidence ("RPE").

177. The Court underlines that the conduct of the election of the Registrar by the judges involves a thorough internal process which has been consistently conducted in close consultation with the ASP at all relevant stages. The Court Presidency prepares the vacancy announcement, consulting with the President of ASP in this regard. From the outset, the Presidency will be supported administratively by a small number of staff members from the Court's Human Resources Section (HRS) who provide assistance in respect of all technical matters related to the recruitment (advertising the vacancy, receipt and processing of applications, technical analysis of whether candidates are qualified, communication with candidates, travel arrangements for interviews etc.). The HRS staff members providing this support are directly responsible to the Presidency in respect of all functions performed in connection with the election of the Registrar. The vacancy announcement is published for a minimum of three months and the timing of its publication is coordinated with SASP so that the Secretariat is able to send the vacancy announcement to all States Parties on the day of its publication. Upon the expiration of the deadline, the HRS evaluates the received applications against minimum requirements provided for in the Vacancy Announcement and produces a list of all qualified candidates. This involves a purely technical assessment of whether the requisite educational requirements and professional experience have been satisfied. The Presidency then examines the applications of the qualified candidates, based on the criteria stipulated in the vacancy announcement and the requirements of the Rome Statute, including geographic and gender representation, and then produces a shortlist of candidates. The Presidency consults with all judges in respect of the proposed shortlist. The judges have access to the *curricula vitae* and executive summaries regarding all candidates to facilitate this step of the process.

178. Once the shortlist is finalized, the names, *curricula vitae* and executive summaries of all short-listed candidates are transmitted, together with a statistical overview of gender and geographic representation, to the ASP by the Court's Presidency. This is the point at which the ASP becomes involved and, having considered the information provided by the Court, issues its recommendations. These recommendations are fully considered by the judges in the subsequent stages of the process. Prior to the election of the Registrar by secret ballot, a full and thorough interview is conducted by all judges of the Court with all short-listed candidates, in accordance with best practice concerning full and equal treatment of candidates. Interview questions are finalized by the Presidency in consultation with the judges, taking into account the vacancy announcement and any recommendations of the ASP in the preparation of the interview questions. The interview questions are detailed and substantive, covering areas such as competence in key areas of the Registrar's responsibility, budgetary experience, questions of institutional knowledge, and strategic vision for the administration of the Court.

179. The Court notes that in recent elections of the Registrar there have been a very high number of applications for this position from nationals of States belonging to the African and WEOG regional groups. Furthermore, there has been a clear majority of male applicants. It is suggested that any reform to the election process could focus on encouraging a broader range of qualified applicants, particularly including nationals of all regional groups, as well as female applicants. The role to be played by States Parties while the vacancy announcement is being advertised could be particularly helpful in this regard.

180. The Court sees value in the recommendation to reinstate the position of a Deputy Registrar (R77) and intends to consider the matter further, including in dialogue with the ASP as appropriate. Having a Deputy Registrar could be beneficial in terms of facilitating transitions at the end/beginning of Registrar's mandates (unless the two are elected at the same time, as contemplated in R77), and it would help ensure business continuity during any absences of the Registrar by having a Deputy in place with the power to take critical decisions on urgent matters where necessary. The Court recalls that there has been a Deputy Registrar in the past, but the position has been vacant since October 2013 and the post was abolished from the Court's budget as part of the *ReVision* exercise, while at the same time the position of Director of External Operations was created at the same D-1 level. Consequently, while the decision to elect a Deputy Registrar falls within the powers of the Court in accordance with article 43 of the Statute and Rule 12 of the RPE - providing that the judges decide on the matter upon the Registrar's recommendation<sup>31</sup> - the ASP's approval would be required for re-instating the post in the Court's budget.

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<sup>31</sup> There is a question as to how this would work, if the Registrar and the Deputy Registrar were to be elected at the same time, as contemplated in R77.

181. The proposal in R78 to consider amending the Registrar's terms to a non-renewable mandate of 7-9 years is an interesting one and merits further consideration. The Court stands ready to engage in further discussions with the ASP on this proposal. It should be noted that the implementation of this amendment would require an amendment to the Statute.

## 2. Various Sections of the Registry

### *Recommendations*

**R328.** *It is recommended that the Registrar evaluates the needs of the VWS and its staffing structures, especially compared to other international tribunals, to see whether and which improvements could be brought.*

### *Overview of findings*

182. In the context of their review, the Experts explain that they received numerous insights from staff of the Court. The majority of these corresponded to areas of Court-wide improvement, as well as governance and management challenges in different Organs. As far as the Registry goes, the Expert report they received submission relating to field offices, resource management and leadership within two specific Sections. The Experts highlight that many of the recommendations put forward in Parts 1 to 4 of the Final Report will impact on staff and units of the Registry. In addition, the Experts report on views received as to Sections in the Registry that were under or overstuffed. In this respect, the Report suggests there is a need to closer look at the organisation and allocation of human resources in VWS, including looking into concerns raised related to the working culture, use of resources and need for further auditing.

### *Overall assessment*

183. Protected witnesses and victims' placement is one of the three key services in the Registry identified for a focused approach under the current Strategic Plan of the Registry (2019-2021). Accordingly, the Registry is fully committed to undertaking the processes as recommended by the Experts with a view to conducting a comparative evaluation of VWS' needs and staffing structure. The implementation of such an evaluation will be considered as part of the objectives of the upcoming cycle of the Strategic Plan of the Registry (2022-2024). It is considered that this evaluation should take as its starting point the significant organizational changes that were implemented in VWS during the *ReVision* project in 2014-2016, and should be conducted in the spirit of continuous improvement and mindful of the need to ensure business continuity to meet the demands of increased judicial activity. In doing so, the Registry plans to benefit from the services of an external consultant with relevant experience from international and domestic courts and tribunals.

## 3. Field Offices

### *Recommendations*

**R80.** *Field offices need to be adapted to the reality of judicial activity, modulated based on capacity and workload. More local staff could be recruited, for increased flexibility in the opening and closing of field offices. Similarly, more flexibility is desirable for Heads of offices in terms of recruitment and procurement.*

**R81.** *The Registry is recommended to develop additional means of coordination between field offices and headquarters, in consultation with Heads of field offices. Staff in the field should continue to report to the Head of the field office, as well as regularly coordinate on their activity with the relevant Section in the headquarters.*

**R82.** *To enhance the impact of the Court's presence in the field and maximise use of resources:*

- (i) regional field offices, acting as hubs for several countries in a region, should be considered;*
- (ii) the OTP should make increased use of field offices, through enhanced coordination and communication with the Heads of field offices;*

*(iii) field offices should also be further made use of to strengthen cooperation with local civil society in the field.*

**R83.** *In the interest of ensuring field staff's ability to engage with local stakeholders, they should be familiar with the language and culture of the respective country. Recruitment of local staff would guarantee both knowledge of the local language and culture, and reduce costs otherwise needed for language or training.*

**R84.** *The Registry is recommended to consider tenure for field office positions, following the example of embassies and UN offices in the field. The conditions of such tenure would depend on whether the duty station is a non-family or hardship one, and whether the staff is international or nationally recruited. The Heads of field offices and Occupational Health Unit (OHU) surveys on field office welfare should be consulted on the matter.*

**R85.** *Increased internal mobility between field office staff and the headquarters, as recommended by the Experts in the Human Resources Section, would also contribute to increased awareness by staff in The Hague of the challenges faced in the field, and vice versa - enable field staff to establish a network at the Court's permanent premises that would enhance the connectivity between Court staff, regardless where they are based.*

**R86.** *Staff from field offices should have access to similar institutionally-offered opportunities in terms of professional and personal development as those in The Hague. This refers, for example, to trainings, possibility to be considered for positions at headquarters, and option to benefit from psychological support (welfare officers). The Human Resources Section (HRS) and OHU should aim to ensure that such services and opportunities are made available to field office staff, preferably via video conferencing (VTC).*

### **Overview of findings**

184. The Report commends the Registry for its work on a draft Framework for Field Engagement and recommends that the Experts' findings inform the final or updated version of the Framework. The Experts' highlight that the capacity of field offices should be adapted to the reality of prosecutorial and judicial activity. In this regard, the Report suggests that the recruitment of local staff can increase flexibility and scalability. As to the role of the Heads of field offices, the Report argues that they should have more flexibility in terms of procurement and recruitment. While the Experts agree that staff in the field should continue to report to the Head of the field office, they recommend that additional means of coordination between the offices and The Hague should be developed. In this respect, the Report highlights recommendation R167 whereby it is recommended that PIOS retain coordination over outreach officers in the field, in cooperation with the chiefs of said offices. Furthermore, the Experts see favourably the establishing regional offices that can act as hubs for several countries, as this would maximise use of resources and enhance the Court's impact. The Report encourages the OTP to make increased use of field offices, and to enhance coordination and communication with the field offices' Heads. The Experts also point out to importance of having staff in the field offices that speak the language of the respective country and that are familiar with its culture. In this regard, the Experts again stress the importance of local staff. Finally, the Report notes a disconnect between staff in the field and in The Hague, a perceived lack of understanding of the challenging conditions in the field and reduced professional opportunities to those in the field compared to colleagues in The Hague.

### **Overall assessment**

185. At the outset, the Registry favours the consideration of these recommendation and, in general terms, their broad implementation. The concept and modalities of field presences and field engagement have been constantly shifting through the years as more experience is gained, frequently adapting the structures, policies and working methods to better reflect the contextual realities in which the Court operates in the different situations respectively. As part of Registry's Strategic Plan for the 2019 – 2021 cycle, the Registry submitted to the CBF a "Framework for the Registry's Field Engagement" which outlines the decision-making for effectively adapting field offices to the reality of judicial activity and workload. The Framework also informs the internal consideration of resources requirements, and the level of services expected at the different stages of the proceedings. Each field office will be tasked to incorporate elements for strengthening cooperation with local civil society in their annual outreach plans.

186. As regard the recommendations to enhance flexibility, the Staff Mobility Project, currently underway might provide for increased flexibility through classifying jobs and functions as part of the same job family or category. This is line with the Experts recommendation R92 under Human Resources, which recommends that positions be classified in terms of responsibilities and generic skills, with the aim of allowing officers from different Organs to apply for positions anywhere in the Court that they have the skills and experience to occupy. It is expected that the initial phases of this project will be implemented at zero cost, through a Cooperation Agreement with OneHR. In addition to the Staff Mobility Project, other current HR initiatives such as multi-duty station recruitment and introducing National Professional Officers (“NPO”) in the field should provide further flexibility for the management of field offices. Furthermore, progress has also been made to give more flexibility to managers in the field for procurement of low-value acquisitions. The Registry will continue to look into this, making sure to evaluate standards and processes in place with a view to enhancing their efficiency.

187. The Registry agrees with the Experts’ assessment that staff in the field should continue to report to the respective Head of field office, as well as regularly coordinate on their activity with the relevant Section in the headquarters. In this regard, Registry Chiefs currently apply a set of procedures defining the modality and frequency of communication and coordination between the HQ and the field in the context of the respective areas of work. These processes are subject to frequent review and evaluation. For instance, as noted in the context of recommendation R167, the Registry will explore ways to improve the coordination by PIOS over outreach officers in field offices, working in cooperation with the Heads of said offices. This matter will be considered and addressed in the context of the Court’s communication strategy.

188. The recommendation concerning the establishing regional offices that could serve as hub is considered as a very constructive and positive idea. In this respect, the concept could be piloted in one of the current situations where the Registry has an established presence, with a view to servicing the requirements in relation to those situation countries where this is operationally, financially and politically feasible.

189. For the OTP, the concept of the field presence has been constantly evolving along the experience gained and also based on the circumstances of every situation, as well the need to find the most efficient solution to ensure effective investigations respecting confidentiality and taking advantage of the infrastructure that the Registry provides, to maximize the efficiency of resource use. This has meant moving from targeted multiple missions into longer periods of missions or even permanent placement in the field office, and also increasing the use of field office support where it has been feasible without risking investigative activities. Often this is linked to the phase of investigations.

190. In general terms, the OTP agrees with the suggestion to increase interaction and communication with (Heads of) field offices, in particular in the areas of mutual interest or impact, such as cooperation with local authorities, diplomatic community, civil society organisations, visible investigative activities, media interactions. In doing so, it is necessary to maintain a clear separation of roles and responsibilities, also perception-wise. For example, the Field Office should not conduct OTP activities related to the substance of the OTP cases. This also takes into consideration the need to preserve the neutral role of Registry and its field offices, including towards external actors, as the field offices also provide assistance to the defence teams, legal representatives of victims, and the TFV. In this regard, efforts must be done with a view to preserving the legitimacy of the Court and of its operations, sustaining the perception of independence and impartiality, and safeguarding Registry’s neutrality. Going further the OTP and the Registry will continue their dialogue, in order to guide future planning regarding new field presence models, interactions and activities, and strengthen cooperation, coordination and communication. Notably, the Registry has already undertaken to join the development of the field presence project in the context of the OTP’s Investigations 3.0 project,

191. Ensuring the recruitment of staff with local knowledge in field offices is a valuable recommendation, and both the Registry and the OTP are increasingly doing so, as appropriate. Indeed, relying on local staff can be a great asset, as their familiarity with local culture and knowledge of the local languages could reduce inefficiencies and costs otherwise needed for language or training. Consideration should be given in this regard to some important aspects, including that nationals are not covered by UN security and/or evacuation agreements, as well as the risk of perception of not being impartial, due to closer links to national actors, which would need to be mitigated and managed. Notably, international actors in the field are often reluctant to include local staff in meetings. Accordingly, it may be more challenging to recruit local staff for positions with functions in the area of security or external relations. This, for example, is a consideration often done by Embassies, who limit their local recruitment to specific roles where contact

to local community and language skills are important, such as logistical, commerce or cultural affairs, but not necessarily in the security policy section. As indicated, an interesting solution that will be explored is the introduction of NPO category staff, as well as further developing field office staffing structures to include more locally recruited staff in relevant areas. Needless to say, all solutions and considerations will have to look into the specific context of each situation.

192. The Experts' recommendation to limit length of postings in duty stations outside The Hague corresponds with the practice of certain international organisations regarding internationally recruited positions in a hardship duty station. In this respect, a system of "rotation" is a more correct term, and also in the context of the ICC "rotation" or "mobility" could be considered as an appropriate modality to achieve the objective that the Experts are proposing. Such consideration should however be made in conjunction with comprehensive consideration of all HR initiatives proposed, such as staff mobility or tenure proposed by the Experts. Importantly, consideration should also be given to avoiding having different categories of staff based on their duty station, this could in turn enhance the challenges noted by the Experts in respect to the perception of reduced professional opportunities for staff in the field. This is in line with the following recommendation made by the Experts, R85, which suggest increasing internal mobility between staff in the field and in the headquarters. In this regard, the Learning and Development administrative instruction, currently under consultation, devises the possibility of "experiential learning" which can take form of job assignments, job shadowing, participation in mission/projects, etc. increasing knowledge sharing and networking between staff in different units, offices, organs.

193. The Registry aims to ensure learning opportunities are also available to field staff. In 2020, field staff welcomed the implementation of My Learning (online learning platform) which allowed for more learning to be delivered in a cost-effective way and with the presence of both headquarters and field staff. The move to virtual training for headquarters staff due to COVID-19 pandemic has assisted in making more trainings available for field staff and for bringing about cultural changes in the organization whereby redundant distinctions between HQ and field staff are eliminated. Webinars, blended trainings and experiential learning will remain an important part of our learning portfolio after the pandemic. This model is to be sustained.

## **II. HUMAN RESOURCES**

### **A. General**

#### ***Overview of findings***

194. The Final Report notes that staff at the Court are generally engaged in a stimulating and worthy international endeavour, with good living conditions (in particular those based in The Hague) and purpose-built facilities that offer good working conditions. Nevertheless, the Experts point out the levels of dissatisfaction expressed in surveys, as well as in the interviews conducted by the Experts. The Report further notes the relatively low turnover of staff, with many staff staying for long periods of time. These matters combined present challenges to the working environment and to staff performance and welfare. Some of the underlying factors, the Experts explain, are common to many international organisations, including the UN Secretariat, and include issues such as diverse management approaches due to cultural differences, lack of internal promotions, language, insufficiently strong organizational leadership due in part to absence of a knowledge management strategy, lack of sufficient rotation at the senior management level, management interference by States, among others. The Final Report further highlights as a contributing factor the intrinsic and unique complexities of the Court's dual nature as both a court and an international organisation. In this regard, they note the nature itself of the demanding work undertaken by staff, which bring its own challenges to maintaining a satisfied and productive workforce.

## **B. Working Environment and Culture, Staff Engagement, Staff Welfare**

### ***Overview of findings***

195. The Experts recall that the Court is a complex organisation that is an amalgam of management cultures. Because the leadership of the Court rotates, the Experts consider that senior management at the Director level -which they note is uniformly male at present- largely dictate the culture of the organisation. The Experts analysed the Staff Engagement Surveys (2010, 2018) and noted that some of the negative scores reflect challenges that are common across international organisations. The Report also notes a difference in the scores between the organs. This, according to the Experts, is linked to the lack of mobility of staff, training and opportunities to grow, which they signal as the major cause of frustration. In addition, the Report highlights the need to improve ethics, provide more equal opportunities and ensure better recruitment procedures.

## **C. Bullying and Harassment**

### ***Recommendations***

**R87.** *The leadership of the Court should adopt and demonstrate a clear commitment to a multi-pronged strategy to deal with predatory behaviour in the workplace, namely bullying, harassment and sexual harassment. It must be clear to all staff, particularly supervisors, that such behaviour is inexcusable and unacceptable at the Court and will not be tolerated. There should be avenues by which staff can safely report bullying and harassment to managers and receive guidance and support as to the procedure to follow if they wish to lodge a complaint.*

**R88.** *The Court should work assiduously, through its recruitment, promotion and training programs, to bring more women into senior managerial positions, in part to bring about a change in the prevailing practices that have tolerated unacceptably predatory behaviour in the past.*

### ***Overview of findings***

196. The Experts reported that they heard many accounts on bullying amounting to harassment in all Organs of the Court. They noted complaints about the adversarial workplace culture, implicitly discriminatory against women. In this regard, they also noted with concern the information received on accounts of sexual harassment, notably from senior male staff to their female subordinates. The Final Report identified the existing mechanisms in the Court to deal with complaints of bullying and harassment as inadequate, and recalls the recommendations made elsewhere in the Report on new complaint investigation and dispute resolution mechanisms. In addition, the Experts note the need for a change in the environment and practices that have allowed this to occur, often with impunity. Accordingly, the Experts recommend a multi-pronged response starting with change and more involvement from the leadership (Principals) who must demonstrate that such behaviour will not be tolerated and convey trust in the systems in place. Further, the Report highlights the need for avenues where victims can safely report and that enable a swift investigation, stressing the need for consequences for the offender. The Report also recommends increasing the number of women in managerial positions, particularly in senior positions, as experience in other organisations suggests this will improve the overall culture making it more collaborative and less tolerant to bullying behaviour. The Final Report commends in this regard Registry's strategic plan focus on increasing gender equality, especially in higher-level posts. Other measures recommended include appropriate training for all managers. The Experts note that positive steps have been taken by the Court in recent years to address bullying and harassment. However, they also note that training initiatives in this regard have not permeated sufficiently across all Organs. The Final Report recommends undertaking a renewed effort in this respect, including a rotation of senior staff through a policy of tenure for these positions, and initiatives to promote greater gender and geographical balance.

### ***Overall assessment***

197. The Court has a zero-tolerance policy for bullying and harassment and considers ethics and upholding the highest standards of conduct as foundational bedrocks on which its mandate must be carried

out. To that end, internal policies are either in place or being updated and harmonized with gaps identified for improvement, objectives and specific targets included in the Court's – including organ specific – strategic plans and Court-wide priorities, and together with the Staff Union Council and under the guidance of the Court's leadership, concrete action is taken to ensure greater enforcement and compliance with relevant policies. Across the Court, when complaints of unsatisfactory conduct are filed, they are processed as per the existing legal framework, and where warranted, disciplinary sanctions imposed in accordance with the applicable governing framework and recorded. The Court agrees with the Experts that these are fundamentally important issues and the Court's leadership has prioritised efforts towards reinforcing the Court's work environment and institutional culture of leadership and accountability at all levels through a number of Court-wide and organ specific initiatives, including the Staff Wellbeing Framework and Leadership Framework launched in 2018 and 2019, respectively. In 2019, the Court set the following macro-level Court-wide wellbeing priorities for focused action:

1. Gender equality: an important cross-cutting topic, which involves different categories/issues such as values/respect, recruitment /development, leadership, *inter alia*;
2. Staff selection and development: with a focus on (i) recruitment, and (ii) opportunities for mobility;
3. Occupational health and Work-life balance: with a focus on (i) stress reduction, (ii) secondary trauma prevention, and (iii) flexible working arrangement;
4. Ethics/Standards of conduct: with a focus on (i) harassment, and (ii) conflict resolution mechanisms; and
5. Leadership: with a focus on (i) leadership at the Divisional/Section/Unit level, and (ii) strategy and leadership of the Court.

198. Since the launch of these initiatives, work has been undertaken and continues on these priority areas. The Court hence welcomes the recommendation to work on a multi-pronged strategy to deal with harassment and predatory behaviour in the workplace.

199. Concretely, a comprehensive strategy should: reflect the high-level commitment of the Court's leadership to the issue of gender equality and organizational culture, identify gaps and propel the review, as appropriate, of disciplinary policies and processes, assess ways to strengthen the roles and responsibility of managers in addressing these challenges, provide clear information on processes and support staff who want to file a complaint, strengthen informal/early on conflict resolution mechanisms, aim at increasing transparency on sanctions and incidents/reporting without compromising due process rights or confidentiality obligations, and identify ways to make formal disciplinary processes more efficient.

200. In developing such a comprehensive strategy, the Court will consider how the different elements of the system can present a cohesive and coordinated solution to address the challenges identified by the Experts. Such elements include the adoption of a revised and updated policy on harassment and sexual harassment (work on the revised policy is well advanced at the time of writing), a policy on investigation and disciplinary measures, a policy on sexual exploitation and abuse, as well as the recent appointment of a Focal Point for Gender Equality and considerations into the establishment of an Ombudsperson, in addition to any training initiatives and communication campaigns that may be developed to this end. In this respect, cohesive and coordinated consideration should be given to other related IER recommendations, such as those in relation to Internal Grievances and Training and Development. For example, paragraph 292 of the Report makes reference to movements within the Court to establish an Ombudsperson (R118), a Focal Point for Gender (R122 and R123), and adopting a comprehensive policy against harassment, especially sexual harassment, as well as a Zero Tolerance approach within the Court in relation to harassment (R130). Similarly, recommendation R119 refers to mediation services when appropriate (mandatory only for administrative matters).

201. As indicated in the context of recommendation R15, with the establishment and appointment of the Focal Point for Gender Equality, the incumbent can assist the Principals as they consider gender initiatives within the Court in a holistic manner, assisting in the identification of potential gaps and areas of improvement. In doing so, the Focal Point will assist the Court's efforts to have comprehensive and strategic approach, coordinating all internal actors, from formal units and sections to grassroots groups and initiatives (through the newly established Gender Platform) that are and will be developing actions and contributing to these efforts. Currently, there are many strategic initiatives underway with potential for improving the working culture at the Court and they must remain high priority, such as the Leadership

Framework and Development, Staff Engagement Survey and follow up, Staff Wellbeing and Engagement Committee, anti-harassment training, unconscious biases training, working groups focused on gender issues in the Office of the Prosecutor, the OTP's Core Values initiative and related trainings, among other pertinent initiatives.

202. The Court has set the appointment of more women to senior positions as a priority in its strategic plans and institutional targets, and thus welcomes the IER's recommendation in this regard. The Court notes the connection of this recommendation to the general recommendation R99 for enhanced and centralized training, as well as other recruitment-related recommendations, including R91 on the need to have always at least one woman in recruitment panels to reduce gender bias in recruitments. This is a best practice in place in recruitments at the Court. Some initiatives to further promote the implementation of this recommendation include considering trainings for recruitment panels and managers on unconscious bias, reviewing certain recruitment practices with a view to further avoiding unconscious bias, promoting and reinforcing initiatives such as leadership, mentoring and sisterhood programmes, mobility/secondment with other international organizations, as well as setting up gender parity targets.

## **D. Management of Human Resources**

### ***Recommendations***

**R89.** *Measures should be taken to transfer general responsibility for human resources in the Court to the Registry. The Human Resources Section should be appropriately strengthened through additional staffing resources, to be able to assume this responsibility.*

**R90.** *The incoming Prosecutor should delegate responsibility for management of human resources in the OTP, given to that position under Article 42 of the Rome Statute, to the Registrar, as a key aspect of the implementation of Recommendation 89 above.*

### ***Overview of findings***

203. The Experts report on complaints that the human resources policies and procedures are not consistently applied across Organs. This, the Report indicates, creates overlaps and distortions, promotes inefficiency, and inhibits appropriate cross-Court cooperation and coordination. The Experts recall that in their view human resources management falls into Layer 3 of the governance structure and thus should be managed by the Registry. In this respect, the Final Report suggests the Prosecutor could formally delegate to the Registrar broad authority over staffing matters, in a manner that preserves the ability of the Prosecutor to step in where they believe the prerogatives and interests of the OTP are not being observed. With regards to the Judiciary staff, whom the Experts see as already operating under the Registrar's nominal authority, the Experts suggest that the Presidency reinforces this by deferring to the Registrar.

204. The Final Report also stresses the importance of broadly adhering to the UN Common System and do not see value in the Court withdrawing from it. Finally, the Report notes the level of staffing in the Human Resources Section and highlight that it would need to be significantly strengthened should it take over responsibility for Court-wide human resources and be given more authority to devise and implement strategic human resources policy.

### ***Overall assessment***

205. The consideration of these recommendations raises two important questions to be addressed in advance: the statutory feasibility of an arrangement with the OTP pursuant to recommendations R6 and R90, and an analysis of the budgetary requirements such a move of responsibilities would entail. On the former, a position in this respect based on, inter alia, the Rome Statute legal framework and the powers bestowed upon the Prosecutor under art. 42.2 of the Statute, has been put forward in response to the Experts' recommendations on Unified Governance. Currently, OTP and Registry have in place a "HR business partnership" model, in which the Registry works closely with the HR business partner in the OTP, implementing initiatives designed centrally by the HRS in the Registry as well as policies and processes implemented also by HRS in the Registry. Functioning as both a specialist advisory function and a partner to the business, the OTP-HR through its limited resources provides a necessary HR asset 'in-house' to the

Office in the provision of accessible, specific, reliable and informed HR advice to the Prosecutor and Senior management of the OTP, servicing over 300 staff. Operating in close coordination with HRS of the Registry, it achieves synergies in the full continuum of the provision of HR services at the Court. As reports of the Court on synergies demonstrate, through this continuum of services, duplication is avoided, policy formulation and implementation harmonised, and service delivery enhanced while respecting the statutory legal framework of the Court. This contributes to a more uniform approach towards HR matters in the Court, including in the areas of working culture, recruitment, leadership and staff wellbeing.

206. As regards the Experts' view that Judiciary staff operate "under the Registrar's nominal authority", while it is true that the Registrar has administrative responsibilities over Judiciary staff,<sup>32</sup> there is no reporting line from the latter to the Registrar; instead, all Judiciary staff report ultimately to the President of the Court - through the Head of Chambers, or the Chef de Cabinet - and are accountable to him for the proper discharge of their functions.<sup>33</sup>

207. As a general point, both HRS and OTP-HR functions of the OTP are under-resourced and under-staffed, a fact recognized in the Report. The Court seeks the opportunity to highlight the need to rectify this resource shortage.

## **E. Adequacy of Human Resources - Recruitment**

### ***Recommendations***

**R91.** *Where this is currently not the case, all recruitment panels in future should have at least one woman, a representative of an under-represented geographical region and ex officio, a representative of the Registry HRS. All panels should include speakers of both working languages of the Court.*

**R92.** *A major effort is needed to re-classify all positions in the Court in terms of core responsibilities and generic skills, with the aim of allowing officers from different Organs to apply for positions anywhere in the Court that they have the skills and experience to occupy. Care should be taken when advertising positions to ensure that the full range of skills needed is accurately reflected in the Job Description and Selection Criteria for that position to ensure that panels make appropriate recruitment decisions.*

**R93.** *Recognising the difficulty of interviewing candidates from different geographical regions with different educational and professional backgrounds via VTC, greater effort needs to be made by recruitment panels to follow-up with referees or even shortlist candidates for more senior positions and bring them to The Hague for a more intensive round of interviews and tests.*

### ***Overview of findings***

208. The Experts note some of the criticism of the recruitment system in terms of it being cumbersome, lacking transparency and time consuming, and that it sometimes leads to recruitment of individuals without the required skills. In addition, they report that often short-term appointments ("STA") and internships are used as a recruitment stream thus disadvantaging potential applicants from under-represented regions. The Experts consider that these criticisms have some validity and are common to the UN and other international organisations. In this respect, the Report notes an inherent tension whereby the lengthy nature of the process is linked to efforts to make it as fair as possible. The Report also notes the substantial differences in the challenges involved in the recruitment for international organisations and those at the national level. All Organs of the Court followed the same procedures, which basically derive from the UN Common System. This includes the use of *Ad hoc* recruitment panels, which on the one hand limit the bias, and on the other hand can slow down recruitment in light of the availability of busy workload of Court's staff. The Experts recommend small tweaks to the recruitment system, which build on the recommendations related to the structure and leadership of the Court, and its culture. In this regard, if all recruitments are running out of the Registry, it should be possible to have one member on all panels from the Human Resources Section. In addition, the Experts recommend that panels' composition include at least one woman and,

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<sup>32</sup> E.g. in accordance with Staff Rule 101.9 (b), Judiciary staff members are "at the disposal of the Registrar (...) for the performance of official functions".

<sup>33</sup> Rule 101.9 (a) of the Staff Rules and Regulation 1.2 (c) of the Staff Regulations of the Court. See also discussion of the three-layered governance model above in chapter I A. on Unified Governance.

where possible, a representative from an under-represented region, as well as speakers of both working languages.

209. Regarding the criticism that those selected do not on occasion possess the right skills for the job, the Experts found that this may be more related to unclear job descriptions and selection criteria rather than on recruitment practices. In this respect, the Final Report suggests that as part of a review of job descriptions, the Court should identify the critical skills and experience required for positions. The Experts recognize the particular difficulties in assessing candidates' ability to work as a part of a team, handle cultural differences and accept direction. To this end, and for recruitments of more senior managerial roles, shortlisted candidates could be brought to The Hague for interactive exercises and follow-up discussions with former supervisors and referees should be instituted.

### ***Overall assessment***

210. In general terms, the Court agrees with all the recommendations, aimed at improving its recruitment practices and processes, and ensuring the adequacy of the Court's human resources.

211. The Court considers gender balance in panels is crucial. Currently, all panels are already required to have representation of both women and men. In addition, the Court can consider the mainstreaming of initiatives including trainings ahead of recruitments to ensure panel members are aware of unconscious bias. In addition, psychometric assessment tools should be considered to avoid bias in selection processes. Furthermore, all panels are already required to be geographically diverse, and include bilingual members when both languages are a requirement. The presence of an HR ex officio representative is currently required in recruitments and, in the case of the OTP, the HR staff member is present as a full-voting panel member. The Court will consider the implementation of this recommendation also in the context of other recommendations related to geographical representation and gender balance in the Court. Importantly, the mandate of the recently appointed Focal Point for Gender Equality includes providing advice on gender parity targets. The Focal Point will engage with relevant internal actors, as well as look to external practices with a view to proposing tools and initiatives to engage on gender balance.

212. The Court sees value in the need to ensure further mobility within the organisation and across the Organs, and while it agrees that classifying positions in terms of generic skills and core responsibilities would facilitate such internal movements, such a broad and comprehensive exercise to redesign or reprofile positions to create job families, as recommended by the Experts will require additional resources. Similarly, the existing policies may not be apt to conduct a wide-scale exercise. In this regard, modalities and policy changes may need to be agreed in advance. An alternative, that does not exclude such an exercise, could be the continuous rolling out of new job descriptions for new vacancies as they come out, with a more generic skills approach (see in this respect recommendation R27), ensuring that competencies from the Leadership Framework are mandatory in selection processes. The Staff Mobility Project, currently underway, might support increased flexibility within jobs and functions, part of the same job family/job category. The initial phases of this project will be implemented at zero cost, through a Cooperation Agreement with OneHR. Phase 2, which is to create more generic and flexible job profiles, will need strong support from ASP.

213. Finally, on the recommendation to make more use of VTC interviews, the Court considers that this practice, which is already being used, can be more consistently promoted by HRS, and consideration can be given to mainstreaming it at a policy level, perhaps as a minimum at certain levels. In this regard, the use of recruitment recording tools could be considered. The Court suggests that a general review of recruitment processes, by an external expert, could consider this and other questions. In respect of the recommendation to bring to The Hague candidates being considered for senior positions, the Court will need to assess the cost-implications of standardizing such practice. Moreover, due consideration should be given to the risks of negatively impacting on candidates that cannot travel on short notice given care situation or location.

## **F. Short-Term Appointments, Local Recruitment**

### ***Recommendations***

**R94.** *The Court's ability to recruit staff on a limited- or short- term bases should be further strengthened, and so have the ability to recruit local staff on a timely basis. Relevant human resources policies ought to be reviewed in this regard, if necessary.*

**R95.** *The ASP and/or the Court should consider having agreements/policy/structural documents in place to allow different staffing models, such as short-term contracts, secondments, local recruitment.*

**R96.** *The fund for paid internships and visiting scholar positions should be enlarged, to enable candidates from developing nations to take up such positions in the Court.*

### ***Overview of findings***

214. The Final Report stresses that the Court Organs should have the ability to recruit directly and for short term assignments and retain such staff for the duration of an assignment of a case. The Experts note that in this respect General temporary assistance (“GTA”) contracts may not offer the required flexibility in recruitment. The Experts note in particular the needs of the OTP to further rely on local and field-based expertise on a limited-term basis during active investigations. The Report recognises that the Court has acknowledged the need for local staff and notes efforts done in this regard. For example, the Experts note that the OTP has recruited several Situation Specific Investigation Assistants and field-based investigators, and that it is looking into using GTA contracts to further increase its local presence. The Experts commend these efforts and recommend a more consistent application of these recruitment models across situations, paying due regard to the security and political contexts.

### ***Overall assessment***

215. The Court agrees with the Experts’ recommendations and notes that having “talent pipelines” (rosters) in place after a competitive process for more generic job profiles is part of the Staff Mobility Project and Workforce Planning Project. Currently, the policy framework allows for short-term appointments (STA), as well as for individual contractors/consultants, secondments and local recruitment. Court further agrees with the recommendation to enlarge the fund for paid internships to enable candidates from developing nations to take such positions. This would provide availability of significantly more opportunities for applicants outside Europe, which in turn could have an impact on geographical targets. Importantly, the fund should also be enhanced by introducing a clearer gender perspective in the selection of candidates. Importantly, the contractual modalities applied by the Court stem centrally from UN Common System. In this regard, the Court is assessing the introduction of National Professional Officers, as already used elsewhere in the UN Common System. Furthermore, the Court is working towards introducing new contract modalities, such as Agile Contracts to work out of locations different from duty stations.

## **G. Performance Appraisal**

### ***Recommendations***

**R97.** *Managers in the Court, including the Principals, need to commit to the system of performance appraisal adopted by the Court, in particular by offering honest and constructive regular feedback to staff so that the annual performance review is not a shock to the individual. Conducting proper performance indicator for supervisors and managers.*

**R98.** *A system of 360-degree assessment of managers should be introduced across all Organs of the Court, which given the hierarchical nature of the workplace there, would probably have to be via anonymous written comments to management by staff or through an annual facilitated discussion amongst the work unit staff without the manager being present.*

### ***Overview of findings***

216. The Experts indicate that they do not take fundamental issue with the Court’s performance appraisal system, which, in their view, has been carefully designed and adjusted to fit the circumstances of the Court. The Report however recognises criticism of the system, including that managers do not consistently follow up on the requirements of the system, that under-performance is rarely recorded, that appraisals do not impact on the workplace, and that there is no sufficient provision of upward 360-degree assessment of supervisors. The Experts note that the system as it currently exists is underpinned by the need for regular dialogue between managers and their staff on work expectations, to limit surprises during the annual review. In this respect, the Report highlights the need for stronger commitment from managers to ensure that it is not a “box-ticking” exercise. The Final Report also finds that mandatory training is likely to be required from Principals and other senior managers, as well as including, as a performance criterion for supervisors themselves, the successful implementation of the performance appraisal cycle. Finally, it is recommended that a component of 360-degree assessment be introduced into the system.

### ***Overall assessment***

217. The Court agrees with the Experts’ recommendations. In addition to training, communication and support, it is important to link individual performance objectives to the ICC and Organ’s strategic plans, in order to increase the relevance of this process for the managers as well. The recommendation to introduce a system of 360-degree feedback for managers is currently being implemented through the Leadership Development Project (Developmental 360). A pilot is currently taking place and a Court-wide roll-out is expected for May-June 2021.

## **H. Staff Training and Development**

### ***Recommendations***

*R99. The Experts recommend that the ASP, the CBF and the leadership of the Court give serious consideration to strengthening the training and development function of the Court, which again should be centralised in the Registry.*

### ***Overview of findings***

218. The Experts recall that the Court, as an international organisation, possesses unique features, including in regard to its structure, and its challenging operations and programmes, which are carried out in a variety of countries around the world. Accordingly, the Report stresses the need for adequate training in order to ensure that recruited staff develop the specific experience to perform up to the expectations of the job. Through training, together with a Court-wide knowledge management strategy, the quality of the work can be maintained. The Experts expect that this will facilitate internal and external mobility initiatives allowing for the application of tenure, while retaining critical knowledge within the Court. Finally, the Report finds that training on key areas is currently inadequate, and notes that this is due to a lack of resources. Some of the key areas highlighted include leadership, management, conflict management, and gender and cultural awareness, which the Experts believe are areas that have an impact on the entire working environment.

### ***Overall assessment***

219. The Court agrees with the need to strengthen the training and development of the Court and to ensure it is provided with sufficient funding for this purpose to support its efforts in this regard. The Court has had an annual training plan tailored to its operational needs and requirements and has integrated regular trainings as part of its strategic goals and approach to continuous improvement. Lack of sufficient funding has been a challenge to the implementation of envisaged training plans. Notably, a number of other training related recommendations are put forward elsewhere in the Report, as, in respect of development for staff in the field (R86), the promotion of gender balance in managerial positions (also) through training (R88), and language related training (R100). The Court considers it is important in this regard having a

comprehensive, tailored, regular, mandatory training programme addressing the different needs and priorities, for example, by including trainings on gender equality and gender-sensitive organisational culture.

## **I. Multilingualism**

### ***Recommendations***

*R100. Sustained effort should be directed at improving the French language capabilities at the Court, through targeted recruitment, French language classes and incentives for staff to improve their French. More generally, when recruiting persons who will be working on a situation country or region, whether in the field or in headquarters, where communication will be predominantly in a particular language, it should be ensured that the individual selected is sufficiently capable in that language to do the job effectively.*

### ***Overview of findings***

220. The Final Report finds that while in some parts of the Court French is commonly used, in practice English has become the default working language. According to the Experts, this in turn creates a disadvantage in the interaction with situation countries when a significant number are francophone. In order to improve French language capabilities, the Experts recommended targeted recruitment, with presence of French speakers on selection panel, more systematic French language classes, and incentives for staff who improve their language skills. The Report recommends in this regard that particular attention be paid for positions for which specific language skills are required, such as positions in the field. In the long-term, the Experts consider that the Court should strive for the requirement that staff master both working languages. A point is also made that by investing efforts in the recruitment phase, the budget required for language classes would be reduced.

### ***Overall assessment***

221. The Court considers the successful implementation of this recommendation to be an important objective, while also acknowledging the challenges, some of which have been identified by the Experts. The implementation of this recommendation may not be budget neutral when it comes to training, in which case alternative ways to provide language training at reduced costs for the organization will continue to be explored. Currently, when specific language skills are required, or desirable for a particular function (e.g., a field position), these are added to the job description either as required (must have), or as an asset. Consideration of language skills also form part of the internal decision making when assigning staff to specific situations.

## **J. Flexibility, Scalability and Mobility in Staffing**

### ***Recommendations***

*R101. The leadership of each Organ of the Court should embrace the concept of movement between work units in the organ to deal with the changing work pressures. Additionally, they should encourage and facilitate the movement of staff across Organs, either short-term or long-term, by allowing staff with relevant skills and experience to apply for positions in Organs other than the one they are currently working in, subject to potential conflicts of interest. Such transfers should include movements into the field, even on a temporary basis.*

*R102. The Principals should support and encourage exchanges and secondments between the Court and other relevant international courts and organisations, inter alia through application of the UN Inter-Agency Mobility Agreement. Such exchanges could be contemplated with other external institutions, including NGOs and universities.*

*R103. The Court could contemplate secondments from national governments on the basis of its needs, rather than the wishes of the government concerned. Such secondments should concern only positions*

*of a non-managerial, technical or specialist nature. Guidelines on Selection of Gratis Personnel should be drafted/updated according to the above considerations.*

## **Overview of findings**

222. The Experts note the insufficient opportunity for promotion and internal mobility in the Court. In this respect, the Report finds that vacant positions are often filled from candidates from the outside as a consequence of accommodating for geographical and other quotas and in response to pressure from member states. According to the Report, with little movement of staff in more senior positions, opportunities for promotion are very limited. The Experts note the difference in this regard with the UN Secretariat, whereby even if staff are blocked from promotion, they can apply and find opportunities in different parts of the Secretariat and UN related organisations around the world. The Experts argue that in light of the Court's inter-organ separation, and the way confidentiality and independence considerations are applied, there is little movement of staff even between OTP and Registry, or the Chambers and OTP.

### **1. Internal Mobility**

223. The Experts have addressed recommendations on this question from different fronts. In general terms, the Report recommends the leadership of the Court to embrace the concept of movement between units within the relevant Organ. According to the Experts, at a time when budgetary increases are difficult, redeployment of staff can be a simple and cost-effective way to improve productivity. In this respect, classifying jobs in terms of broad skills categories could facilitate the movement of staff by allowing them to apply to vacancies within those categories. This will also enhance cross-fertilisation of expertise within the Court. In the same vein, the Experts recommend the Court to provide for temporary assignments of staff to different Organs, arranged relatively informally and for short durations. Finally, the Report stresses the importance of facilitating more transfers into and out of field offices, even on a temporary basis. Again, as noted by the Experts, the adoption of Court-wide job categories would facilitate such transfers.

### **2. External Mobility**

224. The Experts recommend enabling exchanges and secondments between the Court and other international organisations. In this regard, the Report notes that the Court is party to the UN Inter-Agency Mobility Agreement since 2019 and can use it as a platform to implement exchanges with other agencies applying the same framework. Finally, the Experts suggest that the Court also looks at the possibility of staff exchanges with NGOs and academia, while also recognizing it would be more challenging to do. In general terms, the Final Report sees value in allowing staff of the Court to gain new perspectives and expertise, and in the Court benefiting from the expertise and background of individuals coming to the Court for a period.

### **3. Secondments**

225. The Experts report on views from some States Parties proposing that the Court accept secondments from governments, as well as other States Parties expressing concern that such secondments are more likely to come from high capacity (i.e. Western) states, and thus distort the Court's political perspectives and inhibit recruitment from less developed states. The Final Report highlights that as per its Strategic Plan, the OTP will aim to explore with States Parties possible secondments. The Experts note that secondments from States could alleviate budgetary pressures on the Court. In this respect, the Report stresses that such secondments must be based on the needs of the Court rather than the proposal of a state, with the Court retaining its discretionary authority. Furthermore, secondments should be limited for positions with specialised expertise on areas where the Court does not have (sufficient) technical capacity. The Experts finally recommend reviewing the Guidelines on Selection and Engagement of Gratis Personnel with a view to these being fit for purpose, eliminating unnecessary restrictions, and capable of providing the Court with the best expertise from the widest geographical representation.

## ***Overall assessment***

226. The Court agrees with the recommendation to further facilitate internal mobility, this is part of the Staff Mobility Project and it is contemplated within the Learning and Development policy. In this regard, the implementation of this recommendation is also linked to recommendation R92 to enable transfers through job descriptions with broader skills categories. Furthermore, consideration should be given as to whether across-Organ movement requires agreement by the ASP. According to the Financial Regulations and Rules transfers of funds between Major Programmes can only be done with the approval of ASP. In this respect, the External Auditors have noted that inter-Organ transfer of personnel could be seen as defeating the spirit of the Financial Regulations and Rules. The Court is currently studying the matter in more detail with a view to identifying appropriate policy safeguards and modalities, for example, through a Learning and Development administrative instruction. Since the Court became a signatory to the UN Inter-Agency Mobility Agreement, secondments have been applied several times. The OTP has also entered into a number of secondment arrangements concerning “non-managerial, technical or specialist” positions with States Parties and is looking to expand such opportunities with States Parties from all regional groupings.

227. Additionally, in considering the need to update the existing Guidelines for selection of gratis personnel, as adopted by the ASP, the Court highlights the concerns and important caveats by the Experts which condition the use and limit resorting to gratis personnel based on the needs of the Court and limited to positions requiring specialised expertise in areas where the Court does not have (sufficient) technical capacity.

228. The Court will continue to explore external mobility possibilities. In this regard, it bears noting that in its practice across the organs, the Court has traditionally facilitated Special Leave Without Pay for outside employment for staff when such requests provide opportunities for staff development and are operationally feasible, and where there are no other impediment present in granting such requests, namely that: (i) the outside occupation or employment does not conflict with the staff member's official functions or the status of an international civil servant, and that (ii) the outside occupation or employment is not against the interest of the Court.

## **4. Tenure**

### ***Recommendations***

***R104.*** *The Court should develop a comprehensive strategy on knowledge management, to ensure that critical information and experience is not lost every time a member of staff moves out of the work unit on transfer, secondment, retirement or resignation, and to inform the training program across the Court, including training for new recruits.*

***R105.*** *In order to encourage fresh thinking and bring more dynamism to the Court, a system of tenure should be adopted by the Court, applicable to all positions of P-5 and above. The system should stipulate a maximum tenure in positions of these levels of somewhere between five and nine years, and should admit few, if any exceptions. For reasons of procedural fairness, the limitations should not be applied to those occupying these positions currently and would only apply to those newly appointed to the positions. Nonetheless, long serving officers of P-5 or Director level might be encouraged to retire early to allow the new system to be established as quickly as possible.*

### ***Overview of findings***

229. The Final Report recommends the introduction of a tenure policy for staff recruited for P-5 and Director-level positions. The policy would only affect new recruitments, so that tenure, according to the Experts, would thus not apply to existing staff. The Experts firmly consider that this measure is essential to address effectively a number of institutional weaknesses of the Court. In this respect, the Report suggests that the benefits, in terms of introducing fresh thinking, different managerial dynamics and a diffusion of power, outweigh potential work disruptions. The Experts do not recommend, however, applying tenure limits to all staff, as they consider that this will weigh too heavily on the system. They note the complexity and longevity of cases before the Court and thus the need for a degree of continuity, as well as the challenge of having to run constant recruitment campaigns. The Final Report also stresses the need for the Court to

develop a knowledge management framework, whether or not a tenure policy is applied, because retaining institutional knowledge should not depend on the presence of specific individuals.

### ***Overall assessment***

230. The Experts' recommendation, in R104, to develop a comprehensive knowledge management framework, with a view to succession planning, is a priority in which the Court should invest, moving forward. This recommendation should be considered in a holistic manner, in light of other findings the Report makes regarding mobility (recommendations R85, R95, R101, R102 and R103) and training (recommendation R99). All of the issues raised will require further joint consideration and consolidation, so that critical knowledge and experience is preserved. In parallel, staff members will be encouraged to share learning, by availing themselves of platforms, such as "My Learning", which can be used for recording and creating internal trainings, videos, interviews, guidelines and informal knowledge sharing, which can then be made widely available even after a staff member leaves the organisation.

231. Furthermore, the implementation of such a comprehensive strategy could encompass processes and tools that already exist or are in development, for example, in the case of the OTP, its Statement of Core Values; its Code of Conduct; a revised Operations Manual linked to guidelines, policies, Standard Operating Procedures, and other sources; e-learning modules; the Lessons Learned Portal; the repository of ExCom decisions; the digest of the Court's jurisprudence; and other stores of information.

232. The strategy could also involve an active mentoring program for younger members of staff and training in a variety of forensic skills, as ways of imparting knowledge and the working culture of the Court.

233. Respecting recommendation R105, concerning the establishment of a tenure policy for newly recruited staff members for positions at the P-5 level and above, the Court notes the existence of other recommendations relating to more specific forms of tenure elsewhere in the Report, including recommendation R84, regarding tenure for field positions, and the Experts' findings in paragraph 92 of the Report, respecting certain P-4 positions in Chambers, which they suggest could be subject to tenure. Specific considerations, in respect of these further recommendations, are provided in the relevant sections of this document. What follows below relates primarily, although not exclusively, to recommendation R105.

234. The Court is considering the recommendations of the Experts in respect of tenure, and, in general, agrees with the importance of strengthening any institutional weaknesses of the Court, including by ensuring there are processes in place to introduce fresh thinking and dynamism into the organisation. As the Report notes, however, the mechanisms chosen should not weigh too heavily on the system, creating work disruptions and added administrative burdens, such as the need to run constant recruitment campaigns. The Court understands that, through their recommendations, the Experts are attempting to address the challenges of what they see as staff stagnation at the Court, especially at the senior level. The Court considers, however, that there are many other ways to achieve improvements. These include initiatives, such as management and leadership training, sharing lessons learned and best practices, mentoring and coaching programmes, and measures proposed by the Experts in other sections of the Report to ensure internal and external staff mobility. It should also be noted that across the Court long-serving persons now in senior management positions have been agents of change and improvement, a fact implicit in many of the findings and recommendations of the Experts.

235. The Court is eager to engage with the ASP, to discuss the tenure recommendations and examine the implications of introducing a tenure system on the effective and efficient running of the Court's operations. In this regard, serious consideration should be given to a number of elements, which raise important concerns. Some of these concerns are mentioned below, with respect to the operations of the OTP, sometimes referred to as the "engine" of the Court. (A much fuller treatment of concerns relating to the impact of tenure limits on OTP operations may be found in Annex III to this document.)

236. At paragraph 149 of the Report, the Experts refer to the complexity and longevity of cases being dealt with in the OTP and thus the need for a degree of continuity at the working level. This concern, however, can also be translated to the senior management level, that is, P-5 and above. It is important not to lose sight of the unique nature of the Court's mission and the OTP's mandate. To illustrate the point with a hypothetical example, but one based on a real life case: if the tenure limit imposed on P-5 posts

were, for the sake of argument, seven years, then the OTP would be about to lose the Senior Trial Lawyer in charge of a case that is being prepared for a confirmation hearing and trial, following the surrender of the suspect on an arrest warrant issued by the Court 14 years ago. The Senior Trial Lawyer is intimately familiar with the case, having been involved in all aspects of it since his arrival at the Court. The possibility of an exceptional extension of his contract does not provide an adequate solution, because this senior lawyer's situation is by no means unique, and the advice of the Experts runs strongly against making the exception the rule. The difficulty arises from the inherent length of international criminal investigations and prosecutions, and the unpredictable pace of the arrest and surrender of fugitives. The loss of the skill, experience, case and situation knowledge, and personal commitment to the mission possessed by the senior lawyer in this example would be detrimental to OTP operations.

237. The security of tenure that senior lawyers and managers currently enjoy at the ICC is also characteristic of national jurisdictions, respecting prosecution services, police agencies and the public service generally, and this for important reasons. Among other factors, such security of tenure is designed as a bulwark against the vulnerability members of such organisations might otherwise feel, if their ability to make decisions independently of public and political opinions, as career public servants, were not protected. In dealing, for example, with the need to protect the independence of prosecutors, the European Network of Councils of the Judiciary recommends that the tenure in office of prosecutors must be guaranteed until retirement age [see para. 33 in *Independence and Accountability of the Prosecution*, ENCJ Report, 2014-2016]. Stability of prosecution services, at both national and international levels, serves to underpin their independence. The recent experience of the Court with the US Executive Order and the sanctions imposed on the Prosecutor and one of her Directors goes to demonstrate that efforts to undermine the ICC's independence may target its senior management, including both elected and career officials. In this context, it is imperative that the Court's framework be robust enough to protect its senior officers, so that they may take the sensitive decisions they must make, free of any external interference or pressure.

238. Staff turn-over at the senior management level of the Court does occur. However, if a tenure system were introduced, even if it were confined to P-5 and Director-level posts, as suggested in recommendation R105, it would place a severe strain on limited resources due to the need to conduct constant recruitment drives. A tenure system is also costly, given the financial burden of on-boarding and the expense of end-of-tenure repatriation, especially for senior staff members in the categories concerned, not to mention the costs associated with recruitment and the investment in the development of skills and competence.

239. There are other concerns, respecting the implication of imposing a tenure system, which also need to be fairly examined. These include the impact of tenure limits on staff morale and upward career mobility, quite apart from the repercussions of such a system on performance, efficiency and effectiveness, given the specific nature of the Court's mission, already noted in relation to the strain on over-stretched operational capabilities and the risk to the continuity of investigations and judicial proceedings.

240. From a technical and procedural point of view, a decision to implement tenure recommendations will likely require adjustments to the Staff Rules on duration and extension of appointments, as well as a revised policy framework for their implementation, and the application of transitional measures. Moreover, an assessment should be conducted as to whether this would also require amendments to the Staff Regulations. In addition, proper consideration must be given to the policies to be applied, respecting implementation of tenure recommendations affecting different types of positions (i.e., based on level, or duty station, or specific function) and what conditions should apply for the different cases.

### **III. ETHICS AND PREVENTION OF CONFLICTS OF INTEREST**

241. The Report underlines that in the absence of efficient and effective instruments on ethics and prevention of conflicts of interest, the Court is less able to defend itself against criticism and allegations of potential violations. According to the Experts, such allegations, some of which have been publicly covered and speculated upon, when not properly addressed, impact the Court internally and externally, undermining support from States and civil society, and impacting on staff productivity and welfare. In this respect, the Report echoes stakeholders, staff and Court officials calling for mandatory and clear ethical standards for all individuals working with the Court, including elected officials, to be complemented by a robust

enforcement mechanism. In addition, the Experts report on concerns expressed at the lack of instruments binding former officials and staff to certain ethical obligations. Similarly, the Report notes calls made for guidelines on interaction between Court staff and officials with representatives of States Parties.

## **A. Ethics Framework**

### ***Recommendations***

**R106.** *The Court should develop a single Court-wide Ethics Charter, laying down the minimum professional standards expected of all individuals working with the Court (staff, elected officials, interns and visiting professionals, external counsel and their support staff, consultants). Additional Codes of Conduct for specific roles can supplement the Court's Code of Conduct, as per the Audit Committee's recommendations. The instrument should foresee continued application of certain obligations (such as confidentiality) for officials and staff, after they leave their office or post.*

**R107.** *The incoming Prosecutor should review internal processes and procedures to ensure effective and efficient cooperation with the OIA and IOM. Additional measures can be envisaged to alleviate concerns, such as more comprehensive confidentiality agreements that IOM staff would commit to.*

**R108.** *Ad hoc Investigative Panels for Judges, the Prosecutor and the Deputy Prosecutor should be employed by the IOM in case of complaints against these elected officials. The IOM would establish such panels of three judges or prosecutors respectively from a roster list made up of current and former national and international judges/prosecutors. The roster would be agreed upon by the ASP Presidency, the Court Presidency and the Prosecutor, respectively, similar to the procedure indicated in Recommendation 113 (p. 92).*

**R109.** *In the long term, the power to render decisions on complaints against elected officials should be trusted to a form of judicial council, composed of current and former national and international judges.*

### ***Overview of findings***

#### *Court staff and/or officials:*

242. The Report lists the relevant instruments comprising the existing ethical framework, including their scope and application, applicable to staff and/or Court officials. The overview starts with the relevant articles of the Rome Statute, includes the different Codes of Conduct (Code of Judicial Ethics, Code of Conduct for Staff Members, and Code of Conduct for the OTP), as well as the Administrative Instruction on Sexual and other forms of harassment, to which a review, as noted, is underway, and the Financial disclosure programme, applicable to Principals and staff involved in procurement or investment of Court's assets.

#### *Individuals affiliated with the Court:*

243. The Expert Report provides an overview of additional instruments covering individuals affiliated with the Court and acknowledges the substantial body of instruments regulating expected behaviour at the Court. The Experts commended the Court for its recent work of identifying gaps in its values and ethics framework and supplementing them through additional issuances. Nevertheless, the Experts found the framework is fragmented and does not provide clear common principles and minimum standards applicable to all individuals affiliated with the Court. In this respect, the Experts first recommend the issuance of a Court-wide Ethics Charter applicable to all elected officials, staff and other individuals affiliated with the Court. Such Charter should also foresee continued application of certain obligations (such as confidentiality) for officials and staff after they leave office. Similarly, the Report underlines the need to extend the Code of Professional Conduct for Counsel to include support staff working in defence and victims' teams, as well as extending the application of internal policies on welfare related matters to them. As the Registrar is also not currently covered by a specific code of conduct, the Report recommends that the Staff Regulations be extended, mutatis mutandis, to the Registrar. In regard to the Independent Oversight Mechanism ("IOM"), the Experts welcomed its establishment and noted the need to endow it with adequate resources. The Report further finds that an alternative system would be desirable to investigate allegations against judges, the Prosecutor and the Deputy Prosecutor. This recommendation

echoes concerns expressed that the current system of granting the IOM investigative power over judges runs contrary to the Rome Statute. Accordingly, the Experts recommend that the IOM be supplemented by *Ad hoc* investigative panels composed of judges or prosecutors which would be established on a need basis by the IOM. A roster to this effect should be agreed upon by the ASP Presidency and the Court Presidency or the Prosecutor, respectively. The Experts further indicate that the incoming Prosecutor should review internal processes and procedures to ensure effective and efficient cooperation with the OIA and the IOM. Finally, the Report finds that in the long-term the power to remove elected officials should not remain with either the plenary of judges, the Presidency or the ASP, instead a judicial council could be empowered to decide on such matters. As this recommendation requires an amendment to the Rome Statute, the Report suggests that in the meantime emphasis should be placed on strengthening prevention.

### ***Overall assessment***

244. The Court recalls that in 2017 a gap analysis of its values and ethics framework was undertaken, which served as the basis for the work done since on various policies and instruments such as the Administrative Instruction on Sexual and other Forms of Harassment, currently being reviewed, and the new proposed Administrative Instruction against Sexual Exploitation. The existing Court-wide and organ-specific ethics framework, comprises as noted by the Experts, not only provisions in the Rome Statute and the Rules of Procedure and Evidence, but also, *inter alia*, the Code of Judicial Ethics, the Code of Conduct for the Office of the Prosecutor, the Core Values of the Office of the Prosecutor, the Code of Conduct for Investigators, the Code of Professional Conduct for counsel, the Staff Regulations and Rules, the Financial Regulations and Rules, and the Administrative Instruction on the Code of Conduct for Staff Members.

245. The Court considers that enhancing the existing ethics framework requires focusing both on the body of rules and principles as well as on its implementation. It bears emphasizing that, as a result of the gap analysis referenced above, the Court has come to the understanding that it has in place, by comparison with similar organizations, a comprehensive regulatory framework governing the conduct of its sitting officials and staff. Notwithstanding, the framework's ongoing review and the IER process enables the Court renewed impetus to review and update the existing instruments where gaps are identified.

246. The Court takes note, with appreciation, of the recommendation to develop a single Court-wide Ethics Charter, and will give it thorough consideration. The Court recalls that, in a similar vein, it proposed, in its update to the Audit Committee in 2020 on a Court-wide values and ethics framework,<sup>34</sup> to work toward a set of Court-wide core values which would serve to advance the institution's culture of ethics. The set of Court-wide values would supplement the Court's regulatory framework governing the conduct of personnel, which consists of a number of distinct codes that regulate the conduct of elected officials, counsel, staff and other specific groups.<sup>35</sup> This would also avoid duplication or conflict with those standards. It would also complement the Court's Strategic Plan, which defines mission, vision and strategic priorities but does not define core values for the Court as a whole. The Court will engage in inter-Organ consultations, as well as in consultations with the diverse group of stakeholders representing individuals affiliated with the Court, to advance the consideration of these matters.

247. As it concerns recommendation R107, the Office of the Prosecutor has enjoyed constructive and transparent engagement with the OIA and IOM, always aiming to facilitate the respective mandates of these important bodies. The Office regularly resorts to referring matters to the IOM and full access has consistently been granted to carry out investigative activities, while confidentiality obligations have been managed through dialogue and mutual agreement. The revised mandate of the IOM further regulates interactions with the Court's organs and related obligations on all parties, codifying the existing spirit of dialogue and collaboration. The Office remains fully committed to the approach it has espoused to fully support the work of the OIA and the IOM.

248. Concerning the alleged conduct of former elected officials and staff, the Court's legal framework as a whole – similar to organisations like the United Nations, as well as other international courts and tribunals – has up until recently been constrained in this regard. Neither provisions in the Statute, nor the Rules and Regulations of the Court which regulate the investigation procedure in case of misconduct by elected officials, extended the Court's disciplinary authority to former elected officials, either in respect of

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<sup>34</sup> Document referred to in footnote 149 of the IER Report.

<sup>35</sup> In national systems, as well, different codes of conduct may apply to judges, prosecutors, investigators, counsel, support staff etc., reflecting their different roles and responsibilities.

alleged misconduct committed while they were still in office, which comes to light following separation from service, or with respect to misconduct allegedly committed after separation. It may be added here that the relevant substantive provisions and the available types of sanctions - removal from office, reprimand, fine of maximum six month's salary - seem to indicate that such extension was not intended or envisaged. Finally, the absence of enforcement mechanisms for such scenarios would also correspond to the situation in other, comparable international organisations. To address this legal lacuna, "legislative amendments" were required. The Court, more specifically the OTP, previously made the suggestion in different fora, including before the Hague Working Group and the Bureau, that States Parties give consideration to expanding the powers of the IOM, enabling it to investigate the alleged conduct of former elected officials and staff both while they were in office, and when they separated from service, to the extent such conduct has a nexus to the Court and would *prima facie* constitute misconduct. The recent amendments to the IOM mandate, adopted by the ASP in 2020, have addressed this gap when it comes to the possibility of the IOM investigate.

249. From the perspective of the Judiciary, the acknowledgement in the IER Report that IOM should not be investigating complaints against judges, but that only other judges should perform such functions, is welcome and echoes a sentiment previously communicated by the Court's Presidency to the Working Group on the Independent Oversight Mechanism in October 2018. In this same manner, the proposed shift of all disciplinary responsibility in respect of judges to an independent and impartial Judicial Council made up of current and former national and international judges is also a welcome recommendation and warrants close consideration. In respect of the concern that certain obligations should be of a continuing nature even after a judge leaves office, it is noted that the recent amendments to the Code of Judicial Ethics, which entered into force on 27 January 2021, provide, at article 12(1) that the principles embodied in the Court 'apply to the judges at all times and continue to apply to former judges, where relevant, for instance in respecting the secrecy of deliberations or maintaining confidentiality'.

## **B. Prevention of Conflict of Interest**

### ***Recommendations***

**R110.** *The ICC-FDP should be extended to also cover Judges, and be supplemented by an additional declaration of interests to be completed by all elected officials and staff members at D-1 level and above. Candidates for the role of elected officials would submit such a declaration to the ASP advisory body reviewing nominations/candidacies. For those who are elected, a copy would be shared with the Ethics Committee. The information to be provided under this recommendation should be treated as confidential and not rendered public.*

**R111.** *The current guidelines on extra-judicial activities of Judges should be formalised into a binding policy by the Presidency, after clarifying the extent to which Judges can engage in extra-judicial activities during work hours and the type of outside activities that are acceptable. Input from States Parties should be sought in this regard. The policy should foresee consultation of the ASP before any substantial change to the policy is adopted.*

**R112.** *An Ethics Committee should be established, as an independent entity, with Court-wide competency. The Ethics Committee would serve a preventative and advisory role, through the following functions:*

- *Dialogue with Judges and senior staff when they take office, focusing on helping them identify and consider potential conflicts of interests;*
- *Issuance of guidelines on relevant topics such as interactions between Court officials/staff and States Parties, post-court employment guidelines for senior Court officials, based on international and national best practices, raising awareness on ethical issues and ensuring a coherent approach by all Court Organs and individuals affiliated with the Court;*
- *Issuance of advisory opinions to Court Principals and individuals working with the Court, on matters related to ethics. The Ethics Committee could also advise the ASP on ethics-related matters, where there are differing views among the Court and States Parties as to the applicable standard;*
- *Deciding in case of disagreement between IOM and Principals, for instance in case differing views as to whether confidentiality and independence in a specific case would be a bar to IOM oversight.*

**R113.** *The Committee would be called to address issues on a need-basis and work - in principle - remotely. The Ethics Committee would be formed of three current or former judges, from ASP States*

*Parties, from national and international jurisdictions, with knowledge and experience in matters of ethics. Members would be appointed for five-six years for a non-renewable mandate, ensuring diversity in gender, legal systems and geographical representation. They could be appointed as follows:*

- *two national judges with experience in ethics by ASP Presidency based on the Bureau's proposal,*
- *one former ICC judge appointed by the Court President.*

**R114.** *In the long term, a joint Ethics Committee servicing several international courts and tribunals is recommended to ensure coherence in standards and rationalise expenses.*

### **Overview of findings**

250. The Experts note the Financial Disclosure Programme (ICC-FDP), the guidelines for extra-judicial activities of judges, and the norms governing excusal as the three main instruments to prevent conflict of interest employed by the Court. As to the ICC-FDP, which is run by the UN Ethics Office, the Experts underlined its objective to prevent and identify financial conflicts of interest and recommend that it be made also mandatory to all judges, and not only voluntary as it currently is. According to the Report, the ICC-FDP should be further supplemented by an extended declaration of interests as an additional tool to identify risks, rather than to sanction. Moreover, the Experts note that extra-judicial outside activities of judges are currently subject to the Code of Judicial Ethics as supplemented by the Court's Policy Guidelines on this particular question. The Experts recommend that these Guidelines be further developed by the Court's Presidency, with input from States Parties, to assist judges in the identification and management of potential conflicts, incorporating general principles of a mandatory nature and provide specific procedures for its application. According to the Report, this would minimise potential risks of conflicts of interest, enhance transparency and ensure consistency and stability in their application. Finally, the Experts consider the process foreseen in the Rome Statute and the RPE for excusals and requests for disqualifications of judges, the Prosecutor and the Deputy Prosecutor. In general, the Experts' found that, while necessary, this process occurs too late a stage to inform or modify behaviour, leading to delays in proceedings and affecting the reputation of the Court. In this respect, the additional declaration of interest required of judges together with their mandatory participation in the ICC-FDP would enable the early identification of potential conflicts, enabling judges to rectify the situation where needed. The Report goes on to recommend the establishment of an Ethics Committee that would serve a preventative and advisory role for the Court advising its leadership on matters related to the applicable code of conduct, and offering guidelines and advice on ethical issues. As advised by the Experts, the Ethics Committee would be an independent entity called upon on a need-basis. The Experts considered that in the long-term such a committee could serve several international courts and tribunals. Notably, the Report suggests laying-out the relation among all internal and external oversight bodies to enhance cooperation and avoid duplications.

### **Overall assessment**

251. The judges of the Court have previously discussed, in general terms, the possibility of extending the ICC-FDP to the judges, and its supplementation, at the Judges' Retreat in 2018. On that occasion, it was agreed that further detailed study and discussion of the matter was necessary. The judges indicated the importance of ensuring aspects such as confidentiality, as well as ensuring that any such system would be appropriately tailored to the situation of judges. It should also be considered whether the recent experience of coercive economic measures imposed against Court personnel may affect these considerations. In addition to still requiring further detailed study and consideration by the judges, the possibility of extending the ICC-FDP to judges would in any case also have to be consulted with and accepted by the UN office running the programme.

252. In respect of the recommendation that the current Guidelines on extra-judicial activities of the judges should be formalised, following input from States Parties, the Presidency will closely consider this recommendation from the perspective of judicial independence. Notably, the promulgation of the updated Code of Judicial Ethics includes strengthened language in its article 5(1), namely, that 'in interactions with States Parties, civil society, and the diplomatic community and other stakeholders, judges will act with care and consideration to ensure the propriety of their communications in such context'. Going further, as the underlying questions involve an interpretation of the extent of judges' ethical obligations, it is important for the assessment to be done by the judges. In this regard, the judges of the Court welcome the opportunity for further reflection on this matter.

253. The Court agrees in principle with the recommendation to consider the establishment of an Ethics Committee. To this end, further careful reflection and consideration of this complex proposal is warranted, including the need for careful preparation regarding integration into the Court's legal framework and costing, as it would likely have an impact on the budget. Notably, the Rome Statute already contains mechanisms by which certain situations of conflict of interest may be regulated, for example article 40(4), which provides that any question as to whether a judge is engaged in an activity which may interfere with their judicial functions or affect confidence in their independence or engagement in other professional activities, is to be resolved by an absolute majority of the judges, or in the provisions concerning the excusal or disqualification of judges established in article 41. In this regard, consideration should be given to the role of the proposed Ethics Committee in a manner consistent with the existing statutory processes. Additionally, the Court has in place the regulatory legal framework, policies and practices to process and avoid conflicts of interests in relation to staff and parties to the proceedings. The Court endeavours to look deeper into this existing framework with a view to identifying areas where enhancements can be made. On the recommendation to extend the scope of the proposed Committee to cover other organisations, the Court considers that this question would need to be addressed and considered by the respective organisations if and when such Committee is established.

## IV. INTERNAL GRIEVANCE PROCEDURES

### A. General

#### *Recommendations*

**R115.** *The Court's internal justice system should be open to all, including non-staff, former staff and elected officials. In the spirit of the One Court principle, and with the aim of simplifying and centralising the various disciplinary procedures, the Court should employ one internal justice system for all. This will emphasize equality of treatment, promote equal minimum standards of ethics and professionalism for everyone as well as increase the clarity and this the use of the system.*

**R116.** *The Court's settlement of disputes would be better served if handled by professionals. The cost-benefit relationship of this proposal is favourable to the Court, and will enhance the settlement of disputes and conflicts and, accordingly reduce the escalation to the ILOAT. This would involve dissolving the Disciplinary Advisory Board and the Appeals Board, as well as ad hoc mediation currently operated by staff. Such approach would be consistent with other international organisations' decisions to move away from peer-based internal justice mechanisms. such as the UN's decision in 2006.*

**R117.** *Instead of peer-based appeals against administrative decisions, a straight-forward and simple procedure could be set up by employing a First Instance Dispute Judge - a national or international judge, with experience in international administrative matters. The First Instance Dispute Judge would not be a permanent position, but called on to act on a need-basis. A roster of suitable judges could be set up for such purpose. In the case of serious complaints against Judges, the Prosecutor or Deputy Prosecutor, a First Instance Panel, made up of three judges, would decide in first instance.*

**R118.** *The Court should consider the establishment of an Ombudsperson (an ungraded position to be filled through a competitive recruitment exercise, a true outsider) to deal with disputes and conflicts in an informal, friendly and effective way together with Mediation Services, as a preliminary, non-compulsory instance (subject to the following paragraph) for solving disputes and conflicts.*

**R119.** *Recourse to mediation services would only be mandatory for parties in an administrative dispute before bringing their complaint to the First Instance Judge. Similarly, complaints dealing with underperformance would initially be reviewed by a human resources analyst and, if necessary, by an independent reviewer appointed by the Head of HRS, before the complaint could be submitted to the First Instance Judge.*

**R120.** *The Court is encouraged to explore whether resorting to the UN Appeals Tribunal for administrative matters, rather than the ILOAT, would be more cost efficient for the Court. Such a decision would also be in line with the Court's use of the UN Common System.*

**R121.** Any exercise envisaged by the Court in this field should consider the convenience of strengthening transparency, confidentiality and trust for the staff to be able to use it more frequently and for it to be more efficient.

**R122.** The Court should also consider the convenience of establishing an Ethics and Business Conduct Office (EBCO) to promote common values and preventing conflicts of interests, and also to deal with disciplinary proceedings, hosting the unit dealing with serious misconduct. It should also serve as the context for whistleblower policies, as well as host focal points on gender issues, sexual and other forms of harassment, and anti-fraud matters. The EBCO would be headed by a suitable ungraded individual.

**R123.** The focal points would each other work on raising awareness within the Court in their respective field (i.e. whistleblower policies, gender issues, sexual and other forms of harassment, and fraud matters), including by explaining and advising on relevant policies and complaint/whistleblowing procedures.

**R124.** The ASP should consider enabling the IOM to provide support to the EBCO, staffed with outside professionals (investigator, legal officer).

### **Overview of findings**

254. The Expert Report explains the system in place for disciplinary and administrative appeals. Concerning disciplinary matters, the Registrar or the Prosecutor can impose sanctions based on advice received from the Disciplinary Advisory Board (“DAB”). Administrative decisions by the Registrar or the Prosecutor can be appealed to the Appeals Board (“AB”), which can recommend the given Principal to either confirm or change their decision. Both the DAB and the AB, the Experts note, are internal peer-based mechanisms composed of volunteering staff. In relation to both disciplinary matters and administrative appeals, judicial remedy is foreseen by reference to the ILOAT. The Experts found that, in addition to the lack of transparency in their appointment, staff members elected to these internal mechanisms are not trained for these additional responsibilities and are not given sufficient time to work on them. In regard to the IOM, which the Report notes is faced with serious resources constraints, the Experts convey that it does not enjoy the full confidence of all staff. This, they note, has led to a disinclination to make complaints and officially report alleged misconduct. Furthermore, the Experts note a perception from staff that in lodging complaints they may be at risk of repercussions. In the view of the Experts, these procedures are not efficient, as the systems in place only provide for the settlements of disputes, but there is no mechanism to deal with conflict resolution. In this respect, the Report notes that the Court appointed an independent expert in 2019 to look into the establishment of an ombudsman office. In addition, the Experts highlight the movement towards the establishment of a Focal Point on Gender, as well as the initiatives to adopt a revised policy against harassment, including sexual harassment.

### **Overall assessment**

255. The Court sees merit in the recommendation to broaden the scope of the internal justice system and simplify and centralise the various disciplinary procedures to the extent possible and appropriate, as well as to further strengthen the expertise of staff who serve on the relevant boards. While the different boards are the consequence of the regulatory framework currently in place and fulfil important functions – including serving as a due process safeguard mechanism in the overall process – there is merit in further looking into the functioning and expertise of these mechanisms to identify areas in need of improvement. The Court benefits from the observations of the Experts in doing so. The Registry, in coordination with the other Organs, can prepare a study looking into the legal and practical considerations that would need to be taken into account in order to implement this recommendation as well as the cost implications. Notably, exploring alternative dispute resolution mechanisms and relatedly, the establishment of an Ombudsman has been a Court-wide initiative and commitment, and specifically identified as a priority as part of the Principals’ commitment under their Staff Wellbeing initiative and in the Registry Strategic Plan 2018-2021. The Court has obtained preliminary costings for the provision of such a service, which it has sent to the CBF for consideration at its spring 2021 session. Following the advice of the CBF, the Court will put forward a proposal for the establishment of such a service for the consideration of the ASP at its upcoming session. The development of such a proposal will also consider the establishment of a number of new services proposed in other recommendations, such as recourse to mediation services, as well as an examination on how they all fit together. The Court will also look at the experience of other UN organisations in connection to first instance judges, mediation and underperformance before putting forward a proposal for the ASP’s consideration.

256. In general terms, while the Court understands the underlying idea expressed by the Experts in the Report, more specifically in recommendation R120, the Court's use of the UN Common System does not preclude the Court from continuing to resort to the ILOAT jurisdiction. The Court equally notes the Experts' recommendation R12 that a systemic process should further be put in place to ensure reviewing the compliance of the Court's internal legal framework with ILOAT decisions, as soon as practicable after the Tribunal decides on a matter involving the Court. As explained before, such a system has been put in place whereby every new ILOAT decision related to the Court is analysed to implement internally the necessary lessons learned, and identify, as appropriate, any need to update the existing policies.

257. However, in light of recommendation R120, the Court will produce an assessment detailing the costs that moving from the ILOAT to the UNAT would have for the Court, as well as the legal, policy and practical considerations. The Court notes for instance the resort to ILOAT is specifically enshrined in the Staff Regulations of the Court, and any amendment to those regulations would have to be sanctioned by the ASP. A thorough assessment will therefore be of assistance in fully analysing the proposed recommendation.

258. The launch of the Staff Wellbeing Framework by the Court's Principals in 2019 and the priorities set as part of that initiative very much move in the same direction of the Experts on a change agenda on the priority areas identified.<sup>36</sup> A comprehensive Leadership Project (2019), a project to explore alternative dispute resolution mechanisms for the Court, gender awareness training (2019), mentoring for women (2019), training on unconscious bias (2019), a focal point for gender equality (2019), amongst other initiatives have been devised, and have made progress since conception. It is envisaged that the recently appointed Focal Point for Gender Equality will provide advice to the Principals on the development of the next generation of relevant policies (planned for finalisation in 2021) and a Court-wide awareness-raising programme on gender related matters can then be rolled out with the support of the Focal Point. It is worth noting that the OTP since 2014 with the adoption of its Policy on Sexual and Gender-Based Crimes has undertaken a number of initiatives geared towards promoting gender equality and gender awareness by, *inter alia*, making assessments of the understanding of gender perspectives at the Divisional and Office-wide level,<sup>37</sup> developing a gender awareness training for the Office as a whole, conducting gender awareness training at the divisional level, a mentoring program for female staff at the Prosecution Division and creating gender focal points at the Prosecution and Investigation Divisions. In addition, a key internal performance indicator on gender balance has been developed to promote the recruitment of more women to senior level positions. The Court remains fully engaged on this important priority area.

259. With respect to the recommendations on the functions of the IOM, the Court considers that this would require a detailed study and its implementation would need to be very carefully constructed in view of the potential conflicts of interest and different confidentiality requirements of the different functions involved. The IOM mandate would also need to be substantially redefined in order to accommodate these new functions, for which purpose the IOM should be consulted primarily.

## **B. Accountability of Judges**

### ***Recommendations***

***R125.*** *The IOM would retain its functions of inspection, evaluation and investigation. In case of complaints against Judges, the Prosecutor and Deputy Prosecutor, it would delegate investigations to Ad Hoc Investigative Panels, after carrying out an initial assessment of the complaint. The IOM would further act as the executive and permanent secretariat, supporting non-permanent bodies within the EBCO, striving to ensure an efficient and timely resolution of complaints. So too, in respect of the Ombudsperson and Mediation Services, the Ad Hoc Investigative Panels, the Ethics Committee, the First Instance Panels. The IOM would be responsible for providing immediate support when needed, and work*

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<sup>36</sup> Following inter-organ deliberations and a methodological mapping of priority areas identified through the staff survey results conducted in 2018, the Court's Principals set the following macro-level Court-wide wellbeing priorities: Gender equality: an important cross-cutting topic, which involves different categories/issues such as values/respect, recruitment /development, leadership, *inter alia*; Staff selection and development: with a focus on (i) recruitment related issues, and (ii) opportunities for mobility; Occupational health and Work-life balance: with a focus on (i) stress reduction, (ii) secondary trauma prevention, and (iii) flexible working arrangement; Ethics/Standards of conduct: with a focus on (i) harassment, and (ii) conflict resolution mechanisms; an Leadership: with a focus on (i) leadership at the Divisional/Section/Unit level, and (ii) strategy and leadership of the Court.

<sup>37</sup> The OTP-wide assessment questionnaire was conducted at the beginning of 2020.

on raising awareness and building capacity within the Court on issues related to EBCO's scope of work. For this purpose, the IOM should be adequately resourced.

**R126.** The ASP and the Court should consider in the long-term the establishment of a Judicial Council of the Court, with full mandate over the discipline and judicial accountability of Judges.

**R127.** Such a Council, servicing several international courts and tribunals, is further suggested, to ensure coherence in standards and rationalise expenses. For this purpose, the legal framework establishing the Judicial Council should enable its members to fulfill similar roles for other international judicial organisations.

**R128.** The IOM and EBCO should develop a strategy and plan of action aimed at increasing staff confidence and trust in the IOM and the Court's internal disciplinary scheme.

**R129.** The Presidency should continue its efforts towards cultivating increased collegial cooperation between, and respectful working environment for the Judges and Chambers staff in the Judiciary.

**R130.** The Heads of Organs should deliver on their commitment and plans to prioritise zero tolerance of bullying and harassment and the development of a more effective, productive and mutually respectful relationship and atmosphere at the Court.

**R131.** In summary, the Court-wide internal justice system recommended by the Experts is as follows:

#### Misconduct

- *Complaints submitted to IOM*
  - *Against staff or other individuals affiliated with the court: IOM investigates and follows the procedure as detailed in its mandate;*
  - *Judges, Prosecutor and Deputy Prosecutor: after a first assessment by the IOM, investigation is delegated to an ad hoc judicial / prosecutorial investigative panel;*
- *Staff: First Instance Judge; the Prosecutor and Prosecutor: First Instance Panel;*
- *UN Appeals Tribunal.*

#### Administrative disputes

- *Mandatory Mediation Services;*
- *First Instance Judge;*
- *UN Appeals Tribunal*

#### Dispute related to underperformance

- *Mandatory initial review by a human resources analyst and if necessary, by independent reviewer appointed by Head of HRS;*
- *First Instance Judge;*
- *UN Appeals Tribunal.*

## **Overview of findings**

### **1. Disciplinary Mechanisms and Compliance**

260. The Experts found that, with some exceptions, the overall relationship between judges and staff in the Judiciary has been one of mutual respect. In this respect, the Report commends the initiative of the Presidency to organize a session on anti-bullying and anti-harassment during the 2019 Judges' Annual Retreat. The Experts further underline that if action were to be taken sooner than later it would significantly raise staff confidence in the accountability measures for elected and senior officials. To this effect, the Report stresses the importance of the effective implementation of the Court's Whistleblowing and Whistleblower Protection Policy, which by enabling a risk-free reporting of complaints, will contribute to addressing the non or under-reporting of alleged misconduct. Such reluctance to report was highlighted in regard to alleged misconduct or misbehaviour by a Judge. The Experts consider that the current arrangement for accountability of judges involving the IOM is questionable and raises arguable concerns. In this respect, the Experts favour a self-regulation or peer-peer disciplining of judges as a form of accountability. In fact, in the light of potential disagreements or disputes in relation to possible disciplinary investigations against judges or the Prosecutor and Deputy Prosecutor, the Experts consider that the IOM would be unable to adjudicate thereon, being an interested party to the very disagreement in issue.

## 2. Disciplinary Standards

261. The Experts provide an indication of the elements that should be contained as a minimum in a disciplinary regime for misconduct or misbehaviour of judges. Such elements include a reliable and trustworthy channel, strict confidentiality, credible and reliable recipient of complaints, impartial and independent investigations, enquiry or hearing of the complaint, with full respect for due process, and a competent decision-making authority. The Report provides five additional elements, which are more specific to the mandates of the Court's Organs, namely, openness and transparency, confidentiality of the information (relating to the work of judges or prosecutorial information), safeguard the independence of the judges and the Prosecutor, and ensure public confidence and trust in the Court and its judges.

## 3. A Readjusted Disciplinary Arrangement

262. The Report recommends the establishment of an *Ad Hoc* Judicial Investigation Panel, as well as a corresponding First Instance Panel, both of which as non-permanent, independent, impartial and external bodies. The Experts suggest a process whereby first complaints would be lodged with the IOM who will conduct a preliminary assessment to determine its admissibility and whether it was properly lodged. If so, an *Ad hoc* Judicial Investigation Panel would be commissioned by the IOM to fully investigate the allegation, collect evidence and assess all relevant material. As a remedial measure, the Experts suggest that, if agreed, the Panel could refer the complaint to mediation. Otherwise, the Panel could determine whether the complaint meets a required threshold to warrant activation of further steps in the process and recommend to the competent authorities if an enquiry is justified. The authorities could consider convening a First Instance Panel for adjudication. The latter would be empowered to compel or collect additional evidence and arrive at reasoned findings making recommendations and conclusions on the complaint. Such conclusions would then be referred to the relevant disciplinary authorities. In the Experts proposal, all the competent disciplinary decision-making authorities under the Court's legal texts would remain unchanged. In the view of the Experts, this process would buttress the effectiveness of accountability measures and the integrity of the Judiciary, as well as enhance the credibility of the disciplinary mechanism against judges. The Report also notes that should questions arise as to issues of confidentiality, for example, the proposed Ethics Committee should be responsible for their determination.

## 4. Judicial Council of the Court

263. In the long-term, the Experts recommend that the ASP and the Court establish an independent and impartial Judicial Council of the Court. The Council could be endowed with competences related to the accountability of judges, including investigation and inquiry, as well as serve as an advisory body on matters concerning judges, the prosecution or counsel to the ASP and the Court. The Experts consider this model preferable to the case-by-case assignment, on *Ad hoc* basis, of non-permanent Panels of Judges. Should it be established, the Experts suggest that consideration be given to extending the scope of the Judicial Council to other international courts.

### *Overall assessment*

264. Insofar as the accountability of judges and the applicable disciplinary procedures is concerned, the Judiciary of the Court welcomes many of the Experts' conclusions. In particular, the Judiciary welcomes the acknowledgement in the IER Report that peer-to-peer disciplining of judges as a form of accountability is firmly entrenched in almost all major legal systems, as well as at other international criminal tribunals and courts. Consistently with this, the IER Report's recognition that investigative and disciplinary steps against judges should not be taken by non-judges is also welcomed. It is also accepted that a system in which judges of the Court other than the ICC's current judges are involved in the process, could enhance its credibility. In view of this, the Court looks forward to engaging with the ASP as to the manner in which the various proposed entities - the *Ad hoc* Judicial Investigation Panel, the First Instance Panel and, ultimately, a Judicial Council - could ensure a system governing the potential misconduct of elected officials which is in full compliance with the precepts of judicial independence.

265. Further, in respect of further cultivating a respectful working relationship between the judges and staff within the judiciary, in addition to the initiatives already acknowledged by the IER Report, further subsequent initiatives have been the express inclusion of the following text as article 5(2) of the updated

Code of Judicial Ethics: ‘Judges shall treat fellow judges, Parties and participants, staff members and others with dignity and respect. Judges shall not engage in any form of discrimination, harassment, including sexual harassment, and abuse of authority’, as well as the inclusion of this topic in the judicial induction programme in 2021.

266. Concerning recommendation R130, in addition to the relevant submissions made in the present section, the Court refers to its response under section II (Human resources) of the overall response. The Court remains fully committed to continuing its efforts to address this priority area.

## V. BUDGET PROCESS

267. The Final Report highlights the need to simplify the budget process and reduce the underlying bureaucracy. At the outset, the Experts acknowledge that the budget process has been in continuous development since the early days of the Court, and improvements have been made. In this regard, the Experts make reference to the recommendations by the SGG, the CBF, and the External Auditors. Improvements in the budget process, according to the Final Report, should focus on enhancing the trust relation between the Court and the ASP. Increased trust, the Experts note, would reduce perceptions of micromanagement, or questions on the underlying activities that justify resources.

### A. Court Budget Process

#### *Recommendations*

*R132. In parallel with or subsequent to the elaboration of high-level assumptions, inter-organ consultations should be held on a cohesive strategic vision to guide Organs in their budget planning. Additional close consultations should be held between the OTP and Registry on these strategic priorities and the Registry's expected capacity.*

*R133. An enhanced role for the Registrar, in line with the Expert's recommendations in the Unified Governance section, would also enable a more centralised budget process, in line with the One Court principle. The Court should be represented by the Registrar at budget oversight meetings.*

*R134. Financial Regulations of the Court should be amended to enable the Registrar to make transfer across Major Programmes, to adapt based on workload. Similarly, ways through which the Registrar could be given more flexibility in implementing CBF/ASP decided cuts ought to be explored. Such increased flexibility should be accompanied by appropriate reporting and transparency mechanisms.*

#### *Overview of findings*

268. The Experts highlighted the recommendations on the budget process by the External Auditors, and noted that the Court is working on implementing them. In particular they noted the importance of improving the link between the strategic plan and the budget. The Report recognizes the role of the Coordination Council in the budget preparation, including in particular in the identification of high-level assumptions, as an improvement. The Report further recommends that in parallel to identifying the high-level assumptions, the Court should conduct a planning exercise with a view to achieving a cohesive strategic vision that can guide budget planning. Close consultations should aim at developing strategic priorities based on capacity for delivery, which in turn, according to the Experts will lead to a more efficient budget process.

269. Following their recommendations on a unified governance structure, the Experts recommend a more empowered role for the Registrar in the budget process, in line with previous ASP resolutions and the External Auditor's recommendations, and in a way that contributes to the implementation of the One Court principle. The Experts reported that the CBF may on occasion receive contradictory information from different Court representatives, and recommended that the Registrar should be the main representative and spokesperson of the Court in such meetings.

270. The Final Report also addresses the question of increased flexibility in managing resources. The Experts noted that the inability of the Court to move resources between Major Programmes hampers the Court's ability to respond to shifting situations. In this regard, the Expert recommend empowering the Registrar with enhanced flexibility by amending the Financial Regulations and Rules to allow such transfers. This flexibility should include not only the managing of the approved resources, but also the way in which agreed reductions to the budget are allocated.

### ***Overall assessment***

271. The Court welcomes the recognition by the Experts of the improvements achieved over the years in further streamlining the budget process. In this regard, the strategic top-down role of the Coordination Council in setting the high-level assumptions in a coordinated manner is key. So is the role of the inter-organ Budget Working Group, which operates at the working level to support decision-making by the Coordination Council.

272. The Court sees value in further strengthening the inter-organ dialogue, where possible, to improve the translation into resources of strategic operational priorities which are based on capacity. Indeed, the budget planning process is already based on an active dialogue among the organs of the Court from the outset of the budget planning cycle. The consultations include "clearing house" interactions that have to take place by definition, when independent organs discuss their respective mandates and priorities across complex operations with many uncertainties involved, with a view to finding a common ground. Close consultations between the OTP (as main budget driver) and the Registry (as responsible for service-delivery) on strategic priorities and the Registry's capacity take place regularly, both in the budget planning and implementation phase. An example of this, is the work done in relation to the life cycle of field presences, whereby the resources for these are planned in a scalable manner, according to judicial and prosecutorial requirements. The process of preparing and submitting services requests to the Registry by the relevant clients is designed with that objective in mind. Several examples have been reported to the CBF on the efficiencies and savings originated by the close factual consultation between the OTP and the Registry. Efforts to meet the common challenges of the COVID-19 pandemic have further strengthened the inter-organ dialogue and collaboration, demonstrating the efficacy of the system.

273. The Court considers it possible to further enhance and make the dialogue more strategic, frequent and fluid as necessary. In addition, significant enhancements in this regard can be further achieved by improving the Court's strategic planning cycle and its connection with the budget planning, as one's effective implementation is reliant on the other's.

274. The Court agrees with the recommendation that as a rule, the Registrar should be representing the Court in terms of budgetary matters, and this is in fact the current system in place. In addition, the participation - where relevant - of representatives of the other organs in budget discussions ensures having full information privy to the internal aspects of the work and operations of the respective organs, and thus benefits the "enhanced dialogue" with States and the CBF. Likewise, the Registry has central role already in any provision of Court's budget information, including its Financial Statements and Financial updates, Human Resources data, ILOAT cases and litigation, Premises, Precautionary Reserves, updates on Administrative Instructions, Legal Aid, Audit updates, Information Management and Infrastructure, Savings and Efficiencies. The Court ensures the consistency and integrity of the data provided to the CBF, which is achieved through the extraction of all hard data from all Programmes from systems managed by the Registry's functions. To complement the information, individual Major Programmes provide explanations and/or justification to the CBF in respect of the resources required to perform their own specific mandated activities.

275. Concerning the recommended amendment to Financial Rule 104.3, the Court stresses that the impediment to transferring funds between Major Programmes without authorization by the ASP has been put in place with due respect for organs' independence, but also, to ensure the Registrar's role and neutrality as the principal administrative officer of the Court by segregating his management of resources from those destined to activities of the OTP. In considering this recommendation, it is important for the ASP to preserve the independence of the OTP, and in particular the ability of the Prosecutor to fully exercise the independence prescribed in article 42.2 of the Statute over the administration of her/his office, including the staff and other resources thereof. In reviewing the External Auditor's recommendation, the CBF also identified some risks and added that such proposal "should be considered in light of the overall FRR framework (including the use of CF), without undermining the overall budgetary control and budgetary

discipline. The recent practice of inter-MP transfers calls for caution introducing even more flexibility to budget management”.<sup>38</sup>

276. The Court welcomes the recommendation to enhance its ability to implement the reductions to the proposed budget approved by the States with flexibility. Institutionalizing this practice would reduce micro-management, enable the Court to more flexibly respond to developing needs, while ensuring that the overall funds made available remain at the level approved by the ASP.

## **B. Committee on Budget and Finance (“CBF”)**

### ***Recommendations***

**R135.** *The CBF should make an inventory of the most important topics it considers should form its 'standing agenda', for ASP endorsement. This should result in more concise reports, issued as soon as possible after the CBF's session.*

**R136.** *The Committee should include alongside its recommendation, sufficiently detailed explanations of its reasons, as well as the Court's position in the proposal.*

### ***Overview of findings***

277. The Experts note in their findings the difficulties for all members of the CBF to follow all aspects of the work of the Court. In this regard, the Final Report indicates that loss of focus is the main threat to the CBF's efficiency, effectiveness and credibility. The Experts thus recommend that the CBF prepares a list of the key issues to consider, for ASP consideration and endorsement. A more focused agenda should also be reflected in more concise reports, and the CBF could have more time to elaborate on its recommendations. The Experts also recommend that with a view to enhancing the efficiency of the consultations between the Court, CBF and ASP, the reports of the CBF should also include the Court's position on, or response to, CBF's recommendations.

### ***Overall assessment***

278. The Court is mindful that these recommendations fall under the authority of the ASP, as they concern the working methods of the CBF. The important issues raised should be subject to a thorough discussion with the CBF, as they offer an opportunity to strengthen the system. Accordingly, the Court takes note of the recommendations of the Experts concerning CBF and, subject to further consideration by the CBF and States Parties, sees some merit in the recommendations. The general direction of these recommendations seems to be in line with the thinking of the Court. When considering these recommendations, as appropriate, the Court remains available to provide any further insight or information.

## **C. Enhancing Dialogue**

### ***Recommendations***

**R137.** *States Parties are encouraged to consider a meeting with the CBF and the Court after consulting the Court-issued budget proposal, to share preliminary indications as to questions and concerns relating to which they wish to receive the CBF's advice.*

**R138.** *Additional (remote) workshops between the Court and the CBF should be held, ahead of the Committee's fall session, as the main forum for dialogue between the two on the Court-issued budget proposal.*

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<sup>38</sup> Report of the Committee on Budget and Finance on the work of its thirty-third session, ICC-ASP/18/15, para.254, 27 September 2019.

## ***Overview of findings***

279. The Final Report notes the high number of inquiries per session. In addition, the Experts reported that often there is repeated detailed scrutiny by States of the Court's budget submission after the CBF has issued its report with recommendations. According to the Experts, enhanced consultations between the three could lead to increased efficiency of the budget process by maximizing the CBF's advisory role to States, and enable the latter to focus more on less technical matters. They further recommend that States Parties, the Court and the CBF should hold a first meeting after the Court's submission of the proposed budget in order to identify preliminary areas of concern on which States would like the CBF to focus. A stronger CBF report, the Experts note, might alleviate States' Parties concerns and defer judgement on technical details. The Final Report also highlights the importance of the workshops between the Court and the CBF and recommends enhancing their potential as a dialogue between the two. The Experts indicate that the Court should communicate with one voice, represented by the Registrar. Finally, the Experts recall a number of recommendations made by the SGG on the budget process, and in particular on the conduct of budget consultation in the context of the facilitations. According to the Experts, some of these recommendations might still be relevant.

## ***Overall assessment***

280. As previously explained, the Court is mindful that recommendation R137 falls under the authority of the ASP, as it concerns the working methods of the CBF and the ASP in connection to the budget process. As for recommendation R138, the Court is ready to engage with the CBF to consider ways in which additional workshops could be organized with a view to creating more opportunities for strategic dialogue in advance of the Committee's consideration of the Court's proposed budget.

281. On the role of the Registrar in the budget process, it is important to point out that the Registry chairs the Budget Working Group, an inter-Organ coordination mechanism that develops the ICC Proposed Programme Budget on the basis of the highlevel assumptions agreed by the Principals in the CoCo. This cooperative and fruitful approach contributes to enhancing the transparency of the budget proposal and foster a better understanding of the foundation of the requests included in the proposed budget. The Registrar presents the ICC budget proposal on behalf of the entire Court both when the Executive Summary of the Proposed Programme Budget is submitted in July and at the session on budget at the Assembly of States Parties in December

## **D. Assembly of States Parties**

### ***Recommendations***

*R139. To maximise the potential of ASP sessions, States Parties are suggested to defer to the CBF on technical budgetary details, reach consensus on the budget ahead of the ASP session, and dedicate an early slot of the session on budget, attended by specialised State representatives, before the political part of the conference, where high-level political participation can be encouraged.*

### ***Overview of findings***

282. The Final Report notes the concern that ASP meetings tend to be dominated by technical budgetary discussions, at the expense of policy discussions. Different options were considered in this regard by the Experts, including concluding the budget discussions prior to ASP meetings, moving the debate on budget outside of the regular session of the ASP, and prolonging the financial period of the Court from one to two years. Regarding the latter, the Experts considered that while a two-year budget would improve the ability of the Court to plan for the longer term and increase the budgetary predictability for States Parties, a one-year budget allows for improved budgetary precision. The Experts were not convinced that the gains of increasing the financial period outweigh the difficulties of having inaccurate budget assumptions. Instead, aside from aiming at achieving consensus on the budget in advance of the ASP session, the Final Report suggests including in the ASP agenda a specific segment on budget attended by specialized State representatives, which would be separate from the political part of the session.

## ***Overall assessment***

283. As this recommendation concerns the conduct and organization of ASP sessions, as well as the working methods of the Budget Facilitation of the Working Group of the Bureau in The Hague, the Court is of the view that its consideration falls under the authority of the Assembly. The general direction of these recommendations seems to be in line with the thinking of the Court. The Court remains available should, in the context of the consideration by States Parties of this recommendation, information or views from the Court be required.

## **E. Miscellaneous**

### ***Recommendations***

*R140. Noting the concerning state of arrears and potential liquidity crisis facing the Court, the Experts recommend that the ASP explore additional means to encourage timely and in full payment of contributions by States Parties, taking into account practices from other international organisations. For example, the ASP could explore setting a lower threshold of arrears beyond which States Parties lose their voting rights or inability of States Parties in arrears to present candidates for elected officials' positions.*

*R141. At a minimum, the ASP should ensure the levels of the Working Capital Fund and the Contingency Fund are maintained at the fixed levels, if not increased.*

*R142. Increased transparency on the organisational structure and organigram should be introduced, with the number of full-time equivalent posts by Section and Office indicated.*

*R143. States Parties should consider joint approaches with other international courts and tribunals housed in The Hague, such as organising joint trainings, pooling administrative services and exploring possibilities for joint procurement to obtain more advantageous rates.*

### ***Overview of findings***

284. The Experts took note of the liquidity crisis facing the Court due to delayed payments of assessed contributions, and have indicated their agreement with the CBF recommendations to explore additional means to address the situation. In the meantime, they stressed the importance for the Court to resort to the Contingency Fund and the Working Capital Fund, and recommend that at a minimum both funds should be annually maintained at the fixed level, if not increased. Furthermore, the Experts recommend that the number of FTE posts by Section and Office should be included in an organigram of the organizational structure. Finally, the Report recommends that joint activities which are undertaken could benefit from the presence of different international courts and tribunals in The Hague. These activities could include joint trainings, pooling of certain administrative services, such as recruitment, and common procurement.

## ***Overall assessment***

285. The Court welcomes the efforts by the Experts to find ways to address the liquidity challenges faced the Court. As the recommendations concern matters within the purview of the ASP, the Court defers to it for its consideration and remains available should additional information be required. Notably, the recommendation to reduce the arrears period after which States Parties lose their voting rights from 2 full years in arrears to 1 full year in arrears will require an amendment to article 112(8) of the Statute.

286. Furthermore, the Court agrees with the Experts on the importance of having both its Working Capital Fund and Contingency Fund maintained and funded at the fixed level, if not increased. The Working Capital Fund is essential to ensure the continued operations of the Court when outstanding contributions are high, thus increasing the Fund to a level that better reflects at least one month of disbursements by the Court will provide further safeguards. Currently the approved level of the Working Capital Fund is €11.6 million, the CBF has recommended increasing the level to €12.3 million, which is approximately one month of the Court's expenditure. This matter is currently under consideration by the ASP (See ICC-ASP/19/Res.1 Part B, paragraph 3).

287. The Court sees value in the Experts' recommendation concerning the introduction to States Parties of a more detailed organizational chart. Such a chart is already submitted, presented to and discussed with the CBF in the context of the Court's annual proposed programme budget. In addition, a final yearly chart can be produced and made available to States Parties upon the approval of the programme budget by the ASP, and the internal finalization of the approved budget following ASP decisions.

288. Finally, the Court will engage with other international courts and tribunals in The Hague with a view to studying the feasibility of any such joint activities and report back to the Assembly. The issue is being considered in the context of the review of the procurement process currently ongoing. Notably, the types of procurement conducted by the different tribunals in The Hague can often be disparate, as some organizations use EU regulations for procurement, which is different for the UN common system approach applied by the Court. Having said that, several organizations based in The Hague have recently asked to use contracts entered into by the Court, for their own purposes, for example, on supplies and stationery, and charter flights. The network of procurement sections in the Hague, set up by the ICC's Chief Procurement Officer, is quite active and areas for cooperation are explored regularly. Furthermore, some joint training is already organized and taking place in the UN Inter-Agency context.

## **VI. PERFORMANCE INDICATORS AND STRATEGIC PLANNING**

### ***Recommendations***

*R144. All Major Programmes should develop concrete and measurable KPIs, in relation to the strategic goals identified in the Court's or relevant organ's specific Strategic Plans, following the Registry model.*

*R145. The Court should implement the External Auditor's recommendation as to means of employing KPIs in budget proposals and budget performance reports.*

*R146. To assess the Court's efficiency, a report representing raw data based on quantitative indicators should be compiled. The data should be presented in a coherent, consistent and reader-friendly manner. The document should be available to the oversight bodies and the States Parties. Data collection and presentation should be standardised, to enable comparison across several years. Review of KPIs based in lessons learnt should take into account this need for stability in data.*

*R147. To enable comparison with other international organisations, including other international courts and tribunals, the Registrar should engage in dialogue with various such institutions and agree on the type of indicators that can be tracked and shared (e.g. with other international courts - number of days of Courtroom use; with other international organisations - staff engagement, sick leave).*

*R148. Assessing the Court's impact should be delegated to external partners (civil society organisations, academia, international/regional organisations), and encompass quantitative and qualitative indicators. Such efforts could be funded through voluntary contributions.*

### ***Overview of findings***

289. The Report provides an overview of the efforts done by the Court to develop qualitative and quantitative indicators. In this regard, it notes the Glion Retreat in 2016, as well as that the issue has been subject to several recommendations from the SGG, CBF and External Auditors. The Experts conveyed that some States Parties emphasized that the Court should report on its performance against the Strategic Plans, underlined the importance of consistency in the arrangements employed by all Organs, and suggested that indicators could be used to forecast resources and timing of judicial proceedings. Civil society, the Experts note, point to the need for more qualitative indicators, evaluating the satisfaction of affected communities with the Court's performance. The Experts commended the progress made by the Court but noted that the approach lacked uniformity among the Organs, identifying the Registry as the only organ to have KPIs annexed to the Strategic Plan. The External Auditor, the Experts highlight, concluded that there is no correspondence between the KPIs at Court level and the KPIs by Organ. The Experts consider that currently KPIs are not being used to their full potential. In this regard, the Report explains two different objectives in the use of performance indicators: measuring efficiency and measuring effectiveness

## **A. Efficiency**

290. The Experts explain that to measure efficiency, qualitative indicators are needed to be compiled in the form of raw data in a reader-friendly manner. This information can be used to measure activity which can guide budget preparation and help identify performance problems. According to the Report, to more accurately measure efficiency, benchmarks could be established by comparing data with that collected by other international courts. The Experts further stress that with a view to respecting judicial and prosecutorial independence, performance indicators should not be used to evaluate judicial or prosecutorial decisions. However, the Experts consider that these are an adequate tool to measure data related to administration of justice.

## **B. Effectiveness**

291. The Report considers that addressing the effectiveness of the Court means evaluating its impact of affected communities and victims, and its deterrent effect. This kind of qualitative indicators should be assessed through tools such as polls or questionnaires among local communities. The Experts consider that such analysis would be best carried out by entities external to the Court. This could be done on the basis of voluntary contributions and following a methodology discussed with the Court.

### ***Overall assessment***

292. The Court agrees with the thrust of the Experts' report in terms of the potential and value of using the performance indicators. Currently, both the models employed by the Organs use a similar logic in terms of referring to "concrete and measurable KPIs". The Court is putting considerable effort in defining also qualitative indicators. The Court will continue with a renewed effort, also in connection with the development of its next Strategic Plans the work to further develop its KPIs in accordance with the recommendations. However, it bears noting that there is a limit in as far the indicators can be similar among all organs by nature of their respective mandates.

293. The Court continues to work closely on the development and monitoring of KPIs. This approach has also been applied in the quantification of the Judiciary's activities and performance. The OTP has been using KPIs since 2015 but in addition to the quantitative measurements, has also developed qualitative indicators measuring success and performance, so that the indicators would provide real management insights. Shifting solely into quantitative indicators would not be sensible from the point of view of the OTP which prefers using the performance indicators as a management tool (while linking the strategic goals into its budget planning and estimated workloads). The OTP also wishes to correct the observations of the External Auditors, repeated by the Experts, that OTP's KPIs would not be relevant for the strategic planning or budget: in fact, they are included in the current OTP Strategic Plan (including PI Dashboard) and Annex IV of the Budget Narrative shows the link between the Office's activities and the goals in the Strategic plans of the Court and of the Office.

294. There may be value, in some areas, in enhancing standardised data collection and presentation. For the Registry, such an exercise might be more practical given the nature of its and the Judiciary's activities, but the OTP might be able to provide more details on its results and underlying data behind its qualitative indicators. Sensitivities and confidentiality will need to be taken into account when doing so. The Court is fully committed to further fine-tune its use of performance indicators and will continue its internal dialogue as well as that with its external stakeholders with a view to further optimizing the process as well as the outcome. Similarly, the BWG will continue its work to further integrate KPI and Strategic Objectives in its proposed budget formats. Furthermore, the Court will continue to report to the Assembly on the progress achieved.

295. The Court will engage in dialogue with various international court and tribunals in The Hague to discuss the proposal to develop common indicators that can be tracked and shared. This is a substantial piece of work to be taken forward as part of the Court's Strategic Plan for 2022-2024.

296. In developing its performance indicators, the Court has always strictly adhered to focussing on actions and indicators which fall within its own control and influence. The Court has noted a growing body

of research analysing Court's impact overall or in different situations, and feels this is very important for itself, as input from external partners may be valuable to complement to the Court's efforts to measure its activities, but also to the States Parties themselves, as the preventative impact of the Court is a key objective of the States Parties as reflected in the preamble of the Rome Statute. Gathering more empirical evidence by external partners rather than the Court itself also accords with the Court's thinking as outlined for example in its 2019 report to CBF on Court's catalytic impact, and its 2020 Report of the Court on Performance indicators. The Court will bring forward a proposal for consideration of the Assembly on the modalities and scope for a project to assess the Court's impact involving external actors, which would be subject to raising the necessary funds through voluntary contributions.

## VII. EXTERNAL RELATIONS

297. In the chapter of the Final Report dedicated to 'External Relations', the Experts have identified a number of issues related to cooperation and engagement with external partner and stakeholders, political support, communications and the relationship with the United Nations. Indeed, the Court external relations functions are aimed at amplifying, building and fostering a general institutional relationship and interaction with external stakeholders, or galvanizing support to the Court's mandate either from the Court-wide or organ-specific perspective.

### A. Relations with the United Nations

#### *Recommendations*

*R149.* The Court should decide on and identify a focal point in The Hague responsible for the relations with the UN Secretariat.

#### *Overview of findings*

298. The IER Final Report has rightly highlighted the fundamental importance of the relationship with the UN to the operations of the Court. Accordingly, in their findings the Experts note that the ICC-UN Relationship Agreement is fundamental to the operations of the Court since it enables it to take advantage of the global presence and infrastructure of the UN. However, they further note that in practice the relationship has often proven difficult due to the fact that the organizations have mandates and goes linked to the UN Charter that overlap in some areas. The Experts have identified areas of improvement aimed at improving the ability of the Court to more effectively and appropriately engage with the UN.

#### *Overall assessment*

299. The Court agrees on the importance of the relationship with the UN to the success of the Court and the effectiveness of its operations. The Court is of the view that the contacts between the two entities are frequent, positive and constructive. The relationship between the Court and the UN is indeed built on the basis of the Relationship Agreement, with mutual respect for the respective mandates of both organizations, and the recognition that these are to a large extent complementary to each other. The UN deals with a significant number of requests from the Court, both from headquarters and from our country offices, and they do so with a very high execution rate.

300. As to the recommendation to designate a single-entry focal point in The Hague responsible for the relations with the UN Secretariat, the Court is ready to engage with the UN to discuss and better understand if they see value in modifying the existing model of interaction with the organs of the Court based on this recommendation. It is important to do this in a manner that is most helpful to the operations and communication needs of both organizations, but also mindful in particular of the specific mandates and needs of the organs of the Court, notably, OTP's independence and Registry's neutrality, obligations of confidentiality, to safeguard operational integrity, as well as its support to Defence and Legal

Representatives of Victims. Accordingly, prima facie, a single focal point for the whole Court could present some conflicts of interest and practical challenges. All these issues need to be carefully reflected upon.

301. The consultations with the UN will be based on the existing Best Practice Manual for UN-ICC cooperation pursuant to the ICC-UN Relationship Agreement. This Manual already establishes focal points from within the Court's organs and the UN, through its Office of Legal Affairs. Importantly, the Court reimburses the UN for the annual costs of FTE positions within the Office of Legal Affairs who facilitate operations cooperation with the UN system, including specialized agencies and programs.

302. While current relationship is already fluid and working, the Court recognizes that it needs constant nurturing and awareness raising for example due to changes in personnel and new developments at the work done by both the Court and the UN. The interactions with the UN Secretariat may be further strengthened by increasing the frequency and developing the format of the "roundtables" held between the two institutions – in fact discussions and brainstorming are currently underway on the former. These could also include a high-level segment with relevant interlocutors. In this respect, while cooperation mechanisms exist at the working level between the Organs of the Court, notably the OTP and the Registry, and various UN agencies.

## **B. Role of the Court's New York Liaison Office to the UN ("NYLO")**

### ***Recommendations***

***R150.*** *The role of the NYLO needs to be reviewed. Depending on the range of activities that are finally assigned to it, the NYLO should be sufficiently resourced and adequately staffed to be able realistically to carry out these various tasks.*

***R151.*** *The Court should ensure that efficient communication and coordination processes are established, enabling NYLO to benefit from up-to-date information on Court developments, so that it can timeously and reliably respond to queries from the diplomatic community in New York.*

### ***Overview of findings***

303. One of the key elements identified by the Experts to improve the relations with the UN is the strengthening of the role of the NYLO. While the IER Report recognizes the importance of this Office, it stresses the needed to empower the office in a more strategic manner by creating processes that ensure it is well-informed and positioned to represent the interests of the Court *vis-à-vis* the UN. It further recommends a potential range of activities that the NYLO could usefully engage in, including enhancing its role as a channel of communication for the Court, promoting the Court's visibility in different fora within the UN system, promoting accession to the Rome Statute, support the work of the ASP New York Working Group, and provide a platform for public communication, among others. The Final Report further notes that the role of the NYLO should be reviewed and updated accordingly, including a consideration as to whether it is sufficiently resources and adequately staffed to be able to carry out these various tasks.

### ***Overall assessment***

304. The Court considers the recommendations concerning the role of NYLO as important, but requiring further consideration, mindful of the availability of the appropriate level of resources to implement a substantial enhancement of its functions. In this regard, the recommendation to review of the role of the NYLO is a key Court-wide priority, and as such, the Registry undertakes to initiate such an assessment is as a priority objective in the context of the forthcoming Strategic Plan of the Registry. To this end, an initial consultation process will be put in place to better understand the needs and expectations of the different internal (across the Organs of the Court) and external stakeholders, including the UN and States Parties in New York. In conducting this assessment, preserving independence and impartiality of the OTP will be a guiding principle. In this regard, some solutions could include having at least one OTP staff that coordinates and supports the work of the NYLO to perform a range of activities exclusively relevant to OTP. Furthermore, it could be considered how the other recommendations of the Report (i.e role of the SASP in general and pooling of resources) could also have an impact in the case of NYLO. For example, there have been synergies with the ASP staff based in New York, with a positive impact on visibility.

305. The Court is continuously working on enhancing its coordination with the NYLO from Headquarters and its country offices and similarly communicating its expectations to NYLO. Existing communication channels between NYLO and the HQ and the Country Offices can be reviewed to identify any possible gaps and remedial action taken accordingly. Currently, the Head of NYLO participates in various Registry meeting, including in the coordination meetings of all Country Offices within the Registry. This allows the Head of NYLO to be informed of key development on the ground whereby support or assistance from the UN may be required. Furthermore, the Head of NYLO participates in the bi-weekly external relations coordination meeting between all organs in addition to regular communication between all organs.

## **C. Relations with UN Agencies and Other International and Regional Organisations**

### ***Recommendations***

***R152.*** *The leadership of the Court, particularly the Prosecutor, should establish regular consultations with the heads of the UN agencies most relevant to the Court's operation, in cooperation with the UN Office of Legal Affairs, in order to facilitate the assistance required by Court officials in the field.*

***R153.*** *The Court should maintain its practice of engaging actively with regional organisations and should take advantage of opportunities to expand its engagement with other relevant regional bodies.*

### ***Overview of findings***

306. The Final Report highlights the importance of maintaining relations with UN agencies in the field for its operations in situation countries. Some of these agencies include UNHCR, UNDP and UNICEF. For example, the Experts noted that the Court often relies on UNHCR to gain access to victim populations in order to conduct investigations. According to the Experts in some places the cooperation is lower, hampering the Court's activities and slowing down investigations. In the view of the Experts, factors underpinning lack of cooperation include that the Court is not, and is not seen as, a UN agency itself, that investigators often do not share confidential information with these agencies, that Court activities can create tensions with host governments, and that on occasions the Court's objectives are not in accordance with those of the UN agency. The Reports notes that the leadership has sought to interact with the leadership of these agencies and recommends that the Prosecutor and the Registrar have more formal and regular communication with them to share information on planned activities and strategies, promote appreciation and understanding of the role of the Court, and build collegiality. The Experts further note that the Court has engaged with inter-regional and regional organisations, such as the AU, the OAS, the EU and the CARICOM. The Experts stress that these activities should be maintained and where resources allow, strengthened, particularly on regions where the Court is active.

### ***Overall assessment***

307. The Court agrees with the Experts that regular direct interaction between the Court's Principals, as appropriate, and senior UN leadership can assist the Court's activities, notably those in the field, which are highly reliant on the support of the UN. While cooperation mechanisms exist at the working level between the Organs of the Court, notably the OTP and the Registry, and various UN agencies, and it is very much the approach and practice of the Court to have the Court's leadership regularly engage with the UN and its specialised agencies at the highest levels, having more such consultations at the leadership level would further strengthen the Court's relationship with UN agencies on whose cooperation the Court regularly relies. Annual and operational planning of the Court, already envisage direct interaction between the Principals and the UN, and all opportunities are seized for this purpose. Many of such engagements are matters of public record. These efforts will continue and will see added focus. The Court is therefore grateful to the Experts for their support and the importance they equally attach to such engagements.

308. As a particular point of improvement, cooperation with some UN agencies or organisations, in particular those with a significant field presence and humanitarian or protection mandates, is a point of development, for which the OTP is developing an action plan, identifying the relevant UN agencies and organizations with prioritised cooperation needs and strategies to enhance cooperation.

309. As regards the engagement with regional organisations, the Court fully subscribes to its importance, and indeed, fostering such relations is a key part of the continued external relations efforts of the Court. With the expanding geographical scope of the Court's operations, the need to further interact with regional organizations across the globe is more important than ever. To this end, the Court has regular engagement with regional organizations, notably the EU and the AU through its Legal Counsel's office as well as ICC Member States who are also AU members, with whom it organizes annual roundtable meetings, as well as the OAS, the OIF and the Commonwealth, with which the Court has concluded general cooperation agreements, among others. The Court has also invited representatives of many other regional organizations to participate in relevant activities, notably ICC-organized regional cooperation seminars. More concretely, currently the planning includes meetings or seminars with the EU, AU, OAS, ACP and ECOWAS, regional events in Asia and North Africa.

## **D. Relations with Civil Society and Media Organisations**

### ***Recommendations***

*R154. Similarly, the Court should continue to work with civil society to the extent it can, with the aim of bolstering NGO support and advocacy of the Court in particular countries and regions, as well as maintaining the cooperative arrangements with civil society in situation countries that have been so important to the successful implementation of its mandate in those countries.*

*R155. Consideration should be given to making sufficient resources available for maintaining relations with CSOs, jointly across the Courts' Organs.*

*R156. The OTP should consider establishing a focal point for maintaining bilateral relations with the CSOs and responding to their information needs.*

*R157. The OTP should appoint a field staff member to be responsible for relations with relevant CSOs and the media, jointly with the Registry's Outreach staff.*

*R158. Consideration should be given to hosting regional workshops for CSO and local media representatives on the Court's legal framework, evidentiary standards, and collection of information.*

*R159. During Court/OTP official visits to situation countries, side events with local CSOs and media should be organised.*

*R160. Relationships with CSOs should be formalised, similar to the Guidelines Governing the Relations between the Court and the Intermediaries.*

*R161. Paid visiting professional positions dedicated to journalists/media professionals from situation countries could also contribute to increasing the internal and external capacity of the Court to communicate directly with the situation countries, and especially the victims.*

*R162. A scholarship/grant fund for journalists from situation countries could be considered, to enable them to report from The Hague for limited periods of time.*

### ***Overview of findings***

310. In their findings the Experts note that Civil society organisations (CSOs), notably NGOs in the development, human rights, humanitarian, legal and other fields, are a force multiplier for the Court in promoting and carrying out its work. The Report also notes that the Court's ability to develop and maintain positive relations with CSOs and the media is in need of improvement, especially in situation countries. The Experts report that CSOs consulted stressed the need to clarify and formalise the OTP's relationship with CSOs in order to better complement its work. It was noted that there are currently no guidelines in place as they fall outside the category of intermediaries. The Report also points out to a perceived lack of understanding of OTP's mandate by NGOs. In this respect, the Experts note the importance for CSOs and media to be aware of and abide by the standards applicable in order to submit information to the OTP. The Report finds that channels of communication for sharing of best practices and expertise could be established. Furthermore, the Final Report reports on concerns related to the lack of direct channels of communication between the OTP and organisations based in the field, as the OTP does not have field-based staff to act as a focal point. The Experts stress the importance of the Court nurturing its relations with civil society at all levels, as a deeper relationship with CSOs can assist in promoting awareness of the work of the Court to a wider audience.

## ***Overall assessment***

311. Engagement with civil society and further strengthening this relationship is a priority for the Court, and due consideration will be given to appropriate mechanisms and tools that can assist in maintaining and further developing the cooperation between the Court and CSOs. In this regard, engagement with civil society and media is a key element in the Court's external relations efforts and will remain a cornerstone of the Registry's outreach plans and OTP's cooperation plans for individual situations.

312. Generally, the Court and its Organs maintain close and cooperative relationships with civil society, both international NGOs as well as with civil society organisations in all situation countries (the latter concerning mainly the OTP and the Registry) and will continue to look into ways to enhance and improve these interactions. In situation countries where the Court has an office, such close interaction will be easier than in situations without a presence. Efforts will continue to be made to use information technology to bridge the distance gap whenever possible, bearing in mind the specific context of each situation country. Expectations in this respect need to be balanced with the resources available to conduct outreach activities in the increasing number of situations before the Court. The Court agrees that additional efforts should go out to tackling the perception of CSO's that they are not seen as core partners of the Court and its organs, in particular the OTP.

313. The Court will consider the recommendation to allocate additional resources to maintaining the relationship with CSOs and media in the context of its inter-organ communication strategy and the concomitant determination as to the sufficient level of resources to achieve the strategy. Notably, instead of assigning any additional resources, consideration could be given internally to shifting the focus of the existing ones, through different prioritization following the above dialogue. Any requests for additional resources would need to be addressed in the Court's annual budget proposal.

314. As to the Experts' recommendation to the OTP to designate a focal point for bilateral relations with CSOs, while the OTP agrees with its importance, it considers that several, rather than one, focal points are needed based on the varying information need needs in each situation. As advocated by the CSOs themselves, the Court should not address CSO's as one homogenous group, that require one focal point, but actually be mindful of, and flexible to adjust to, the wide variety of interests represented by different CSO's in situation countries and beyond. The OTP currently has in place different channels of communication with CSOs for cross-cutting and general issues, as well as for situation-specific interaction. Hence having just one focal point would seem to limit and add bureaucracy rather than responding to the expressed information needs. The OTP will endeavour to increase the visibility of the situation-specific focal points, where needed.

315. Generally, interactions between the organs of the Court and CSO's and media are of a different nature and with different objectives, but there is also overlap. As with other stakeholders the OTP engages with, it needs to find the right balance between addressing information needs of CSO's and media, and confidentiality of investigations. To this end, an enhanced coordination between Registry and OTP can indeed assist, mindful that relations with CSO's may have different shapes and objectives for the two Organs in light of their respective mandates. The Court agrees that increased coordination between Registry and the OTP on outreach activities, media queries and interactions, workshops and, where relevant, joint activities would serve all parties. As a matter of existing practice, the OTP consults the Registry in designing its outreach activities to ensure a coordinated approach; the process is a collaborative one with the Registry having the overall responsibility for 'outreach' activities of the Court. There is no overlap, but collaboration and the continuum of services. The Court will continue to advance the existing collaborative working methods and coordination between the Registry and the OTP in this regard and build on its strengths. It bears noting, however, that OTP as a party to the proceedings and as independent organ with defined duties and responsibilities will need to continue to communicate on substantive matters under its purview.. The Court has observed marked improvement and synergies in collaboration between relevant Registry and OTP services in these domains in the past nine years. Workshops and seminars with CSOs are organized as often as possible by the Court in close coordination among the Organs, but additional resources would be needed to further expand their frequency and scope. The Court has organized visits and training of CSO and media representatives to The Hague to attend important hearings in relevant trials. Furthermore, various seminars, including on thematic issues such as SGBC, forensics, as well as seminars on online evidence collection and preservation and 'first responders' have been organized with CSOs and media attending, and the Court endeavours to continue this practise. Also visits of local media, CSO's and local authorities to the are taking place regularly and will be further encouraged. These educational visits

increase awareness of proceedings and enhance relations between the field and HQ. Notably, a Concept Note and Project for Training Journalists has been initiated by the Court and its roll-out will be continued.

316. Moreover, the organisation of outreach events, public information activities and media engagements in connection with high-level OTP and Registry missions respectively are already a standard practice and form an embedded component of the mission programme, unless there is a good reason not to do so (i.e. due to operational sensitivities), and the benefits of this engagement are obvious. The Country Offices remain ready to organize and facilitate such events with local CSOs and media whenever appropriate. If no field presence is available, the Registry, through PIOS, will organize side events to the extent feasible. Such engagement will certainly be continued, and the Court will consider, given the possibility and within resources, to make more time available for such meetings during missions to situation countries. Efforts will also be made to enhance OTP communications to CSOs and media needs to the local context and target audience building on existing efforts.

317. While increasing interaction and further clarifying the relationship between the Court and CSOs can be achieved through actions such as those identified in other recommendations, it may not be feasible to codify the relationships between CSOs and the Court in a manner that is similar to that found in the Guidelines for Intermediaries. Intermediaries perform previously identified tasks for various parts of the Court, some of which may for example involve the reimbursement of costs. CSOs however act independently in the performance of their mandates, and formalizing their relationship with the Court might, apart from practical difficulties of such an exercise, compromise their ability to act effectively to promote international justice, as their independence is crucial to their credibility and legitimacy. Engaging in such a formalized relationship would thus work against the independence of both the Court and CSOs and could lead to misunderstandings and confusion on the role of each within the Rome Statute system. Only in certain exceptional circumstances, there could be an *Ad hoc* operational need, for example, to deliver on specific a project, when a formal agreement is needed. The Court, and in particular the OTP, will aim at enhancing clarity in its relationship with CSOs by increasing its interactions with CSOs, in situation countries and outside, to have further insights regarding their needs and ideas for interaction and cooperation.

318. The Court sees value in considering the introduction of a system of paid visiting professionals for journalist and media professionals from situation countries, as such a programme would potentially support the Court's outreach work and allow journalists from situation countries to gain experience working for an international organization. While criteria will have to be defined for the selection of such visiting professionals, for example to take into account any potential or perceived conflicts of interests, the recommendation can only be actualized with sufficient and sustained funding, possible for example through multiannual voluntary contributions.

319. The Court will close consider the Experts' recommendation to consider establishing a fund for journalists from situation countries to enable them to report from The Hague. Indeed, the Court has already in place some mechanisms, albeit limited, to bring journalists from situation countries to The Hague for limited amounts of time to follow and report on relevant judicial proceedings, for example, with the support of the City of the Hague. In this regard, the recommendation will be further considered in the context of developing the Court's communication strategy as identified in recommendation R163.

## **E. Communications Strategy**

### ***Recommendations***

**R163.** *The Court needs a cross-Organ, coordinated communications strategy. Most importantly, it needs the different Organs to be talking to each other and coordinating public information responses to issues and developments in the Court's business even in the absence of such a strategy. An outreach plan, at least for every situation country, if not also per region, should be devised and then implemented from the PE stage of every situation.*

## ***Overview of findings***

320. Given the Court's reliance on cooperation with relevant governments, international and regional organisations, NGOs and individuals, the Experts recommend that it should have a dynamic and comprehensive communications strategy, which it seems to currently lack. In this regard, the Experts note the need for enhanced coordination among the Organs thus allowing the Registry to be more prepared. The Reports stresses the importance for the Court of having in place capacity to explain its developments at every stage of the process, from preliminary examinations to conviction or acquittal. The Final Report also suggests that the Court should develop an inter-organ communication strategy tailored to the needs of specific target groups, as well as communication materials and online updates in various languages of States Parties. The Experts also suggest that PIOS in Registry develops communication materials in different languages to be used by States Parties in carrying out national communications campaigns on the work of the Court. The Expert further reported on a number of communication initiatives suggested by some States Parties, mostly in the context of the UN, as well as in the context of formal and informal political networks and platforms.

## ***Overall assessment***

321. The Court is in agreement with the Expert recommendation on the communication needs of the Court and limited funding provided in support of related activities. The Court has taken the initial steps to consider an inter-organ communications strategy, and as part of its existing practice, also approaches situations with tailored communication strategies. The Court could benefit from the services of an external consultant to assist Registry's PIOS and other entities within the Court responsible for communication to draft a Court-wide new communication strategy. The completion of this strategy is a Court-wide priority and, as such, will be included as a specific deliverable for the Registry's strategic planning cycle 2022-2024, to be developed as a Court-wide effort. In a manner consistent with the findings in the Report, the Registry's annual outreach plans are developed for each of the Court's situations, with the lead of either a field office or PIOS, and in consultation with relevant internal and external stakeholders. These plans will continue to be developed and further refined in light of lessons learned and the Court' strategic communication focus. It is worth noting that within the OTP, media and communications plans already form a part of the situational cooperation strategy. However, adding outreach activities into the preliminary examination stage, which the OTP has treated as a more quiet albeit increasingly transparent process, would be an important change that would need to be carefully considered both in terms of the realities and constraints of the preliminary examination process, outreach as traditionally understood to be geared towards affected communities following the opening of an investigation, possible access limitations to affected communities and situation country, managing expectations, and indeed, added resource requirements of expanding 'outreach' to the preliminary examination phase. While outreach as such has not been undertaken as a rule during the preliminary examination phase, public information activities have always been part of the preliminary examination process with activities at the ICC headquarters, in the situation country where that has been possible, through media engagements, the Office's end of the year preliminary examination activities report, inter alia. The Office's missions to situation countries during the preliminary examinations phase also carry a public information and 'outreach' component when that is deemed helpful to advance the purpose of the mission. There are countless well publicized examples including OTP missions to Bangladesh, Guinea, Nigeria Ukraine and Colombia. Further consideration can be given to starting 'outreach', earlier; in doing so, it is important that the OTP remains in control of the messaging to safeguard against politicisation of the often delicate preliminary examination process.

## **F. Outreach Strategy**

### ***Recommendations***

***R164.*** *Outreach programs and activities should be built into decisions to pursue particular investigative activities from the start, given the critical importance of winning the support of communities impacted by the events to be investigated. Outreach strategies for new situations should be coordinated across the Court and should be ready to be implemented at the time that any new preliminary examination is announced. The Registry's Regulations, limiting outreach to situations and cases, should be amended to enable outreach activities to be carried out from the PE stage.*

**R165.** *Outreach activities should be built into the program budget of any new investigation, to ensure that this dimension of the case is not ignored. Given the budgetary challenges faced by the Court, consideration should be given to innovative ways of raising essential funding, including lobbying of interested States Parties and drawing on the expertise and resources of civil society.*

**R166.** *The Court should develop communication materials to be shared during outreach activities, according to the specific Outreach Strategy. Such materials should cover:*

- (i) The role and mandate of the Court;*
- (ii) The role and mandate of the OTP and its strategy;*
- (iii) The goals and steps of PEs/Investigations;*
- (iv) The specific progress of a PE/Investigation in a given situation;*
- (v) Next steps envisioned within each PE/Investigation;*
- (vi) The rights of victims in the Rome Statute system, at each stage of the proceedings;*
- (vii) The independent character of the OTP and the parameters under which the Court can and cannot act in relation to different country situations.*

**R167.** *PIOS should retain coordination over outreach officers in field offices, working in cooperation with the Heads of said offices, and have available a centralised outreach budget that enables them to more flexibly allocate resources based on needs (workload, judicial developments and priorities among the different situations). The OTP should consult the PIOS in designing its outreach activities to ensure a coordinated approach and avoiding overlaps.*

**R168.** *In order to improve media access to the Court/OTP, the Court/OTP should simultaneously host video press conferences with situation/regional countries.*

### ***Overview of findings***

322. As regards outreach, which is a more specific form of engagement directed at particular communities, typically those affected by the crimes under the Court's jurisdiction, the Experts are concerned that the messages communicated by the Court are insufficient and lack relevant information to enable the recipients to understand the Court's involvement in the situation. Moreover, they observe a significant delay in the Court/OTP outreach, which only begins when a formal investigation is opened. The Experts thus propose that the Court devises its Strategic Outreach Plan per situation country, and then implements it at the earliest possible moment, preferably at the time of preliminary examination. In this respect, the Report suggests that the Regulations of the Registry be amended to enable outreach as of the preliminary examination level, as opposed to only once there is a situation.

323. As an improvement the Experts suggest that the Court should be nurturing its relations with civil society at all levels, by consulting with them, listening to their suggestions and advice, briefing them when possible, on Court developments, and taking advantage of their services where it is sensible and cost-efficient to do so. In doing so, the Experts note that the Court should bear in mind that absence or insufficient outreach creates a disproportionate burden on civil society to keep affected communities informed.

324. Finally, the Report considers the resources allocated to outreach strategies in situation countries to be miniscule, and stresses that outreach, as an integral part of an investigation (and judicial activities) should be appropriately funded. In the absence of sufficient funding, the Report suggests that the Court be allowed to raise funds for discrete aspects of the strategy. The Experts recommend that PIOS retains authority over outreach officers in country offices, as well as have available a centralised outreach budget to allocate resources more flexibly.

### ***Overall assessment***

325. The Court agrees with the importance of integrating external communications and outreach to the Court's engagement in relation to a situation from the outset. However, as indicated, the exact contours for this at the preliminary examination stage should be carefully assessed and set by the OTP. The Registry's ability to support outreach activities in situations under preliminary examinations is currently extremely limited, and any decision to do so must be accompanied by the requisite consideration of resources. The Court sees merit in the recommendation to integrate a strong and capable communications component in its field presences, as appropriate, at an early stage, in order to allow for effective communication and

outreach from the outset of the opening of an investigation. This is in particular so as awareness building on the Court, its organs and respective mandates in a given situation requires time. This would increase the Court's capacity to assess the communication environment at an early stage and develop appropriate tools to develop and enhance effective outreach/communication.

326. The Court supports the Experts' assessment that outreach is a core activity of the Court, linked to the conduct of prosecutorial and judicial activities, and as such should be adequately funded. In this regard, the Court should retain core funding for outreach in its annual budget, and agrees with the Experts that more funding for this critical function of the Court is required. Any consideration of voluntary funding should be done with a view to enhancing its activities. The experience from other international courts and accountability mechanisms shows that fundraising for outreach purposes can be quite complicated and time consuming. It is particularly difficult to find donors willing to fund staff positions – which are, however, absolutely essential to effective and comprehensive outreach. With the Court's global reach, it would also be undesirable if only some situations receive funding for outreach following the preferences of the donors. As recommended by the Experts, in the absence of sufficient core funding for outreach activities in the regular budget, the Court will consider innovative ways to raise funds for specific aspects of the implementation of outreach plans. In addressing this question, the Court will draw on the experience from country offices where fundraising was successfully done and consider whether there is scope to do so in a more systematic and effective manner. Any such fundraising strategy should be considered in the context of the Court's communication strategy, which should clearly identify the appropriate purposes for which voluntary funding should be used.

327. The Court considers that the Experts' recommendation to develop communication materials to be shared during outreach activities provides useful guidance on areas of focus when new communication materials are produced, and older ones updated. The Court already has communication materials that address many of the aspects identified in the recommendation and is looking into improving these accordingly.

328. Following recommendation R81, the Court agrees with the Experts' assessment that staff in the field should continue to report to the Head of the country office, as well as regularly coordinate on their activity with the relevant Section in the headquarters. Accordingly, the Court will explore ways to improve the coordination by PIOS over outreach officers in field offices, working in cooperation with the Heads of said offices. This matter will be considered and addressed in the context of the Court's communication strategy. Similarly, the Court sees merit in centralizing the budget allocated for outreach activities, thus allowing for enhanced flexibility and economies of scale. On the other hand, these considerations should be measured against the importance of Country offices having direct operational capabilities on the ground to carry out the necessary activities in an evolving context. These and other aspects of the recommendation will be carefully considered in the context of the development of the Court's communication strategy.

329. Close coordination between the Registry and the OTP will continue including on designing outreach activities, as well as in planning and hosting, when appropriate, video press conferences with media in situation countries.

## **G. External Political Measures against the Court**

### ***Recommendations***

***R169.*** *The ASP and States Parties should develop a strategy for responding to attacks on the Court by non-States Parties, and should be prepared to speak up in the Court's defence, given that its dignity and political impartiality seriously inhibits its ability to defend itself against unsubstantiated and biased attacks. The ASP and States Parties could further conduct public information campaigns in their countries, with support from the Court's PIOS in developing communication materials.*

***R170.*** *The Court should formalise a crisis management policy that clarifies responsibilities, chain of command and process, enabling concerted action on behalf of the Court and timely responses.*

## ***Overview of findings***

330. The Experts observe that while a lack of cooperation from certain non-states parties has been an issue dogging the work of the Court from the start, in recent years it has faced an even bigger challenge in the adoption by certain countries of policies of active opposition to the Court, and even sanctions against members of the Court, including the Prosecutor herself, as well as a questioning of the integrity of the judges and of the OTP. They note that given the capacity of these attacks to undermine the effectiveness of the Court and impact its impartiality over the long-term, the ASP should take action. Indeed, the Experts consider the ASP to be the best vehicle for mounting a defence of the Court, as it is more appropriate for the Court not to engage in such political debates. This could be done through a strategy to deal with any such attacks in the future, whereby the ASP and individual States Parties could conduct public outreach. This, the Experts say, is in line with the ASP's finding that public information and communication is a shared responsibility of the Court and States Parties.

331. Moreover, the Report recommends that the Court evaluates its responses up to date to both the political threats and the health crisis, and to formalise a crisis management policy that clarifies responsibilities, chain of command and process.

## ***Overall assessment***

332. The Court fully endorses the recommendations on the role of the ASP in responding to attacks on the Court, its elected officials and personnel. An active and enhanced role of States Parties in this regard is necessary, urgently needed and a crucial element in supporting the Court, not only during political attacks but also more broadly to defend and promote the Rome Statute system, the integrity of its proceedings, safeguard judicial and prosecutorial independence, as well as ensure the safety and security of ICC personnel. The Court is of the view that States Parties should prioritise the consideration and implementation of this recommendation and engage with the Court for this purpose. The Court remains available to exchange ideas, share information and provide suggestions to States for their consideration, including on the different risk factors, related action points and in developing communication materials; it can also provide the Court's materials and adapt them to the extent possible taking into account the available resources and other limitations (e.g. language).

333. In the context of the COVID-19 pandemic, the Crisis Management Team (CMT) was formally constituted and recognized by the Principals in March 2020. The CMT in turn constituted a number of subcommittees relating to returning to the permanent premises; productivity; welfare; return to missions, and the Country Offices. A similar institutional crisis management response was undertaken in the context of US sanctions against the Court, tailored to the specific requirements of that challenge. The Standard Operating Procedure (SOP) on crisis management has been developed by the Court's Organs. Although the formal promulgation of the SOP has been delayed, the SOP proved to be a useful tool in devising the structure and chain of command for the CMT and allowed it to become fully operational within a short period of time. The crisis management policy, and the practical lessons learned from the CMT process were applied in the context of addressing additional crises encountered by the Court during 2020 which included the issue of US Sanctions and the liquidity crisis. The Court is working towards issuing its revised SOP on Crisis Management.

## ***Organ Specific Matters: Chambers***

334. As noted in the Introduction, views expressed on matters related to the Presidency and Chambers are preliminary in nature and without prejudice to positions that the plenary of the Court's judges may adopt in the future.

### **VIII. ELECTION OF THE PRESIDENCY**

***R171.*** *The Presidency should draft guidelines to be approved by the Plenary session of Judges, for the conduct of the election of the Presidency, including provision that candidates should not make directly or indirectly any offer to a colleague that might in the context of the election be construed as an inappropriate personal gift, advantage, privilege or reward, and include a similar provision in the Code of Judicial Ethics.*

***R172.*** *Candidates should restrict campaigning to addressing colleagues on their personal attributes that fit them for the office sought and their plans for their term of office.*

#### ***Guidelines on the Procedure for the Election of the Presidency***

335. Recommendations R171 and R172 have already been addressed in late 2020 and early 2021, on the basis of pre-existing initiatives of the Judiciary.

336. Even prior to the IER Report, the judges of the Court had been engaged in detailed reflections as to how to ensure that future Presidency elections could take place in a spirit of collegiality, transparency and openness. This issue was discussed in detail at the Judges' Retreat held in November 2020 and continued in December 2020. Arising from these discussions, the judges of the Court have developed Guidelines on the Procedure for the Election of the Presidency ('Presidency Election Guidelines')<sup>39</sup>, which entered into force on 19 January 2021. The Guidelines may be further enhanced by the Court's judges at any time.

337. The Presidency Election Guidelines combine elements of the codification of long-standing internal practice in Presidency elections, with more novel initiatives of the judges. On the issue of the conduct of judges in respect of Presidency elections, the Presidency Election Guidelines states, at section 6.3 that:

Judges will exercise their responsibilities in respect of the election of the Presidency with probity and integrity and in full compliance with the principles and standards of the Code of Judicial Ethics, including in respect of electoral campaigning. Judges shall vote independent of any external influence and shall not be motivated by personal interests while participating in such elections. Candidates shall refrain from any action that might, in the context of the election, be reasonably perceived as an inappropriate promise, gift, advantage, privilege or reward of a personal nature.

338. In respect of the issue of the extent of campaigning, the Presidency Election Guidelines, at section 6.2, expressly prohibit all forms of electoral campaigning, whether direct or indirect, except as permitted in the Guidelines themselves. The forms of campaigning expressly permitted are a short statement of suitability by a candidate, which focuses on relevant professional experience and personal attributes qualifying the candidate for the office sought and plans/visions for her or his term of office (section 1.2) and participation in a preparatory meeting of all judges eligible to vote in an election where judges may present their candidacies and answer questions (section 3.1). Pursuant to section 6.3 of the Presidency Election Guidelines, all discussions or communication amongst judges concerning the potential outcome of a Presidency election should occur among all judges, unless otherwise specified in the Presidency Guidelines.

339. These initiatives concerning the limited scope of electoral campaigning and the express regulation of electoral promises have been equally incorporated into the updated Code of Judicial Ethics, adopted by the judges on 19 January 2021 and entered into force on 27 January 2021. The judges also completed their work on this update at the Judges' Retreat in 2020, although, in doing so, they drew from their earlier work

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<sup>39</sup> <https://www.icc-cpi.int/Pages/item.aspx?name=Guidelines-on-the-Procedure-for-the-Election-of-the-Presidency>.

on this topic commencing at the Judges' Retreat in 2018. On the specific topic of Presidency elections, article 5(5) of the Code of Judicial Ethics, under the heading of "Integrity", provides as follows:

Judges' obligation to act with probity and integrity extends to all aspects of their office, including their participation in decision-making to elect their fellow judges to positions of administrative responsibility, including in the Presidency of the Court and as Presidents of Division. Judges shall vote independent of any external influence and shall not be motivated by personal interests while participating in such elections. Candidates shall refrain from any action that might, in the context of the election, be reasonably perceived as an inappropriate promise, gift, advantage, privilege or reward of a personal nature. Any permitted electoral campaigning shall be in accordance with the principles and standards of this Code and focussed on the candidate's professional experience and attributes which qualify her or him for the office sought and/or plans for her or his term of office. All limitations on electoral campaigning established in the Guidelines on the Procedure for the Election of the Presidency must be respected, any violation of which shall be a violation of this Code.

340. The text of the Presidency Election Guidelines and the updated Code of Judicial Ethics squarely address and even go beyond the recommendations set out as R171-R172 of the IER Report. As a result of these instruments, the procedures governing the Presidency election at the ICC are now the most transparent of all comparable international courts and tribunals.

341. It should be emphasised that the initiatives of the Presidency Election Guidelines and the related update to the Code of Judicial Ethics significantly predate the IER Report and were introduced with a view to enhancing judicial collegiality. They were not introduced in response to any of the unfounded allegations made in the IER Report concerning previous elections of the Presidency, which are discussed below.

### ***Unfounded allegations related to 2018 Presidency election***

342. Paragraph 405 of the IER Report, particularly when read in conjunction with paragraph 439, contains a suggestion of impropriety in the election of the Presidency in March 2018. It presents a 'finding' that judges of the Court who were candidates for election had offered inducements to their fellow judges.<sup>40</sup> The Experts state that they heard concerns 'by some that the call to full-time service in March 2018 might have been motivated by inappropriate or extraneous considerations such as the election of the new Presidency. It was further suggested that the decision was motivated not by the workload of Chambers, by election campaign promises or pledges made by some of the newly elected Judges'.<sup>41</sup>

343. Such allegation potentially impugns the conduct of all three members of the Presidency elected in 2018, all other candidates for election that year, as well as six then-newly elected judges, effectively implying that more than half of the judges of the Court may have engaged in a behaviour entirely at odds with the commitment of judges to act honourably and conscientiously. Such entirely unsubstantiated allegation must be publicly rejected. No such inducements were made and all judges called to full-time service in 2018 have been engaged in vital judicial work since the date of their calling to full-time service.<sup>42</sup>

344. It is further opportune to address a significant procedural concern. Fairness requires that allegations of inappropriate conduct – where necessity compels their marking – must be squarely and directly put to

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<sup>40</sup> IER report, para. 405.

<sup>41</sup> IER report, para. 439. *See also* IER report, para. 450.

<sup>42</sup> Judges Ibáñez and Judge Bossa have served as judges of the Appeals Division, active in all cases before the Appeals Chamber. Judge Akane and Judge Aitala have served as members of Pre-Trial Chamber II, which has been occupied by various active matters including the pre-trial proceedings in the case of *Yekatom and Ngalssona*, the request for compensation of Mr Bemba and the Afghanistan situation. It is currently additionally preparing pre-trial proceedings in the *Abd-Al-Rahman* case, the confirmation of charges of which is scheduled to occur in February 2021. Further, in November 2019, Judge Akane additionally assumed service as a member of Trial Chamber X hearing the *Al Hassan* case. Judge Alapini-Gansou has served as a member of Pre-Trial Chamber I, which has issued arrest warrants against Mr Al-Werfalli and Mr Al Hassan, conducted the pre-trial proceedings in the *Al Hassan* case and been active across a range of other situations, including Palestine. She is also a member of Trial Chamber IV and is the single judge of Pre-Trial Chamber A (Article 70 Rome Statute) in the *Gicheru* case. Judge Prost is a member of Trial Chambers III, IV and X, the latter of which is conducting the *Al Hassan* trial. She has also been assigned as a replacement judge to the Appeals Chamber in the Afghanistan appeal. Judge Prost was also specifically tasked to conduct a number of special projects crucial to the work of the judiciary such as research, consultations and preparation of the Chambers' Judgment Drafting Guidelines (2018) and the guidelines on delivery of judgments and decisions and best practices for trial management (2019).

those whose conducts may be perceived as impugned, so that they may have an opportunity to respond.<sup>43</sup> The candidates for the election in March 2018, together with the newly-elected judges could have been given an opportunity to present their side of the story before the publication of the IER report. Available documentary records could have been requested by the IER. No attempt whatsoever was made to obtain such information by the IER.<sup>44</sup>

### ***Service of the President in the Appeals Division***

***R173.*** *The Statute should be amended to remove the provision requiring the President to serve the entire term of office in the Appeals Division and only in that Division.*

345. The Court fully concurs with the assessment that all judges of the Court are equally capable of potentially possessing the required skill set to be President of the Court<sup>45</sup> and welcomes States Parties' further reflection on this issue. It is hoped that such reflection will involve close dialogue with the Court's Judiciary to make sure that all aspects of the matter are properly considered.

## **IX. WORKING METHODS**

### **A. Induction and Continuing Professional Development**

***R174.*** *The Presidency should design and organise a compulsory, intensive and comprehensive Induction Programme of sufficient duration for new Judges, soon after commencement of their judicial mandate, and in cooperation with other partners and stakeholders. The contents of the re-designed induction should be tailor-made (taking into account the background and profiles of the newly elected Judges), with sufficient consideration given to the subjects proposed by the Experts.*

***R175.*** *The Presidency should also design and organise annually a Continuing Professional Development Programme of a series of events in The Hague and elsewhere at which the Judges can engage with experts in international law and other professional activities to address matters of interest relevant to the development of their professional, scientific and cultural knowledge, skill and experience, including therein an event similar to the current Judges Annual Retreat.*

***R176.*** *The Presidency should consider, in the organisation of the re-designed Induction and Professional Development Programmes, obtaining the advice, cooperation and support of universities, institutes and other organisations with recognised experience in professional development in the subject areas intended for the programme.*

***R177.*** *The Court should consider developing further the Annual Judicial Seminar, including its content, duration and participants from State Parties' highest courts.*

346. The judges welcome the recommendations to improve both the judicial induction programme and the opportunities for continuing professional development for the judges.

347. In respect of the induction programme (R174), at their judicial retreat in 2020, the judges engaged in extensive discussions in order to design a detailed comprehensive programme for the induction of new judges. Such a programme would enable the newly-elected judges to become attuned to the structure,

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<sup>43</sup> For example, a so-called 'Salmon Letter' might have been expected to have been sent by the IER in such circumstances. Such letters entail a principle of fairness in the manner of official letters sent out by a public inquiry to people that will be subject to criticism when that inquiry's report is released. The aim of the letter is to give the person a chance to prepare for the resultant exposure and possible legal recourse which may need to be taken when allegations against them become public.

<sup>44</sup> The Presidency of the Court attaches Annex II to illustrate complications caused by the fact that institutional comments were not requested during the consultation or the drafting phases of the review exercise. The two memoranda contained in Annex II concern allegations contained in paragraphs 405 and 439 of the IER report which, when read together, suggest that the calling to full-time service of newly elected judges in March 2018 might have been motivated by inappropriate or extraneous considerations such as the election of the new Presidency. In the memoranda contained in Annex II, five of the then newly-elected judges directly affected by this allegation, and the previous President of the Court, respectively, strenuously reject such allegations. If the Court or the officials affected had been provided the opportunity to comment on the allegations, the concerns as to their inaccuracy could have been addressed in an appropriate and timely manner.

<sup>45</sup> IER report, paras. 409-413.

functions and judicial practice of the Court in a practically-oriented and participatory programme. The programme would involve all judges of the Court and be driven by judge-to-judge learning through structured dialogue between new and experienced ICC judges.

348. Despite such preparations, however, it was not possible to implement the full revised induction programme in 2021, due to logistical challenges and health considerations related to the COVID-19 pandemic. Instead, the Presidency, together with the judicial divisions, implemented a “scaled-back” version of the programme, focussing on key essential elements. This shortened programme was arranged in a hybrid format that allowed for in-person participation with necessary physical distancing and other precautions, as well as remote participation for those judges who could not join in person. Although condensed, the revised judicial induction programme for 2021 covered a wide range of key elements, including: judicial collegiality and ethics, Court values, current challenges, and detailed discussions of key legal issues at the pre-trial, trial and appeals stages of proceedings. The Presidency is considering organizing a follow-up induction program for all new judges in the foreseeable future. Timing and logistical details are to be determined in light of the evolving situation of the COVID-19 pandemic, as well as the calling of new judges to full-time service.

349. In respect of improved continuing professional development for the judges (R175), the judges of the Court remain open to exploring such opportunities, including the suggestions to work with other organisations or other institutions in this regard (R176). The continuing challenge of COVID-19 may make the full exploration of such possibilities difficult at present. While there is agreement that a properly implemented and thorough continuing professional development programme for judges will enhance the Court and should be pursued, it should be noted that such a programme will require a commitment of time from the judges and appropriate budgetary provision. The development of any continuing professional development initiatives will have to be carefully designed to ensure a maximum of benefit without significantly impacting on judicial proceedings. The Human Resources Section of the Registry will be consulted, as appropriate, in the context of future efforts regarding continuing professional development.

350. In respect of the Annual Judicial Seminar (R177), itself an initiative of the judiciary, there is full openness to continuing this initiative, once the COVID-19 situation improves to ensure that it can be conducted effectively and safely. The event has already undergone some conceptual development, shifting from topics of a general nature in the first years toward more focused discussions in the third edition of the seminar in 2020.

## **B. Full-Time Service of New Judges**

*R178. To afford greater transparency on the calling to serve on a full-time basis by newly-elected Judges, the Presidency should consider issuing a formal public statement intimating the decision and the grounds for making it.*

*R179. The Presidency should, with the assistance of the Registrar, give priority to and ensure effective succession planning of Judges.*

*R180. The Registrar should ensure the timely provision of full details on the conditions and terms of service of Judges, including their repatriation, pension, medical, and other entitlements and their obligations to States Parties for onward transmission to candidates for nomination.*

351. In respect of the recommendation that there be greater transparency concerning the reasons underlying decisions on calling judges to full-time service (R178), the newly-elected Presidency in March 2021 chose to include reasoning in this regard in their public decision on the assignment of judges to judicial divisions.<sup>46</sup> Consistently with the IER Report’s recommendations, the newly elected Presidency has justified its decision to call two judges to serve on a full-time basis, on purely workload grounds, noting that neither of the Appeals Chamber or Pre-Trial Chamber I could remain unable to operate and thus the

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<sup>46</sup> Presidency, Decision assigning judges to divisions and recomposing Chambers, 16 March 2021, *see e.g.* ICC-01/04-763.

calling to full-time service of two judges was needed.<sup>47</sup> Further, one of the new judges has been placed in several chambers simultaneously,<sup>48</sup> as a matter of judicial economy.<sup>49</sup>

352. In respect of the IER Report's discussion of succession planning (R179),<sup>50</sup> it is noted that the Presidency has long paid attention to such planning, with this matter being an integral part of the Presidency's responsibility for the proper administration of the Court, in accordance with article 38(3)(a), and the current judges of the Court provided a detailed report to States Parties as to the challenges in this regard in 2020.<sup>51</sup> That report highlights that the judges of the Court have taken a number of initiatives in order to facilitate such succession planning, noting specifically in this regard the introduction of time limits for the rendering of decisions and judgments, the narrow interpretation given to article 36(10) of the Statute and the use of one judge finalizing a trial on a non-full-time basis at considerable cost saving to the Court.<sup>52</sup> That report also highlights that the Presidency assigns judges to trial chambers with particular consideration of the desirability of avoiding extensions of mandate,<sup>53</sup> but highlights the statutory limitations which make the risk of some such extensions unavoidable.<sup>54</sup>

353. In respect of the need for the timely provision of full details on the conditions and terms of service of judges to judicial candidates (R180), there is full agreement regarding the necessity of the provisions of such vital information. Noting that the provision of such information forms part of the election process in which the Court itself is not directly involved, it would be appropriate that such information be furnished through States Parties, with assistance from the Court as necessary. In 2020, in line with recommendation R180, the Presidency already worked closely with the Registrar to ensure the availability of related information to the SASP for circulation to the judicial candidates, notably in the context of changes to judicial remuneration.

### C. Code of Judicial Ethics

**R181.** *The Presidency should undertake, as a matter of priority, a review directed to update and strengthen the Code of Judicial Ethics.*

**R182.** *The Presidency should include in the Code an express prohibition of inappropriate campaigning and pledges, promises or indications in the election of the Presidency and for any other judicial leadership position.*

**R183.** *The Presidency should, in reviewing the Code, consider comparable Codes of other international criminal tribunals and courts, as well as regional and national courts, and take into account lessons learnt and other relevant developments.*

**R184.** *The Presidency should consider including in the Code a provision requiring its review and update at least every five years.*

354. In January 2021, following on from detailed work on this topic at the Judges' Retreat in 2020,<sup>55</sup> the judges of the Court updated the Code of Judicial Ethics.<sup>56</sup> In so doing, the judges of the Court took into account each of the recommendations included in R181-R184. In accordance with R183, the exercise was undertaken with an extensive review of comparable Codes to ensure that the ICC's updated Code of Judicial Ethics would constitute an example of best practice, being fully up to date with recent developments.

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<sup>47</sup> *Ibid.*, p. 9.

<sup>48</sup> Judge María del Socorro Flores Liera has been placed in PTC I, TC II, TC IV and TC VIII.

<sup>49</sup> It is not possible for a judge in the Appeals Division to serve in multiple chambers, *see* article 39(4) of the Statute.

<sup>50</sup> IER report, para. 451.

<sup>51</sup> 'Report of the judges of the Court on Managing Transitions in the Judiciary', 30 January 2020, accessible at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/SGG-Report-Judiciary-Transitions-ENG.PDF](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/SGG-Report-Judiciary-Transitions-ENG.PDF).

<sup>52</sup> *Ibid.*, paras 3-5.

<sup>53</sup> *Ibid.*, para. 7.

<sup>54</sup> *Ibid.*, paras. 7-14.

<sup>55</sup> This itself built on work already commenced by the judges at the Judges' Retreat in 2018.

<sup>56</sup> <https://www.icc-cpi.int/Publications/Code-of-Judicial-Ethics.pdf>.

355. In respect of the specific aspects mentioned in the IER Report, the updated Code of Judicial Ethics now expressly safeguards collegiality,<sup>57</sup> includes an express prohibition of all forms of discrimination and harassment,<sup>58</sup> requires judges to show judicial restraint in commenting on ICC decisions or judgments,<sup>59</sup> applies to former judges where relevant<sup>60</sup> and includes limitations on electoral campaigning,<sup>61</sup> as further established in the Guidelines on the Procedure for the Election of the Presidency, as discussed further at paragraphs 335-341 above. In accordance with the spirit of R184, the updated Code additionally provides for regular review.<sup>62</sup> The appropriate relationship between judges and States Parties/civil society<sup>63</sup> is also addressed.<sup>64</sup>

356. In addition to covering every suggestion in the IER Report as to how to strengthen the Code of Judicial Ethics, in the updated Code, the judges of the Court took a number of further initiatives. The judges strengthened language concerning judicial independence,<sup>65</sup> based on applicable international standard, incorporated a duty of loyalty towards the Court<sup>66</sup> and expressly indicated that the principles embodied in the Code apply to judges at all times.<sup>67</sup>

357. By way of the above developments, the Court considers that all recommendations contained in the IER Report on this topic (R181-R184) have now been fully implemented.

## D. Judicial Collegiality

***R185.** The Presidency and the Presidents of the Divisions and Chambers should as a matter of priority actively and continuously promote a more cohesive judicial culture of collegiality in the discharge of the judicial functions of Judges and Chambers.*

***R186.** The Presidency should consider including or reintroducing collegiality as a subject for facilitated discussion among Judges at the Induction Programme for new Judges, the Judges' Annual Retreat or other judicial professional development events.*

***R187.** The Presidency should consider the incorporation of a reference to collegiality in the Code of Judicial Ethics.*

***R188.** The Presidency should, in consultation with the Judges, consider more specific measures and the issuance of guidelines designed to foster collegiality, including improvements in the quality of the working relationships, through (i) improved methods and means of communications, (ii) increased intra-Chamber and intra-Division dialogue and discussions, (iii) augmented intra-Division consultations, (iv) promoting the awareness that lack of collegiality leads to dysfunctionality of Chambers, affects the final result of their work and as a consequence also the credibility of the Court, and (v) reinforcement of mutual respect and trust among Judges, and between Judges and staff.*

358. There is full agreement within the Judiciary of the Court the cultivation of a cohesive culture of judicial collegiality is of central importance (R185). It is noted, in this regard, that the current Presidency sought to open the dialogue of the judges on this issue at the Judges' Retreat in 2018 and has consistently emphasised the importance of all aspects of collegiality throughout its mandate. It is hoped that this will contribute to a culture shift and that judicial collegiality will continue to be actively and continuously promoted by future Presidencies and judges. Noting R186, the Presidency of the Court included judicial collegiality as a topic for discussion at the judicial induction in 2021.<sup>68</sup> Further, in full concordance with

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<sup>57</sup> IER report, para. 455, *see* Code of Judicial Ethics, article 5(3).

<sup>58</sup> IER report, para. 456, *see* Code of Judicial Ethics, article 5(2).

<sup>59</sup> IER report, para. 456, *see* Code of Judicial Ethics, article 10(2).

<sup>60</sup> IER report, para. 457, *see* Code of Judicial Ethics, article 12(1).

<sup>61</sup> IER report, R182, *see* Code of Judicial Ethics, article 5(5).

<sup>62</sup> Code of Judicial Ethics, article 1(2).

<sup>63</sup> IER report, para. 460.

<sup>64</sup> Code of Judicial Ethics, article 5(1).

<sup>65</sup> Code of Judicial Ethics, article 3(2).

<sup>66</sup> Code of Judicial Ethics, article 8.

<sup>67</sup> Code of Judicial Ethics, article 12(1).

<sup>68</sup> *See* further discussion of the induction programme at paras. 346-348 above.

R187, a reference to collegiality has been incorporated into the Code of Judicial Ethics, as well as into the Guidelines on the Procedure for the Election of the Presidency.<sup>69</sup> Further, the experience of the judges in judicial retreats and in the development of texts governing the work of chambers on an inter-Divisional basis, such as the Chambers Practice Manual and the Chambers Style Guide, demonstrate the recognition of the judges of the Court of the value of increased dialogue and discussion. The judges of the Court, under the guidance of the newly-elected Presidency, remain open to exploring mechanisms to further facilitate improved judicial collegiality, with the recommendations set out in R188 providing potentially useful guidance in this regard.

## **X. EFFICIENCY OF THE JUDICIAL PROCESS AND FAIR TRIAL RIGHTS**

### **A. Pre-Trial Stage**

359. The pre-trial stage is an essential part of the Court's procedural law. The confirmation procedure was introduced into the Rome Statute to provide additional protection to the suspect and to filter out cases and charges that are too weak to proceed to trial. This filtering function has proved to be effective as several cases brought by the OTP, or charges within cases, were found to be insufficiently supported and therefore not confirmed. At the same time, it is important to ensure that the confirmation procedure, which does not exist in other international criminal courts or tribunals, is carried out efficiently so as to avoid undue delay. Indeed, the judges of the Court, and of the Pre-Trial Division in particular, continuously strive to render the pre-trial stage more efficient, based on the experience gathered. In fact, the Chambers Practice Manual, which has become an important tool of the Judiciary in reviewing its practices, was first developed in the Pre-Trial Division. Accordingly, the Judiciary welcomes the detailed recommendations contained in the IER Final Report that concern specifically the pre-trial stage of the proceedings (R189-R198). The judges of the Pre-Trial Division have already commenced an in-depth analysis of these recommendations. Some initial reflections on the recommendations are set out below. Some recommendations are discussed together, to avoid repetition and overlap.

*R189. The Judges should include in the Chambers Practice Manual a provision that Chambers should routinely, at the first appearance of an accused, request the Prosecution to specify the state of the investigation in order to assist the Chamber in the exercise of its powers under Rule 121. The representative of the Prosecutor attending hearings should be in possession of complete, accurate and contemporary information on the situation to enable them to provide a full report to the Chamber.*

360. A key factor for an efficient confirmation procedure is the preparedness of the Office of the Prosecutor. In fact, this issue goes well beyond the initial appearance, in particular because the Office of the Prosecutor is allowed to continue its investigation during the pre-trial stage of the proceedings. Depending on the circumstances, there may be new opportunities for the Office of the Prosecutor to gather evidence to further illuminate the case. Nevertheless, there is a potential tension with the need to carry out proceedings – including on the confirmation of charges – expeditiously, and the Pre-Trial Chamber in charge of the case must be apprised of the status of the investigation. Therefore, the recommendation will be considered further in detail, and will be taken into account in due course, when the Chambers Practice Manual is next updated.

361. In effect, requesting the Office of the Prosecutor to provide information about the status of the investigation at the initial appearance is likely to be a first step, but should be followed up by additional measures as the development of the Prosecutor's investigation may change over time. To address this issue, Pre-Trial Chamber II has, for instance, ordered the Prosecutor in relation to the *Abd Al Rahman* case to provide the Chamber every other week with confidential, ex parte reports on matters relevant to the preparation of the confirmation hearing, including on investigative steps. This ensures that the Pre-Trial

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<sup>69</sup> <https://www.icc-cpi.int/Pages/item.aspx?name=Guidelines-on-the-Procedure-for-the-Election-of-the-Presidency>.

Chamber is always in possession of full information not only at the initial appearance, but also as the case progresses.

**R190.** *The system of Pre-Trial disclosure of evidence and all related matters, including redaction and other relevant protocols, should be the subject of urgent review by a Review Team which should be chaired by a Judge and should include a senior prosecutor, a senior member of Chambers staff, the Head of OPCD and the President or nominee of the ICCBA with a view to making recommendations to render the system more predictable and expeditious.*

362. Disclosure and related matters are indeed a key factor for efficient proceedings, both at the pre-trial and trial levels. The recommendation to review these matters is therefore welcomed. Such a review should include an in-depth discussion of practices of the Office of the Prosecutor, including those long before the actual disclosure of evidence commences, as they have a direct impact of the subsequent steps.

363. It should also be noted that much of the disclosure process is strictly regulated in the Rome Statute and Rules of Procedure and Evidence and changes to existing practices may therefore require amendments to the relevant instruments. Given the complexity of the matters at hand, while it appears appropriate to engage in a review of disclosure practices, it must be noted that this would be an ambitious project the realisation of which will require some time. In addition, further thought should be given to the exact composition of an eventual Review Team.

**R191.** *Throughout the conduct of confirmation proceedings, Judges should have regard to the purpose of the confirmation process as a filter for inadequately supported charges and to ensure the fair trial rights of the accused, including by conducting efficient and expeditious proceedings leading to a clear and unambiguous confirmation of charges decision.*

364. The Judiciary fully agrees with the stated objectives of the confirmation procedure. This is indeed reflected in all confirmation decisions issued so far, many of which have expressly highlighted these points and emphasised that the confirmation process must not turn into a mini-trial. It must be underlined that the objectives of the confirmation process must be appreciated not only by the judges, but also by the parties and participants to the proceedings, in particular the Office of the Prosecutor. As appropriate, the objectives of this recommendation will be reflected in future efforts on further harmonisation of Chambers' working methods and the induction of new judges.

**R192.** *Judges should adhere to the provisions set out in the Chambers Practice Manual and other agreed protocols including by applying the timelines and deadlines therein throughout the conduct of all proceedings, unless there are compelling reasons for being unable to do so.*

365. The Chambers Practice Manual was adopted by the judges of the Court with view to achieving greater uniformity in the proceedings and to learn from past experience. At the same time, the choice of including provisions in the Chambers Practice Manual, as opposed to in the (binding) Regulations of the Court, reflects the need for Chambers to retain some flexibility in their implementation, to meet the needs of specific cases. To the extent that the Chambers Practice Manual has not been followed, this has always been on account of the circumstances of the case. As such, the recommendation is already followed in practice. As appropriate, the objectives of this recommendation will be reflected in future efforts on further harmonisation of Chambers' working methods and the induction of new judges.

**R193.** *The presentation of evidence for the purposes of confirmation of charges, the parties' submissions thereon, the hearing itself and the form, content and structure of the decision confirming the charges should follow the guidance in the Chambers Practice Manual.*

366. As explained above in relation to R192, the guidance contained in the Chambers Practice Manual is followed whenever possible, including in respect of the confirmation procedure. However, the specific circumstances of a case may make it necessary to diverge from certain of its elements from time to time. That said, the Judiciary has taken note of the recommendation and it will be given due attention going forward. It should be noted that aspects of the recommendation are currently being discussed in the context of a proposal to amend the Regulations of the Court.

**R194.** *The Chambers Practice Manual should be revised by a small team of Judges invited by the Presidency to undertake that task, with a view to rendering its language more prescriptive and identifying provisions which could suitably be incorporated into binding Regulations of the Court. The Manual should be amended to provide that its remaining contents should be adhered to unless the Chamber considers that that it would be contrary to the objectives of efficiency, expeditiousness or fair trial.*

**R195.** *Alternatively, following the review of the language of the Chambers Practice Manual, its provisions could be divided into two categories: those that cannot be derogated from except under exceptional circumstances which should be explained in the Chamber's decision; and those which should be followed unless the Chamber considers that it would be contrary to the objectives of efficiency, expeditiousness or fair trial. The Regulations of the Court should then be amended to set out those categories and identify those which fall into Category 1.*

367. The judges of the Court currently have two tools at their disposal to reflect experience and best practices: the Regulations of the Court and the Chambers Practice Manual. The former are foreseen in the Rome Statute and are binding on the parties and participants as well as the Chambers of the Court. The Chambers Practice Manual, in contrast, provides guidance to the parties and participants and to the Chambers of the Court. It is a document that is not specifically foreseen in the Rome Statute and is not part of the Court's applicable law in terms of article 21 of the Statute.

368. The judges have previously considered whether certain provisions should be included in the Regulations of the Court and not the Chambers Practice Manual. This is indeed the appropriate way forward. Having a small team of judges identify provisions in the Chambers Practice Manual that could be included in the Regulations of the Court is an interesting proposal which would sit well with the Judiciary's commitment to regularly review and improve the Chambers Practice Manual.

**R196.** *Considering that judicial case management is a complex process, it is advisable, as stated in the section 'improving the nomination process of Judges', that for the position of the Presiding Judges of the Pre-Trial and Trial Chambers, Judges with extensive experience in managing and in presiding complex criminal cases be assigned where possible.*

369. This recommendation is well noted, and it is already being followed in practice, though the decision on who should preside over a case cannot be reduced to a single factor. In accordance with the Regulations of the Court, each Chamber decides on the presiding judge.

**R197.** *The Pre-Trial Division Judges should have regular meetings to discuss matters that are the source of inconsistent practices among differently composed Chambers with a view to harmonising procedures as far as possible. The Judges of the Pre-Trial Division are encouraged to continue to meet as necessary with the OTP and the Head of the new Defence Office (currently OPCD) to discuss matters of mutual concern including matters relating to the interface between their respective roles at the start of the confirmation process, with a view to identifying ways of improving and maintaining the efficiency of the pre-trial stage.*

**R198.** *An occasional symposium among Judges of the Pre-Trial Division, members of the OTP and defence counsel in active and/or previous cases before the Court would provide a suitable forum for discussion of topical matters relating to the work of the Pre-Trial Division.*

370. These are welcome recommendations, which will be further discussed among the judges in due course. Regular communication between the various Pre-Trial Chambers is already taking place, as are meetings with the Office of the Prosecutor, and additional fora for exchange of views can only be beneficial to the Court. Consideration may be given to including other judicial divisions – in particular the Trial Division – in such dialogue in order to take a holistic view of the criminal process, as well as involving the OPCV and/or the International Criminal Court Bar Association, to ensure representation of victims' representatives as well.

371. It should be noted that, contrary to what the IER Final Report asserts, there are currently few, if any, inconsistent practices between the Pre-Trial Chambers.

## B. Trial Stage

372. The recommendations concerning the trial stage concern various issues, ranging from matters pertaining to the legal framework of the Court to the use of electronic tools. Not all of them fall plainly in the core responsibility of the Judiciary.

***R199.** When a confirmation decision is issued, it should be transmitted immediately to the Presidency with the record of the proceedings, and the Presidency should forthwith transmit both to the Trial Chamber to begin trial preparation.*

***R200.** The Trial Chamber should commence trial preparation and issue the scheduling order for the first status conference as soon as possible. There is no reason in principle why preparation cannot begin while the confirmation decision is the subject of an application for leave to appeal or an appeal. Any delay in or postponement of trial preparation should occur only if there is good cause shown therefor.*

373. Moving a confirmed case from the pre-trial to the trial stage as quickly as possible is indeed desirable. However, within the existing legal framework, this is not always possible. It is the established practice of the Pre-Trial Chambers to transmit a case to the Presidency following a confirmation of charges only once all pending matters have been resolved, including eventual requests for leave to appeal. This is because the Rules of Procedure and Evidence (in Rule 155) provide that it is the Chamber that issued the decision that is sought to be appealed that has to decide on the leave request. Once the case is transmitted to the Trial Chamber, the Pre-Trial Chamber is no longer seized of the case and it is therefore important that all pending requests are decided before the transmission of the case. Should this be considered undesirable, it would probably be necessary to amend the legal framework.

374. Once a confirmed case has reached the trial stage, it is current practice that the Trial Chamber seized of the case deal with trial preparation right away, including through the scheduling of status conferences (see in this regard Chambers Practice Manual, paras 71 et seq.). The effective implementation of these guidelines has already led to significant improvements in the expeditiousness to the trial preparation.

***R201.** Recognising that a motion for acquittal on the ground that there is no case to answer is now an established feature of the Court's procedure, the Judges should draft Regulations of the Court to govern the procedure, including specifying the effect of a successful motion, to ensure a consistent approach by Chambers and providing for an appeal in appropriate circumstances.*

375. The Appeals Chamber recently issued a judgment in the *Gbagbo/Blé Goudé* case, which addressed several aspects of the no case to answer procedure. Whether there is need for amendment to the legal instruments of the Court will be given due consideration by all judges on the basis of a careful analysis of the aforementioned judgment, including the separate and dissenting opinions thereto, as well as the other relevant jurisprudence of the Court.

***R202.** The Judges should consider whether 'desirability' is the appropriate standard for representations by an *amicus curiae* and whether Chambers should be required to give reasons for authorising an *amicus curiae* to make submissions and, where several apply, for selecting those to whom authority is given.*

376. The 'desirability'-standard is the standard set out in rule 103(1) of the Rules of Procedure and Evidence. Any changes to the standard would therefore be for the ASP. In any event, it would be prudent to leave Chambers with flexibility as to when to solicit the views of *amici curiae*. There may be situations that lend themselves to submissions from *amici* that cannot be anticipated. Typically, decisions inviting submissions from *amici curiae* set out the reasons why they are invited, as well as why certain *amici* are selected if there are several applications and not all are granted. There does not appear to be much need for reform in this regard, but the issue may be subject of further discussions among the judges as part of regular exchanges on developed practices.

***R203.** It is recommended that a rule should be drafted to provide for the appointment of an *amicus curiae* or independent counsel to investigate and/or prosecute where a contravention of Article 70 is alleged, in circumstances where there is a potential conflict of interest for the Prosecution.*

377. This recommendation, which would need to be implemented by the ASP, raises significant questions and potential problems. Notably, it would need to be considered if vesting an *amicus curiae* with investigative and prosecutorial powers is compatible with the statutory framework. Thus, potentially not only an amendment of the Rules of Procedure and Evidence, but also of the Statute might be required. More generally, the integrity of the Office of the Prosecutor should not be brought into question lightly, and care would need to be taken to ensure that the envisaged procedure is not open to abuse.

**R204.** *It is recommended that Chambers make the widest practicable use of the means of presenting evidence provided for by Article 69(2) and Rules 67 and 68 allowing for use of prior recorded testimony and for the presentation of evidence by electronic or other special means.*

378. The Chambers of the Court already make use of the possibility to introduce prior recorded testimony into the proceedings and to allow presentation of evidence through electronic and other means. It is both the obligation and the prerogative of each Chamber in each case to ensure that the evidence is presented in the most appropriate way, ensuring that proceedings are conducted fairly, expeditiously and efficiently. Further regulation in this regard does not appear to be required or indeed desirable. That said, the Judiciary has taken good note of the recommendation, which will be given due attention going forward.

**R205.** *The Court should remain mindful of the authority it has under Article 3 to sit elsewhere than in The Hague whenever it considers it desirable and should make budgetary provision for that to occur when any Chamber decides that sitting elsewhere would be in the interests of justice.*

379. Having hearings *in situ* or conducting site visits may be beneficial. That said, this will depend on the circumstances of each case. Further, there are significant costs and logistical challenges that must not be underestimated.

**R206.** *The ASP and/or the Judges should make provision, by whichever legislative means they consider appropriate, for proceedings to continue in the absence of one Judge for illness or other urgent personal reasons for such period as they consider appropriate on the basis that the remaining Judges are satisfied that to do so will have no adverse impact on the fairness of the trial.*

380. This recommendation touches upon an important matter that is currently not expressly regulated.<sup>70</sup> Further, it is a lacuna which directly impacts ongoing trial activity at the Court and can result in significant delay and cost. It appears that this matter should indeed be included in the Court's legal instruments. Arguably, this is a matter that goes beyond the 'routine functioning' of the Court (article 52(1) of the Statute) and therefore cannot be included in the Regulations of the Court. A draft rule on the subject was presented in 2014 by the ASP's Study Group on Governance, to be included in the Rules of Procedure and Evidence. However, the draft rule has not been adopted by the ASP.

**R207.** *Budgetary provision should be made for the completion and on-going update and development of the Case Law Database.*

381. The Case Law Database (CLD) is a project developed in, and driven by, the Judiciary. The CLD is a key tool that greatly facilitates the daily work of Chambers as well as the parties and participants to the Court's proceedings, while also enabling easy public access to the Court's jurisprudence. The CLD is a priority for the Judiciary also in the coming years, and the Court agrees that sufficient resources should be available for its ongoing update and development.

**R208.** *The Court should also be vigilant to take advantage of any currently available technological facilities that can be deployed, and that may be readily adapted, to further enhance the efficiency of the Court.*

**R209.** *Following delivery of the first modules of the JWP in 2021, the Registry should develop a plan for regular review and evaluation of the current capabilities of the Court digital systems in light of developments in digital technology with a view to taking timely and appropriate steps to update digital*

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<sup>70</sup> See also discussion on related issues in paras. 385-386 regarding recommendations R214 and R215.

*support to ensure the efficiency and expedition of proceedings. In order to ensure successful implementation of such plan, a Task Force, comprising staff from both Chambers and the Registry's IT Department should be set up. That Task Force should also be entrusted with the responsibility for identifying working methods and technological tools that could potentially be introduced for use in Chambers and proceedings. The OTP and Defence Office should be consulted as appropriate. The Task Force should issue an annual report and share this with the Judges and all Chambers staff.*

**R210.** *Chambers and the Registry should develop a consistent practice of recording oral decisions made in judicial proceedings in a digitally searchable database, numbering them and notifying the parties of the details thereof.*

**R211.** *The JWP Project Board should facilitate the widest possible access to the JWP for external legal teams.*

382. The Judiciary welcomes and strongly supports efforts of the Registry and the Court as a whole to enhance the Court's electronic infrastructure. Digital technology can strengthen the Court's efficiency. For the purposes of the JWP as well as other projects concerning IT projects, there is already strong participation by representatives of the Judiciary in the relevant working groups, committees and project boards. Going forward, as the Court continues to develop its electronic infrastructure, improvements to facilitate the presentation of evidence during proceedings will be prioritized. In the context of developing and implementing new tools, strong attention will be given to inter-Organ coordination so as to avoid unnecessary duplication of efforts and processes. Recommendation R211 will be considered by the JWP Project Board, which includes the participation of external legal teams.

**R212.** *The VPRS should intimate to all potential clients their willingness to provide VAMS services more directly through the provision of relevant user accesses.*

383. In assessing the modalities for implementation of this recommendation, and noting that VAMS contains sensitive and confidential information, careful consideration should be first given to issues related to information security and establishing the necessary security measures to facilitate relevant access. A policy could be considered to this end.

## **C. Interlocutory Appeals**

**R213.** *The Judges should consider introducing into the Chambers Practice Manual guidelines regarding decisions on substantive and procedural issues which may be subject to interlocutory appeal, as well as clarification of the cases in which the proceedings should be stayed for the time necessary to adjudicate the interlocutory appeals.*

384. Giving guidance in the Chambers Practice Manual as to which decisions should be liable to interlocutory appeal pursuant to article 82(1)(d) of the Statute and in which cases proceedings should be stayed pending the outcome of the appeal is worth further consideration. Nevertheless, the complexity of such an endeavour should not be underestimated, given the diversity of the Court's jurisprudence in this area thus far. Furthermore, new and unforeseen issues may in the future arise in pre-trial and trial proceedings in relation for which the relevant (Pre-)Trial Chamber may justifiably consider that an early determination by the Appeals Chamber would be desirable. Thus, seeking to limit the type of decisions that may be the subject of an interlocutory appeal could be problematic. It must also be noted that the decision on requests for leave to appeal are of judicial nature and that judges must make their decisions independently, in keeping with their oath of office. Proper discussion and analysis of this recommendation at the level of the plenary of judges will be required.

## **D. Management of Transitions in the Judiciary**

**R214.** *The Rome Statute should be amended to provide for the assignment of a substitute Judge to enable a trial to continue following the substitute Judge certifying that they have familiarised themselves with the record of the proceedings.*

*R215. When the workload of the Court develops to the point where it no longer allows for a substitute Judge to be assigned from the 18 regularly elected, the ASP should consider applying Article 36(2) and electing one or more Judges for such purpose.*

385. These recommendations and the related findings are fully in line with the observations contained in the "Report of the judges of the Court on Managing Transitions in the Judiciary",<sup>71</sup> submitted by the Court's judges to the Study Group on Governance on 30 January 2020. As discussed in the Report of the judges, it appears likely that amendments to both the Statute and Rules would be the ideal means to address the various limitations which currently create difficulties in the management of transitions in the judiciary, considering that the use of alternate judges - currently provided for in the Rome Statute - is impractical and ineffective for this purpose for a range of reasons.

386. The matter is urgent, since under the current system, an entire trial – even after a year or more of courtroom hearings – may have to start from the beginning if a judge of the Chamber becomes unable to continue sitting on the case due to death or serious illness. Accordingly, the Court urges the Assembly to address this group of recommendations as a matter of priority.

## **XI. DEVELOPMENT OF PROCESSES AND PROCEDURES TO PROMOTE COHERENT AND ACCESSIBLE JURISPRUDENCE AND DECISION-MAKING**

387. No judicial system can exist without accessibility, certainty and predictability of its jurisprudence. It is thus to be welcomed that the IER Final Report places emphasis on the need for coherence in the jurisprudence. All Chambers of the Court already carefully consider previous jurisprudence before reaching their own decisions.

388. At the same time, the Statute does not establish a system of binding precedent, as is known in some domestic jurisdictions, but stipulates that the 'Court *may* apply principles and rules of law as interpreted in its previous decisions' (emphasis added). Thus, Chambers are free to depart from existing jurisprudence if they consider it appropriate.

*R216. Pre-Trial and Trial Chambers should accord respect to the decisions of other Chambers.*

*R217. Recognising the importance of legal certainty and consistency, the Court should depart from established practice or jurisprudence only where that is justified on grounds precisely articulated in the decision/judgment.*

389. As noted above, the Chambers of the Court already have due regard to existing jurisprudence and generally will depart from it only if there are valid reasons to do so. These reasons are generally explained in the reasoning. The objective of upholding and strengthening these principles in the work of the Judiciary will be accorded due attention in the context of future discussions on working methods.

*R218. Before departing from practice or jurisprudence approved by the Appeals Chamber, the Chamber should be required, by procedures stated in a Regulation of the Court, to identify the point precisely in a written notice to parties requesting written submissions thereon. Argument should be heard before deciding the point either as a preliminary issue or in the context of the appeal. In the event that the Chamber is faced with inconsistent decisions of the Appeals Chamber on a point, the same process should apply. In the long term, consideration should be given by the ASP to amending the Rome Statute by increasing the Appeals Chamber to seven Judges in order to address important issues including such as conflicts in previous decisions.*

390. These are interesting recommendations that merit further discussion and thought. A potential concern with the first proposal could be that judges would be required to reveal their inclination to change

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<sup>71</sup> Available at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/SGG-Report-Judiciary-Transitions-ENG.PDF](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/SGG-Report-Judiciary-Transitions-ENG.PDF).

existing jurisprudence in advance, thus potentially conflicting with the principle of secrecy of deliberations. Furthermore, the judges already have the possibility to seek submissions from the parties and participants on questions of law if they consider it appropriate – this may make the need for further regulation superfluous. As to the second proposal, while the idea of expanding the Appeals Chamber to comprise seven judges – even if only in a limited number of situations – is interesting, its implementation would present considerable practical challenges, not least because the additional two judges would have to be ones that have not sat on the case in question in the pre-trial or trial phase and they would be precluded from doing so in the future, besides having cost implications.

**R219.** *The Presidency should encourage the development within Chambers of a genuine deliberation practice.*

391. Deliberations are at the heart of the judicial process and each Chamber is taking them seriously. Each Chamber has to identify the working methods that it considers most suitable, including in respect of the deliberative process. Intervention by the Presidency could be seen as conflicting with judicial independence; instead, the regular exchanges among the judges on collegiality and working methods that already take place seem like a more appropriate forum for discussions on further enhancing the practice of deliberations at the Court.

**R220.** *Deliberations and Judgment drafting should begin upon the constitution of the relevant Trial/Appeals Chamber and be a continuous process grounded on the instructions and directions generated through on-going deliberations by the Judges, and should follow the Judgment Structure and Writing Guidelines as set out in the Chambers Practice Manual.*

392. One of the objectives of the Judiciary in adopting the internal Guidelines on Judgment Drafting and Guidelines on Judgment Structure in 2019 was to facilitate the efficiency of judgment drafting and deliberations by ensuring that these processes commence early,, while respecting judicial independence in this regard. These internal Guidelines are now being actively implemented across various Chambers of the Court. Nevertheless, it must be emphasised that the early commencement of deliberations and judgment drafting should not interfere with the presumption of innocence. The final decisions will only be taken once the proceedings have been closed.

**R221.** *Trial Chambers are encouraged to show respect for and pay particular regard to the obligation in Article 74(5) to arrive at a unanimous decision, and make increased efforts to do so, including where appropriate endeavouring to arrive at a compromise on divisive issues, or exercising judicious restraint.*

393. This is a welcome recommendation, which reflects the value of cohesive judicial decision-making and warrants further close reflection, even if the use of majority and minority views, as permitted by article 74(5), remains possible, *inter alia* given the novelty of many of the issues arising in the proceedings before the Court, the different legal cultures from which the judges hail, and the numerous ambiguities in the Statute and other legal instruments.

**R222.** *The Regulations of the Court should be amended to require all trial decisions and appeal judgments on conviction or acquittal and all related dissenting and concurring, opinions to be issued in writing at the same time as the decision or judgment.*

394. This recommendation should be given further careful thought. The matter will be brought up at the level of the plenary meeting of judges at an opportune time.

**R223.** *Chambers should be required to circulate the final draft of the proposed judgment among all the Judges of the Chamber, sufficiently in advance of the judgment being issued, to enable any Judge, who intends to issue an opinion separate from the judgment of the Chamber, to have time to finalise and circulate that judgment to other members of the Chamber before the judgment is finalised.*

395. This is indeed a matter of good practice and generally already occurring – while balanced with the objective of issuing the judgment in a timely manner. Being an internal matter relating to the management within a Chamber, this is arguably not a matter to be regulated in the Court’s legal instruments, but rather something that is most appropriately discussed within the judges’ regular dialogue on working methods.

*R224. Guidelines as to the length and content of all forms of separate opinions should be introduced into the Chambers Practice Manual.*

396. While such guidelines exist in some jurisdictions, this would appear to be a complex project to accomplish, given that it touches directly upon judicial independence. This, however, does not preclude further internal discussions within the Judiciary on the optimal ways of using separate opinions. To this end, the Court has in the past taken the initiative to engage in dialogue with national, regional and other international jurisdictions regarding experiences and developed practices in the use of separate opinions: this was one of the main topics of the Court’s Third Judicial Seminar organized by the Judiciary in January 2019.<sup>72</sup>

*R225. The Judges should keep the Judgment Structure and Drafting Guidelines under constant review and update them regularly in light of their ongoing experience.*

397. This is indeed the Judiciary’s intention and is already taking place.

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<sup>72</sup> A summary of the Seminar is available on the Court’s website, <https://www.icc-cpi.int/news/seminarsDocuments/2020-Judicial-Seminar-Summary-EN.pdf>.

## *Organ Specific Matters: Office of the Prosecutor*

### **XII. OTP SITUATIONS AND CASES: PROSECUTORIAL STRATEGIES OF SELECTION, PRIORITISATION, HIBERNATION AND CLOSURE**

398. In introducing their **Findings** at paras. 633-635, the Experts touch on important matters that are developed in the subsequent text of their report.

399. Handling the high volume of potential situations, with the limited resources it has available, has been a challenge for the OTP.

400. The OTP takes a conservative approach to the selection of situations and cases, but must still respond to the mandate the framers of the Rome Statute entrusted to it. It attempts to do so, by setting realistic priorities to organize the sequencing of its activities, applying limited resources efficiently, and redeploying staff to meet demands as effectively as possible.

#### **A. Initial Situation and Case Selection: Preliminary Examinations**

##### **1. Situation Selection during (Phase 1) (paras. 636-640)**

401. The **Findings** here present an accurate picture of the volume of communications the OTP receives, and how they are processed by the PES.

##### **2. Situation Selection during PEs (Phases 2-4) (paras. 641-645)**

402. The Experts accurately reflect the level of pressure on the OTP's limited resources, and the consequent risks the OTP has to mitigate.

##### **(1) Narrower Standards for Admissibility (paras. 646-650)**

403. The Experts accurately reflect the admissibility criteria the OTP applies to situation selection, then they focus on a suggestion that the OTP should apply a higher and more restrictive gravity threshold, in order to reduce the number of situations, having regard to the limited resources available.

404. It is true that, in order to succeed, the OTP must connect the ends it wishes to achieve with the means it has available to achieve them. This is the hard reality. It must also meet this challenge within the framework of the Rome Statute and the mandate it has been given.

405. Appearing to accept that States Parties will not increase their investment in the ICC, at least in the foreseeable future, the Experts recommend that the OTP should, instead, reduce the scope for its activities by raising the gravity threshold it applies. Such an approach raises a number of issues that require careful examination. It also implies the practical question whether, if the gravity threshold were to be pitched even higher than it is now, would any of the current situations fail to meet that threshold? Moreover, the question of gravity, insofar as it is applied as a legal threshold under the Statute, cannot be addressed unilaterally by the OTP, since it will be subject to judicial review.

##### **(2) Feasibility Considerations in Situation Selection and Prioritisation (paras. 651-655)**

406. Focusing particularly on the prospects for arrest, the Experts treat sympathetically the approach the OTP takes to feasibility, recognizing that "feasibility ebbs and flows during the course of the examinations and investigations."

407. The Office takes feasibility into account, when it considers the prospect for conducting an effective and successful investigation leading to a prosecution with a reasonable prospect of conviction. In this regard, however, it should be recalled that two cases, which recently resulted in convictions, namely, *Ntaganda* and *Ongwen*, involved individuals who eluded arrest, respectively, for seven years and ten years. Feasibility is thus a concept that can be flexible in application, subject as it must be to evaluation of a range of variable factors.

408. The issues raised by the Experts are now addressed, in relation to the Recommendations below.

### ***Recommendations R226-R229***

***R226.*** *The Prosecutor should develop a policy on the criteria relevant to the opening of a PE based on Article 15 communications (PE Phase 1) and include it in an update to the Policy Paper on Preliminary Examinations.*

409. This is an actionable recommendation, implementation of which would achieve greater transparency. To this end, in its 2020 Report on Preliminary Examination Activities, the OTP did provide information on the function of phase 1 of PEs and the criteria it applies.

***R227.*** *In order to address the disparity between the OTP resources and the high number of PEs resulting in investigations, the Prosecutor should consider adopting a higher threshold for the gravity of the crimes alleged to have been perpetrated. Gravity should also be taken into account at Phase 1 of PEs.*

410. This recommendation will necessarily engage the attention of the incoming Prosecutor. The concerns underlying it have already occasioned internal discussions within the OTP, even before the IER, given the pressure on the limited resources of the Office.

411. However, as the Experts themselves appear to recognise, there is a difference between gravity as a *legal* threshold respecting the opening of investigations, with the ICC's jurisprudence so far setting a relatively low gravity threshold, and gravity as a *policy* factor, where the OTP might raise the gravity threshold where it has broad discretion, such as in case selection or prioritisation decisions. It should be recognized that the OTP cannot unilaterally raise the legal threshold of gravity, although it can exercise its discretion in selecting which cases to investigate or prosecute.

412. However, careful consideration must be given to how a gravity threshold should be applied, as a function of the discretion found in article 15 (expressed by the word "may"), concerning the decision of the Prosecutor to seek judicial authorisation to initiate an investigation, as opposed to the imperative found in article 53 (expressed by the word "shall"), obliging the Prosecutor to initiate an investigation, once a reasonable basis for doing so is established, in State Party or UN Security Council referrals. One important aspect of this issue is how to balance the various interests that are engaged, including those of victims, in a fair and principled way.

413. The gravity threshold issue is far more complex and difficult of solution than may be immediately apparent, and it will, as noted, have to engage the attention of the next Prosecutor. Nor will attending to the gravity threshold alleviate the need for a discussion with States Parties on the sufficiency of the resources they make available to the Court.

***R228.*** *Feasibility should not be taken into account with regard to PE assessments.*

414. This recommendation reflects what is already the OTP's practice.

***R229.*** *The Prosecutor under this heading should also consider the recommendations made in relation to the OTP communications and outreach.*

415. See further below, respecting the relevant recommendations (for example, R297).

## **B. Selection and Prioritisation of Cases and Perpetrators**

416. In introducing this part of their report, the Experts highlight a number of criticisms and suggestions they received from various stakeholders, on which the Office will not comment here, beyond observing that it has enjoyed recent success in court and noting that the Court has never been busier than it is now, with five trials on-going or in preparation.

### **1. The Criteria for Case Selection and Prioritisation (paras. 660-662)**

#### **(1) The Policy in Relation to Selecting and Charging Suspects (paras. 663-670)**

#### **(2) Defining a Case: Charging Practices (paras. 671-675)**

#### **(3) Case Prioritisation: Feasibility Issues (paras. 676-678)**

417. Under the general heading above, relating to the criteria for case selection and prioritisation, the Experts focused, with respect to the sub-headings mentioned above, on three main issues, namely, the degree of responsibility of alleged perpetrators, the number of charges and modes of liability decided by the Prosecutor, and feasibility.

418. In their **Findings** on these issues, the Experts, while noting the criticisms and suggestions received, also commented on positive trends they discerned in current OTP practices and the improved outcomes these practices have achieved.

419. The matters upon which the Experts focused their attention are best addressed as a function of the recommendations they made, which are collected below.

### ***Recommendations R230-R239***

**R230.** *The OTP should consider establishing a hierarchy among the criteria for case selection. The criteria of highest importance might be considered to be: (i) the gravity of the crimes (in line with the Policy Paper); (ii) the strength and diversity of the evidence (currently included only in relation to case prioritisation); and (iii) the degree of responsibility of potential suspects.*

420. This recommendation merges existing criteria in the OTP's *Policy Paper on Case Selection and Prioritisation* that are linked to case selection, notably, gravity and degree of responsibility of potential suspects, with criteria that are linked to case prioritisation, notably, strength and diversity of the evidence. These criteria have obvious importance and will often be accorded the greatest weight when the OTP determines which cases to take forward. However, it may not be beneficial to reduce the range of factors that the OTP will consider in making such a determination, and the Office should have flexible recourse, as necessary, to the full range of criteria set out in the Policy.

**R231.** *The OTP would benefit from focusing on evidential strength, giving priority to the cases with the strongest evidence, in particular non-testimonial evidence, such as intercepts, contemporaneous video and forensic records.*

421. This recommendation is sound and reflects the OTP's current approach, as defined in its Strategic Plan: the collection of evidence of varied and diverse nature builds stronger cases, by establishing facts that are mutually supportive and by reducing reliance purely on witness testimony that may be vulnerable due to a variety of factors. The OTP's objective is to build cases on the basis of strong evidence, of the sort mentioned by the Experts, but on occasion the Office will be compelled to build cases that are witness-intensive, if other sources of evidence are simply unavailable.

**R232.** *The OTP should consider more transparency with regard to its approach to assessing the degree of responsibility for crimes ('those most responsible') and the hierarchical rank of the accused ('mid- and high-level perpetrators').*

422. This is a sound and actionable recommendation, aimed at creating greater transparency around what already enters into the OTP's assessment of the degree of responsibility for crimes and the hierarchical rank of a suspect. It is undesirable to establish rigid criteria of assessment in the abstract, however, but helpful indicators could be established, on the basis of the OTP's experience with such assessments.

***R233.** As part of a larger situation strategy, prosecuting mid-level perpetrators might be appropriate in terms of effectiveness, fighting impunity, and developing solid jurisprudence. Where notorious or mid-level suspects are prosecuted, consideration should be given to their role in the overall strategic planning for the situation.*

***R234.** In line with the evidence-led approach, the OTP should make it clear that the focus is on those most responsible for the crimes charged, even if they do not occupy senior ranks in organisations allegedly responsible for the commission of the crimes, especially where such cases may lead to investigating and/or prosecuting cases against those occupying high level positions.*

423. Both of the above recommendations, R233 and R234, reflect the OTP's current approach, in practice and as reflected in the framework provided by its *Policy Paper on Case Selection and Prioritisation* and its strategic planning.

424. A brief survey of cases brought by the Office will reveal that persons against whom a warrant of arrest has been issued include both top- and mid- level perpetrators, with an increasing number of cases brought against individuals falling within the latter category in recent years. What is required is consistent application across teams of the existing framework.

425. However, the decision to start lower down the chain of command, in order to build cases against suspects higher up, presupposes a prior choice by the Office to keep a situation open for a number of years, and to devote resources to the investigation and prosecution of different cases within that situation. There is a clear connection between implementation of these two recommendations and the development of situation-specific programs, a matter addressed further below.

***R235.** Charges should be concise and well-grounded on the available evidence. They should be limited to those charges in respect of which the evidence is the strongest.*

426. This recommendation accords with the Office's current thinking. The policy is already in place, but a more consistent and thorough application is required. Ways to achieve this include strengthening the evidence review process (a matter addressed further below), and avoiding, if possible, the imposition of unrealistic "guillotine deadlines" for the completion of an investigation and presentation of a case. Critical thinking within the integrated team, involving a thorough internal assessment of the evidence it has acquired, is necessary before the team presents a case for "external" review within the OTP.

***R236.** The OTP should consider limiting the scope of the cases temporally, geographically, and with regard to modes of liability.*

427. This recommendation merits serious consideration, because, in many situations, presenting a narrower case may bring benefits that range from evidentiary strength to economy in protection efforts. In other situations, however, the Office may need to expand the scope of the case, in order to present a more comprehensive picture of the range and breadth of the crimes and the culpability of the suspects, or to establish the contextual elements of the crimes charged, a particularly acute problem in the case of Crimes Against Humanity, given the elevated evidentiary threshold imposed in some judicial decisions. Therefore, a case-by-case analysis is required, rather than the application of an absolute rule.

***R237.** In line with the Court jurisprudence, the OTP should consider all modes of liability to be of equal seriousness and importance.*

428. This recommendation reflects the OTP's approach and the existing case-law. However, during internal quality control and review processes, the Office should ensure that sufficient attention is paid to various modes of liability and that no excessive reliance is being placed on any particular mode.

**R238.** *The OTP should abandon policy considerations when determining the modes of liability, and focus on the mode of liability best supported by the evidence available.*

429. This recommendation, which reflects current OTP thinking, is being implemented through the draft Charging Guidelines that were shared with the Experts. These Guidelines, once promulgated, will require compliance across the teams with the approach advocated by the Experts. It should be noted that the OTP charges various modes of liability in the alternative, based on the same set of factual allegations, as long as they are all equally supported by the evidence. This sensible practice has won acceptance by the judiciary.

**R239.** *The OTP should develop guidelines concerning guilty pleas. Such guidelines should govern the situations in which guilty pleas would be acceptable having regard, in particular, to the seriousness of the crimes and any moral or ethical issues involved.*

430. This recommendation has already been implemented. The OTP *Guidelines for Admissions of Guilt*, which were shared with the Experts, have been in force since early 2020, and were recently made public. All that remains is for the teams to apply these Guidelines consistently, in any case where an accused admits guilt.

## **1. The Process of Case Selection and Prioritisation (paras. 679-683)**

431. In their **Findings** on the process of case selection and prioritisation, the Experts, noting the intention of the OTP to follow a comprehensive process in selecting and prioritizing cases, as expressed in its *Policy Paper on Case Selection and Prioritisation*, called for a far better implementation of the policy than is currently the case. The OTP accepts that what the Experts have urged should be done, and this is reflected in the positive approach the Office takes to the recommendations that are collected below.

### ***Recommendations R240-R242***

**R240.** *In order to improve the process of case selection and prioritisation, the OTP should:*

- (i) Complete the development of Case Selection Documents;
- (ii) Institute an annual cycle of input collection from integrated teams regarding the status of their investigations, and their recommendations for case selection and prioritisation;
- (iii) Ensure that team leadership (ID Team leader and PD Senior trial lawyer) are able to submit their views directly to the Prosecutor.

432. This is a sound and actionable recommendation. The *Policy Paper on Case Selection and Prioritisation* already provides for the development of a case selection document for each situation. However, teams now have to implement this requirement consistently.

433. The ID is developing an annual input cycle, with specific benchmarks, as suggested in this recommendation.

434. Team leadership usually submits its views directly to the Prosecutor when the integrated team reports to ExCom, but the frequency and manner, in which team leadership communicates with the Prosecutor or Deputy Prosecutor, can be improved. Further changes could be linked to initiatives to reform ExCom's role and generally improve communication between the Prosecutor, the Deputy Prosecutor and the teams.

**R241.** *In order to be more strategic in its case selection, the OTP requires situation-specific strategic plans, which should include the goals of the OTP in relation to discrete investigations and prosecutions. In other words, the goals may be provisional at the outset of the investigation and develop as further evidence collection and analyses are conducted.*

435. This sound and actionable recommendation will be implemented. A recently completed draft of a Policy Paper on Situation Completion has been circulated to States Parties and other stakeholders for feedback for consideration by the Office prior to finalisation and implementation. This policy includes as a requirement the development of a strategic plan for each situation that will aim to achieve the objectives sought by this recommendation. The OTP accepts that this is a much needed improvement.

*R242. The OTP should consider developing a situation-specific case overview document, so that case selection or prioritisation decisions are made in the context of strategies developed for each discrete situation. In this regard, the analysis of crime patterns and structures are an important starting point, providing an overview of the incidents based on their gravity, temporal and geographical scope, as well as the structures of all the groups potentially responsible for the incidents.*

436. Implementation of this recommendation should flow naturally from the combined effect of the entry into force of the Policy Paper on Situation Completion and the development of a situation strategy, together with the consistent development of case selection documents for each situation, as required by the *Policy Paper on Case Selection and Prioritisation*.

## **C. Situation Prioritisation, Hibernation And Closure**

437. The Experts highlight the situation the OTP confronts in setting investigation priorities and the strain on the resources it has available to meet demands.

438. The Experts welcome the work the Office is currently doing to develop completion strategies, notably, the drafting of a policy paper on completion strategies.

439. The Experts also recognize the difficulties the Office would have to overcome, if, for example, it shortened PEs and more proactively “hibernated” investigations (see, notably, paragraphs 689-690). Issues, such as these, continue to preoccupy the OTP and will engage the attention of the incoming Prosecutor.

440. The OTP’s response to the set of recommendations below is best done collectively.

### ***Recommendations R243-R250***

*R243. The OTP should devise a policy for the prioritisation, de-prioritisation and hibernation of situations. It should contain the criteria and benchmarks to guide the strategic planning in each situation. Such plans should also include the activities that are necessary during the de-prioritisation or hibernation of a situation in order to ensure that the situation remains viable and capable of re-activation.*

*R244. Feasibility-related factors should be seriously considered after the opening of an investigation. Should more situations reach the investigation stage without sufficient resources available to conduct serious investigations, the OTP should hibernate de-prioritised investigations.*

*R245. If the strategy in respect of a situation is not succeeding for factors considered to be temporary, the investigation should be hibernated/de-prioritised. If lack of success is due to factors assessed to be permanent, e.g. death of the accused or building up of national prosecuting capacity so that cases can be deferred, the investigation should be closed.*

*R246. The OTP should determine and communicate to the ASP the resources required to de-prioritise or hibernate and/or reactivate a situation.*

*R247. The following elements should be incorporated into the forthcoming OTP policy paper on completion:*

*(i) Coordination between the OTP, Registry, and TFV in devising and implementing completion strategies;*

*(ii) Strategies to address the avoidance of impunity and support for local justice processes. The ASP should consider establishing a working group to assist and support the Court in addressing impunity*

*gaps and facilitating partnerships to develop domestic justice processes and maintenance of the rule of law;*

*(iii) Strategies to facilitate evidence- and information- sharing with domestic courts and authorities;*

*(iv) Consider developing a joint Outreach strategy for completion of situations by the OTP, in line with the Court-wide Outreach strategy.*

**R248.** *Following the development of the OTP Policy Paper on Completion, the Office should consider integrating it into a wider and more comprehensive strategy for the 'life-cycle' of the OTP's involvement in a given situation. It should reference all stages of the Court's engagement, including PEs, investigations, prosecutions, and engagements with victims. This comprehensive strategy should also be translated into the Operations Manual for the OTP, with clear responsibilities assigned for devising and implementing the situation-specific strategies, and for monitoring compliance therewith.*

**R249.** *The OTP should ensure that when an investigation is opened, an implementation and completion strategy is in place.*

**R250.** *The implementation and strategy plans should be included in the Key Performance Indicators.*

441. The above recommendations are collectively sound and actionable, and will command the attention, especially, of the incoming Prosecutor for implementation. Certain of them, such as R244 concerning feasibility, reflect what is already OTP practice. Others, such as R243 and R245 concerning the approach to setting priorities, reflect, to a degree, existing practice, but more systematic planning with respect to the matters described can be achieved. The suggestions, respecting communication to the ASP (R246), completion strategies (R247-R249), and KPIs (R250) are also helpful.

442. It is important to appreciate that the OTP is working in the same direction as the recommendations promote.

443. For example, the Office's current strategic plan includes the need to develop situation-specific strategies; engage with States Parties on prioritisation issues; and build complementarity with (situation) countries.

444. In addition, in the past two years, senior OTP management has consulted with teams on resources and setting priorities, as part of the cyclical budget process and the control of financial outlays.

445. The Office is examining the possibility of developing closer cooperation with law enforcement in situation countries. It has also been a long-standing practice of the OTP to pass information it uncovers incidentally to its own investigations to non-situation countries to trigger or assist them in their investigations.

446. The OTP uses a dashboard with KPIs that is the subject of quarterly ExCom review.

### **XIII. PRELIMINARY EXAMINATIONS**

447. In their **Findings**, the Experts correctly identify the essential purpose of preliminary examinations (PEs), one of the three core activities of the OTP, as being to assess whether communications and situations submitted to the Office meet the statutory criteria to initiate investigations.

448. PEs are an extension of the gatekeeper function that is performed by the Preliminary Examination Section (PES) in two initial stages: first, by filtering out those communications that do not merit attention from those that do; and, secondly, by identifying among the latter those communications and situations that justify further attention, and then screening out those that, upon further analysis, do not fall within the scope of the ICC's jurisdiction. Hundreds of communications are processed each year, with a significant group requiring further detailed analysis to determine whether they merit a fully-fledged PE. The OTP informs those who send communications or refer situations of the reasons why they will be taken no further, should this be the outcome of the filtering process.

449. This filtering stage is characterised as phase 1 of the PE process. In its most recent annual Report on Preliminary Examination Activities, the OTP provided more information on the phase 1 function and the criteria it applies, in response to R226 of the IER Report (see paragraph 29 of the 2020 PE activities report).

450. If communications or situations make it through the filtering stage, they are then subjected to a fully-fledged PE, following the process that is described in the OTP's *Policy Paper on Preliminary Examinations*, to assess whether the statutory prerequisites are met to justify initiating an investigation; the relevant criteria are examined holistically. The OTP reports on the progress of PEs in its annual Report on Preliminary Examination Activities.

451. If it appears that a situation will require investigation, PES staff work with investigation, prosecution and international cooperation staff to form a nuclear integrated team and they take steps, in collaboration with specialists on the OTP's staff, to begin developing a case hypothesis and investigation strategy; to assess operational conditions, risks, cooperation and resource needs for an investigation; and to preserve evidence, as necessary, against a future investigation.

452. In examining the PE process, the Experts identified four areas of concern: (i) the working methods of the PES; (ii) the length of PEs; (iii) the Prosecutor's approach to complementarity; and (iv) transparency.

## **A. Concerns Related to Preliminary Examinations Section ("PES")**

453. In examining concerns various stakeholders expressed about how the PES functioned, the Experts ultimately came down on the side of the current practice of the OTP: the PES functions efficiently and effectively as a separate section in JCCD and the model now involves embedding ID, PD and JCCD's ICS staff members with PES staff members in the integrated teams that are established during the PE phase.

### ***Recommendations R251-R253***

**R251.** *In order to increase the efficiency of the handover process from the PES to IAS at the conclusion of a PE, the OTP should institutionalise the practice of appointing an integrated team from Phase 2 of PEs to include a member from each of the ID, PD, and JCCD.*

**R252.** *The OTP should harmonise the working methods of PES and IAS. It should also consider adopting cross-divisional analysis guidelines.*

**R253.** *The OTP should encourage staff exchanges between PES and IAS to further familiarise those Sections with their respective working methods, and to facilitate the smooth and efficient start-up of an investigation at the conclusion of a PE.*

454. The above recommendations, R251-R253, are actionable and either reflect existing OTP practice or are already being, in large part, implemented.

455. Respecting R251, all PE teams currently have one or more PD, ID and JCCD's ICS focal points assigned. This has been standard across all teams since the end of 2019.

456. Note too that the PES does not work in isolation, but interacts with all facets of the OTP's operations, having an interface with investigative measures, evidence collection and analysis, legal qualification of facts, risk assessment, and cooperation.

457. R252 has already been implemented, since the PES and IAS have now adopted common analytical standards, which are only adjusted for the PE context. Cross-divisional guidelines now apply in the OTP, and these include methods of online evidence preservation even at the PE stage. The PES is also harmonizing its legal advice on PE situations, by involving APLCS counsel in its legal analysis work, and by employing the same legal tools and standards as those used by the APLCS and IAS.

458. The suggestion in R253 has been implemented on an *ad hoc* basis in the past. The IAS and PES are currently discussing the goal of instituting, for example, at least one such exchange opportunity each year, which should be project-based, and could be done on a full or part-time basis. The loan of PES staff to the integrated team at the start of an investigation remains a practical goal (capacity permitting). The

PES and PD have also explored the same for PES lawyers (a provisional agreement on this has already been reached between the PES and APLCS). PES and ICS staff are increasingly being integrated, especially in the start-up phase of investigations.

## **B. Length of PE Activities, Time Limits**

459. In their **Findings**, the Experts have taken on board criticisms from States Parties and civil society concerning the long duration of “many PEs.” They note the expression of concern by certain Pre-Trial Chambers over the length of PEs. The Experts recognise, however, that the PE activities carried out by the OTP are “both extensive and complex.”

460. The Experts present a broad overview of the activities undertaken in each PE phase and a graph featuring the length, in months, of PEs during the period 2003-2020. They express the opinion that “having PEs run for multiple years is untenable, damaging to potential evidence and other investigative opportunities, frustrating for the victims and civil society, and unsatisfactory to the States Parties.”

461. The OTP recognises the basis for these criticisms, and has itself in recent years taken steps to generate efficiencies in the PE process. The Office is therefore receptive to the recommendations the Experts have made. These will require the attention of the incoming Prosecutor and may need some adjustment, but the overall goal of reducing the length of PEs is one the Office shares with the Experts.

462. The length of PEs is not generally driven by subject-matter assessments, which are typically concluded within a short time period. Instead, lengthy PEs are typically due to complementarity, that is, the need to assess the relevance and quality of national proceedings, which may be in flux. This process can, in some instances, take years. There are risks to short-cutting the process: early intervention to open ICC investigations may undercut the primary responsibility of States Parties themselves to investigate and prosecute Rome Statute crimes, but equally a premature termination of a PE, without a proper assessment being done, could also undermine the OTP’s due diligence responsibility concerning its own obligations, where the national response fails. Some situations are clear-cut, where domestic authorities are obviously inactive or not conducting genuine proceedings. However, in many cases this is not at all clear. Among possible solutions to the issue of the length of PEs, the OTP has embarked on a project to articulate benchmarks that would help guide decision-making on whether to bring a PE to a conclusion, by closing it or by moving to open an investigation, and to make these benchmarks public.

463. Moreover, where national proceedings are ongoing, it may be of little utility for the OTP to open an investigation, thus provoking an admissibility challenge under article 18 of the Statute that may have a reasonable chance of success, unless the Office is in a position to substantiate the conclusion that the national proceedings are not genuine. Ultimately, it is to the benefit of the Rome Statute system of international criminal justice for national authorities to investigate and prosecute international crimes, on the basis of the fundamental principle of complementarity preserved in the Statute. In certain situations, where the admissibility assessment has been prolonged, the “presence” of the ICC, through the OTP, has been of palpable benefit to domestic stakeholders, including victims, civil society and judicial authorities. In sum, the approach advocated by the Experts may have to be refined to take into account the varied and complex factors that may affect an admissibility assessment.

464. The Office has made a commitment to issue a paper on its understanding and practice of complementarity, which will invite the views and comments of States Parties and other stakeholders. This may help chart a way forward to arriving at a consensus on the proper role and function of complementarity at the PE stage (see too R363 on stakeholder discussion concerning complementarity).

465. Of course, not all PEs are of such long duration: the majority of PEs, the Experts note, are opened and closed in under five years; according to the graph, about a third of the PEs were completed in two years or less. Still, the issues the OTP and the incoming Prosecutor will have to grapple with, in relation to how to reduce the length of PEs, are many and complex. The very uniqueness of each situation makes the development of stringent guidelines difficult. In its most recent annual Report of Preliminary Examination Activities, however, the Office refers to measures it has been taking to improve the efficiency of the PE process.

466. Moreover, concerning the risk of lost opportunities, it is also worth noting that, even during the PE phase, the OTP takes measures to preserve evidence. Also, how to bring a PE to a close is not the only issue for the OTP to resolve. If the OTP is successful in bringing a PE to a swift close, but then, lacking the resources necessary to carry out an investigation, is compelled to de-prioritise or even “hibernate” it, the question arises, how will this meet the concerns of victims and civil society? How to sequence situations susceptible to investigation, in a fair and principled manner, is an issue the OTP will have to determine. (How to prioritise the investigation of cases *within* a situation, once the investigation of the situation itself has been opened, is addressed in the OTP’s *Policy Paper on Case Selection and Prioritisation*; this, however, is a different issue.)

467. For now, the recommendations, with certain of the above issues in mind, may be addressed, as follows.

### ***Recommendations R254-R261***

***R254.*** *The OTP should consider carrying out the PE activities more holistically. There is little benefit to a phased approach (Phases 2-4). The OTP should consider reducing the number of separate reports produced by the PES, and combining the Phase 2-4 reports into one PE report comprised of the assessment of subject matter jurisdiction, complementarity, gravity, and the interests of justice.*

468. With respect to this recommendation, R254, the OTP has for years been conducting PEs on the basis of a holistic approach. This is already noted in relevant OTP documents, such as the *Policy Paper on Preliminary Examinations* and in the introductory section of the annual Report on Preliminary Examination Activities. If necessary, the point that the OTP takes a holistic approach could be given even more prominence.

469. The phases referred to simply identify the main focus, though not necessarily the exclusive focus, of activity at any given stage, helping to organize the work of the PE in a logical way. This point could be made clearer in PE documents and reports. The IER concern seems to be more one of efficiency than of form; hence, from the perspective of efficiency, it makes little sense to request information on national proceedings or to assess gravity, until it is clear that there is subject-matter jurisdiction (to avoid putting “the cart before the horse”). The 2020 annual Report on Preliminary Examination Activities also made clear that a holistic approach is taken to phase 1 filtering in PEs, although the focus at this stage is usually, although not always, more upon subject-matter jurisdiction than on complementarity or gravity. Since 2019, the PES has been taking an integrative inter-divisional approach to its assessments, for the sake of efficiency.

470. Respecting internal reporting, PES will provide ExCom with consolidated reports on PE phases 2-4, but this should not impede ExCom’s oversight of PE work; so, for example, the PES should continue to seek ExCom’s review of PE subject-matter assessments before the focus shifts to phase 3, that is, the issues of complementarity and gravity.

***R255.*** *The OTP should consider adopting an overall strategy plan for each PE, with benchmarks and provisional timelines for all its phases and activities, including closure, and, if relevant, re-opening.*

***R256.*** *The strategy plan should include, at minimum: (i) the timeline of the PE, with an estimate of the dates for delivery of the analytical reports to the Prosecutor; (ii) benchmarks and timelines for the assessment of complementarity; (iii) benchmarks and time limits for any responses requested from the state concerned; (iv) any missions (visits) or other activities apart from the analysis conducted at the seat of the Court, together with an estimate of the time and resources required for each of them (including unique investigative opportunities). It should be made apparent that such a plan retains flexibility and be subject to change in the event of supervening material and substantial changed circumstances.*

471. With respect to R255-R256, the PES has an annual section plan that sets out benchmarks and projected timelines for PE stages in each situation. This is an internal product provided to ExCom at the start of each year. The components listed in R256 are also projected for each year and included either in the section plan or another internal document, such as the PES travel plan, budget proposal, and so on.

472. However, building on the existing PES section plan, the PES could consolidate all issues for the annual cycle into one document for ExCom at the start of each year. The PES could also develop a multi-year PE strategic plan that sets out a more holistic long term strategy for each PE, to be updated based on developments.

*R257. The strategy plan should be prepared on the basis that the PE will last no longer than two years. Extensions could be granted by the Prosecutor, but only in exceptional and justified circumstances.*

473. This recommendation, which raises more issues than may be apparent on the surface, will necessarily engage the attention and decisions of the incoming Prosecutor.

474. It does, by suggesting a simple formula – a two-year rule for PEs, with an extension in only exceptional and justified circumstances – appear to ignore certain dynamics of the PE process, which have proven highly beneficial to the Rome Statute system of international criminal justice, advantages it would be a shame to sacrifice without a careful cost/benefit assessment. Some of these considerations are raised above, and below, on the issue of complementarity.

475. Respecting R257, however, a two-year limitation could work as a general framework, with the flexibility noted, but might require the application of additional OTP resources to bring the relevant PE to a determination. Success would also depend on the willingness and ability of States Parties and other stakeholders to respond in a helpful and timely way to OTP requests for information. In this context, deadlines might have the benefit of ensuring a timely State response to requests for additional information – or they might not.

476. For PEs likely to lead to investigations, a two-year rule might facilitate an early transition to an investigative mode that would bring with it the full range of investigative powers that the Rome Statute confers upon the OTP. Should the OTP lack the resources to pursue the investigation at that moment, however, this could result in the investigation being opened, but then de-prioritised or even “hibernated”, until OTP resources could be deployed to it or acquired in some other fashion.

477. For PEs that may appear to remain “fixed” in the admissibility assessment over a number of years, the OTP could also adopt a policy of closing PEs where there is tangible progress on domestic investigations or prosecutions, provided there are no indications of a lack of genuineness, with such a policy being subject to the ability of the OTP to re-open the PE, should identified benchmarks not be met in the situation or if certain “red lines” are crossed. The OTP has the benchmarking concept currently under active development.

478. For PEs that require more than two years, the OTP could issue its reasons for an extension either in its annual Report on Preliminary Examination Activities or, depending on the nature of the PE, in a separate status report setting out the Office’s interim findings and reasons for extension.

479. The two-year time frame should, however, be discussed with the incoming Prosecutor. Implementation would engage issues relating to situation prioritisation and operational capacity, which are complex matters.

*R258. The strategy plan should be a living document, updated regularly throughout the course of the PE. Upon authorisation of an investigation, this plan should provide the foundation on which to build the OTP’s targets and strategies for the investigation.*

480. The proposal contained in this recommendation covers issues that are currently captured by other PE-related processes, such as the ID-led operational feasibility assessment, which includes investigative strategy, as well as operational, logistical, security, protection and cooperation considerations, and the PD-led prosecution scenarios memorandum, which examines case selection and prioritisation issues. An overall strategic document could be developed, as proposed, reflecting current processes that seek to achieve the same outcome and are intended to form the basis of future investigations.

*R259. If a PE, or a phase of a PE lasts longer than the provisional timeline provided in the strategy plan, the causes of any such delays should be reported by the Prosecutor in the Annual Report on Preliminary Examination Activities.*

481. This is an actionable recommendation; see, however, the discussion above relating to R257.

*R260. If the two-year limit suggested for a PE is exceeded, care should be taken to assess the need for activities directed at the need for preservation of evidence. The ID member of the integrated team should be tasked with finding any unique investigative opportunities and, where possible, to initiate steps to preserve such evidence.*

482. This recommendation reflects what is already undertaken by the PE team, now supplemented with ID, PD and JCCD's ICS staff members. In collaboration with other OTP Divisions and Sections, the PES is continuing to draw on lessons learned and to discuss best practices, including for the best approach to evidence preservation and collection at the PE stage. This approach will be implemented through a combination of enhanced evidence collection capabilities of PES staff (in process), sustained IKEMS support, distribution of specific tasks and duties within ID (IAS, FSS), ICS assistance, and agreement on a common OTP-wide information storage platform.

*R261. Compliance with the PE strategy plan should be included in the Key Performance Indicators of the OTP, and reported upon to the ASP.*

483. This is an actionable recommendation, implementation of which is only pending the development of a multi-year PE strategic plan. The OTP's working group on KPIs could implement the recommendation.

## **C. Complementarity and Positive Complementarity**

484. The Experts take the view that the OTP's legal and factual analysis of complementarity for the assessment of jurisdiction, and its engagement in "positive complementarity" activities, have proven problematic and have significantly extended the length of some PEs.

### **1. Complementarity Assessments for Admissibility (Article 17) (paras. 721-728)**

485. The Experts describe how the principle of complementarity functions, the approach the OTP takes to its operation in practice, and the difficulties the OTP encounters in assessing the genuineness of national proceedings, the key issue for the admissibility determination animating the complementarity concept. The Experts appear to have some sympathy for the OTP, respecting the challenges it must overcome in assessing admissibility.

486. Nevertheless, the Experts identify concerns they share with some stakeholders, especially over what they consider to be a prospective application of the admissibility test, describing the OTP "in some instances waiting for years for national authorities to demonstrate their 'willingness and ability'." Citing the examples of Guinea and Colombia, they suggest that "the OTP has been monitoring the national proceedings for many years, without being able to come to a conclusion on their genuineness or sufficiency."

487. The latter observation, however, may treat the issue too simplistically. It overlooks features of the situations under examination that define the scope of the admissibility assessment, essential to the OTP's determination whether to open an investigation. These features have also shaped the ability of the Office to discharge its due diligence responsibility. Moreover, the OTP's vigilance and engagement with national authorities, in carrying out this responsibility, have proven beneficial to the operation of the Rome Statute system of international criminal justice, by giving priority to domestic proceedings, where possible, to avoid ICC intervention.

488. Respecting the situations of Guinea and Colombia, cited by the Experts, had the OTP been required to come to a determination earlier, this would in all likelihood have resulted in the OTP requesting judicial

authorisation to open investigations, on the basis of alleged inaction or lack of genuineness on the part of the national authorities, concerning investigation and prosecution of the most relevant categories of conduct or persons. If these requests had been granted – a result by no means certain – this would have added to the OTP’s already over-burdened docket and undercut the prospect of catalysing domestic proceedings, which the Preamble to the Rome Statute envisions. Such benefits should not be lost lightly.

489. Take, for example, Colombia. Colombia emerged from over five decades of armed conflict between the guerrillas of the FARC-EP and government forces. As a component of a peace agreement that now has constitutional force, Colombia set up transitional justice mechanisms to address war crimes, some of which may also amount to crimes against humanity. Colombia made accountability a feature of the peace agreement, because it is a State Party to the Rome Statute. Colombia has a sophisticated legal system, but setting up the transitional justice mechanisms took time, involving the passing of legislation, constitutional amendments, the testing of laws before the Constitutional Court, and other processes, as well as a wider national discussion on issues of justice and peace.

490. The transitional justice mechanisms just mentioned, which apply in respect of members of the FARC-EP and the Colombian military, are the latest station to be reached in a long journey toward the delivery of justice for victims. The situation in Colombia has involved a multiplicity of actors. Earlier, ordinary justice processes were to apply to all; then a special system was set up to deal with demobilised paramilitaries, while the ordinary justice system still dealt with non-demobilised paramilitaries. Military justice processes also continued to operate. In accordance with a ruling of the Constitutional Court, the ordinary justice system now applies to so-called “third parties”, namely, non-State actors, who are alleged to have funded paramilitary groups. Each of these accountability streams is lengthy and complex.

491. For the OTP, in recent years, in addition to the issue of genuineness or sufficiency of national proceedings, a reasonable concern has arisen periodically that the transitional justice processes might be derailed or imperilled. Had this in fact occurred, it would have rendered cases admissible before the ICC and undercut the momentum to create genuine national accountability mechanisms, thus diverting time, energy and resources from all actors involved, both in Colombia and at the ICC.

492. As for imposing a two-year time limit: when, in November 2012, the Office issued an Interim Report on Colombia, it identified gaps that indicated shortfalls in activities respecting certain categories of persons and crimes; were the IER recommendation to have been applied in 2012, the Office would have immediately requested judicial authorisation to initiate an investigation. Instead, the Office has vigilantly engaged with national and judicial authorities, as well as other stakeholders, to support genuine domestic accountability efforts that have continued to progress to this day, despite ongoing challenges. Moreover, the role of the ICC has been seen as highly beneficial in Colombia by victims, civil society, judicial authorities, government, UN and European Union representatives, and other stakeholders.

493. The relationship between the OTP and Colombia is thus far more subtle and dynamic than the Experts may have appreciated. It has been conditioned throughout by the admissibility question, that is, whether the Court should intervene, and not by any supposed “human rights monitoring” or “playing a ‘watchdog role’.”

494. Nevertheless, the Office agrees with the goal of articulating an end-point to a PE, but this goal may best be met through a benchmarking process, rather than by the imposition of an artificially rigid timeline. The OTP’s experience has led it to consider how to create benchmarks for PEs that would enable it to arrive at a decision, at an appropriate time, whether to continue the PE, or to close it, either by concluding it without further action or by seeking to open an investigation.

495. What is outlined above only underscores the need for a careful analysis respecting time limitations on PEs.

## **2. Positive Complementarity (paras. 729-736)**

496. The Experts do not view favourably the approach to the concept of complementarity that has been termed “positive complementarity”, according to which the OTP engages with domestic authorities to promote domestic proceedings. In their opinion, PEs should only be undertaken with a view to determining whether to open an investigation.

497. This view has merit, from the OTP's perspective. Nevertheless, it is a view that should be leavened with flexibility, since it may not take sufficient account of the whole range of factors that go into the determination whether to open an investigation. (And see the comments above respecting the beneficial dynamics that have characterised certain situations under preliminary examination.)

498. The Experts are correct, however, in saying that, even after the OTP opens an investigation, complementarity may remain a live issue. Their observations on the ways that the OTP could engage with States Parties and even the authorities of the situation country, to catalyse prosecutions beyond the limited scope of the OTP, and the active role that the ASP could play in this, are valuable and welcome.

499. As mentioned earlier, the Office will be issuing a paper on its understanding and practice of complementarity, including with respect to positive complementarity, which may help chart a way forward to arriving at a consensus on the proper role and function of complementarity at the PE stage (see also R363).

### **Recommendations R262-R265**

**R262.** *The OTP should not have regard to prospective national proceedings and focus solely on whether national proceedings are or were ongoing (Article 17). This would further align the admissibility criteria on complementarity with Article 17 of the Rome Statute ('is', 'has been' conducted), and the requirements set out by the Appeals Chambers ('tangible' steps).*

**R263.** *Time limits should be considered for states to comply with OTP requests during complementarity assessments, in combination with providing clear criteria of what the OTP requires in order to make an Article 17 determination.*

**R264.** *Positive complementarity activities should not delay the opening of an investigation or closure of a PE. The OTP should consider positive complementarity in the context of the strategy for the situations at all stages of proceedings, and not restricted to PEs. The OTP should consider whether positive complementarity activities would be more appropriate after an investigation is authorised.*

**R265.** *Positive complementarity should be considered in the design of completion strategies.*

500. Recommendations R262 and R264, above, will require the attention of the incoming Prosecutor.

501. These recommendations will also require engagement with the ASP, to obtain its views on their substance. As noted above, there should be reference as well to R363, which recognises that some issues, such as the OTP's approach to positive complementarity and PEs, may require engagement by all stakeholders, including the Court, States Parties and civil society, on a strategic vision for the Court. In the HWG context, a number of States have pushed for the OTP to give more time to States to initiate proceedings and thereby reduce the Court's work overload.

502. The recommendations make sense, if the goal is to shorten PEs and reduce the risk of evidence degradation and loss prior to an investigation, by achieving faster movement into investigations. However, their implementation would not resolve the OTP's current operational capacity/overload issue, other than by potentially creating either (i) many opened, but de-prioritised or "hibernated" investigations, which would incidentally obviate the advantage of the ability to exercise full investigative powers, or (ii) many closed PE situations that have to be re-opened, in a revolving-door fashion.

503. It should be noted that the concept of "positive complementarity" has already had application during investigations, for example, in the OTP's cooperation on requests from the CAR Special Criminal Court, the Government of Libya and the EU Joint Investigative Team (with which the OTP cooperates following a mutually supportive strategy), Uganda's War Crimes Division, *ad hoc* requests from the DRC, and so on. Such cooperation is in line with Strategic Goal 6 of the OTP's current Strategic Plan as well as Strategic Goal 5 of the Court's Strategic Plan for 2019-2021. It may be noted that supporting the work of national jurisdictions, as well as their strengthening, can be one of the most effective ways to build positive connections between the Court and national authorities, enhancing the Court's perception and credibility among key stakeholders and ultimately contributing to the full implementation and universalization of the Rome Statute.

504. R263 has already been implemented, because the PES typically articulates timelines in its requests for information (RFIs), but States Parties often fail to comply, due to lack of diligence or capacity. The

PES also articulates what is required, by explaining relevant case law and describing the specific information it is seeking. However, the OTP could emphasise more strongly in its RFIs the importance of consistent adherence to timelines and resist requests for lengthy extensions of time to comply.

505. The substance of R265 is actionable and is addressed in the draft OTP Policy Paper on Completion Strategy that will be soon circulated to States Parties and other stakeholders for feedback.

## D. Transparency of Preliminary Examinations

506. The Experts accept the level of transparency that the OTP maintains in relation to PE activities.

### *Recommendations R266-R267*

*R266. The OTP should continue with its current level of transparency in relation to PE activities: announcements of opening and closing each PE, annual report to the ASP, situation-specific updates and statements.*

507. This recommendation endorses current OTP practice. PE teams should also continue to assess the appropriate level of public information provided, in the light of risks to the destruction of evidence, witness protection and the integrity of future investigations.

*R267. The Prosecutor should consider appointing an OTP focal point to be in charge of responding to queries and otherwise communicating with the civil society and other stakeholders during the PEs.*

508. This recommendation also reflects current OTP practice, in that the PIU currently does what is being suggested in collaboration with the IOP, the JCCD's PES and the ICS. (This function could be enhanced, should the OTP have the means, and the incoming Prosecutor decide, to engage a senior media officer.)

## XIV. INVESTIGATIONS

509. In their **Findings**, the Experts accurately describe the organisation, functions and staffing level of the Investigation Division. They note a number of concerns, expressed by both internal and external stakeholders, relating to OTP investigation strategies and techniques, the quality and types of evidence collected, lack of situation country knowledge and insufficient OTP field presence during investigations. However, the Experts also recognize that there are a number of important positive developments taking place in the ID, notably in relation to the on-going "Investigations 3.0" project. This, the Experts note, is a work in progress and many of the recommendations they make "are in line with some of the provisions of Investigations 3.0."

510. As part of its continued self-evaluation, development and improvement efforts, the OTP has already identified a number of areas where it intends to "upgrade" its investigations to the new 3.0 level (Investigations 1.0 being understood as the OTP's approach to its initial investigations under the first Prosecutor and Investigations 2.0 as its current practice); this will follow a change plan, with a focus on certain priority areas having potentially the greatest impact.

511. The recommendations made by the Experts coincide largely with the thinking of the OTP, providing the Office with instructive support for the improvements it foresees. The IER recommendations do not focus on what is already going well, but do afford a helpful analysis of what needs improvement, in the form of actionable recommendations. The OTP will focus as a priority on those improvements that are expected to have the greatest impact. Implementation planning will, however, avoid predetermining issues that properly require decisions by the incoming Prosecutor.

512. The OTP will focus, as a priority, on actionable recommendations designed to achieve improvements at a strategic level, in particular, to set priorities among situations and cases, in line with focused charging and situation-specific strategies; help manage the mismatch between resources and workload by such prioritisation; continue identifying efficiencies and savings; seek to acquire additional resources (via, for example, secondments); and further optimise synergies with the Registry. KPIs will be used to steer performance.

513. Respecting investigative tools and methods, the OTP will further increase its use of advanced investigative techniques through partnerships with law enforcement agencies; enhancing its ability to conduct remote investigations; strengthening tracking and arrest functions, in coordination with the Registry and States Parties; and reinforcing the role of analysis within the integrated teams.

514. Concerning cooperation, the OTP will continue developing its cooperation frameworks with priority entities, including those mentioned by the Experts, but also with other international and regional organisations. The OTP will strengthen its cooperation with law enforcement agencies, in order to rely on them for investigative assistance when advisable, but also to assist them, as appropriate and at no cost, with their activities. The OTP will continue its work with entities, such as NGOs, who often serve as “first or early responders” in situations, and with other agencies, such as Internet service providers, in order to preserve evidence. The OTP is also looking, in cooperation with Registry, with which it is already in discussion, to increase the number of its operational focal points in the field (see too further below).

515. The change trajectory the OTP intends to follow should have as limited a financial impact as possible. While some aspects of the change plan will require extra resources (e.g., information management or field presence), others will be compensated through reallocation of resources internally and increased cooperation externally (e.g., optimised operations with Registry; secondments; *pro bono* assistance).

## A. Investigative Strategy

516. In their **Findings**, the Experts strongly support the current OTP investigation strategy of pursuing open-ended, in-depth investigations, with the aim of being trial ready as early as possible in judicial proceedings. They nevertheless express concern over a lack of situation-specific planning from the earliest stage of the OTP’s engagement in a situation and an absence of long-term strategic planning, which they find makes it difficult to assess the progress of an investigation and to take strategic decisions on it. These and other concerns, they hope, will be addressed in the Investigations 3.0 project.

### ***Recommendations R268-R271***

***R268.*** *The ID should consider drafting a policy paper on OTP Investigations, combining the best practices and lessons learnt from its 18 years of practice. It should include its vision for the way forward. The policy paper should cover the principles, practices, standards, and strategies that should be applied in OTP investigations.*

517. Distilling investigative best practices and lessons learned into a coherent policy on OTP investigations is a sound and actionable recommendation. One of the real challenges that must be overcome in implementing any such a recommendation, of course, is the difficulty of stepping back from the day-to-day crush of managing operations to design and implement the improvement.

518. Nevertheless, ID is already engaged in implementing this recommendation, at least partly, by means of a thorough review and evaluation of its activities, methods and policies, through various means, a process being aided by others within the OTP and partners external to it (such as Interpol, Europol, the Institute for International Criminal Investigations (IICI), the international Investigative Interviewing Research Group (iIRG), universities, and others). With the understanding that a holistic approach is needed to take investigative competencies to the “next level”, the Investigations 3.0 project will therefore be drawing on a wide variety of relevant sources, including lessons learned from past experience, the Court’s jurisprudence and other critical elements.

**R269.** *The ID should develop long-term situation-specific investigative strategies that cover all stages of investigations from the opening of an investigation to possible deprioritisation, hibernation and closure of an investigation. These plans should have flexible benchmarks to monitor the implementation of the strategy.*

**R270.** *The strategy should include, at minimum: (i) the goals of the investigation; (ii) the main incidents identified, and discrete investigative strategies for each incident; (iii) a matrix of the incidents identified, together with potential suspects, to form part of the case selection and prioritisation document; (iv) types and volume of evidence available, including evidence that might be obtained through financial, cyber and other investigations; (v) analysis requirements in terms of software and resources; (vi) planning for an ID field presence; (vii) cooperation prospects, partners and stakeholders; (viii) prospects of arrests, assessment of tracking capabilities in relation to the situation; (ix) resources necessary to comply with the goals of the strategic plan; (x) closure and hibernation benchmarks and strategies.*

**R271.** *Situation-specific strategic plans should be treated in a flexible manner, and adapted in the light of developments as the investigation proceeds. Annual investigation plans should be incorporated into a long-term investigative strategy, and aligned with it, to ensure that ongoing activities contribute to the overall goals of each investigation.*

519. The above actionable recommendations, R269-R271, are already being put into practice, primarily as an integrated team responsibility, but with senior management review and approval; the OTP can further develop and improve its approach.

520. For example, it is now the practice to integrate members of ID, PD and JCCD's ICS staff into the PES teams conducting preliminary examinations of situations, and to create advance teams where situations are headed toward investigations and so to begin planning for the needs identified in R270. Investigation and cooperation plans are developed at the outset of investigations and are subject to regular review and assessment. At the moment, the sort of strategic investigative planning contemplated by R269 comes within the responsibility of the integrated team, but senior management could provide even more active oversight of this process.

521. This kind of planning is envisioned by the current OTP Strategic Plan 2019-2021. Each situation presents its own challenges and opportunities, so a flexible approach is needed, but standard practices can be developed and applied. While investigative goals will usually be developed during the first year of an investigation, engaging in short term planning within the framework of a flexible long-range strategy pertaining to the overall situation makes sense.

## **B. Investigative Techniques and Tools**

522. In their **Findings**, the Experts note the concern expressed by stakeholders about the OTP's ability to use specialised investigative techniques, relating especially to financial investigations and tracking and arresting fugitives. They rightly observe that these concerns require "increased in-house capacity" in combination with increased cooperation with national authorities, intergovernmental organisations and other stakeholders.

523. The matter of increased in-house capacity is essentially one of a budgetary need to correct chronic OTP resource deficits. Currently, the OTP cannot afford to allow the few investigators it has with experience in financial investigations to focus exclusively on this otherwise important, but resource- and time-intensive specialised activity, because of other investigative demands on their time and energy. The OTP has a highly skilled and effective tracking team, but it is woefully under-resourced.

### **1. Cooperation for Evidence Collection (paras. 751-756)**

### **2. Cooperation requests – JCCD International Cooperation Section (ICS) (paras. 757-760)**

524. The **Findings** and recommendations under the above two subheadings may be dealt with collectively, as follows.

525. The observations of the Experts on cooperation are largely accurate, and they describe the importance of cooperation, especially concerning the ability to acquire certain types and sources of evidence, as well as some of the challenges the OTP faces. They also correctly identify the role of the JCCD and its ICS, which embeds International Cooperation Advisers (“ICAs”) in the integrated teams.

526. Certain of the findings on requests for cooperation, however, have been overtaken by improvements to the process or may have been based on incomplete information. The following necessary refinements to the findings should therefore be noted, respecting paragraphs 758-760:

- Draft requests for assistance (“RFAs”) are prepared by the integrated teams, principally by ID members, with the *support* of the relevant ICA or by the ICA with additional inputs by ID or PD members.
- Templates and models are in place for all types of RFAs (by situation, language, type of cooperation needed) and are easily accessible by integrated teams through their ICAs. Overall, the RFA process has been streamlined and facilitated with the new RFA Database (“RFA DB”), which is an evolving tool designed to adapt to future needs and challenges. The ICAs are responsible for the online processing of RFAs.
- The review process is already limited to selected parts of the RFAs flagged by the ICAs or to new, sensitive or complex requests for cooperation; requests to new partners; and requests that raise complex legal or operational issues.
- This review process is important, because it responds to the quality expectations of State central authorities or other stakeholders, such as the UN or other international and regional organisations, which have strict information management rules, among other requirements, and it ensures that RFAs respect the requirements of Part 9 of the Rome Statute (art. 96), in accordance with the Court’s jurisprudence and the expectations of States Parties concerning consistency and reliability of requests.

527. The recommendations relating to the two subheadings above, respecting cooperation for evidence collection and requests for assistance, may be addressed now, as follows.

### ***Recommendations R272-R282***

***R272.*** *The OTP should continue to develop strong partnerships and enter into Memoranda of Understanding with States Parties, international and intergovernmental organisations, and private companies.*

528. This is an actionable recommendation, which also reflects current OTP efforts, especially on the part of the Prosecutor and JCCD, which takes the lead for the Office in developing cooperation networks and negotiating Memoranda of Understanding (“MoUs”) with States. The JCCD also negotiates cooperation agreements with other entities that can support investigation activities, including non-State actors. An example is the work the ID and JCCD have done in reaching agreement with the Law Enforcement Network, the Norwegian Police University College and the Institute for International Criminal Investigations.

529. In addition to developing new partnerships, the JCCD tends to the maintenance of existing partnerships. Through country focal points, it works to gain, and create, better understanding, in order to facilitate operations.

530. Also, partnerships do not always have to be translated into MoUs; there are other ways to formalise and maintain them, sometimes more efficiently, so that the OTP should remain flexible in its approach. Given, for all parties involved, the resource-intensive nature of the whole process of concluding MoUs, their negotiation should be reserved for circumstances that would generate efficiencies.

***R273.*** *The OTP should consider requesting assistance from the ASP in raising the awareness of States Parties to the needs of the OTP. Best practices and lessons learnt could be shared.*

531. This is an actionable and welcome recommendation. It could be implemented in various ways, including through the Hague Working Group facilitation on cooperation. As the Office has highlighted in regular reports and presentations in ASP working groups and plenary sessions, priority areas for raising

awareness include financial investigation needs and arrest and tracking challenges, as well as other areas for support, such as access to certain domestic immigration records. Annual ASP cooperation reports include feedback on difficulties faced and the 2020 report presents a more detailed account of the execution of requests.

*R274. The OTP and the ASP should consider improvements in cooperation. Consideration might be given to the development of a uniform cooperation framework for all States Parties, or for regional groups of states.*

532. This recommendation is only partly actionable, because internal State structures that address cooperation depend on domestic constitutional and legal norms, and on available capacities. Developing a uniform cooperation framework has not proven feasible in the experience of the JCCD's ICS.

533. The JCCD's ICS has introduced RFA templates in an effort to harmonize cooperation requests that the OTP sends out, thus contributing to a more uniform pattern of cooperation and a standardisation of Office interactions with domestic law enforcement and judicial actors. However, the real challenge may be for the Court to negotiate specific cooperation frameworks with States Parties, to allow for direct judicial cooperation between the OTP and States Parties, for example, by including the OTP in the European network of judicial cooperation, an operational cooperation network that would assist in financial investigations. This would require adjustments to national legislation.

534. The OTP does support the Mutual Legal Assistance Treaty initiative led by some States Parties. The OTP has also noted efforts to create uniform practices in the field of mutual cooperation in legal matters at the regional level, such as those promoted by the Council of Europe, and contributes to these efforts as appropriate. It may be that the most promising way for the OTP to follow up on the Experts' recommendation would be to participate in initiatives that States foster at the regional level, where the OTP and the Court could develop best practices for cooperation and more uniform operating procedures.

*R275. The OTP and the ASP could consider revisiting agreements with international and intergovernmental agencies with which the OTP engages frequently, such as the UNHCR and International Organisation for Migration.*

535. This recommendation may only be partly actionable, since it must take into account that cooperation with UN entities is governed by the existing umbrella UN-ICC relationship agreement. The relationship agreement is Court-wide and not OTP-specific. It was subject to lengthy negotiations, especially in fields such as peacekeeping operations, and the outcome from re-opening those negotiations would be uncertain. The current framework agreement covers the needs of the OTP broadly, foresees obligations on the UN side and allows some leeway in the level of cooperation provided by the UN.

536. However, with the objectives sought by the Experts in mind, the OTP could, within the broad parameters of the agreement, and with the support of the UN Office of Legal Affairs (OLA), seek to increase its exchanges with the relevant offices, agencies and entities to improve cooperation. For example, in recent years, guidelines on cooperation have been developed with the OLA and focal points identified for each entity; similar initiatives could be examined. Supported by the OLA, ICC management and operational staff interact regularly with organisations, such as UNHCR and the IOM, to improve cooperation; this remains an area of ongoing effort, however, and improvements are desirable.

537. On this last point, States Parties could themselves act on the need for some UN agencies to improve their cooperation with the OTP and the Court. States Parties could do this in their role as UN Member States who support and contribute to those organisations, by pushing for improved cooperation through both high level and working level bilateral discussions.

*R276. The OTP should consider a review of relevant domestic cooperation laws, procedures, and policies for the purpose of enabling cooperation with States Parties for evidence collection.*

538. This actionable recommendation is being implemented. The JCCD's ICS now collects relevant records in the course of developing cooperation plans and in its interactions with States; it makes information on domestic cooperation laws, procedures and policies available to the integrated teams. Such

information is now recorded in the recently established RFA DB system and is available to relevant OTP staff, including integrated teams. In addition, the ICS is in the process of making available within the OTP information on State requirements respecting assistance requests.

**R277.** *The OTP should consider establishing joint training with Court staff and investigators from States Parties, not only to improve capacity, but also to strengthen an informal network of contacts.*

539. This is an actionable recommendation, but has so far had limited application, given time and resource constraints respecting the organization of trainings and seminars. However, the value of such initiatives is obvious, and some examples where the OTP has been able to engage in them include contribution to regional trainings for legal communities, such as magistrates and members of law enforcement; annual Court focal point seminars; contribution to European Judicial Network and Interpol trainings; and workshops on financial investigations and witness management. These engagements do improve capacity and strengthen a growing network of informal contacts.

**R278.** *The OTP should consider strategic secondment of national law enforcement agents to assist in achieving the same goals.*

540. This actionable recommendation is highly desirable and is under active OTP consideration. It has been implemented in a few limited instances, but with notable success, with the cooperation, for example, of national governments and UN Women.

541. Certain financial rules and regulations can operate as a constraint on this practice; but the benefits to both the Court and domestic law enforcement agencies have become obvious. The OTP may have to work with the other Organs of the Court to ensure that ICC HR regulations permit such secondments, without compromising the principles of merit-based representative recruitment.

**R279.** *The efficiency of the RFA process should be improved. Many delays could be averted by eliminating the additional review process, leaving the ICAs responsible for the consistency and reliability of judicial cooperation practices. The Senior Trial Lawyers should provide the ICAs with the content of the RFAs. The ICAs should then be able more speedily to facilitate compliance with the requests.*

**R281.** *Consideration should be given to the RFA database being made more accessible to appropriate leadership of PD and ID.*

542. Respecting R279 and R281, see above the refinements that have to be made to the findings that underlie these recommendations, which are based, to a degree, on out-of-date or incomplete information.

543. However, bearing in mind the objectives the Experts are seeking to achieve with these two recommendations, R279 and R281, the OTP can identify ways to further increase the speed and efficiency of the RFA process. The ICS has been developing, despite constraints due to resource deficits, templates and standardised practices to limit the need for review, as well as installing a back-up system for the review of RFAs to ensure timeliness.

544. Also, some delays could be reduced by improving the Office's French language capabilities, given the language used by officials in many situation countries in which the OTP is currently engaged (see too R100); this would reduce delay caused by the need for translation, which is done either by the ICA or by the OTP's Language Services Unit).

545. Since 2019 the new RFA DB has been made available to all PD and ID management; since early 2020 it has become available to all integrated team members identified by ID and PD management (see too R276 above). The RFA DB has also since been integrated with the Language Service Request System, to reduce duplication and ensure timely translation of RFAs. There are also plans to integrate it with the Forensic Service Request System and the OTP Contacts Database. The Office is also working to integrate information and task management systems for the benefit of integrated team operations.

***R280.** A framework for informal operational contacts should be established in all situation countries. Investigators could then make informal enquiries to law enforcement or national authorities to ascertain whether the information sought actually exists/and is available. RFAs should, if necessary, then follow.*

546. This actionable recommendation has already been implemented, as a matter of OTP practice, but with some practical limitations due to particularities of specific situation countries.

547. Integrated teams, with the support of the ICS, establish networks of operational contacts in their situation countries. This approach will be strengthened in future by the greater field presence the OTP is planning to have. Facilitating operational contacts is a key objective of cooperation plans and an element of situation-specific cooperation agreements. ICAs embedded in the integrated teams “open the door” for these contacts, to enable the investigators to walk through and follow up, using their own professional experience and skills.

548. The ICS also develops such networks in non-situation countries, subject to their agreement, for use when the need arises. The RFA DB records all such available operational contacts, for example, with War Crimes Units, Immigration services, judicial authorities, law enforcement agencies, and so on. The OTP has also developed a contact database, which is available to integrated teams and will be integrated with the RFA DB to avoid duplication of contact data.

549. While some States welcome the development of operational contacts by investigators, some others insist, instead, on having one focal point for such interactions and also ask that requests be channelled through one OTP contact person, rather than be conveyed directly by a number of OTP staff.

550. Operational focal points nominated in Ministries or State structures can change frequently and are often used not only by the OTP, but also by the Registry and Defence; therefore, to ensure confidentiality of contacts and observance of correct legal processes, extra caution may be needed, so that contacts by the team are made with the support of the ICA.

551. RFAs are in most cases the result of a process, which includes preliminary contacts and consultations with the country concerned, to ensure they are correctly formulated and focused specifically enough to achieve their objectives.

***R282.** The recommendations made in the section on staff quantity should be taken into account with regard to requests for cooperation.*

552. This actionable and desirable recommendation can only be implemented to the extent that overall OTP resource deficits are addressed. While there are pressing resource needs, especially within the judicial cooperation team, conserving existing ICS staff levels is, at the very least, essential to preserve the ability of the JCCD to deal with an increasing workload arising from new situations. JCCD management will try, as circumstances permit, to identify ways to increase the Division’s resources and the capacity of its judicial cooperation team.

### **3. Developing Technical Expertise within the ID (p. 245, paras. 761-762)**

553. The **Findings** correctly correlate the ability of the OTP to obtain cooperation with the requisite in-house technical capacity. In-house technical experts determine precisely what information is required for an investigation to advance, and they play a role in assessing the quality of the information received and in producing the analytical products for use in court. The Experts base these observations on successes the OTP achieved in two recent trials. Their concern relates, however, to the low capacity the OTP currently has respecting two key investigative avenues, namely, financial investigations and tracking fugitives.

554. These concerns could be met by a greater investment by States Parties in such capacities. The OTP does possess staff members with a high level of competence in these investigative activities, but it has too few of them. In the short term, the OTP may have to seek to compensate for these chronic resource deficits through secondments or other *pro bono* assistance. The value of enhancing the OTP’s capacity in these areas is obvious.

**(1) Financial Investigations (paras. 763-766)**

555. The Experts accurately describe the value of financial investigations; the OTP’s own recognition of this; and the frustration OTP senior management feels at the inability of the Office to strengthen its financial investigative capacity, due, for example, to ASP refusal in the 2020 budget to create a new P-4 Senior Investigator post that could be filled by a financial investigator to provide strategic guidance, planning and coordination of activities relating to financial investigations, including asset tracing. The Experts also note the failure of certain stakeholders to appreciate the distinction between the mandate of the Registry’s financial investigator and that of the financial investigator the OTP wished to acquire, given the very different mandates of the Registry and the OTP.

**(2) Tracking and Arrests of Fugitives (paras. 767-774)**

556. The Experts offer an accurate assessment of the importance to the Court of securing the arrest of fugitives, noting that failure to do so means that “resources that were put into investigating these cases up to the stage of an Application for Warrant of Arrest (AWA), and maintaining the evidence while the cases are in hibernation, are wasted.”

557. The Experts describe the efforts of the ASP and the Court to develop arrest strategies and the creation by the OTP of the Suspects at Large Tracking Team (SALTT); they also note, given the Registry’s role in the arrest and surrender of fugitives, the coordinated way the SALTT works with the inter-Organ working group on arrest strategies, the Suspects at Large Working Group (SALWG). However, the Experts also identify deficiencies, such as the lack of budget assigned to the tracking team or to rewards programs to incentivise intermediaries.

558. A major difficulty highlighted by the Experts is that the SALTT is under-resourced, which limits its ability to operate at an optimal level. Yet the Experts stop short of recommending even a modest increase in resources by the ASP to strengthen the OTP’s capacity, a solution that would greatly enhance tracking and arrest operations.

559. The Experts do acknowledge positive developments in OTP working methods – and it should be noted that the Court is busier now than it has ever been, thanks to recent successful arrest and surrender operations.

560. The Experts also suggest that significant improvements can be made to cooperation between the Registry and OTP, so as to minimise duplication, avoid inter-Organ rivalries and “reap the rewards of a truly unified approach between the two Organs.” Here, there is every indication that this improvement is being made, given the smoothly coordinated “team of teams” approach employed by the OTP and the Registry in the successful Mahamat Said Abdel Kani (Said) arrest and surrender operation recently carried out in Central African Republic (CAR).

**(3) Remote Investigations (paras. 775-778)**

561. The Experts note with approval the OTP’s focus on cyber and online investigations, made even more necessary by the restrictions imposed on operations by the COVID-19 pandemic, and the fast-tracking of related projects, including remote interviewing. However, they note that the pandemic also exposed the weakness of the current ID lack of an embedded field presence in situation countries; such a presence would have enabled the ID to continue at least some evidence collection and witness management activities despite travel restrictions.

562. Based on the successful use of Situation Specific Investigative Assistants in situation countries, such as Uganda, Côte d’Ivoire and Georgia, and the productive redeployment of staff to situation countries, such as Uganda, Côte d’Ivoire, Mali and CAR, the OTP is now planning for an increased ID field presence in situation countries or in the region where these are situated, and examining how such field presence could best be established and maintained.

563. The recommendations relating to financial investigations, tracking, and remote investigations may now be addressed collectively, as follows.

## **Recommendations R283-R292**

**R284.** *The ASP should consider appointing a focal point for arrests.*

**R285.** *In order to improve the tracking of suspects, the OTP should continue to develop mechanisms for coordination and cooperation at the technical level (national law enforcement), and focus on informal cooperation networks.*

**R286.** *The OTP should strengthen the SALTT by appointing an additional analyst/investigator.*

564. The OTP supports the above actionable recommendations, R284-R286.

565. The SALTT has organized meetings with relevant States Parties, to increase access to special investigative techniques; as authorised by these States, it has ongoing direct contacts with partners at the technical level. However, the SALTT would benefit from a more coordinated approach on the State Party side: the ASP, or an ASP focal point, could help foster additional support from States Parties to assist with intelligence collection and special investigative tools (such as intercepts and remote monitoring).

566. The SALTT would benefit from the addition to the team of an analyst or an investigator, but resource deficits remain an issue. The JCCD will do what it can to increase its current involvement with the SALTT to ensure sufficient capacity on the cooperation side.

**R287.** *The OTP should strengthen coordination with the Registry's financial investigator. One of the initial steps to facilitate this coordination could be the creation of an inter-Organ working group on asset-tracing and financial investigations.*

567. This is an actionable recommendation, which has already been partly implemented. The Registry and the OTP have a protocol in place for sharing information on financial investigations. Regular meetings between ID and JCCD's ICS and the Registry on transversal judicial issues relating to asset tracking and financial investigations are taking place, as well as situation-specific meetings on financial information and assets tracking, including coordination (when legally possible) of cooperation processes between Registry's ERSCU and OTP JCCD's ICS and ID.

568. However, a structured inter-Organ working group resembling the SALWG could further facilitate the process. There is room for the OTP to enhance coordination with the Registry's financial investigator, and it is important that Court-wide discussions continue, to develop guidance on such coordination, as well as on the respective roles and responsibilities of the Registry and the OTP in requesting and sharing specific types of financial information. (It should be noted that the Investigations 3.0 project envisions even wider synergies with Registry, relating not only to financial investigations, but also to tracking and arrests, witness protection, exploitation of open source information and field presence.)

**R288.** *Arrest prospects and activities should be included in investigative planning for each situation.*

569. This actionable recommendation has already been implemented, but can be further improved. Coordination already occurs between integrated teams and the SALTT with the aim of sharing information and expertise. The OTP is developing specific guidelines for this necessary coordination, which involves yet another application of a "team of teams" concept.

**R289.** *The Court needs a rewards program in order to facilitate access to information from the general public for the location and arrest of fugitives. The ASP should consider setting up a working group to consider the possible ways such a program could be set up and funded.*

570. This is a welcome and actionable recommendation. The OTP has reached the same conclusion. The matter, however, is in the hands of the ASP. (The OTP notes the existence of a rewards program funded by a non-State Party, the United States; while it has not resulted in arrests, it has incentivised intermediaries to attempt to engineer arrest possibilities.)

**R290.** *There is a need for a special operations fund for the OTP. It would enable the teams carrying out the tracking and arrests of suspects to plan for and cover expenses in the field without delays.*

571. This is a welcome and actionable recommendation, which is supported by the experience of the SALWG in relation to all arrest operations so far conducted – most recently the OTP/Registry lessons learned exercise undertaken after the successful surrender of Abd Al Rahman (aka Ali Kushayb). Also, consultations with the tracking units from the UN International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the UN International Criminal Tribunal for Rwanda (“ICTR”) confirm this need. The OTP and States Parties should consider jointly how to implement this recommendation in view of the resource implications.

**R291.** *The OTP should consider further developing remote investigation techniques, including remote witness screening and the online collection of evidence.*

572. This is an actionable recommendation, which is already being implemented. In fact, the OTP is in the forefront respecting online methods of investigation and prosecution of international crimes. In 2017, it obtained an arrest warrant in a case that relied significantly on evidence acquired in online investigations. As far back as 2012, the OTP initiated a strategy for online investigations and remote investigation activities. Since then, the Office has developed its capacity for online investigations and is now at the stage of consolidating its knowledge and looking into further developments.

573. To achieve this stage, the required in-house expertise has been recruited; the needed technical infrastructure is being established; legal and operational standards and protocols have been developed to guide the work of the integrated teams; trainings have been held; a network of relevant partners has been created, covering law enforcement agencies, civil society actors, academia, Internet service providers and the private sector; in 2015, the Office established the Technology Advisory Board involving external experts.

574. A working group on online investigation strategies was set up, in the meantime, to ensure the continuation and consolidation of the above work and it produced a report outlining strategies for further growth in this area. The Office has been conducting staff trainings on these strategies on a rolling basis. In 2019, it issued a new Manual on Online Intelligence and Investigations, designated team focal points, and set up a Committee on Intelligence and Investigations to coordinate work in this area. Guidelines for the integrated teams could eventually be included in a revised Operations Manual.

575. With all of these improvements in place, integrated teams are conducting remote screenings and interviews on a regular basis, whenever these meet operational requirements. To enhance these developments, the IKEMS is equipping rooms with the technology to support remote investigation techniques. The JCCD is exploring options bilaterally with relevant States.

576. The Office has also developed strategies and tools to engage with affected communities and potential witnesses remotely; it has conducted outreach activities directed at relevant groups, using communications tools, such as SMS messaging, and has created online tools to allow it to interact, in a safe and controlled manner, with individuals willing to share information with the OTP.

**R292.** *Once the COVID-19 pandemic-related restrictions are lifted, the OTP should conduct a lessons learnt exercise in relation to the (i) techniques for remote investigations; (ii) flexible use of staff during the time of travel restrictions; (iii) the role that a field-based team could have played; (iv) possible future restrictions for reasons such as a local epidemics and budget restrictions; (v) possible requirements for cooperation in relation to remote investigation techniques such as partnerships with internet service providers.*

577. This actionable recommendation is already being partly implemented, despite COVID-19 restrictions (see also R291 above). Working groups are in place at both Court and OTP levels to consider issues of the kind identified in this recommendation. As the Office explained to the Experts, to deal with the restrictions made necessary by the COVID-19 pandemic, the OTP focused on the sort of measures envisioned in this recommendation: reinforcement of field-based and remote activities; flexible use of available resources; and reallocation of tasks and activities. Mission costs are being analysed. An ICC focus group has been set up to examine “the future of work”. The Court is also engaging with Internet service providers on relevant technical issues.

578. States Parties will have an important role to play, since they could facilitate cooperation with Internet service providers situated in their territories.

579. All of this work will continue and increase in step with the lifting of restrictions.

### C. ID Field Presence in Situation Countries

580. The **Findings** explain why the Experts say that a fundamental review is necessary of the OTP's current model of deploying investigators into the field on a rotational basis, and their view that the OTP does not have a sufficient field presence or knowledge of situation countries. The OTP is keenly aware of the basis for such criticisms, and the Experts acknowledge current efforts the OTP is making to change its whole approach. In addressing the recommendations below, the OTP will face the challenges presented by funding constraints and human resource issues. The shift in approach is also one that properly requires the active attention of the incoming Prosecutor and of States Parties. It is thus likely a longer term goal, rather than one that can be accomplished as an immediate priority.

#### ***Recommendations R293-R298***

**R293.** *The OTP should continue to consider the different models available in order to maintain more investigative staff in the field on a longer-term basis. The Experts support the strategy of more local, field-based recruitment on the GTA or STA basis, as well as international recruitment with a duty station based in the field.*

**R295.** *The OTP should consider the recruitment in situation countries of local investigative staff who could be active in the field for the duration of an investigation, and who would support the integrated teams, as well as liaise with local contacts.*

**R296.** *Where local recruitment is not an option, the OTP should consider ways in which some of the investigators and/or analysts on the team could acquire greater familiarity with the context of the investigation. Long-term missions are one option. Another might be the recruitment of suitable staff from neighbouring countries.*

**R297.** *The OTP should consider increasing their cooperation with the Registry regarding the use of field offices. Field offices should include OTP staff, including analysts, and local contractual staff. A permanent arrangement should be investigated jointly by the OTP and the Registry. In particular, consideration should be given to the OTP using field offices for outreach and cooperation, increased ID contact with local officials, victims and witnesses, with appropriate advice from PD and JCCD.*

**R298.** *The OTP should continue its ongoing consultations with staff in relation to possible long-term deployment to the field. They should also consult with the Court's Human Resources Section regarding development of contracts with flexible duty stations.*

581. The above recommendations, R293 and R295-R298, are sound and will be addressed in the Investigations 3.0 model currently under development. It should be noted that the position of SSIA has existed since 2016 and has been used successfully in investigations. The Office is also redeploying staff members to the field and securing longer term missions. However, implementation of the above recommendations will require further consideration, respecting many issues, both financial and human resource-related, and one of them, respecting the use of field offices, will require close coordination with the Registry. Finally, such fundamental and important changes must engage the attention and views of the incoming Prosecutor.

582. Currently, the OTP has staff, including local staff, who are already based in field offices, along with Registry staff (whose field complement includes members of the VWS); OTP staff members include operational risk and security personnel, a psychosocial assistance professional and locally recruited psychosocial assistance experts, and investigators deployed permanently to the field. As noted, the OTP employs SSIAAs too. In its current recruitment planning, the OTP is designating positions for protection strategy personnel and investigators to be stationed in the field.

583. As the Experts acknowledge, deployment of OTP investigators in the field will have to take into account local conditions, where on-going armed conflict can create a high-risk environment. Prospects for desirable long-term deployment of staff in the field can be constrained by such operational contexts in situation countries. Additionally, cooperation challenges, respecting the preference of certain States Parties and non-State organisations for the OTP to initiate communications from headquarters, rather than

locally in the field, will have to be overcome. However, adaptable and flexible planning should prove capable of addressing such issues.

**R294.** *The OTP should consider increasing the number of Situation Specific Investigative Assistants and Country Experts.*

584. This recommendation is soundly based and reflects the productive experience the OTP has itself gained with SSIAAs and Country Experts. The OTP recognises how important it is to increase its situation-specific knowledge. There are, of course, financial and human resource implications to be addressed. These and other considerations will command the attention of the incoming Prosecutor.

## **D. Evidence Assessment and Analysis**

585. The **Findings** sum up the Experts' concerns about the OTP's lack of comprehensive analysis of evidence and case theories, as reflected in certain unfavourable judicial decisions, and its failure sufficiently to value and use the skills of analysts in many aspects of its investigation and prosecution work. The findings also point to the insufficiency of analytical resources within the OTP, and the need for the Office to acquire specialised technical expertise in the fields, for example, of cyber, financial and intelligence analysis.

586. The OTP does make use of analytical skills in its operations, but accepts that significant improvements need to be made, and capacities enhanced. It already possesses certain sophisticated analytical capabilities, for example, concerning cyber evidence, within the Cyber Unit of the Forensic Sciences Section, which is separate from the IAS. It has also tasked the IAS to do situation analysis with a view to identifying strategic goals. The full utilisation of analysis is still, nonetheless, a work in progress.

### **Recommendations R299-R304**

**R299.** *The important role of analysis should be recognised and valued by the OTP. Collection of evidence should be analysis-driven to avoid over- and under-collection. It would also support evidence-led, rather than target-led, investigations.*

587. This recommendation is a confirmation of the OTP's philosophy that investigations should be evidence-led, not target-driven.

588. The OTP recognises the importance of the role of analysis, and, in optimizing the internal structure of the ID, set up the IAS as a separate section, to house the analysis specialty, and has embedded analysts in the ID component of integrated teams carrying out the core OTP activities of investigation and prosecution. IAS staff become involved in situations as early as at the PE stage.

589. Nevertheless, this approach can still be improved. The OTP already possesses sophisticated analytical capabilities, but the chronic strain on investigative resources, a stress that has become acute for the IAS, presents one of the principal challenges to full achievement of the objectives underlying this recommendation.

**R300.** *Analysts should draft and manage collection plans (with team leadership's approval). Their input should also be sought during the drafting of strategic situation and case specific plans.*

590. The OTP takes note of this recommendation, and agrees that analysts should have a vital contribution to make in the drafting and management of collection plans. However, the lead in this area will normally be taken by the senior investigator, that is, the Investigation Team Leader, who must take into account multiple analytical and operational requirements. Such planning will benefit, of course, from the critical input of the analyst(s) and others embedded in the team.

**R301.** *Analysts should form a critical component of evidence review at all stages. In particular, AWA reviews and internal evidence reviews should be analysis-driven and informed by the senior analyst on each team.*

591. This is an actionable recommendation that reflects what is currently developing as OTP practice, a practice that can be further optimised. Evidence reviews, of the sort mentioned here, are usually assisted by the Head of IAS and involve the analyst embedded with the team.

**R302.** *Analysts should play a key role in the preparation of cases. They should assist in the formation of factual hypotheses and theories, and help guide the collection of evidence.*

592. This is an actionable recommendation, which reflects the current direction of OTP practice, a practice that can be enhanced, however, and that suffers from some resource deficits.

**R303.** *The OTP should make additional resources available for the IAS. More analysts, especially at P-1, P-2 levels, are necessary to realise the analysis requirements of the OTP.*

**R304.** *Consideration should be given to the recruitment or secondment of analysts with specialised skills to ensure efficient exploitation of a more diverse evidence base.*

593. These recommendations, R303-R304, are sound and actionable, always bearing in mind funding constraints. With respect to R304, while the OTP has recruited specialized analysts, it will need to strengthen its capacity to handle an increasing volume of digital and telecommunications data.

## **XV. OTP INTERNAL QUALITY CONTROL MECHANISMS**

594. In their **Findings**, the Experts point to the need for the OTP to improve existing practices concerning evidence reviews, trial progress monitoring, and lessons learned procedures.

### **A. Evidence Reviews: Internal and Peer Review**

595. The Experts examine in more detail what was reported to them about OTP practices concerning internal and peer review of evidence, the challenges the OTP faces in implementing consistent and effective practices, and the matters requiring concerted attention for improvement. Their observations underlie the recommendations, which are addressed now.

#### ***Recommendations R305-R310***

**R305.** *The OTP should consider increased monitoring of internal evidence reviews. They should be obligatory in every investigation and trial preparation, and appropriately regulated.*

596. This recommendation appears to mirror the principles adopted in the recently amended Evidence Review Guidelines, which provide for (a) mandatory regular internal team evidence reviews; and (b) external evidence reviews once an integrated team wishes to present a draft AWA for consideration. Consistent implementation across integrated teams is essential, however, and will require the combined effort by the Senior Trial Lawyer and Investigation Team Leader, on one hand, and monitoring by senior management on the progress made by each team in this regard, on the other hand.

**R306.** *The OTP should assess the reasons for poor compliance with source evaluation. It should ensure that source evaluation guidelines comply with the relevant jurisprudence of the Chambers.*

**R307.** *Reporting on compliance with source evaluation of witnesses should be included in the OTP report on Key Performance Indicators.*

597. The above recommendations, R306-R307, are actionable. Respecting R306, the IAS has drafted a new version of the ID Source Evaluation Guidelines, relying on the most recent jurisprudence and expert feedback. R307 is already a component of the KPI dashboard used in quarterly presentations to the Prosecutor and ExCom, and source evaluation of highly relevant witnesses has improved.

**R308.** *Peer evidence reviews should be made more efficient and meaningful by:*

*(i) Allowing more time for the panels to prepare for the reviews. The minimum preparation time for review should be two weeks;*

*(ii) Consider the tasking of review panel members solely with the review of the case file for an appropriate number of days, i.e. suspending all other tasks of the staff member assigned to a panel for that period of time. In this context, it might be more convenient to include in the review panel more of the junior members of staff;*

*(iii) Appointing a senior member of the review panel to draft the report of the panel and provide it simultaneously to the PD Director and to all the members of the team whose document is under review. The reports should include sufficient detail and argumentation in favour of and against accepting the factual allegations contained in the draft document under review;*

*(iv) Considering the greater use of ‘red-teaming’, or simulated opposition, in reviews. That would represent a more realistic preview of what is likely to happen during a hearing.*

598. This recommendation deserves serious consideration. However, some of the steps recommended (chiefly, (i) and (ii)) may simply not be feasible, unless the current resource situation changes drastically – a development that seems unlikely in the short- or mid-term. The incorporation of junior members of staff as reviewers would be a welcome initiative, and one in relation to which PD should act promptly, but it does not detract from the need to ensure that there is a critical mass of experienced staff in any review process. The idea of appointing a rapporteur is already included in the amended Guidelines (para. 5) and so is the use of simulated opposition (paras. 1 and 10). Both steps, however, require consistent implementation in all evidence review processes.

**R309.** *Peer review panels’ composition requires the following improvements:*

*(i) Including analysts and investigators in the preparation and consideration of reviews. The ID staff should lead the discussions on evidentiary/fact-finding questions, while the PD staff should lead on the legal analysis;*

*(ii) Considering inviting more P-2/P-3/P-4 staff onto the panels, in order to optimise the time available for preparation of the review. Allowing more junior grade staff to participate would also be a positive recognition of their work;*

*(iii) In appointing members of review panels, consideration should be given to the situation or regional expertise of possible panel members.*

599. The inclusion of analysts and investigators is already provided for in evidence reviews (and, notably, the Office’s Senior Analyst – the Head of IAS – and the Investigations Coordinator are standing reviewers in all panels), but their input can be enhanced. Yet the proposed division of roles should not be allowed to become artificial, by creating too rigid a distinction between factual and legal analyses. Undoubtedly, the evidence should drive the legal characterisation of the case, and a firm grasp of the evidence and what factual inferences and legal consequences it generates remains essential. However, teams should examine facts and law in a balanced way, developing a clear case theory firmly supported by the evidence.

600. Proposals (ii) and (iii) can be already easily implemented in an upcoming evidence review.

**R310.** *The OTP should institute a process of rigorous testing of the trial readiness of cases between the confirmation of charges and the commencement of the trial.*

601. Implementation of this recommendation should be favourably considered. However, trial readiness is a multifaceted concept, embracing not only evidentiary strength, but also issues of information management (chiefly, a review of the progress and readiness to effect disclosure) and witness protection issues, among other matters. Also, most, if not all, of these issues should, in the ordinary course of events, have been discussed and assessed in the context of the evidence review process, prior to the filing of an AWA. In this sense, the step proposed constitutes a supplementary check in order to ensure that the case being brought forward is firmly rooted in solid evidence, and that adequate planning is taking place. In order to be truly helpful, such a supplementary process should take place soon after the confirmation process is completed.

602. PD should develop a check-list for trial readiness for use by all teams. This is already being discussed in the Working Group on Case File.

## **B. Trial Monitoring**

603. In their **Findings**, the Experts point to the need for the OTP to have a more systematic approach to monitoring the progress of trials and how this might be accomplished. They also question an approach to trial advocacy preparation that depends more upon the initiative of the Senior Trial Lawyer, rather than on a universal practice.

604. It should be noted, however, that there is an in-house advocacy training program, in which more junior lawyers and interns are free to participate; it operates on a regular basis and is run in English and in French.

605. The recommendations below are likely most efficiently addressed, by capturing for implementation across the Office the impetus to best practices generated on certain teams by the Senior Trial Lawyers.

### ***Recommendations R311-R312***

**R311.** *The OTP should consider surveying the practices employed by the trial teams to date, to develop a comprehensive and consistent approach to the manner in which trial teams prepare for witness examinations, presentations of complex evidence, and oral arguments.*

**R312.** *The OTP should record all the findings of the above in the lessons learnt portal.*

606. These recommendations, R311-R312, reflect best practices that were already characteristic of teams, such as that conducting the *Ongwen* trial, and will be implemented across teams. These best practices form part of the Lessons Learned document recently produced by the *Ongwen* trial team.

607. It is also acknowledged that PD should have a more structured approach to Lessons Learned, including (a) conducting regular LL processes after each particularly relevant development; (b) uploading the results of those processes in the LL Portal; and (c) distilling the key findings in “Best Practices” documents available to all teams.

## **C. Lessons Learned**

608. In their **Findings**, the Experts note that the OTP formally initiated a lessons learned program in 2014, creating a lessons learned portal on the OTP intranet to capture all the lessons learned in one place. However, they report that the policy has been poorly implemented and so has not been institutionalised as had been originally envisioned. While they note the more informal ways that lessons learned exercises are carried out in the OTP, the Experts consider this to be a wholly inadequate approach that inhibits institutional learning and the development of best practices.

609. The OTP acknowledges the basis for the criticisms made by the Experts and accepts that, to live up to its goal of being a learning organisation, it must improve its lessons learned practices. The Office was recently the subject of an audit of its lessons learned processes by the OIA, which also concentrated its attention on the implementation of the lessons learned policy and utilisation of the LL Portal, as a more

measurable feature of lessons learned processes. The recommendations of the IER Report anticipate, in many important features, those made in the OIA report.

610. It must be said, however, that not all of the criticisms made by the Experts are supported by the facts. In particular, it should be noted that:

- currently, there are more than 100 lessons learned in the LL Portal;
- recorded among those lessons learned are lessons from the *Bemba* and *Gbagbo and Blé Goudé* cases, which have both been the topic of discussion, as part of after action reviews, in the OTP;
- the public version of the report on the Kenya situation lessons learned exercise conducted by external consultants is now in the LL Portal; it contains an analysis of the recommendations made by the consultants on the basis of the experience of the Kenya situation, and attaches the consultants' executive summary of their report;
- the above mentioned public version of the Kenya report was shared with OTP staff via email before the Prosecutor released it to the public, so that it was, in fact, available to staff.

611. As a repository for lessons learned, to preserve institutional learning and impart best practices, the LL Portal is an important tool, utilisation of which should continue to be improved. The OTP does engage in multiple after action reviews and lessons learned exercises; however, a more systematic approach to sharing the gains in knowledge made through such activities is highly desirable.

612. It is also important to realise that not all lessons learned will be captured in the LL Portal. For example, the OTP Intranet presents updates in investigation standards that are of value to ID staff, and the revision and upgrading of guidelines, respecting matters, such as evidence reviews and on-line investigations, are also the product of lessons learned.

613. The continuous improvement in its operations that the OTP strives to achieve – and has, in fact, achieved – does mark it as a learning organisation.

614. The recommendations pertaining to lessons learned may now be addressed.

### ***Recommendations R313-R319***

***R313.*** *The OTP should review the guidelines relating to lessons learnt, and consider making adherence to the process either mandatory and/or part of the performance appraisal of managers.*

615. This is an actionable recommendation that is supported by the OIA report on lessons learned processes in the OTP.

***R314.*** *Appoint a senior staff member of the OTP management to be responsible for monitoring compliance with lessons learnt.*

616. This is an actionable recommendation expressed in terms very similar to those of one of the recommendations made in the OIA report. While the Prosecutor must decide whom to make responsible for this function, monitoring compliance with lessons learned should logically fall within the general management responsibilities of the Deputy Prosecutor. Development of a compliance policy in this regard has been entrusted to the LAS.

***R315.*** *Incorporate lessons learnt into the workflow of the teams.*

617. This actionable recommendation is already part of the OTP's practice, but can be implemented more systematically.

***R316.*** *Reconsider the present practice which requires team members, at the end of a case, being immediately reassigned to other tasks and consequently not being available to consider lessons learnt.*

618. Despite the pressure on the limited resources of the OTP, this is a recommendation that is being implemented, in the sense that, even if staff members find themselves immediately reassigned to other tasks, their experiences are mined for the benefit of lessons learned. Capturing the lessons, both positive and negative, to be drawn from a team's experience has become a feature of current OTP practice, since its value is so obvious. A recent example is the internal lessons learned document prepared by the *Ongwen* Prosecution team at the end of the trial.

619. The IKEMS, working in collaboration with the LAS and other components of the OTP, could enhance this function by developing a knowledge gathering form as part of knowledge management, relating to the preservation and transfer of knowledge gained from the experience of teams.

***R317.*** Consider the incorporation of lessons learnt into OTP Key Performance Indicators, and report on them publicly.

620. This an actionable recommendation, and would reinforce the culture of the OTP as a learning organisation. For example, the KPI Working Group, in its quarterly reports to ExCom, could develop KPIs for lessons learned exercises and monitor use of the LL Portal. Performance indicators may have to be developed for other lessons learned activities.

***R318.*** Consider ways to maintain the investigations jurisprudence report. Consider assigning a junior qualified staff member to maintain this project.

621. This is a recommendation that finds strong support in the OTP, resource availability having been the most difficult challenge to manage in maintaining this valuable report. (It may not, strictly speaking, be related to lessons learned exercises, as such, but more to knowledge preservation and management; nevertheless, the Report could serve as a valuable source of input for lessons learned exercises.)

***R319.*** Adherence to the jurisprudence should be integrated as lessons learned and new staff should be introduced to the relevant jurisprudence.

622. This is an actionable recommendation that makes sound common sense. (It may not, strictly speaking, be related to lessons learned exercises, as such, but more to knowledge preservation and management; nevertheless, training new staff in the relevant jurisprudence could help maintain improvements gained from lessons learned exercises.)

## ***Organ Specific Matters: Registry***

### **XVI. DEFENCE AND LEGAL AID**

#### **A. Institutional Representation**

##### ***Recommendations***

**R320.** *Although accused have mainly been represented by private, external Defence Counsel, appointed from the List of Counsel maintained by the Court, the possibility for the OPCD to be appointed as public Defence Counsel (duty counsel) should be maintained.*

**R321.** *In light of ICCBA's recognition as the Bar of the Court, its role on the annual training for counsel ought to be formally recognised. Further, consideration could be given to having an elected ICCBA representative as a member of the Advisory Committee on Legal Texts (ACLT).*

**R322.** *Regarding internal organic structures, reshaping the current office for the Defence (OPCD) by entrusting it with additional responsibilities would improve efficiency of governance and of administration, increase budgetary transparency, provide a strategy for Defence Services, enhance accountability, and ensure appropriate representation of the Defence in the ACLT.*

**R323.** *These objectives may be achieved by bringing under the OPCD's management and governance the Counsel Support Section (CSS)'s Defence services, as well as legal aid. This new Defence Office 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. This would also resolve the difficult position the Registry is in, in having to represent the Defence while maintaining its neutrality.*

**R324.** *The Defence Office would further be responsible for oversight, capacity building and strategic development for defence representatives before the Court.*

**R325.** *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.*

**R326.** *Finally, in developing the Court's public information and outreach strategies, the Defence Office should also be consulted, to ensure such communication efforts respect the principles of fair trials and presumption of innocence.*

**R327.** *The Experts 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.*

##### ***Overview of findings***

623. The Expert Report highlights that 'equality of arms' is intrinsically linked to fair trial rights. As noted by the Experts, this means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing a disadvantage for the defendant. The rights of accused, the Report continues, include the right to legal representation and legal aid, which are included in the Rome Statute. The Experts note that article 34 of the Rome Statute does not mention an Organ for the Defence among the Organs of the Court. The Report further indicates that the great majority of cases before the Court defendants are represented by private external counsel from the 'List of Counsel' approved by the Court. Furthermore, the Report looks into the establishment of the Office of Public Counsel for the Defence ("OPCD") (2006), an Office created to promote, represent and protect the rights of the defence, persons entitled to legal assistance, and represent general defence interests in the proceedings. The Experts also note that the OPCD can act as standby defence team acting as duty counsel. As mentioned in the findings, the OPCD is substantively independent office under the administrative remit of the Registry. The Experts understand that the OPCD representation role within the Court is not formalised through, for example, its participation in Court-wide coordination mechanisms and processes. Finally, the Experts considered the establishment of the ICCBA, a Bar Association for Defence and Victims Counsel on the Court's 'List of Counsel'. The Experts took note of

the recognition by the ASP of the ICCBA in 2019 and indicate that such recognition should put representatives of the Defence in a better position to raise their concerns within the Court or at the ASP.

### ***Overall assessment***

624. The Court agrees with the Experts' recommendation to maintain the system and procedures in place in regard to appointment of Defence Counsel, whereby accused have mainly been represented by private, external Defence Counsel, appointed from the List of Counsel maintained by the Court, and the possibility for the OPCD to be appointed as duty counsel remains. This is indeed the system currently in place

625. The Court notes the Experts' recommendation for the ICCBA's role in annual training of counsel to be formally recognised. In this respect, the Court notes that Counsel training is an activity currently organized by the Court with voluntary contributions from the European Commission (EC). The EC grant is given directly to the Court, and it carries implementation and reporting obligations on the Court as a recipient. Moreover, the scope of the grant includes other extra-budgetary activities of the Court, including the organisation of regional seminars on cooperation. In this regard, a formal recognition of a role and subsequent accountability of the ICCBA *vis-à-vis* the use of funds from the EC cannot be formalised in the context of the grant, as the ICCBA is an independent entity, and it is not part of the organisational structure of the Court. Having said this, and mindful of the legal obligations of the Court in the implementation of projects under the EC grant, the Court works closely together with the ICCBA, and includes and facilitates a prominent role for members of the ICCBA in identifying training needs and providing some of the training themselves. The Court will continue to engage with the ICCBA with a view to identifying ways to ensure a more inclusive process.

626. In respect of the recommendation to have an elected ICCBA representative as a member of the ACLT, the Court recalls that the composition and work of the ACLT is governed by Regulation 4 of the Regulations of the Court. Accordingly, Regulation 4.1(d) provides for a representative of counsel from the List of Counsel, to be part of the Committee's composition. The Counsel representative to the ACLT is elected from all those in the Court's List of Counsel. Notably, while members of the ICCBA are in the list of counsel, not all lawyers in the Court's List of Counsel are members of the ICCBA. In this regard, limiting the election of the Counsel representative to the ACLT to the members of the ICCBA, would entail that all those who are interested in this role must first become members of the ICCBA, including by paying the corresponding membership fees. As the ICCBA is not yet fully universal, the Court respectfully submits that the current system of having a member of the List of Counsel chosen by the lawyers on the list ensures more universality, and wider geographical and gender representation. In practice, counsel elected as representatives to the ACLT are often members of the ICCBA, and all members of the ICCBA in the List of Counsel can vote in this election.

627. The Experts further recommend reshaping the current OPCD by entrusting it with additional responsibilities with a view to improving the efficiency of governance and of administration. The Court understands the importance of institutionally endowing Defence with sufficient and adequate support structures to ensure its independence, the full implementation of the principle of equality of arms and give Defence a more prominent organisational weight. In this respect, careful consideration will be given by the Court to the Experts' recommendations. Such considerations will include the multifaceted nature of Defence, understanding that each Defence team is autonomous from the other (and on occasions even conflicted from one another), and the value in this regard to having support structures within a neutral Organ, the Registry. Similarly, the Court will carefully consider the potential benefits of enhancing Defence's visibility and autonomy through the creation of the Defence Office, responsible for oversight, capacity building and strategic development for defence representatives before the Court, as recommended by the Experts. Options will be explored to this end, involving all relevant actors and stakeholders, with the objective of identifying relevant functions that could be transferred to a Defence Office, their legal, policy, structural or budgetary implications, as well as consideration to ensure synergies and efficiency in the provision of the services.

628. Similarly, the Court notes the recommendation to transfer the responsibilities currently under the Registry in its Counsel Support Section to the OPCD, including the management of legal aid. In this respect, the Court highlights some of the responsibilities of the Registrar relating to the rights of the Defence as contained on Rules 20 and 21 of the RPE, including the management, criteria and procedures for legal aid. Notably, decisions of the Registrar concerning the eligibility of defendants to legal aid, which are connected to determinations of indigence, are subject to review by the Presidency. Similarly, decisions

by the Registrar on the scope of legal aid provided to Defence teams in the context of a particular case, are subject to the review of the relevant Chambers. In transferring such responsibilities to the OPCD, attention should be given to the impact this will have on the normative framework, as well as on the efficiencies and synergies gained by having the management of legal aid to the Defence being managed together with the legal aid for Victims. The latter could not be transferred to the OPCD, and the Experts have noted in their clarifications that “it could not go to OPCV as they are ‘competing’ in a way with external victims’ representatives”<sup>73</sup>. Alternatives or complementary options, such as better repartition of tasks, including identifying further synergies will be explored. As indicated, the Court will include consideration to these recommendations, in the context of the Registry-led consultation process, the results of which will be shared with the States Parties for their appropriate consideration.

629. As regard the recommendation to enable Defence-generated press releases on the Court's website, the Court will consider, in the context of the finalisation of its revised Communication and Outreach Strategy. The Court’s assessment will include ways to more institutionally include Defence in its communications. While the exact modalities will be considered, the Court notes the neutral role of the Registry in respect of the Court’s institutional communication. In this respect, while enhancing Defence perspectives in the Court’s institutional communications is possible, and indeed desirable, a situation whereby the Court’s communications platform is used by parties or participants of the proceedings to air case related matters which have not yet been adjudicated should be avoided. Furthermore, the Court sees value in consulting with appropriate interlocutors institutionally representing the interests of the Defence, on ways in which the Registry could further enhance its existing messages on rights of the defence, fair trial principles and presumption of innocence. The Registry already integrates these elements into its communication strategies and will continue to explore ways to enhance its messaging in this respect, while maintain the required institutional neutrality.

## **B. Legal Aid**

### ***Recommendations***

**R328.** *Renewed efforts, taking into account past assessments and consultations already carried out, should take place to finalise the reform of the legal aid policy. It should be accessible, effective, sustainable, and credible, including ensuring equality of arms with the Prosecution and adequate facilities to Defence teams to prepare and conduct an effective defence. A full reform of the Policy is recommended, rather than only updating numbers. Otherwise, the topic will return to the ASP agenda in the coming years. The reform should be carried out and finalised 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 working group should not begin its work within confined limits (e.g., budgetary limitations).*

**R329.** *Decisions on interpretation and application of legal aid should be made accessible to other Defence and Victims' teams, with any needed redactions that might be necessary, to ensure uniform application of the policy.*

**R330.** *The current framework and operation of the functions regarding financial investigations on suspects and accused persons should be reviewed, to ensure increased efficiency. It should also be brought in closer working relation to other units within the Court that collect information that might be relevant.*

**R331.** *Additional resources are needed in the Registry to strengthen and complement the sole Financial Investigator position, as well as the Registry's capacity to support States Parties in implementing cooperation requests in this field. For this, the Experts recommend that the Court makes use of seconded personnel with specific expertise. The Experts note that strengthened Registry capacity in this area would contribute to lowering legal aid costs.*

**R332.** *States Parties to the Rome Statute have a role to play in ensuring that declarations of indigence by prosecuted persons are secured pending the result of the trial.*

**R333.** *The Court should consider elaborating scales of professional fees for legal staff working in external victims' teams, especially young professionals and women. Alongside maximum rate indicated*

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<sup>73</sup> Statement delivered by the IER Experts, *Responses by Cluster 1*, 7 October 2020

*in the legal aid policy per role, a minimum rate should also be foreseen. The use of the money provided by the Court in terms of legal aid should respect different functions, while not being discriminatory.*

**R334.** *The relationship between the Court and support staff assisting external counsel for Defence and Victims should be formalised by granting them SSA contracts or consultant status.*

**R335.** *As recommended elsewhere, in line with the One Court Principle, the Court wellbeing framework (including for example the system foreseen by the Administrative instruction on harassment, access to OHU) and disciplinary procedures should be extended to support staff.*

### **Overview of findings**

630. In its Final Report, the IER echoes concerns expressed by counsel and civil society organizations on the level of funding of the Defence teams and their limited access to support and facilities. This, according to the Final Report, impairs the ability of the teams to prepare and conduct effective representation. The Final Report provides an overview of the efforts that had been carried out with a view to reviewing the 2012 Legal Aid Single Policy document, including in particular a more recent exercise in 2019, following the request of the ASP for the Court to propose a reform to the policy with existing resources. However, as noted by the IER, the revised policy by the Court, which was submitted for the consideration of States Parties, was not taken up by the ASP in light of concerns by the then HWG facilitator. The facilitator, who had been following the discussions, indicated that the draft policy was not yet ready for the ASP consideration citing a number of unresolved issues that required substantive consideration by States Parties. These included: taxation by the Host State of remunerations under legal aid, the lack of employment, benefits and social security for support staff, and the flexibility of counsel to fix remuneration levels of support staff affecting their income and security. The Report explains that the management of the Court's legal aid scheme falls within the ambit of the Registrar, with a recourse to review the Registrar's decision on legal aid by the Presidency. Furthermore, the Report notes that as per Rule 21 of the RPE, the criteria and procedures for assignment of legal assistance shall be established in the Regulations, based on a proposal by the Registrar, following consultations with independent representative body of counsel or legal associations.

### **Overall assessment**

631. The Registry stands ready to continue to work on a full reform of the Legal Aid Policy on the basis of guidance provided by the ASP. Notably, at its 16th session, the ASP requested the Court to present proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly making 'every effort to present a reform that can be achieved within existing resources by exploring opportunities to contain the administrative burden without jeopardizing the need for accountability and by setting priorities accordingly.' The IER recommendations tackle important matters, which may have budgetary implications on the level of the overall legal aid expenditure, while at same time opportunities for further savings in other areas. It is thus crucial that before continuing the complex and comprehensive exercise of consultation that will lead to a proposal from the Court to the ASP on a reformed legal aid policy, States Parties first consider the basis and criteria within which the process should be framed. The Court stands ready to support the consideration by States Parties of the recommendation by providing the necessary information pertaining to possible implications. The Court will accordingly initiate consultations for a reformed legal aid policy after the ASP, at its upcoming session, sets the criteria on the basis of which the exercise is to be conducted. This could be done as soon as January 2022. A final proposal can be submitted for the consideration of the ASP at its 21<sup>st</sup> session in close coordination with the Bureau facilitator and through the Committee on Budget and Finance.

632. Once States Parties have considered the IER recommendations and identified the relevant guidance for the process, the Court will immediately set out to produce a reform of the legal aid policy following the process identified by the Experts. Importantly, a proposal for a reformed legal aid system will first have to be assessed by the CBF both in terms of the long-term budgetary implications of the policy, as well as in respect to the concrete programme budget of the respective year. After the CBF consideration and recommendations, the ASP will also have to consider the reformed policy and the CBF recommendations before its effective implementation.

633. Some of the recommendations concerning legal aid can be directly implemented by the Registry. The Registry will discuss with the Presidency the appropriate manner in which decisions on interpretations and applications of legal aid should be provided to the teams. On matters pertaining to financial

investigations, an internal review of the framework is being conducted within the Registry, looking into the workflow on the determination of indigence and financial investigation pursuant to regulation 132(5) of the Regulations of the Registry, including access of the financial investigator to the information in the possession of the Prosecution and other Sections within the Registry. Discussions are also under way with OTP on how best to join forces (in instances where there are no mandate-related obstacles present and while maintaining Registry's neutrality) to strengthen the Court's capacity to carry out financial investigations on suspects and accused persons.

634. The Registry is mandated to conduct financial investigations in order to determine the indigence of the applicants for legal assistance paid by the Court pursuant to regulation 132(5) of the Regulations of the Registry. In relation to the execution of the Chamber's requests to states for cooperation to identify, trace, freeze and seize the assets and property of a suspect or an accused, the Registry transmits the Court's requests and follow up with States regarding their execution. In both contexts, the Registry has indeed been looking into possibilities to reinforce the coordination and cooperation, including the use of gratis seconded personnel from states, developing formal/informal task forces with the participation of states and/or to request direct access to various national databases provided that the said approaches are permitted in accordance with national legislations. Cooperation from States is key. In this regard, the Registry will continue to explore ways of enhancing its capacity by means of secondments of specific technical expertise from States Parties, mindful of the neutral role of the Registry in ensuring the independent implementation of judicial decisions and the confidentiality of the information.

635. Finally, when reviewing the Legal Aid policy, and subject to the guidance expected from the ASP in this respect, the Court considers it important to review the welfare and social coverage provided to support members of external teams. The Court will review their situation in terms of protection under the Court's disciplinary policies and rights regarding work-life balance. In the meantime, steps are being taken towards the full application of the Court's wellbeing framework to Counsel and their support staff, including on policies concerning harassment and retaliation, and access to OHU services.

## **XVII. VICTIM PARTICIPATION**

### **A. Outline of the System**

#### ***Overview of findings***

636. The Expert Report highlights the rights of victims to both reparations and participation in the proceedings before the Court as a striking major innovation, which since its adoption in the Rome Statute has become a feature in other internationalised criminal institutions. The Experts note that while article 68(3) of the Statute provides for the right of victims to participate in the proceedings and acknowledges a role for counsel, it is silent with regard to how to give this right into effect. The Report further considers Rules 89 to 92 of the RPE which cover issues concerning the application procedure for admission as a participant, selection of legal representatives, modalities for the participation of legal representatives, and the obligation of the Court to notify victims and the representatives. The Expert indicate that the legal framework leaves considerable scope for experiment and judicial flexibility. The Report highlights that victims play a significant role in a broad range of moments in the work of the Court, starting with early developments in a situation. In this regard, the findings indicate that the views and concerns of victims have informed decisions to open investigations, have contributed legal arguments (procedural and substantive) at all stages of proceedings, and have played a central role in reparations proceedings.

## **B. The System in Operation**

### ***Overview of findings***

637. Noting the judicial procedural discretion in relation to victim participation system, the Report goes on to explain that the implementation of the system is dependent on the work of a number of offices within the Registry, the OTP, and the legal representatives of victims. Accordingly, the Experts identified three major offices within the Registry who are responsible for different aspects of the engagement of victims in respect of the work of the Court, namely, the Public Information and Outreach Section (“PIOS”), the Victims Participation and Reparations Section (“VPRS”), and the Victims and Witnesses Section (“VWS”). The Reports clearly explains how the roles of these offices provide a clear division of tasks. As such, PIOS is responsible of conducting outreach ensuring that proceedings are made public and accessible, in particular within affected communities. VPRS is responsible for facilitating the victim application process, the management of the Victims Application Management System (“VAMS”), informing victims of their rights and receive applications, and assist victims in organizing their legal representation. Finally, VWS assists with the protection and safety of those victims and witnesses who actually before the Court, in other words, when victims testify as witnesses. The Report further considers the role of the Office of Public Counsel for Victims (“OPCV”), a substantively independent office within the administrative remit of the Registry. Its functions range from providing general assistance and support to legal representatives to, when instructed or with the leave of the Chamber, appearing before the Court on specific issues, advance submissions, and represent victims in the proceedings. In their findings, the Experts explain that the Court has repeatedly recognized that the purpose of the scheme is to give victims a ‘meaningful’ role in proceedings. The Experts further report on concerns received that the involvement of victims on the length of the proceedings was taxing to defence counsel and that by tying the right of reparations to conviction legal representatives of victims act as a second prosecutor. The Experts underlined that in the absence of concrete examples, and in the face of accounts to the contrary, there is no basis for suggesting any curb on the right of victims to participate in proceedings of the Court.

## **C. Recognition of Victims as Participants**

### ***Overview of findings***

638. The Expert report addresses the evolution of the different systems applied thus far by the Court to admit victims as participants in the proceedings. In this respect, the Expert note that, taking into consideration that victim participation was such a major innovation, having to develop an efficient and effective process from scratch without a comparable pattern to follow would necessarily take time. The Experts narrate the experience and systems applied in the early stages of the work of the Court, which were considered an intensively bureaucratic approach to verification and adjudication, as it required the judges to scrutinize applications. The Report also explains subsequent model whereby only those victims who sought to make representations personally were required to submit applications and all others would register with the Registry which would compile a database of registered victims. In the view of the Experts, this model can be problematic as it does not appear to be what victims wish as it does not provide for the official acknowledgement by the Court of the status, dignity and suffering of individual victims. In their findings, the Experts go on to present the procedure now followed today as holding answers, as it appears to be working well and reduced the burden of dealing with application to manageable proportions. The current procedure, which is a slight improvement of that used in the *Ntaganda* and *Ongwen* cases, uses a single-page form on the basis of which Registry, using the criteria from the Chamber, separates victim applicants in three groups: those who clearly qualify as victims, those who clearly do not qualify as victims, and those for which a clear determination cannot be made by the Registry. Thus, only those application falling under the last group will be presented to the Court to resolve. The Experts note that the procedure, with a modification to the form, has now been applied in the *Al Hassan* and the *Yekatom and Ngaissona* cases, as well as more recently in the *Ali Kushayb* case. The process is also reflected in the Chambers Practice Manual. As recommendation for further improvement, the Experts suggest that the application process could start earlier in order to avoid the time pressures often faced by the Registry and the judges. This could be, according to the Experts, as early as a warrant of arrest is issued. Another recommendation in the Report, is that to automatically allow victims who are already admitted as participants in a case, to participate as well in another within the same situation, and for the same events but against another accused.

## **D. Concerns about the System as a Whole**

### ***Overview of findings***

639. In its Report, the Experts echo concerns expressed by a variety of legitimate sources on the system as a whole. The concerns range from inadequate engagement of the Court with victim communities to the danger that victims may become a potential ‘Prosecutor bis’, as well as concerns on the overall cost/benefit of the system. The Report explains and presents in detail the different concerns put forward for the consideration of the Experts. Generally, the Experts found that although the right of victim participation has yet to crystallise into a consolidated and clear practice, there is no reason to doubt that the Judiciary and the Registry are well aware of the challenges of providing an effective system for meaningful participation of victims in the proceedings. The Report further indicates that the IER lacked the capacity to determine whether and the extent to which the criticisms advanced are warranted, and the extent to which any may be systematic, as many of the comments depend upon the particular circumstances of individual cases. The Experts note that this may be an appropriate time for a full appraisal of the effectiveness of the scheme aimed at identifying ways in which the system can be made more efficient with the objective of ensuring the meaningful participation of the maximum possible number of victims in proceedings before the Court.

## **E. Legal Representation of Victims**

### ***Overview of findings***

640. The Experts convey views received as to some inconsistencies in procedure adopted by the different Chambers, which reportedly create confusion and uncertainty. The first issue relates to control of examination of witnesses by victims’ counsel, with some Chambers requiring notice of the questions proposed to put to the witness, while others leave counsel free to decide on the scope of the examination, subject to the intervention of the Chamber. While the Experts consider both approaches simply as different examples of judicial case management, they note that the notice requirement in their view seems unnecessarily demanding. The second issue concerns deadline for observations by legal representatives on issues affecting the personal interests of victims (e.g., provisional release, questions on jurisdiction or admissibility). This was raised with the Experts as problematic in the light of the complex and challenging circumstances required from legal representative to obtain the views of their clients. While the Experts consider that some of these questions may be foreseeable at the time of taking initial instructions from victims, for issues that arise unexpectedly and that affect the interests of victims, it should be possible to persuade the Chamber to allow for a reasonable timeframe. Again, the Experts consider this question a matter for judicial case management and not formal regulation. A discrete issue conveyed in the Report relates to the lack of funding for legal representation during early stages of the involvement of the Court. Noting that indeed there is no provision for funding at the pre-investigation stages, the Experts point out to the OPCV which is mandated to provide general support and assistance to victims and their legal representatives. The Experts suggest that consideration be given to extending the range of circumstances in which the Court can appoint counsel for victims to include during the preliminary examination and during requests for authorisation to open an investigation.

641. Moreover, the Report highlights the importance of the right of victims to choose counsel and to have the opportunity to engage with counsel to convey instructions. In this regard, the Experts note that representation can be funded realistically where counsel represent groups of victims. The Experts stressed that the views of victims on their choice of counsel should be, and do appear to be, taken into account. This is noted in particular as the cases before the Court may require specialist representation depending on the context of the case in question. Finally, the Experts take note of the activity of the OPCV which has had a role in virtually every case before the Court. They note that their independence as counsel is identical to that of external counsel and, as is also the case with external counsel, they make regular contact with those they represent where that is possible.

## **F. Tracing Victims in the Reparations Phase**

### ***Recommendations***

**R336.** *The VPRS should be recognised as the lead entity charged with tracing and identifying further victims with claims for reparation during the reparations phase.*

**R337.** *It is recommended that arrangements for facilitating and collecting applications for victim participation should commence earlier than at present. In particular, in a case where normally applications would be collected from the time of the submission of the DCC, the date of commencement should be advanced to the point of issue of an arrest warrant or a summons to appear.*

**R338.** *Victims admitted to participate in proceedings should be automatically admitted to participate in any other case opened within the same situation for the same events.*

**R339.** *The standing coordination body should carry out a full appraisal of the effectiveness of the scheme with the aim of facilitating the meaningful participation of the maximum possible number of victims in proceedings.*

**R340.** *Where a Chamber requires notice of the line of examination a legal representative of victims proposed to follow, the deadline set, if any, should be no more than 48 hours before the relevant hearing.*

**R341.** *Consideration should be given by the Registry to extending the range of proceedings in which the Court can appoint counsel for victims to include preliminary examinations and requests for authorisation to open an investigation.*

### ***Overview of findings***

642. The Report notes that the process to identify victims with an interest continues beyond the completion of the criminal case and moves into the Reparations phase. The Experts point out to the early experience in the *Lubanga* case where the Chamber requested that the TFV undertake the task of identifying more victims with claims for reparations. A similar order to the TFV, the Report notes, was made in the *Al Mahdi* case. In both cases, the Experts found that key major data assessment activities ended up delegated to VPRS in the Registry.

643. The Report argues that since the tasks involved are an extension of the routine work of VPRS, they should be assigned to that service. Furthermore, the Experts note that the TFV may not be equipped with the resources to trace and locate victims in an expeditious manner. The Report takes note of the request of the Registry in the *Ntaganda* case to start the process of identifying further beneficiaries while the case was still awaiting appeal with the aim of having a list available should the appeal be refused. The Report also notes concerns raised by OPCV that such action run the risk of raising victims' expectations. The Experts report that the Chamber finally found it desirable for the identification of victims to advance as much as possible before the issuance of the reparations order, and requested VPRS to lead the identification of potential beneficiaries

### ***Overall assessment of chapter XVII***

644. The Court is carefully considering the Experts' recommendation concerning the different procedural and administrative aspects of the victims' participation process. In this respect, the Court sees value in the Experts' insight and in the opportunities that their assessments provide to consider improvements, where appropriate.

645. As regards the role of VPRS in identifying victims, the Court agrees that this recommendation should be given further thought. While the matter is essentially of an administrative nature, it may touch upon matters addressed in reparations orders issued by Trial Chambers, and thus needs to be considered as well within this context. Similarly, the start date for collection of applications for victim participation, while it is a recommendation primarily for the Registry to consider in light of its capabilities and with a view to ensuring further future efficiencies, its implementation will be subject to any specific directions a Pre-Trial Chamber may wish to give taking into account the context of the respective cases.

646. The Court understands the efficiency rationale of the Experts in recommending the automatic admission of victims to participate in other cases in the same situation for the same events. The Court will

carefully consider if this recommendation is compatible with the Court's legal framework, which, as interpreted by the various Chambers, usually requires a decision by the Chamber before which proceedings are taking place, authorizing the participation of victims, as well setting out the modalities of the participation. Regarding the recommendation to establish a standing coordination body tasked with the appraisal of victim participation scheme, the Court notes that the modalities of the participation of victims in the proceedings are, in the end, judicial matters which Chambers will need to decide based on their interpretation of the relevant legal framework of the Statute, Rules of Procedure and Evidence and Regulations of the Court as applied to the specific case. While careful and appropriate appraisal of existing practices may be helpful, this must not go against the principle of judicial independence.

647. Similarly, the Court sees value in the attempt to further streamline processes and achieve procedural efficiencies, which is also a continuously key priority for the Court. In this regard, the setting of a specific deadline for notice of the line of examination a legal representative of victims proposes to follow is primarily a case management issue for consideration by Trial Chambers. As a general consideration, before any strict rules in this regard are contemplated, the Court would need to carefully assess whether this is not rather a matter that requires flexibility, so that each Chamber can appropriately react to the specific circumstances of the case. It may be noted that the recent practice of Trial Chambers shows movement into a direction in line with the spirit of this recommendation. For example, in the *Al Hassan* case, Trial Chamber X ruled that the legal representatives of victims may file an application seeking to question a witness up to one working day before start of testimony. In the *Yekatom and Ngaissona* case, the legal representatives are not required to provide advance written notice of the questions they wish to ask, and they can present them orally prior to questioning. Consideration will be given in due course to whether there is potential for further harmonisation of practices in this regard.

648. Finally, the recommendation to extend the range of proceedings in which legal representative of victims can be appointed to preliminary examinations and requests for authorisation of an investigation, the Court notes that there is jurisprudence from the Appeals Chamber from the early days of the Court rejecting the idea that victims can generally participate in a situation, unless there are specific proceedings pending before a Chamber. The impact of this jurisprudence on the feasibility of the Experts' recommendation will need to be carefully considered. As regards article 15 proceedings, rule 50(3) of the RPE provides for the right of victims to make representations, which is what indeed happens in practice.

## **XVIII. VICTIMS: REPARATIONS AND ASSISTANCE**

### **A. Current Framework for Victims' Participation in the Rome Statute System, and its Functioning**

#### ***Overview of findings***

649. The Report highlights the innovations in the Rome Statute to place victims at the heart of the system, not only through participation in the judicial proceedings, but also through the request for reparations. The Experts note that while foreseen in the Statute only as a trust fund, the TFV has developed into an entity of its own, with its Secretariat employing several staff members at the headquarters and in field offices, and with its expenses covered through the Court's regular budget. The TFV, the Experts note, has two mandates, namely, reparations and assistance. With the former done in compliance with reparations orders by the Chambers, and the latter outside judicial control or oversight. The Report explains that complexities in the conceptual and procedural processes for reparations have created uncertainties, delays and inefficiencies, and further concludes that the reparation scheme has not delivered fair, adequate, effective and prompt reparations to victims. In this respect, the Experts note the experience in the *Lubanga*, *Katanga* and *Al Mahdi* cases, in all of which implementation is still ongoing, in the first one even after the convicted has completed a 14-year sentence of imprisonment and was released in 2020. This delay, the Expert stress, is also noticeable in relation to the TFV's assistance mandate. The Report notes the experience in the Bemba case, where the delay in the implementation of assistance is, according to the Experts, a reflection on the weaknesses of the TFV's institutional capacity. Such delays, the Experts argue, impact on victims' expectations, on the reputation of the Court, but also financially, both in terms of human

resources dedicated to these processes, as well as in terms of the resources continued to be needed for legal assistance for both Defence and Victims.

650. The Report further notes some reported deficiencies of the system which lead to inequality between victims, namely, that reparations are ordered only in respect to crimes for which a person has been convicted, that only a fraction of the totality of those who suffered harm are beneficiaries when considered in the context of all crimes committed in a situation, and that victims and affected communities are a diverse group of persons who only share the commonality of having suffered harm. The Report points to the challenges noted by TFV Secretariat in securing the required financial capacity to complement reparations awards in the *Lubanga* and *Al Mahdi* cases, to fund the five years assistance programmes in Uganda and DRC, and to expand assistance programmes to an additional four countries. In its findings, the Report notes that the TFV has not been successful in attracting more donations partly due to systemic challenges related to governance and management issues of the Secretariat, ineffective oversight and the absence of a fundraising strategy. In this respect, the Expert stress that prompt action is needed to address the current challenges, particularly considering the likely increase in the future of victims requesting reparations in the light of the Court's current activities.

## **B. Judicial Matters Related to Reparations**

### ***Recommendations***

**R342.** *The Court should, in the context of its judicial proceedings, and as a priority, further the development of consistent and coherent principles relating to reparations in accordance with Article 75(1) of the Rome Statute.*

**R343.** *The Presidency should incorporate in the Chamber Practice Manual standardised, streamlined and consistent procedures and best practices applicable in the reparations phase of proceedings.*

**R344.** *The Court and the ASP should incorporate in the RPE or any other statutory text that reparations proceedings under Article 75 (Reparations to victims) and subsection 4 (Reparations to victims) of section III, Chapter 4 of the RPE, shall not be stayed pending an appeal against conviction and/or sentence, with proper safeguards for the fundamental rights of the accused or appellant.*

**R345.** *Increased investment should be made in, and more value drawn from, an early and proper completion, collection and processing of the combined standard application form for victim participation and reparations. The more complete the information gathered on the form, particularly on questions 6 and 7, including the collection of proper supporting documentation, the more facilitative it would be for subsequent use, in the eventuality of a conviction, in the reparations phase and in expediting the implementation of reparations.*

**R346.** *Measures should be taken by the Court, in particular by the Registry, the OTP, OPCV, LRV and TFV in their outreach, public information and in general in their interactions, before the final outcome of appellate criminal proceedings against a conviction. Further, the Court's communication and outreach strategies should aim to solutions in which the Court may or cannot provide timely and effective assistance to victims in its assistance and/or reparations mandates.*

**R347.** *The Court should confer on the Registry (VPRS) the principal responsibility for identifying, facilitating, collecting, registering and processing, including the legal assessment of all (i) applications by victims for participation at the trial, who intend to request reparations, and may fall within the scope of the case following the judgment, and (ii) of all new potential beneficiaries eligible for reparations, and who intend to join the judicial process at the reparations phase, prior to the issuance by the Chamber of the Reparations order.*

**R348.** *There should be continued identification and collection of applications from victims who wish to join the proceedings, but request participation only in the reparations phase, even after the final time limit before the commencement of trial, as set by the Trial Chamber, has expired.*

**R349.** *The competent Chamber should have available for its consideration, at the commencement of the reparations proceedings, all applications (requests) for reparations and their supporting documentation, complemented by the VPRS' legal assessment of applications.*

**R350.** *The Registry should intensify efforts to identify and register reparations experts on its list of experts under Regulation 44 of the Regulations of the Court.*

*R351. The judiciary should encourage the Registry, TFV, LRV, OPCV, OTP and the Defence to appropriately enter into Protocols that would enhance the efficiency and effectiveness of reparations proceedings in all its phases.*

*R352. The ASP, the Court and the TFV should consider a more clearly defined demarcation of the respective roles and responsibilities between the Chambers, as the judicial oversight and monitoring authority for the implementation of reparations plans and projects, and the TFV as an independent implementing agency, and a subsidiary body of the ASP, in particular during the final stages of the execution of reparations projects.*

*R353. More determined and resolute efforts should be made to solicit partnerships, cooperation and learning from the experiences of other competent and experiences organisations in the implementation of reparations projects similar to those being or likely to be realised within the framework of the Court's reparations scheme. To improve the implementation of reparations and assistance projects, more advantage should be taken of the presence in situation countries of UN entities, as well as other international, regional or national organisations. Consideration should be given to the potentiality of Court-ordered reparations to feed into and reinforce national reparative justice and reparations efforts.*

## **Overview of findings**

### **1. General (Judicial) Principles on Reparations**

651. The Experts explain that Article 75(1) of the Statutes requires the Court to establish principles relating to reparations. Accordingly, the Report underlines that a set of general principles was established by the Appeals Chambers in the Lubanga case. These principles, which were issued as general concepts, have been applied and developed by Trial Chambers in other cases in the context of the specific context and circumstances relevant to each specific case. As indicated by the Experts, criticism against the Court was raised in the context of their consultations developing general principles and procedures on reparations for case-to-case application. Reportedly, it was submitted that this creates uncertainty, inconsistency and unpredictability to the reparations process. The Expert find that the general principles and the jurisprudence of the Court offer standards of guidance on a number of subjects central to reparations. In this respect, the Experts consider that the five principal elements of reparations orders have been firmly established, and three decisional stages by the Chambers have been identified: The Chamber's issuance of a reparations order, its authorisation of the implementation plan, and the approval of reparations projects. The Experts highlight that the jurisprudence of the Court in this respect is being built, and surely will continue to develop. Conversely, a major issue identified by the Experts as affecting the efficiency of the reparations phase is its procedure. The Experts note in this regard that there is no requirement for the reparations proceedings to constitute a trial stage, and that a less exacting standard than that at trial applies. The Experts recommend the simplification of and consistency in the application of procedures in order to set aside or avoid procedural hurdles.

### **2. Specialised Reparations Chamber**

652. In considering the proposal to establish a specialised Chamber for the reparations phase, the Expert found that there is no guarantee that such a Chamber in of itself would deliver an adequate, fair and prompt process. Conversely, the Experts identified advantages for reparations to be determined by the Trial Chamber, given its institutional memory, full knowledge of its proceedings, and its discretion to enlist experts.

### **3. Non-Stay of Reparation Proceedings**

653. The Experts considered concerns raised in relation to running reparations simultaneous to appellate proceedings or even sentencing, where applicable. The Experts concluded such approach is appropriate and represents gains in terms of judicial economy and expeditiousness, as at least one year of time could be saved. The Experts did not consider such approach as an indication of a reconfirmation of a guilty verdict, even more, they believe this to be in the interest of the accused and justice.

#### **4. Individual Requests for Reparations**

654. The Report explains that reparation awards primarily follow an individual written application request. In what the Experts highlighted as a marked improvement, the Report notes the Registry's latest standard application form for individual victims which combines the information required for participation and reparations. The Experts report on information received that the four pages form -which is also available electronically- is being used in the current cases before the Court. As it contains information regarding reparations, the forms collected at the early stages of proceedings can be used at the reparations phase should a conviction ensue.

#### **5. Registry-Led Victim Application Process**

655. The Experts propose, as a strategy, framework and procedure, that the Registry be conferred the lead responsibility for all functions related to the procession of victims' applications for the participations at trial, who as a result thereof, may potentially be eligible for reparations, as well as of all new potential beneficiaries eligible for reparations. The Experts argue that as a strategic direction and a policy objective, the whole reparations scheme should aim at the relevant Chamber having available for its consideration, at the commencement of the reparations proceedings all applications for reparations and their supporting documentation. In this regard, the Experts highlight a number of reasons why the Registry, through VPRS, should be conferred with this principal responsibility. Such reasons include that the Registry plays the main role in outreach, identifying, facilitating, collecting and analysing the application by victims across the stages of the proceedings, that the Registry has established working relationships with local organisations, networks and intermediaries, that the field offices have acquired extensive expertise on the local situation, and that the Registry's victims database (VAMS) is used throughout all the proceedings keeping the victim information and record collection united in the same unit. The Experts consider that should any identification of new potential beneficiaries eligible for reparations who did not participate in the trial is needed, it should be carried out by the same Organ -the Registry- applying its acquired knowledge, skills and expertise. This, according to the Report, will lead to judicial economy, as in a context where the Court's resources are not unlimited, duplication of efforts with the TFV and savings are significant factors. The Experts stress that while the TFV is an independent body, there is no justification for it to reinvent or build analogous and competing capacity with the Registry.

#### **6. New Potential Beneficiary Requests and Information**

656. The Report points to the bar in the Chambers Practice Manual on collection of victims' applications before the commencement of trial hearings as a substantial procedural cause of delay. As this has been understood as prohibiting the Registry from any continued collection, the Experts note it has caused a delinking by the Registry in the continued identification and collection of any new requests for participation at trial and/or reparations after the commencement of and during trials. According to the Experts, fair trial rights and due process guarantees dictate there should be a continued identification and collection of applications from those who may request to apply for the reparations phase. The Report underlines that a freeze during the trial period causes a substantial bottleneck in the quest for expeditious determination of reparations and argues that a major saving in time and resources, and increased efficiency could be gained by lifting the bar. In doing so, the Experts clarify that new applications are not meant to be introduced at trial, and that there is a need to effectively manage victims' expectations. Accordingly, it is suggested to redesign relevant parts of the application for increased emphasis on the information requirements relating to reparations.

#### **7. Reparations Experts**

657. The Experts recommend that the early calling and commissioning of experts by Chambers would save time. The Report notes that Chambers have the discretion to avail themselves of experts that could assist in determining the scope and extent of any damage, loss or injury to, or in respect of victims, or in the consideration of various types or modalities of reparations. Furthermore, the Experts recommend that the Registry finds more proactive ways of identifying relevant experts and thus enriching the list of experts it maintains.

## 8. Mutually Agreed Protocols

658. The Report recommends that, where possible, the reparations process could be facilitated by advance mutually agreed protocols between the parties, participants, the VPRS and the TFV. In the view of the Experts, if these practices, which already occurs at the pre-trial and trial stages, could be done at the reparations phase, the process would be additionally enabled.

## 9. Chambers Oversight Role in Implementation

659. The Experts addressed questions relating to the extent of judicial oversight and monitoring of TFV's implementation. In this regard, the Experts considered the need for a demarcation with a view to avoiding that the procedure continues many years after the issuance of an order, with the Chambers finding themselves overseeing or adjudicating on reparations and transforming into perpetual boards of reparations projects. To this end, the Experts suggest that a common understanding be reached by the ASP, the Court and the TFV on an appropriate cut-off point during the implementation phase, that is, when it can safely and confidently be done.

### *Overall assessment*

660. Generally, on the Experts' recommendations on reparations, the Court notes that the various aspects of the reparations process are interlinked and, thus, should ideally be considered holistically. Adopting a specific approach on one aspect necessarily impacts other aspects of the process, whether substantively or procedurally.

661. The Report recommends the Court to further the development of consistent and coherent principles relating to reparations. The reparations principles have been developed through jurisprudence. This has taken the form of an evolution, where each case builds on the next. In the early days of the Court, it was decided that this 'jurisprudential' approach was indeed what is required under article 75(1) of the Statute. In this regard, the principles adopted by the Appeals Chamber in *Lubanga* have been adopted in subsequent cases (*Katanga*, *Al Mahdi* and *Ntaganda*), with the Trial Chambers adapting them and adding new principles as necessary on the basis of the specific circumstances of the cases. Trial Chamber VI in *Ntaganda* has for example added principles on 'do not harm', 'gender-inclusive and sensitive approach to reparations', 'sexual and gender-based violence', 'prioritisation', 'transformative reparations', and 'no over-compensation'. In principle, the Court sees value in reparations principles being adopted by the Court as prescribed in article 75(1) of the Statute and avoid these being litigated in individual cases. In this respect, the Court could further consider whether the time is ripe for identifying principles that have crystallised and for transforming them into a legal instrument. This is a discussion that should take place at the level of the judges, as it pertains to, essentially, a judicial matter.

662. Furthermore, the Experts recommend that the Presidency incorporates in the Chambers Practice Manual standardised, streamlined and consistent procedures and best practices applicable in the reparations phase of proceedings. In general term, the Chambers Practice Manual is kept under constant review and judges update it when they consider it opportune. The Trial Chambers dealing with reparations consider the practice in previous cases and adopt and adapt them to the extent necessary depending on the circumstances of the case. For example, in the *Ntaganda* case, Trial Chamber VI adopted approaches followed in the *Lubanga*, *Katanga* and *Al Mahdi* cases. Given that four cases have given rise to reparations proceedings, consideration could be given to consolidating best practices, noting that diverging approaches may be necessary depending on the circumstances of the cases. On some issues, options may therefore need to be included, also considering the jurisprudence of the Appeals Chamber. However, it may be more productive to revisit the issue of best practices following the conclusion of the reparations proceedings in the fifth case (*Ongwen*) as it is closer in scope to the *Ntaganda* case.

663. The Report further recommends the Court and the ASP to incorporate in the RPE or any other statutory text that reparations proceedings shall not be stayed pending an appeal against conviction and/or sentence. In respect of this recommendation, the Court notes that in practice, the reparations process in the cases in which the conviction and sentence were appealed have proceeded apace while these appeals were pending. Article 82(3) provides that an appeal does not have suspensive effect unless the Appeals Chamber orders it. The Appeals Chamber has not ordered suspensive effect in any of the appeals of reparations order to date. It may therefore not be appropriate or necessary to adopt a provision limiting the application of

article 82(3) in reparations appeals. It is noted that the reparations order in the *Ntaganda* case was issued before the delivery of the appeals on conviction and sentence. However, the implementation of reparations order is always subject to the conviction being confirmed on appeal.

664. On the recommendation that aims at outreach efforts before the final outcome of appellate criminal proceedings against a conviction and for the Court's communication and outreach strategies to aim to solutions in which the Court may or cannot provide timely and effective assistance to victims in its assistance and/or reparations mandates, the Registry will consider this in the context of its development of the Communication and Outreach Strategy. In this regard, all relevant actors will be consulted. Notably, the Registry is not privy to the judgement of the appellate criminal proceedings against a conviction prior to its issuance. In order not to be perceived as prejudging the outcome of a final judgement, the Registry is indeed proactively looking into how to form its communication strategy prior to the issuance of the judgement by developing all possible scenarios so it could react swiftly regardless the outcome of the judgment. In relation to the solutions in which the TFV may or cannot provide timely and effective assistance to victims in its assistance and/or reparations mandates to be conducted by the TFV, the Registry will indeed reinforce the coordination with the TFV and take this into account when developing its Communication and Outreach Strategy.

665. In respect of the Expert's recommendation to increase investment and draw more value from early completion, collection and processing of the combined standard application form for victim participation and reparations, the Court agrees in principle that the more complete the information gathered on the form, including the collection of proper supporting documentation, the more facilitative it would be for subsequent use, in the eventuality of a conviction, in the reparations phase and in expediting the implementation of reparations. In this regard, the practice of the Trial Chambers seized of reparations proceedings have diverged on whether to order the Registry to identify potentially new eligible victims, register them and collect individual forms. Some decided to order the Registry to identify and collect individual forms while others chose not to. It is noted that depending on the type(s) of reparations awarded, the collection of individual forms may not be necessary.

666. The Appeals Chamber has held that both approaches are possible, depending on the circumstances of the specific case (see *Lubanga* case). Notwithstanding, the Appeals Chamber has noted in the *Katanga* case that an approach involving the individual assessment of applications may not be the most appropriate approach as it led to unnecessary delays. In the *Al Mahdi* case, where both individual and collective reparations were awarded, Trial Chamber VIII set the criteria for the eligibility of victims and delegated this assessment to the TFV. In this respect, while it is desirable for as many victims as possible to be identified by the time a judgment is issued, the standard application form may not always be the best tool. As to the collection of forms on reparations, Trial Chamber VI in the *Ntaganda* case initially held that the Registry was the appropriate entity to identify and register new potential beneficiaries before the issuance of the reparations order. However, due to the COVID-19 circumstances, notably the difficulties in conducting missions in the field, the Chamber modified its approach. There are a number of known advantages and disadvantages to requiring victims to answer detailed questions on the harm suffered and to provide supporting documentation. In addition, the information included in individual forms can also be relevant to identifying the types of harms suffered and to assess the financial liability of the convicted person. It would be beneficial to consider this issue in detail with a view to identifying the most appropriate options after the *Ongwen* reparations order is issued.

667. Furthermore, the Trial Chambers recognize in general terms that the Registry is best placed to identify, register and collect application forms to participate in the proceedings. In the presently active trials, Trial Chamber V (*Yekatom and Ngaissona* case) and Trial Chamber X (*Al Hassan* case) have set longer deadlines for victims to apply to participate in the proceedings, namely until the end of the presentation of the Prosecutor's evidence. In addition to taking into account the difficulties resulting from the COVID-19 pandemic, this should also allow a higher number of victims to be known by the end of the trial. Some of the recommendations pertain to rather administrative, operational matters which squarely fall within the competence of the Registry. Others relate to the modalities of victim participation and question of standardisation. In this regard, it will need to be carefully considered to what extent standardisation of approaches is possible and desirable, given that the cases before Court vary significantly in terms of number of victims, type of allegations etc. It will need to be carefully explored whether a 'one-size-fits-all' approach is possible, or how much flexibility ought to be maintained. It must also be noted that the modalities of victim participation are judicial matters, decided by the relevant chambers on the basis of their interpretation of the legal framework. In doing so, the views of the different actors will be considered, including those of the Registry, the OPCV and the TFV.

668. The Report recommends that the Registry intensifies efforts to identify and register reparations experts on its list of experts. While the Registry agrees with this recommendation and it is committed to intensifying its efforts accordingly, it should be noted that specific cases likely require very specific reparations related expertise and therefore additional effort to identify experts with appropriate knowledge and experience in relation to the circumstances of this specific case and the types of harm suffered by victims. Notably, some Trial Chambers seized of reparations proceedings have not sought the assistance of experts, while others have. Trial Chamber III (*Bemba* case), Trial Chamber VI (*Ntaganda* case) and Trial Chamber VIII (*Al Mahdi*) have appointed experts to assist them pursuant to Rule 97(2). While experts in reparations generally can provide useful information, experts in narrower fields such as sexual and gender-based violence, the impact of specific crimes or who have detailed knowledge of the relevant situation countries, can provide more directly relevant information. Considering that the publication of a call for experts when a Trial Chamber orders it, and its processing, can be time-consuming, it is indeed agreeable for the Registry to proactively identify potential experts in the latter category without waiting for reparations proceedings to be initiated. In this context, the Registry notes that the TFV is prepared to contribute to the development of the list of experts and contribute, as appropriate, to the identification of experts in relation to reparations proceedings in specific cases. Aside from the issue of the list of experts, the Court is of the view that it would be useful to consider the lessons learned from the use of experts in reparations proceedings to date.

669. Concerning the recommendation for the Judiciary to encourage a number of actors to enter into Protocols in regard to the reparation proceedings in all its phases, the Court notes that Legal Representatives of victims and Defence represent parties in the reparation proceedings and as such may have a different role to play than the Registry, the TFV and the OTP. The Trial Chambers have variously instructed the LRVs/OPCV to support the Registry on some tasks, or the TFV to rely on the Registry in performing its responsibilities, all with the aim of harnessing the various resources and capacities available. While generally it may be desirable to have such protocols, thought will need to be given to the form of 'encouragement' that the judiciary can give. The Chambers typically communicate with the parties and participants through their decisions and orders, not through recommendations. An additional issue here may be that some of the parties and participants will remain the same across cases (Registry, TFV, OTP, OPCV), while others will change (Defence, LRV) making such protocols not binding from one case to another. It would therefore be useful to discuss the role of the various stakeholders on the basis of the experience of the cases in which reparations proceedings were conducted.

670. The Experts further recommend the ASP, the Court and the TFV to consider a more clearly defined demarcation of the respective roles and responsibilities between the Chambers, as the judicial oversight and monitoring authority for the implementation of reparations plans and projects, and the TFV as an independent implementing agency, and a subsidiary body of the ASP, in particular during the final stages of the execution of reparations projects. Notably, one common feature in all the relevant cases before the Court is the significant amount of time taken to implement the awards and delays that have arisen. Considering the length of trials for international crimes and the requirement of prompt reparations in case of conviction, it is crucial for the implementation of reparations order to proceed expeditiously. While in two cases, most of the implementation of the reparations' orders issued has been completed, none of the reparations' orders have been fully implemented. In this regard, it would be timely to start identifying lessons learned and best practices and to consider the appropriate oversight and monitoring role that the Chambers should play. Any demarcation of respective roles of Chambers and the TFV in the reparations process must be compatible with the Statute, which establishes the reparations phase as part of the judicial proceedings. The TFV may have a role in this regard (article 75(2) of the Statute), but there may be statutory limits as to how big this role may be and how independent the TFV may operate when it is implementing a reparations order. These matters must be given very careful consideration.

671. Finally, the TFV has expressed agreement with the need to review its practices of selecting partners for implementation of reparations, and indeed are currently addressed by the TFV. With the support of the Registry, the TFV is exploring more befitting options for partnerships of various characters than having to go through a procurement for services. In addition, the TFV is currently cooperating with UN organisations in Mali and Côte d'Ivoire and seeks to intensify the collaboration with the UN. The TFV, in the framework of assistance programmes seeks to complement, not duplicate, national and international efforts for reparative justice and reparation programmes extremely seriously and seeks to closely cooperate with the relevant governments; and is currently heavily involved in such processes in Côte d'Ivoire, Mali and Central African Republic and seeks such involvements in Georgia and Kenya. The TFV has since 2008 been involved in such processes and their development in Uganda and DRC and follows them closely in

particular in relation to reparations in the *Ongwen* case. The TFV will press forward on all those points and report on development in its reports to ASP and CBF.

## **C. The TFV and its Secretariat: Governance and Functioning**

### ***Recommendations***

**R354.** *Increased efficiency and effectiveness could be gained if the TFV is focused on its original mission as a trust fund, with functions restricted to fundraising, administration of the funds, and release of the funds as ordered by the Court.*

**R355.** *The TFV should promptly finalise and publish a Strategy Document, aligned with the Court's and with relevant KPIs.*

**R356.** *The TFV should develop as soon as possible a comprehensive and effective fundraising strategy that includes as targets private donors (e.g. large foundations and non-governmental organisations). The strategy should further anticipate engagement with civil society organisations, aiming to benefit from their position as multipliers for the purpose of obtaining additional funds for the TFV.*

**R357.** *The ASP should also review the level of involvement and oversight it wishes the Board of Directors to provide the TFV, and resource it accordingly.*

**R358.** *Responsibilities and resources related to implementation of reparations and assistance mandates should be gradually moved under the Registry's authority, to the VPRS. The existing expertise in victim matters within the Registry should be complemented by transferring to the VPRS Secretariat staff with experience in reparations and assistance. Further input and expertise should be sought from field offices, as well as through cooperation with other international/regional organisations and external partners, such as civil society organisations.*

**R359.** *To facilitate and enhance cooperation of all actors within the Court with a victim-related mandate, including for the successful implementation of the above recommendations, a standing coordination body should be established, chaired by the Deputy Registrar.*

**R360.** *The standing coordination body should also facilitate the drafting and adoption of Manuals and Standard Operating Procedures on Reparations to Victims and on Assistance to victims. These instruments should aim to assist Chambers in conducting efficient reparations proceedings through consistent application of judicial principles and guidelines for decisions on reparations and assistance projects; include best practices and lessons learnt from past TFV activities, as well as from the experience of other similar projects carried out by third parties. In this process, and especially on the latter point, the Court is encouraged to consult with local CSOs working with victims.*

### ***Overview of findings***

#### **1. Delivery of Mandate**

672. The Report underlines that given the TFV limited capacity and resources, issues of prioritisation between the two mandates are bound to emerge. The Report quotes concerns expressed by a Trial Chamber in a 2017 decision questioning the TFV's command of its mandate when operating within the judicial process. With respect to the assistance mandate, which the Experts explain is not Court-ordered and is within the authority of the TFV, the Report notes the experience in the *Bemba* case where assistance in CAR was initiated to aid victims and mitigate the negative reactions to the acquittal. The Experts note in this respect the absence of a coherent and sustainable strategy or policy so that assistance does not always end up as a mere default for acquittals. Similarly, the Experts note the absence of strategic documents or guidelines on principles to be followed to decide on reparations or assistance projects, and recall the CBF invitation to the Court to work on a policy framework for reparations.

673. Two important and complex challenges underlined in the Report are the implementation plans for reparations and the reparations projects, both of which are subject to the Chambers' decision-making. The Expert highlight that on average at least fifteen months are required to properly contract a reparations project implementing partner. Some of the views conveyed to the Experts include that the Chambers micromanages the TFV's implementation plans, and that instead, the Chamber should only set out the general framework for collective and individual reparations. The Report indicates that the TFV recognized

in 2017 that the two gravest challenges it faces are lack of institutional capacity and financial resources, as well as their acknowledgement that the implementation of reparations is materialising on the back of a steep learning curve. Given the TFV's own admission, the Experts express serious doubts on its current capacity to effectively implement reparations should additional and simultaneous awards be ordered. The Experts highlight that sufficient experience exists outside the Court on the implementation of reparations projects and that more determined efforts are required inviting and soliciting cooperation from partners. While the Report notes that the Chambers have recognized the TFV has gained operational experience in the implementation of reparations, it argues that this has not yet translated into marked gains in their effective and prompt delivery. The Experts conclude that a number of challenges and operational constraints remain including the design of frameworks, formulation of projects, identification and building of partnerships, procurement and contract processes, and the commissioning, monitoring, supervision and evaluation of projects.

## **2. Governance, Oversight and Management**

674. The Report considers the role of the Board of Directors as the entity responsible for oversight of the TFV, and notes in this respect the absence of provisions guiding how oversight of the TFV Secretariat by the Board should be achieved. Accordingly, the Expert recommend the ASP to review the level of involvement and oversight it wishes the Board to have and resources it accordingly, with a view to formally and clearly delineating roles and responsibilities. The Experts point to the delays in the implementation of its mandate as further signs of challenges in the functioning and effective oversight of the Secretariat under the current model. In this regard, the Report references concerns expressed by the External Auditors, the CBF and the IOM, which have found that the TFV's structural shortcomings lead to lacking the required level of rigour when implementing reparations, constant under-implementation of its budget, and the TFV's inability to address the self-identified areas for managerial improvement of its Secretariat. The Experts further note that at the reporting date no fundraising strategy had been developed. Similar concerns questioning the TFV fitness were shared with the Experts by a number of stakeholders.

675. The Report concludes that in its current set-up the TFV is overstretched and unable to effectively and meaningfully carry out its reparations and assistance mandates, even if, notably, some efforts have been put in place to address these shortcomings. The Experts consider that increased efficiency and effectiveness could be gained if the TFV is focused on its original mission as a trust fund, with functions restricted to fundraising, administration of funds, and release of the funds and property as ordered by the Court and complementing reparations awards. The Experts argue this would allow the TFV to develop a comprehensive and effective fundraising strategy. Furthermore, the Report recommends that the responsibilities and resources related to the implementation of reparations and assistance be moved under the Registry. The Experts note that the ASP already in 2002 foresaw a role for the Registry in the successful implementation of the Board's mandate and the Secretariat already leverages essential administrative functions within the Registry. In this respect, the Report recalls the CBF's request to the Court to report on the division of responsibilities between Registry and the TFV Secretariat, including possible synergies and duplications. A report in this regard was recently submitted by Registry and TFV. The Experts note that the proposed change would require amendments to the legal texts and that it would need to be gradual to ensure it does not overwhelm the Registry or affect ongoing reparations and assistance projects.

### ***Overall assessment***

676. The Court and the TFV note the Experts' recommendation seeking to limit the responsibilities of the TFV focusing its mission to fundraising, administration and release of funds. Notably, the implementation recommendation falls within the responsibility of the ASP and would require changes to relevant legal texts (TFV Regulations and, potentially, the Rules of Procedure and Evidence) and to the character of the TFV as such. The TFV is not in favour of adoption of this recommendation, mostly as it is already effectively addressing the underlying issues that led to the recommendation. In this regard, the TFV considers that greater efficiency and effectiveness is being and can indeed be further achieved within its existing structures. In addition, it is noted that there may be risks involved in effectively fundraising, if the functions of fundraising and implementation are split, as it is likely to generate unwelcome complications in accountability and authority in decision-making on the allocation of resources. This risk would need to be fully evaluated before any decision is taken. Prior to any such consideration by the ASP, the TFV would welcome the opportunity to demonstrate that it works efficiently and effectively, including by producing the necessary policies and strategies in 2021, in line with the proposal set out in Annex IV,

such as on fund management and investment in relation to reparations and assistance activities, and that it continues its ongoing work relevant to the implementation of reparations and assistance programmes. Similarly, the recommendation to gradually move the responsibilities for the implementation of reparations and assistance to the Registry requires careful scrutiny by the ASP, noting that implementing this recommendation would require a change to relevant legal texts (TFV Regulations and, potentially, the Rules of Procedure and Evidence) and the character of the TFV. In particular, due consideration should be given to the resource implications, as well as any potential disruptions to ongoing key projects, which would mostly affect the victims and affected communities as key stakeholders of the Court. As indicated, the TFV has been investing in improved performance of its operations, including by the strengthening of the capacity and key functions in 2019-2020, as also reflected by the budget implementation rate for 2020.

677. In respect of the Experts' recommendation to finalise a Strategy Document, the TFV Strategic Plan 2020-2021 was issued in 2020 following the approval by the Board of its final version taking into account the recommendations of the IOM of 2019 and the impact of the COVID-19 pandemic. The TFV's Strategic Plan cycle is now aligned with the Court's Strategic Plan cycle. Further definitions of this strategic alignment, including better use of KPIs, will be undertaken in the preparation of the 2022-2024 Strategic Planning Cycle, which will provide the opportunity for increased mutual alignment of strategic plans.

678. The Experts further recommend the TFV to develop a fundraising strategy. In this regard, the TFV notes that a separate fundraising strategy is currently in development in 2021, to be integrated in the strategic plan for the next cycle of 2022-2024. The implementation of the fundraising and visibility strategy will require strengthening of the current relevant competencies and roles within the Secretariat, and at the Board – currently undertaken through consultancies – and is likely to require additional professional expertise at the Secretariat, in particular in relation to resource development from public donors, including international/multilateral donors and partnerships. Engagement with civil society organisations may support the TFV's fundraising, keeping in mind the constrained market and that they may be competing for resources in that same market. Indirectly, in the domain of advocacy, there is significant benefit to be gained from a more structured engagement with international and national civil society organisations.

679. As to the recommendation for the ASP to review the level of involvement and oversight from the Board to the Secretariat of the TFV, the TFV considers that a dialogue with the ASP as to the relationship between the work of the TFV Board and the ASP, as well as the TFV Board and the TFV Secretariat would be advantageous. The TFV Board is addressing its working methods and relationship with the TFV Secretariat since 2020 as a matter of priority. It looks to benefit from the advice of the Registrar in the process. The Board will consult with and inform the ASP of its conclusion in regard to the adoption of new policies for the consideration of the ASP. Following the adoption of such policies, a more structured engagement with the Bureau could be devised aiming at enhancing the governance and oversight structure of the TFV. Such considerations could include matters addressed in the TFV Regulations, for example, the original authority of the Secretariat and delegations by the Board, or a closer relationship of the Board with the States Parties.

680. Finally, in respect of the recommendations pertaining to the establishment and mandate of a standing coordination body, mindful of the positions expressed in the context of recommendation R339, the Court agrees with the importance of facilitating and enhancing cooperation of all actors within the Court with a victim-related mandate, including the TFV. The establishment of such a committee, chaired by the Registry, will be carefully studied with a view to ensuring that the independence of some actors, the role of actors in the context of the judicial proceedings, and the judicial prerogatives of the Chambers are not affected. To this end, further internal coordination and consultation is required on the exact scope and modalities of such a mechanism, taking into account, as indicated, the authority and functions of the Chambers, the Registry, legal representatives and the TFV.

## *External Governance*

### **XIX. OVERSIGHT BODIES**

#### **A. ASP – Court Relations**

##### *Recommendations*

*R361. Cooperation between the Court and the ASP needs to be encouraged by the implementation of the recommendations in this Report and by stronger political support for the Court by States Parties.*

*R362. The Court should accept the legitimate authority of the ASP to decide its budget and should tailor its activities to match the resources available.*

*R363. A discussion among stakeholders (Court, States Parties and civil society) should be convened on the strategic vision for the Court for the next ten years, which will enable the Court and the ASP to focus their efforts of implementing the Rome Statute in the same direction. An outcome of the discussion should be agreeing on the level of activity that the Court is expected and desired to reach in ten years' time and the steps (resources, cooperation and institutional development) that need to gradually occur for the organisation to reach that point.*

##### *Overview of findings*

681. The Experts report on concerns conveyed to them by both the Court and States Parties, which in their view evidence a level of mutual distrust and suspicion. According to the Report, these perceptions are linked to the nature of the Court as both a complex international criminal justice system, as well as an international organisation similar to the UN and its specialised agencies. In other words, a tension between confidentiality and independence of decision-making (key features of the Court as a justice system), and the responsibility of States Parties to provide oversight (a key aspect of the management and accountability of all international organisations). In order to rebuild trust, the Experts highlight the importance of the Court progressively implementing the recommendations in the Report, particularly those related to leadership and management, as well as an improved cooperation between States Parties and the Court, including political support from States when the Court is attacked by non-States Parties. In this respect, the Experts recommend that the leadership of the Court recognize and respect the legitimate oversight role of the ASP, including its responsibility to approve the Court's budget. The Experts further note a number of areas where there are different expectations on the Court's mandate coming from States Parties and the Court, in particular the Prosecutor. Such questions include the type of cases the Court would pursue, the level of cooperation States Parties are able to offer, and the Court's approach to positive complementarity and preliminary examinations. In this respect, the Report suggests engaging in discussions, in the context of the Rome Statute framework, that would lead to agreeing on the level of activity for the Court for the next ten years, which could be then crystalized in a strategic plan including the steps to gradually reach that point.

##### *Overall assessment*

682. The Court is encouraged by the opportunity to work together constructively with the ASP to enhance mutual trust and build an improved collaborative relationship, based on the reciprocal respect for the distinct respective responsibilities laid down in the Rome Statute. In this regard, the Court firmly believes that the successful completion of this Review will be an important step in that direction; an achievement that will cement both the Court's and States Parties' shared commitment to the strengthening of the organisation's efficiency and effectiveness, and the Rome Statute system as a whole.

683. As a starting point, the Court wishes to reaffirm the legitimate oversight role of the ASP or its authority over the budget, as it has always done. The Court has always followed the agreed budget process through submitting a budget based on its assumptions for the scrutiny of the Assembly, and then implemented the approved budget at the level and in the terms decided by the ASP and in compliance with the regulatory framework established by the ASP.

684. The Court strongly welcomes the initiative to convene a strategic discussion among stakeholders on core expectations in relation to the work of the Court. To do this right, time and resources are required to plan an effective and meaningful exercise. In this respect, the Court suggests that such an exercise could be planned for 2023, when the Rome Statute celebrates its 25<sup>th</sup> anniversary, and sufficiently in advance for its conclusions to become the basis for the 2025-2028 Strategic Planning cycle of the Court, which ought to be elaborated during 2024. In addition, this timeframe would allow sufficient time for the ASP and the Court to have concluded all or most of the work in relation to the review process, and thus provide for an opportunity to take stock of the accomplishments.

## **B. Internal and External Oversight Mechanisms**

### ***Recommendations***

**R364.** *The IOM and the OIA should be given enhanced authority and resources to be able to better carry out their functions.*

**R365.** *Heads of Organs and the next Prosecutor should commit to ensuring effective and full cooperation with oversight and disciplinary mechanisms. Additional confidentiality agreements could be envisaged for individuals in the relevant oversight bodies.*

**R366.** *The Audit Committee and the CBF could be merged into one Organ of budgetary control and audit. The mandate of CBF-Audit Committee members should be extended to five-six years, non-renewable term.*

**R367.** *As a work unit located in the Registry, the OIA would more properly report to the Principals rather than to the Audit Committee, a subsidiary body of the ASP. This would not prevent the OIA from appearing before the new budgetary control and audit body as required, and responding to its requests. The new body's role towards the OIA would be overseeing the adequacy of the framework set up for the Court's internal audit function, rather than oversight of the substance of the OIA's work.*

**R368.** *The ASP is recommended to make use of the upcoming recommendations of the External Auditor, tasked with assessing the Court's oversight bodies, to find ways to streamline and render more efficient its oversight structures.*

### ***Overview of findings***

685. The Experts considered the different bodies, internal and external, that monitor aspects of the Court's management and operations, and which act independent from each other. Such bodies include the IOM, the OIA, the CBF, the Audit Committee and the External Auditor. As a general observation, the Experts found that internal bodies are not given enough resources, and their authority is not always respected. The Report notes views that independence and confidentiality are often used by the OTP and Chambers as obstacles to effective oversight from the existing mechanisms. Concretely, the Report recommends the merger of the Audit Committee and the CBF into an organ of budgetary control. Moreover, the Report recommends for CBF/Audit Committee members to have non-renewable mandates of five-six years. Finally, in regards the OIA, the Experts recommend that it report to the Principals of the Court, which would not prevent it from appearing before the CBF/Audit Committee as required. The CBF/Audit Committee would then oversee the process rather than the substance of the OIA's work.

### ***Overall assessment***

686. While this part of the Report is mostly addressed to the ASP, the Court stands ready to provide any support required by the ASP in considering or meeting these recommendations. In this regard, the Court conveys the unequivocal commitment of the Heads of Organs to an effective and full cooperation with the oversight bodies in respect, in full compliance with the Rome Statute's framework and the respective responsibilities of the ASP and the Court therein. Such cooperation with the oversight mechanism is already in accordance with and guaranteed by the relevant administrative issuance. The Court will continue to fully support and facilitate the important work of the oversight mechanisms while respecting obligations of confidentiality imposed by the Rome Statute legal framework. When those obligations have posed institutional restrictions on disclosure, the Court has found a workable solution in every case while respecting those obligations; the record bears out this fact. The Court welcomes the amended operational

mandate of the IOM as adopted in December 2020, which provides helpful guidance and guarantees to both the mechanism and the Court on the question of confidentiality and the disclosure of information.

## C. Secretariat of the ASP

### *Recommendations*

**R369.** *An office and focal point should be appointed within the Registry to coordinate with the different services of the Court to provide all necessary support for the ASP. In the long-term, the functions of the Secretariat of the ASP should be taken over by the Registry, and the Secretariat of the ASP, in its current form, dismantled.*

**R370.** *In line with the Experts' recommendation for the ASP Secretariat to be absorbed into the Registry, it is envisaged that the Executive Secretary of the CBF and Audit Committee position, currently located in the ASP Secretariat, also be transferred to the Registry, where it would maintain its functional independence.*

### *Overview of findings*

687. The IER recommendations in relation to the ASP Secretariat part from the understanding that the Assembly is best served when it is supported by the central administration of the Court (the Registry), without the need for a separate body performing such services. The Experts base this recommendation on the experience of other major international organisations. While the Report recognises that having a separate structure is justified as an effort to distance the Court from the direct influence of States Parties, it also explains that this division undermines the capacity of the Assembly to understand the full range of Court operations. Nevertheless, the Expert Report highlights the views of some States Parties who reaffirmed the importance of maintaining an independent Secretariat. According to these States, such independence is necessary to address ‘the perceived need to shield the judicial institution and process from political influence’, and ‘to provide neutral information to the ASP, not influenced by any of the Court’s organs’. The Report recognizes the importance of these concerns and explains that by engaging with the Court through a number of subsidiary specialized oversight bodies (i.e., CBF, Audit Committee) these concerns are in practice addressed.

### *Overall assessment*

688. The IER recommendations on the Secretariat of the ASP have an immediate short-term implication, as well as longer-term policy and structural implications. In the first instance, the IER is recommending the appointment of a Focal Point in the Registry to serve a coordination role with the Secretariat of the ASP in regard to the services necessary to support the work of the ASP. The rationale to increase synergies between the service structures existing in the Registry and those provided to the ASP through its Secretariat is welcomed. This could relate to areas including translation of documents, interpretation services, conference services, etc. Notably, the recommendation is first one of coordination between the two bodies with a view to identifying opportunities where the Registry can enhance or offer some of the services it provides, within its capacity. A full transmission of these service-responsibilities is likely to have budgetary implications in the short term. The Registry will initiate discussions with the Secretariat of the ASP with a view to designating an appropriate channel of communication and focal point that can coordinate and have an overview of the needs and services to support the work of the ASP. This focal point could be appointed with a view to ensuring a more coordinated and cohesive provision of support and reliance, as appropriate and possible, on the service structures within the Registry, both in The Hague and in New York.

689. In the long-term – the Report does not provide a timeline – the recommendation of the Experts is for the functions of the Secretariat of the ASP to be absorbed by the Registry, leading to the winding up of the former. This would include the functions of the Executive Secretary of the CBF and the Audit Committee position. The Court remains available to support the consideration by the ASP of these including potential difficulties in the proposal to merge the secretariat of a political body responding directly to States Parties, with the core structure of a judicial body, the Court. Matters pertaining to

reporting lines, for example, are a central aspect of this difficulty.<sup>74</sup> In addition, the consideration of this recommendation should take into account the structural and budgetary implications that ‘absorbing’ the aforementioned functions within the Registry would entail. It should be considered, for example, whether a separate Unit within the Registry would need to be created to provide these services and functions, and if in doing so such a Unit would require functional independence. Finally, the principled concerns from some States Parties highlighted by the Experts should be considered fully by the ASP before taking a decision, including, safeguarding against any perception of political interference with the work of the Court, as well as ensuring that ASP is provided with neutral support, and that the ASP’s oversight bodies enjoy the necessary independence.

## **XX. IMPROVEMENT OF THE SYSTEM OF NOMINATION OF JUDGES**

690. The findings and recommendations in this chapter are entirely for the Assembly of States Parties to consider.

## **XXI. DEVELOPMENT OF THE RULES OF PROCEDURE AND EVIDENCE**

### ***Recommendations***

**R381.** *Article 51(2) of the Rome Statute should be amended to provide that amendments to the RPE may be proposed by a Judge, the Prosecutor, the Defence Office or any State Party, and that any amendment will enter into force if agreed to by an absolute majority of the Judges at a plenary meeting convened with notice of the proposal. It would have immediate effect. Until such an amendment enters into force, the ASP should vote on RPE amendments by two thirds majority, rather than consensus, in line with the provisions of Article 51(2).*

**R382.** *Any proposal should be intimated to the Prosecutor and the Registrar a reasonable time before the plenary meeting for their comments.*

**R383.** *In adopting any proposal, the Judges should be required to ensure, and to certify to that effect, that the amendment is not inconsistent with the provisions of the Rome Statute and the right of accused persons appearing before the Court to a fair and expeditious trial.*

**R384.** *On adoption the amendment should be circulated to States Parties for comment and would remain in force in the absence of objection from a majority of States Parties within six months.*

691. The Judiciary fully welcomes the recommendations at R381-R384 concerning the granting of increased autonomy to the judges of the Court in respect of amendments to the Rules of Procedure and Evidence, whilst ensuring that all such amendments must maintain full consistency with the provisions of the Rome Statute and maintaining the opportunity for States Parties to object. As the Experts rightly note, the current deadlock over RPE amendments, with a number of amendments lying in limbo in the absence of consensus, has effectively prevented the Court from introducing measures to improve diverse aspects of its proceedings.

692. The modified procedure proposed by the Experts would significantly enhance the capacity of the judges to adapt the Court’s criminal process to lessons learnt, which has been integral to enhancing procedural efficiency at the ad hoc tribunals. It would also draw upon the proven track record of the judges to seek measurable efficiency improvements through tools such as the Chambers Practice Manual.

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<sup>74</sup> See discussion of the three-layered governance model above in chapter I A. on Unified Governance.

693. The Judiciary urges the Assembly to address this group of recommendations as a matter of priority. If the full implementation of the recommendations proves difficult to achieve within a reasonable time frame, the ASP may consider alternative solutions to enable critical amendments to the RPE, such as adopting them by majority as foreseen in article 51(2) of the Statute.

## Annexes

### Annex I

#### *Legal analysis aimed at clarifying the ICC's governance framework in light of issues raised by the IER Report*

##### **A. The distribution of administrative responsibilities according to the Rome Statute**

1. The Rome Statute must be understood in accordance with the applicable rules of interpretation set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”), which themselves reflect customary international law in this regard.<sup>1</sup> Adherence to the Rome Statute is adherence to the most authoritative and definitive expression of States Parties’ will.

2. Commencing with article 38 of the Rome Statute, the Independent Expert Review (“IER”) Report presents the view that the statement that the Presidency is responsible for [t]he ‘proper *administration* of the Court’ is to be understood to mean that the Presidency is responsible for ‘the *judicial function* of the ICC’.<sup>2</sup> The assertion is not in accordance with the applicable interpretative rules according to international law. Commencing with the ‘ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’,<sup>3</sup> the precise language of article 38(3) stipulates that:

The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

- (a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and
- (b) The other functions conferred upon it in accordance with this Statute.

3. Without needing to go further, the ordinary language of (a) itself clearly communicates that ‘proper administration of the Court’ does not mean the proper administration of judicial functions only. If this were the case, there would simply be no need to include the language of ‘with the exception of the Office of the Prosecutor’. The latter exception supports the most ordinary meaning of the text available: namely, that the proper administration of the Court entails that of the Court as a whole, as an institution, with the exception serving the necessary purpose of delimiting the scope of action protected by prosecutorial independence. This is a good faith, ordinary interpretation of the language of the provision.

4. It is further supported when article 38(3)(a) of the Rome Statute is considered contextually, as required by article 31 of the VCLT. Article 38(3)(a) is immediately followed by sub-paragraph 4, which is expressly connected to it, and provides that ‘[i]n discharging its responsibility under paragraph 3(a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern’. If the Presidency’s administrative powers were connected to its judicial functions only, there could be no matters of ‘mutual concern’ with the Prosecutor.

5. It is not difficult to find further explicit contextual support for the view that the ‘proper administration of justice’ means more than just the ‘judicial function of the ICC’. Article 38(3) is located in part 4 of the Rome Statute, which addresses the ‘Composition and *Administration of the Court*’ (emphasis added). That part as a whole may, therefore, provide insight into the intended scope of the term ‘administration of the Court’. While part 4 of the Rome Statute contains provisions concerning the administration of the judiciary (e.g. articles 35, 36, 39) it also includes some provisions which plainly do

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<sup>1</sup> ICJ, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 3, para. 63 and references cited therein.

<sup>2</sup> IER report, para. 37, emphasis added.

<sup>3</sup> VCLT, article 31(1).

not pertain exclusively to judicial functions, such as the creation of the Office of the Prosecutor (article 42), the Registry (article 43) and the provision concerning all staff of the Court (article 44).<sup>4</sup> The structure of part 4, in which article 38(3)(a) is located, supports the ordinary meaning that the ‘proper administration of the Court’ is to be understood in the context of the administration of the Court as an institution as a whole.

6. As it concerns the Office of the Prosecutor (the “OTP” or the “Office”), article 42(2) of the Rome Statute reads as follows:

The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and *administration of the Office, including the staff, facilities and other resources thereof*. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis. (emphasis added)

7. As a purely textual reading clearly demonstrates the provision vests the Prosecutor with extensive and exclusive managerial authority over his or her office. Indeed, when article 42(2) is considered in the light of article 31(1) of the VCLT’s requirement that a treaty be interpreted in accordance with the ordinary meaning given to its the terms, it is apparent that no ambiguity arises from this particular provision: the words “full authority over the management and administration of the Office, including the staff, facilities and other resources thereof” leave no room for interpreting article 42(2) as allowing any imposed limitation of the managerial independence of the Prosecutor. If the Prosecutor has “full authority”, as clearly stipulated in the Court’s founding treaty, then any limitation on that statutory authority would be inconsistent with any other body exercising authority over the same areas or persons. In this sense, transferring managerial responsibilities specifically belonging to the Prosecutor to another organ of the Court is legally and logically incompatible with the exercise of “full authority”. Thus, article 31(1) does not seem to leave any room to interpret article 42(2) in a manner that supports the transfer of the functions included therein.

8. When analysed in context, article 42(2) is an exception to the general rule under article 38 that tasks the Presidency and his or her office with the responsibility over the proper administration of the Court. This administrative and management role ought to be read in conjunction with other provisions, such as Rule 9 of the Rule of Procedure and Evidence, which requires the Prosecutor to put in place “regulations to govern the operation of the office”. The exclusive nature of the authority enshrined in article 42(2) is also highlighted by Rule 11 of the Rules of Procedure and Evidence (“RPE”), which makes clear that the Prosecutor may only delegate his/her functions exclusively to full staff members of his office, to the exclusion of, for instance, so-called gratis personnel within the meaning of article 44(4) offered by States Parties, inter-governmental or NGOs. This means that, at a minimum, a wholesale delegation of article 42(2) functions to another organ of the Court is incompatible with the Court’s basic documents, and indeed, the Court’s founding treaty. A similar need to safeguard the integrity of the Rome Statute by ensuring its interpretation in accordance with recognized principles of law is equally evident insofar as article 43 of the Statute is concerned. The “Three-Layered Governance Model” does not reflect the explicit provision in the second sentence of article 43(2) of the Rome Statute that:

The Registrar shall exercise his or her functions under the *authority* of the President of the Court. (emphasis added).<sup>5</sup>

9. This provision is connected to the Registrar’s responsibility for the ‘non-judicial aspects of the administration and servicing of the Court’ (article 43(1)) and the role of the Registrar as the ‘principal

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<sup>4</sup> The express indication in article 44(3) Rome Statute that the agreement, not consultation, of the Presidency and the Prosecutor is required in setting the terms and conditions for staff of the Court appears contrary to the suggestion that the Presidency’s administrative scope is limited only to judicial functions. Recommendation 4, suggesting that the Registrar is only required to consult with the President in respect of ‘layer 3’ functions, which are said to include human resources matters, appears at odds with this article. See IER report, para. 27, p. 18.

<sup>5</sup> According to the Oxford English Dictionary, the potentially relevant definitions of authority include: power to enforce obedience or compliance, or a party possessing it; power derived from or conferred by another; the right to act in a specified way, delegated from one person or organization to another; official permission, authorization; an instance of this; power to influence action, opinion, or belief, or a party possessing it, see OED online: <https://www.oed.com/view/Entry/13349?redirectedFrom=authority#eid>.

administrative officer of the Court’ (first sentence of article 43(2)). The statutory language, in this regard, appears to envisage a *delegation* of administrative powers from the President to the Registrar.

10. If the Registrar is responsible only for the ‘non-judicial’ aspects of the administration of the Court and the Registrar exercises her or his functions under the President’s authority, the scope of authority of the latter, clearly cannot be limited to the ‘judicial function of the ICC’ only. The statutory language of article 43(2) also offers no support for the suggestion in the IER Report that even when the Registrar supports ‘layer 1 or 2’ functions (i.e. those pertaining to core judicial functions and those pertaining to the ‘administration of justice’), she or he acts merely ‘under the *guidance* of the Court President’ and ‘*cooperates* with the Prosecutor’ (emphasis added).<sup>6</sup> The statutory language governing the relationship between the Presidency and the Registrar is that of ‘authority’, not ‘guidance’ and, second, its scope in no way delimits any of the Registrar’s functions in this regard, with the ordinary meaning therefore being that the supervisory relationship covers *all* the functions of the Registrar.

11. Similarly, contrary to the assertion in the IER Report that the Registrar reports to States Parties as the head of an international organisation,<sup>7</sup> it must be noted that article 43 creates no reporting line from the Registrar to States Parties.<sup>8</sup> The applicable management oversight is set out in article 112(2)(b) of the Rome Statute which, in providing that the Assembly shall: ‘[p]rovide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court’, contains no indication of a unique and specific oversight role for States Parties with respect to the Registrar.<sup>9</sup>

12. The IER further posits that ‘the distinction between ICC/Court and ICC/IO in terms of authority and accountability is also consistent with the provisions of article 119 which provides that the Court has authority to settle any disputes concerning its judicial functions, and that any other disputes related to the interpretation or application of the Rome Statute is referred to the ASP.’<sup>10</sup> Yet, in interpreting the Rome Statute, accuracy is paramount. It is not ‘any other dispute’ which may be referred to the ASP under article 119, but, rather ‘[a]ny other dispute *between two or more States Parties*’ (emphasis added). Article 119 is a simple dispute resolution clause – entirely common place, if not essential, in a complex multilateral treaty.<sup>11</sup> It is not a provision concerning authority and accountability in management oversight.

## **B. Further elements on the administrative responsibilities emanating from the Rome negotiations**

13. Further, article 32 of the VCLT provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to, *inter alia*, confirm an interpretation under article 31 of the VCLT. The drafting history of the Rome Statute provides no support for the interpretation that the Presidency’s responsibility for the ‘proper administration of the Court’ pursuant to article 38(3)(a) Rome Statute may be limited to judicial functions only.

14. The *travaux préparatoires* leading to the adoption of the Rome Statute show that from the outset it was foreseen that the responsibility for the ‘due administration of the Court’ shall lie with the Presidency<sup>12</sup>

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<sup>6</sup> IER report, p. 18 (Recommendation 2).

<sup>7</sup> Cf. IER report, para. 45.

<sup>8</sup> See also discussion at para. 26-29 below.

<sup>9</sup> The IER seeks to draw tangible support for its interpretation of the role of the Registrar in the ICC Financial Regulations and Rules (‘Financial Regulations’). See IER report, para. 45, n 26. The latter is evidently of limited scope and cannot displace the clear language of article 43(2) of the Rome Statute. Further, unlike as implied in the IER report, the provision of the Financial Regulations relied upon does not actually create a privileged relationship of accountability between the Registrar and the ASP, but, rather, expressly indicates that *both* the Registrar and the Prosecutor are accountable to the Assembly of States Parties for the management and administration of financial resources – an entirely ordinary proposition which is consistent with article 112 Rome Statute. In sum, the only legal provision relied upon in the IER’s interpretation that there exists a unique and direct supervisory relationship between the Registrar and States Parties in respect of certain aspects of the Registrar’s functions, quite simply, creates no such relationship.

<sup>10</sup> IER report, para. 38.

<sup>11</sup> E.g. It is materially similar to article XIV(2) of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

<sup>12</sup> General Assembly, Report of the Preparatory Committee on the Establishment of the International Criminal Court, vol. II, 13 September 1996, UN Doc. A/51/22 (‘1996 Preparatory Committee Report II’), p. 17 reproducing article 8(3)(a) of the Draft Statute for an International

with the Registrar being the ‘principal administrative officer of the Court’<sup>13</sup> who shall report to the President of the Court. A proposal of the United States to add the words ‘including the supervision and direction of the Registrar and staff of the Registry and the Court’ to what is now article 38(3)(a) of the Rome Statute was ultimately not retained.<sup>14</sup> The delegation of Trinidad and Tobago expressed that it was in favour of deleting the suggested addition ‘as that idea was contained in the term “due administration of the Court”’.<sup>15</sup>

15. A similar idea, however, appears in a different form in article 43. In line with a proposal from France and a similar proposal from Australia and the Netherlands, the sentence: ‘[t]he Registrar shall exercise his or her functions under the authority of the President of the Court’ was added to what is now article 43(2) of the Rome Statute.<sup>16</sup> This provision was not discussed in any detail during the Rome Conference and it can be assumed that this aspect did not spark controversy.

16. Further, the drafting history shows that proposals to the effect that the Registry ‘shall be responsible for the administration and servi[cin]g of the Court’ were not incorporated.<sup>17</sup> This wording would have been in line with a similar provision in the Statute of the International Criminal Tribunal for the former Yugoslavia.<sup>18</sup> The drafting history refers to this provision, indicating that the view was expressed that the functions of the Registrar needed further elaboration.<sup>19</sup> While article 43(1) of the Rome Statute, likely as a result of these discussions, specifies that ‘[t]he Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court’, this does not alter the fact that the Registrar’s functions are exercised under the authority of the President.<sup>20</sup> More importantly nothing in the drafting history of the Rome Statute indicates that assigning responsibility for non-judicial aspects of the administration of the Court to the Registry was meant to limit the overall responsibility of the Presidency for the proper or due administration of the Court. The only limitation of such authority as a result of the preparatory work of the treaty, was the addition of the words ‘with the exception of the Office of the Prosecutor’ in the eventual article 38(3)(a) of the Rome Statute.<sup>21</sup>

17. Instead, the reference to the Registry’s responsibility for the non-judicial aspects of the administration of the Court appears to have been the result of a desire to better define the responsibilities of the Registry, which naturally would exclude judicial aspects of the Court’s administration. The views expressed by the French delegation during the Rome Conference provide support for this. It held that France’s ‘preference, in the interests of proper management, would be for an arrangement which, while according a specific sphere of competence to the Registry, would place it under the Presidency’.<sup>22</sup>

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Criminal Court, *Yearbook of the International Law Commission* (1994), vol. II (Part Two) (‘ILC Draft’). During the Rome Conference, the formulation ‘due administration’ was replaced by ‘proper administration’. See UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Drafting Committee to Committee of the Whole, 13 July 1998, UN Doc. A/CONF.183/C.1/L.67 (‘Report of the Drafting Committee’), p. 7.

<sup>13</sup> See General Assembly, Report of the Preparatory Committee on the Establishment of the International Criminal Court, vol. I, 13 September 1996, UN Doc. A/51/22 (‘1996 Preparatory Committee Report I’), p. 39 reproducing article 13(1) ILC Draft.

<sup>14</sup> 1996 Preparatory Committee Report I, para. 42; 1996 Preparatory Committee Report II, p. 18; UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of the International Criminal Court, Addendum, 14 April 1998, UN Doc. A/CONF.183/2/Add.1 (‘1998 Preparatory Committee Report’), p. 65; Rome Statute, article 38(3)(a).

<sup>15</sup> UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary records of the meetings of the Committee of the Whole, 15<sup>th</sup> Meeting, 24 June 1998, UN Doc. A/CONF.183/13 (Vol. II) (‘Meeting of the Committee of the Whole’), p. 242, para. 121.

<sup>16</sup> 1996 Preparatory Committee Report II, pp. 39, 41; 1998 Preparatory Committee Report, p. 69; Article 43(2) Rome Statute. It is worth highlighting that instead of the word ‘direction’ the word ‘authority’ was ultimately chosen to describe the relationship between the Registrar and the President regarding the administration of the Court, See 1996 Preparatory Committee Report, paras. 42, 47; 1998 Preparatory Committee Report, p. 65; Rome Statute, article 38(3)(a).

<sup>17</sup> 1996 Preparatory Committee Report II, pp. 39, 41.

<sup>18</sup> 1996 Preparatory Committee Report I, para. 47 referring to article 17(1) of the Statute of the International Criminal Tribunal for the former Yugoslavia (‘ICTY Statute’ and ‘ICTY’, respectively).

<sup>19</sup> 1996 Preparatory Committee Report I, para. 47. While Article 17(1) of the ICTY Statute refers more generically to responsibility of the Registry for the ‘administration and servicing of the International Tribunal’, Rule 33(A) of the ICTY Rules of Procedure and Evidence clarifies, similar to article 43(2) of the Rome Statute, that this function shall be exercised under the authority of the ICTY President: ‘Under the authority of the President, the Registrar shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication’ (emphasis added).

<sup>20</sup> Rome Statute, article 43(2).

<sup>21</sup> 1996 Preparatory Committee Report II, p. 17 reproducing article 8(3)(a) ILC Draft; 1998 Preparatory Committee Report, p. 65.

<sup>22</sup> Meeting of the Committee of the Whole, p. 241, para. 105.

18. As the negotiating history of the Statute shows, States did not wish to concentrate administrative and financial authority for all organs of the Court in the position of the Registrar. On the contrary, the model adopted was a very different one, consciously departing from the one adopted for the *ad hoc* Tribunals and reinforcing the full independence of the Prosecutor under the Statute. Indeed, a key difference between the ICC on the one hand and the *ad hoc* Tribunals and the original ILC Draft on the other hand is the inclusion of management and administrative autonomy for the OTP as an additional feature of this independence: while article 42(2) vests the ICC Prosecutor with full managerial authority over his or her Office, including staff, facilities and other resources, at the UN ICTY/R, these functions fell under the competence of the Registrar.<sup>23</sup>

19. The provision was first inserted at an early stage during the PrepCom process (1996),<sup>24</sup> reflecting the concerns of some delegations that “the Prosecutor’s utilisation of personnel and other resources of his or her Office must not be restricted by the Registrar in a way that interferes with investigations and prosecutions”.<sup>25</sup> Concern was also raised with respect to an early report by the UN Office of Internal Oversight (“OIOS”) on the ICTR that the relationship between the Registry and the OTP had often been characterized by tension rather than cooperation.<sup>26</sup> In particular, the Report expressed concern over the perception of the Registrar that his function as Chief Administrative Officer of the Tribunal gave him ultimate authority for all matters having administrative or financial implications, rendering the independence of the Prosecutor’s decisions in these fields subservient to Registry authorisation.<sup>27</sup> As the OIOS observed:

The disputes over the authority of the Registrar need to be addressed. As currently perceived by him, he can - and does - overrule decisions on substantive administrative matters taken by the judges and the Office of the Prosecutor. According to the Registrar, he has absolute authority when it comes to any matter with administrative or financial implications. Because of this perception, almost no decision can be taken by the other organs of the Tribunal that does not receive his review and agreement or rejection. In the opinion of OIOS this must change to more accurately reflect the servicing function of a Registry ... *The Registry is not an independent body in itself and its objective is to service the other two organs of the Tribunal.*<sup>28</sup> (emphasis added)

20. Accordingly, the Report recommended that “[t]he Tribunal, with the assistance as needed of the Office of Legal Affairs, should set forth clearly the role, scope and reporting relationships of the Registrar, within the definitions established by the statute, so that the independence of the Chambers and the Office of the Prosecutor are fully recognized and the service function of the Registry is emphasized and guided”.<sup>29</sup>

21. Another reason for the separation of administrative functions between the OTP and the rest of the Court is the argument that since the ICC Registrar is elected by the judges, rather than being appointed by the Secretary-General as in the ICTY/R, it would be *inappropriate* for the Registrar to also provide administrative services to the OTP.<sup>30</sup> It has also been suggested that a shared administration could *interfere with the impartiality* of the Court.<sup>31</sup>

22. The fact that decision to vest the Prosecutor with financial and administrative autonomy was one in relation to which States were very quick to reach agreement is testimony not only to the importance of the principle, but also of its uncontroversial nature: indeed, in most, if not all jurisdictions, the prosecuting agency is financially and administratively autonomous, and accordingly does not depend on any other

<sup>23</sup> Article 17 ICTY Statute, Article 16 ICTR Statute

<sup>24</sup> See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Proposals), UN GAOR, 51st session, Supp. No. 22, UN Doc. A/51/22(VOL.II)(SUPP) (1996), 13 September 1996, p.37. See similarly Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One, Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p.67.

<sup>25</sup> Morten Bergsmo/Frederik Harhoff, ‘Article 42’, in Triffterer, ed., Commentary on the Rome Statute of the International Criminal Court (1999), 631;

<sup>26</sup> Report of the Secretary-General on the Activities of the Office of Internal Oversight Services (‘Paschke Report’), A/51/789 (1997), 2; John Jones, ‘The Office of the Prosecutor’, in Cassese, Gaeta, Jones, eds., The Rome Statute of the International Criminal Court: A Commentary (2002), 273

<sup>27</sup> Paschke Report, ¶4, ¶8

<sup>28</sup> *Ibid.*, ¶8

<sup>29</sup> *Ibid.*, ¶78

<sup>30</sup> David Tolbert, ‘Article 43’, in Triffterer (1999), 640

<sup>31</sup> Virginia Morris and Michael Sharf, An Insider’s Guide to the ICTY (New York 1995), Vol.1, p.168, n.466

organ for the purposes of making financial decisions or managing its human resources. The clear and conclusive language in article 42(2) is therefore an accurate reflection of the intentions of states when adopting the provision.

23. Finally, post-Rome developments confirm both the principled nature and the wisdom of article 42(2): In 1999, a panel of experts appointed by the UN Secretary General to evaluate the performance of the ICTY and ICTR recommended:

“[...] that the Secretary-General consider a realignment of administrative matters as between the Registry and the Office of the Prosecutor, through a re-delegation or administrative instruction, as set forth in paragraph 246 above in respect of the Registry, better reflecting the independence of the Prosecutor and more responsive to its administrative support needs. Thus the Registry's court administrative functions would remain essentially unchanged, apart from the modest transfer of responsibilities to the Chambers with respect to the latter's degree of control over the judges' legal assistants, secretaries and internal administrative matters. The Office of the Prosecutor would assume administrative responsibility with regard to its own budget, its staff, including language staff and public information, and the care and protection of its potential witnesses during investigations and also, if necessary, while trials are in progress. The Registry would continue to provide all support services other than those enumerated above. Needless to say, if and to the extent that the Registrar and the Office of the Prosecutor reach agreement resolving the manner in which such administrative matters are to be handled, thus obviating the need for a re-delegation or administrative instruction, that would plainly be desirable.”<sup>32</sup>

24. In sum, it can be concluded that the ‘Three Layered Governance Model’ proposed by the IER is not compatible, at minimum, with articles 38, 42, 43 and 112 of the Rome Statute.

### **C. Further elements by way of comparison with other international courts and tribunals**

25. The Rome Statute’s careful division of administrative responsibilities between the Presidency/President and the Registrar, without prejudice to the independence of the OTP, is entirely consistent with the structure of the vast majority of other international criminal courts and tribunals, which, with only one exception, clearly grant the Presidency/President an administrative scope of action which goes beyond that which occurs in judicial proceedings only, as suggested by the ‘Three-Layered Governance Model’.

26. The ICTY, the ICTR, the International Residual Mechanism for Criminal Tribunals (“IRMCT”), the SCSL, the Residual Special Court for Sierra Leone (“RSCSL”), and the Special Tribunal for Lebanon (“STL”) all foresee that the Registrar/Registry is responsible for the administration and servicing of the relevant court or tribunal, ‘[u]nder the authority of the President’.<sup>33</sup> The President supervises the activities of the Registry.<sup>34</sup> It is entirely clear from their structure that the President is in charge and at a higher level

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<sup>32</sup> United Nations, A/54/634, 22 November 1999, para. 252.

<sup>33</sup> ICTY Statute, article 17(1); ICTY Rules of Procedure and Evidence (‘ICTY Rules’), rule 33(A); ICTR Statute, article 16(1); ICTR Rules of Procedure and Evidence (‘ICTR Rules’), rule 33(A); IRMCT Statute, article 15(1); IRMCT Rules of Procedure and Evidence (‘IRMCT Rules’), rule 31(A); SCSL Statute, article 16(1); SCSL Rules of Procedure and Evidence (‘SCSL Rules’), rule 33(A); RSCSL Statute, art. 15(3); RSCSL Rules of Procedure and Evidence (‘RSCSL Rules’), rule 33(A) (‘[u]nder the authority of and in consultation with the President’); STL Statute, article 12(1), STL Rules of Procedure and Evidence (‘STL Rules’), rule 48(A). Rule 39 of the STL Rules clarifies that ‘[t]he President, in carrying out his duties under Article 12 (1) of the Statute, may consult and coordinate with the Registrar on any matter related to the Registrar’s administrative and judicial support functions’. *See also* rule 19(B) of the RSCSL Rules further provides that ‘[i]n order to ensure the proper operation of the activities of the Residual Special Court, the President shall liaise with the Registrar, the Prosecutor, the Defence or their representatives’.

<sup>34</sup> ICTY Rules, rule 19(A); ICTR Rules, rule 19(A); SCSL Rules, rule 19(A); RSCSL Rules, rule 19(A); STL Rules, rule 32(C). While rule 23(A) IRMCT Rules does not list the supervision of the Registry by the President, in light of the wording of rule 31(A) IRMCT Rules, which places the Registrar under the authority of the President, this seems to have no practical bearing.

in the hierarchy than the Registrar.<sup>35</sup> The Registrar or Registry assists<sup>36</sup> and services.<sup>37</sup> The President submits the annual report to the UN Secretary-General or any other governing body.<sup>38</sup> There is no mention of merely leaving judicial aspects of administration under the authority of the President.<sup>39</sup>

27. The only outlier in this respect is the Kosovo Specialist Chambers (“KSC”).<sup>40</sup> Article 32(3) Kosovo Law No.05/L-053 provides explicitly that ‘[t]he President of the Specialist Chambers shall be responsible for the *judicial* administration of the Specialist Chambers’ (emphasis added). In addition to the Registry being ‘responsible for the administration and servicing of the Specialist Chambers’, it is responsible for ‘all necessary and affiliated functions’.<sup>41</sup> The KSC Registrar ‘shall be independent in the performance of his or her functions’<sup>42</sup> and the ‘terms and conditions of service of the Registrar shall be at a comparable level as those of the President of the Specialist Chambers and the Specialist Prosecutor’.<sup>43</sup> The Registrar’s independence from any governing body appears to be an important feature in this set-up.

28. The above language creating this unique structure at the KSC is entirely different from that contained in the Rome Statute. The limitation of the administrative authority of the President of the KSC to judicial matters only, *is expressly stated in the text*. The Registrar’s broader scope of functions is, similarly, specified, as is the structural element of the Registrar’s independence and his or her remuneration. None of these features exist in the Rome Statute. Rather, the governance structure set out in the Rome Statute is clearly similar in nature to the structure of all other international criminal courts or tribunals, whose President is responsible for the proper administration of the Court (not only judicial administration) overseeing the work of the Registrar.

29. Indeed, the provisions of the Rome Statute in this respect reflects a further refinement that is specific to the ICC, in order to avoid difficulties experienced at the *ad hoc* tribunals and the Special Court for Sierra Leone, where the Registrars were organically considered to be the representatives of the UN Secretary General. Under such arrangements, the Registrars were appointed and dismissed by the Secretary General, although the Registrar was functionally under the authority of the President of the Court. Yet, the feature of the Registrar being beholden to the Secretary General, by virtue of the power of appointment, reappointment or dismissal, the arrangement occasioned elements of dysfunction in relationships between the President and the Registrar, in a manner that affected morale and performance at the tribunals. Those sufficiently familiar with the history of the ICTR and the ICTY (and later the SCSL) will attest to this experience. Consequently, the arrangement under the Rome Statute, under which there is no doubt that the

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<sup>35</sup> The Registrar is generally appointed by the UN Secretary-General in consultation with the President. *See* ICTY Statute, article 17(3); ICTY Rules, rule 30; ICTR Statute, article 16(3); ICTR Rules, rule 30; SCSL Statute, article 16(3); SCSL Rules, rule 30; RSCSL Statute, article 15(1); RSCSL Rules, rule 30. At the IRMCT and STL there is no consultation with the President. *See* IRMCT Statute, article 15(3); STL Statute, article 12(3). At the ICTY, ICTR and IRMCT, the Registrar has the terms and conditions of service of an Assistant Secretary-General of the United Nations whereas the Prosecutor and, by analogy, the President have the terms and conditions of service of an Under Secretary-General of the United Nations. *See* ICTY Statute, article 16(4), 17(3); ICTR Statute, articles 15(4), 16(3); IRMCT Statute, articles 14(4), 15(3). *See e.g.* <https://www.unsystem.org/content/definition-staff-categories>. The Registrar takes his oath of office before the President. *See* ICTY Rules, rule 32(A); ICTR Rules, rule 32(A); IRMCT Rules, rule 30(A); SCSL Rules, rule 32; RSCSL Rules, rule 32; STL Rules, rule 45.

<sup>36</sup> ICTY Rules, rule 33(A); ICTR Rules, rule 33(A); IRMCT Rules, rule 31(A); SCSL Rules, rule 33(A); RSCSL Rules, rule 33(A); STL Rules, rule 48(A).

<sup>37</sup> ICTY Statute, article 11(C), 17(1); ICTY Rules, rule 33(A); ICTR Statute, article 16(1); ICTR Rules, rule 33(A); IRMCT Statute, article 15(1); IRMCT Rules, rule 31(A); SCSL Statute, article 16(1); SCSL Rules, rule 33(A); RSCSL Statute, article 15(3); RSCSL Rules, rule 33(A); STL Statute, article 12(1); STL Rules, rule 48(A).

<sup>38</sup> ICTY Statute, article 34; ICTR Statute, article 32; IRMCT Statute, article 32(1); SCSL Statute, article 25; RSCSL Statute, article 26(1); RSCSL Rules, rule 19(E); STL Statute, article 10(2); STL Rules, rule 32(I).

<sup>39</sup> Article 10(1) of the STL Statute and rule 32(B) of the STL Rules clearly spell out that the STL President shall ‘be responsible for its effective functioning and the good administration of justice’ thereby leaving no doubt that the President’s managerial functions go beyond the ‘good administration of justice’.

<sup>40</sup> Kosovo Law No. 04/L-274; Kosovo Law No.05/L-053, article 3(1).

<sup>41</sup> Kosovo Law No.05/L-053, article 34(1); Rules of Procedure and Evidence before the KSC (‘KSC Rules’), rule 23(1). The KSC Rules further clarify that the President is ‘responsible for the effective judicial activity of the Specialist Chambers and the good administration of justice’ (KSC Rules, rule 13(1)(b)) and that he shall ‘consult and coordinate with the Registrar on any matter related to the Registrar’s judicial support functions’ (KSC Rules, rule 13(1)(f)). The Registrar may issue internal rules and instructions, consulting the President ‘where needed’ (Kosovo Law No.05/L-053, article 34(3); KSC Rules, rule 23(1)). He makes recommendation and representations, and reports to the plenary of judges on his or her functions ‘that affect the *judicial* activity of the Specialist Chambers’ (emphasis added) (KSC Rules, rule 23(2)(b) and (c)).

<sup>42</sup> Kosovo Law No.05/L-053, article 34(3).

<sup>43</sup> Kosovo Law No.05/L-053, article 34(5).

Registrar is selected by the Judges and functions under the authority of the President, greatly reduces the incidence of the experiences of the *ad hoc* tribunals. And it has worked effectively thus far.

30. Furthermore, as explained above, the OTP at the ICC is different from its *ad hoc* Tribunals equivalent, in the sense that the Statute embraces a wider notion of independence, encompassing not only independence in the exercise of investigative and prosecutorial functions, but also managerial and administrative independence. As shown above, this was a deliberate and informed choice of the drafters of the Statute, based on the experience of the *ad hoc* Tribunals, including internal oversight and expert review of their processes. This evaluation directly led to an intentional design by the States negotiating the ICC Statute to emphasise and enshrine the necessary guarantees to ensure the functional independence of both the Prosecutor and the Presidency.

#### **D. Judicial and prosecutorial independence**

31. The previous sections have elucidated the concern that the ‘Three-Layered Governance Model’ fails to properly account for the basic parameters of the Rome Statute. Contrary to the positions taken in the IER Report, the Rome Statute does not limit the administrative functions of the Presidency and Prosecutor to purely judicial and prosecutorial activities, but rather divides the exercise of administrative responsibilities amongst the Presidency, Prosecutor and Registrar. At the heart of the reasons for this is judicial and prosecutorial independence. There are a number of elements of the ‘Three-Layered Governance Model’ which fail to pay sufficient respect to such fundamental independence – namely the notion that certain so-called ‘level 3’ functions, including the budget, do not fall within the scope of the Presidency’s responsibility for the proper administration of the Court and are presented as entirely disconnected from judicial and prosecutorial independence<sup>44</sup> and the notion of the Registrar as a ‘Secretary-General’ directly responsible to States Parties.<sup>45</sup> The latter will be further developed in the next section.

32. The protection of judicial independence is a bulwark of human rights and the rule of law, and as such, fundamental to achieving the aims of international justice. This is not to say that judicial independence is a shield which prevents scrutiny, accountability or change – nothing could be further from the truth. Courts the world over have long grappled with balancing judicial independence with budgetary accountability – budgets and human resources are, after all, scarcely the exclusive domain of international organisations – whilst leaving judicial independence intact. In other words, a central argument used to support the relevant proposal in the IER Report is unsustainable for its intended purpose. That argument is that the ICC is an international organisation, because of the existence of routine administrative needs (human resources, budget, finance, procurement, facilities management, etc.), as in every other international organisation. That argument ignores the fact that every court in the world also has human resources, budgets, and all the other elements that the IER Group has identified as the factors that make the ICC an international organisation. The Court would have very much welcomed closer analysis of how this necessary balance between judicial independence and operational oversight is achieved in such comparable contexts of international and national courts.

33. Similarly, prosecutorial independence is an integral part of the rule of law and crucial to the achievement of a lasting respect for international justice. Only the fullest of respect for prosecutorial independence can protect the Court from the criticism of political influence over its work. Recent measures taken by the US against the Prosecutor, and a senior member of her staff, and travel bans on undisclosed ICC personnel further highlight the need to ensure that the standard of prosecutorial independence enshrined in the Rome Statute is fully reflected in the Court’s governance structure.

34. In this context, there are several sets of international standards on judicial independence, which emphasise the judiciary’s autonomy and independence *vis-à-vis* the executive<sup>46</sup> and that the executive shall not have control over judicial functions.<sup>47</sup> It is a generally recognized standard that judicial administration

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<sup>44</sup> See IER report, recommendation 4.

<sup>45</sup> IER report, paras 45-46.

<sup>46</sup> International Bar Association, Minimum Standards of Judicial Independence, adopted in 1982, available at: [https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) (‘IBA Minimum Standards’), para. 2.

<sup>47</sup> IBA Minimum Standards, para. 5.

shall be vested in the judiciary<sup>48</sup> or jointly in the judiciary and the executive.<sup>49</sup> Specifically related to the budget, it is broadly acknowledged that the competent authority should cooperate with the judiciary,<sup>50</sup> and that the latter shall submit their estimate of appropriate budget.<sup>51</sup> Other standards provide that the judicial independence and impartiality is undermined if the judiciary lacks participation in the elaboration of the budget.<sup>52</sup> As to the staffing, it is internationally acknowledged that supervisory functions of staff should be vested within the judiciary or a body in which the judiciary is sufficiently represented.<sup>53</sup> It appears that those international standards of judicial independence have not been sufficiently taken into consideration by the IER.

## E. The Registrar as a ‘Secretary-General’ of an international organisation

35. The IER suggests that judicial and prosecutorial independence<sup>54</sup> exist only in distinct and narrow spheres, from which both judicial and prosecutorial administration and the administration of an international organisation can be neatly excised. In this structure, the Registrar is suggested to act similarly to a ‘secretary-general’ of an international organisation who ‘reports’ to States Parties in respect of the latter and provides support, in consultation with the Prosecutor and under the guidance of the Presidency, in respect of the former.<sup>55</sup> The IER Report further suggests that the Prosecutor may simply delegate to the Registrar core functions expressly granted to that office in article 42(2) of the Rome Statute.<sup>56</sup>

36. It should be noted that any comparisons of the Registrar to the UN Secretary-General require close cognisance of distinct legal differences. The UN Secretary-General, as the chief administrative officer of the organisation (UN Charter, article 97) is expressly entrusted to perform functions conferred upon her or him by every organ of the UN *except* its judicial organ, the International Court of Justice (UN Charter, articles 7 and 98). Further, the independence of the UN Secretary-General is expressly acknowledged in article 100, thereof. The absence of any such recognition in the Rome Statute likely reflects the reality that the role of the Registrar, while being an administrative one, was not considered similar to the UN Secretary-General owing to the distinct nature of the ICC as a judicial body.

37. The IER presents the notion of a separate administrative layer of ‘the ICC as an international organisation’, yet there is an evident risk of oversimplification. The Rome Statute does not distinguish between the ‘ICC/Court’ and the ‘ICC/IO’. It must first be recalled that the ICC is an international organisation because it possesses international legal personality<sup>57</sup> and because the States Parties to the

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<sup>48</sup> IBA Minimum Standards, para. 9; First World Conference on the Independence of Justice, Montreal Declaration - Universal Declaration on the Independence of Justice, adopted on 10 June 1983, available at: <https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf> (‘Montreal Declaration’), para. 2.40.

<sup>49</sup> IBA Minimum Standards, para. 9.

<sup>50</sup> Montreal Declaration, para. 2.40; UN Commission on Human Rights, Final Report by the Special Rapporteur, Draft Universal Declaration on the Independence of Justice, UN Doc. E/CN.4/Sub.2/1985/18/Add.5/Rev.1, 24 August 1987 (‘Singhvi Declaration’), para. 34; Conference of the Chief Justices of Asia and the Pacific, Beijing Statement of Principles on the Independence of Judiciary in the LAWASIA Region States, 19 August 1995, available at: <https://www.lawasia.asn.au/sites/default/files/2018-05/Beijing-Statement-19Aug1995.pdf> (‘Beijing Principles’), para. 37.

<sup>51</sup> Montreal Declaration, para. 2.42; African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, May 2003, available at: <https://www.achpr.org/legalinstruments/detail?id=38>, para. A(4)(v); In its International Standards for the Independence of the Judiciary the non-governmental organisation Democracy Reporting International even states that the judiciary or a judiciary council should be solely responsible for managing the judiciary budget. Democracy Reporting International, Briefing Paper 41: International Standards for the Independence of the Judiciary, September 2013, available at: [http://democracy-reporting.org/wp-content/uploads/2016/03/dri-bp-41\\_en\\_international\\_standards\\_for\\_the\\_independence\\_of\\_the\\_judiciary\\_2013-09.pdf](http://democracy-reporting.org/wp-content/uploads/2016/03/dri-bp-41_en_international_standards_for_the_independence_of_the_judiciary_2013-09.pdf), p. 1, (g) and (i).

<sup>52</sup> International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, available at: <https://www.icj.org/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners-Guide-2009-Eng.pdf>, p. 33.

<sup>53</sup> Beijing Principles, para. 36; In addition, the Burgh House Principles on the Independence of International Judiciary state that the court shall be free to determine the conditions for its internal administration, including the allocation of budgetary expenditure. International Law Association, Burgh House Principles on the Independence of International Judiciary, available at: [https://www.ucl.ac.uk/international-courts/sites/international-courts/files/burgh\\_final\\_21204.pdf](https://www.ucl.ac.uk/international-courts/sites/international-courts/files/burgh_final_21204.pdf), para. 1.3.

<sup>54</sup> Although this present text focuses on judicial independence, it is also worth noting that article 42(2) of the Rome Statute, in its statement that, ‘[t]he Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof’ is similarly entirely clear as to the incapacity of certain administrative powers being excised from the Prosecutor’s scope of authority.

<sup>55</sup> IER report, paras 27, 45, p. 18 (Recommendation 2).

<sup>56</sup> IER report, paras 43-44, p. 19 (Recommendation 6).

<sup>57</sup> Rome Statute, article 4(1).

Rome Statute consented to its creation as a body governed by international law. As noted earlier, the existence of routine administrative needs (human resources, budget, finance, procurement, facilities management etc.) neither define nor characterise international organisations. The IER Report appears to suggest the existence of an international organisation which is separate from the ICC as a Court. Yet, *the Court itself is the international organisation*.<sup>58</sup> The simplification of ‘ICC/Court’ and ‘ICC/IO’ may be a false dichotomy or, at minimum, one on which there is prudent reason to avoid excessive reliance.

38. The IER presents this dichotomy in terms of a Court which conducts judicial or prosecutorial activity, therefore being liable to the protection of judicial and prosecutorial independence, and an international organisation which does not. The protection of judicial independence involves more than simply safeguarding ‘judgments, deliberations by Judges’.<sup>59</sup> It also requires that the work of the judiciary in its entirety can be performed without interference or the appearance thereof and that the judiciary has access to the decision-making processes which ensure the human and physical resources necessary to guarantee that fair and impartial judicial proceedings can occur.<sup>60</sup> It requires ensuring that the judges of the Court feel safe from direct or indirect external pressure. Similar might be said of prosecutorial independence. To put it simply, the reason that the Court and the ASP have consistently found it difficult to mutually delimit where ‘management oversight’ ends and ‘judicial or prosecutorial independence’ begins is not because of failings nor bad faith on the part of any interlocutor, but rather because these are complex questions which raise issues which lie at the heart of the rule of law and the multilateral international order. These are issues which cannot always be solved by reference to the UN, which, unlike the ICC, does not exist as an international organisation which functions solely as a judicial body.<sup>61</sup>

39. Finally, by way of further and vital context to the present discussion, States Parties and the Court should be united in fearing that *any* appearance that certain aspects of the Court’s activities are subjected to the control (or appearance of control) by a political body will be a boon for those who seek to cast aspersions on the Court. The accusation that the Court is a political body, whose work is dictated by political interests and influence, is already frequently and baselessly made. States Parties and the Court share a mutual interest in not lending structural credence, in any way, to such falsehoods. The risk of deleterious and potentially even existential consequences arising if faith in the independence of the institution is fundamentally undermined in such a manner should not be dismissed as entirely far-fetched.

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<sup>58</sup> See Rome Statute, article 1.

<sup>59</sup> IER report, para. 28.

<sup>60</sup> The IER report does not elaborate on the added value of having the Head of Chambers under the Registrar exercise control over the resources and personnel of the judiciary. See IER report, paras 101-102. It ignores the direct impact on the independence of the judiciary.

<sup>61</sup> See also discussion at para. 27 above.

## Annex II

*Documents referred to in footnote 44 (provided by the Presidency of the Court)*

 <b>Cour Pénale Internationale</b> <b>International Criminal Court</b>	<b>Les Chambres</b> <b>The Chambers</b>		
<b>Internal memorandum</b> <b>Memorandum interne</b>			
<b>To   À</b>	<b>Presidency</b>	<b>From   De</b>	<b>Judge Akane, Judge Ibañez, Judge Bossa, Judge Alapini-Gansou Judge Aitala</b>
<b>Date</b>	<b>20 November 2020</b>	<b>Through   Via</b>	<b>Email and hardcopy</b>
<b>Ref.</b>	<b>C/04/2020</b>	<b>Copies</b>	
<b>Subject   Objet</b> <b>Independent Expert Review of the Court – paragraph 439</b>			
<p>Dear Presidency,</p> <p>Following the extensive discussions on the matter within the judges’ retreat, we would like to express our strong disappointment for the findings in paragraph 439, in conjunction with paragraphs 404 and 405, of the final report of the “Independent Expert Review of the Court” on 30 September 2020.</p> <p>The experts cite anonymous concern raised with them on the calling to serve full-time at the Court by the Presidency of six newly-elected judges. The experts allege to have “heard that the call to full-time service in March 2018 might have been motivated by inappropriate or extraneous considerations such as the election of the new Presidency” and report anonymous and unsubstantiated accusations that “the decision was motivated not by the workload of Chambers, but rather by election campaign promises or pledges made by some of the newly elected judges”.</p> <p>It is extremely disappointing that the experts did not feel the need, as the most basic rules of correctness and fairness would have dictated, to allow the concerned judges and the Presidency having their say on these defamatory and unfounded accusations before releasing the report, to the detriment of the whole Court’s reputation and credibility.</p> <p>Needless to say, the entire story is absurd. Since all judges were called up to full time simultaneously, this would imply that not “some” but all the judges consistently made “promises or pledges”.</p>			

The reality is that no improper pressures, offers, promises or pledges of any nature have occurred on the part of any of the candidates for the positions of president and vice president, who transparently presented their programmes and vision about the Court's future. Likewise, we wish to recall that the six newly-elected judges speaking openly before the whole judiciary, unanimously demanded to be treated equally and be given the dignity of contributing to the attainment of the Court's high mandate, also in view of preserving solidarity and collegiality in the judiciary. Several of the then sitting judges, including the candidates for the positions of president and vice president, stated their support to this position. This is demonstrated by the records of the meetings.

Two and a half years after having been called to full-time service we do appreciate how well grounded was the decision of the Presidency to call the six judges to serve full-time in June 2018. Arguably the Court has gone through the most intense period of work of its life and all of the newly-elected judges have been decisively contributing to a remarkably-long list of proceedings, including but not limited to three proprio motu proceedings, four confirmation of charges proceedings, one trial case, one case of compensation, two art. 81 and several art. 82 appeals proceedings. The newly elected judges have also conducted legal studies and drafted proposals for amendments of the statutory framework.

We encourage the Presidency to have detailed statistics prepared reporting the long list of decisions and hearings which the six judges have undertaken since June 2018. We confide the Presidency will take the initiatives appropriate to protect the Court, justice and the victims of mass atrocities.

With best regards,



Tomoko Akane



Luz Ibáñez Carranza



Solomy Balungi Bossa



Reine Alapini-Gansou



Rosario Salvatore Aitala

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## Unfounded Allegations of Promises during Presidency Elections

The Presidency firmly rejects any impression conveyed in the IER Report to the effect that during the 2018 Presidency Election, any member of the current Presidency may have won the post by making promises of early full-time call-up to the newly elected judges.

Concerned that the IER Report may have conveyed that impression, the President wrote to Mr Goldstone to reject that suggestion—particularly pointing out the error of recording that information in the report, without giving members of the Presidency or the new judges a prior opportunity to discuss the matter with the members of the IER Group.

In his letter to the President, Mr Goldstone conveyed the following relevant information:

- ‘In writing the Report, the Experts exercised restraint and caution with regard to making any adverse findings against any individual elected official of the Court or any member of its staff. They were careful to protect the identity of persons they interviewed.’
- ‘... As appears from the relevant paragraphs, they relate in general to past elections.’
- ‘Only in paragraph 439 is reference made to “issues of concern” expressed to the Experts with regard to the calling up of the six judges who had been elected at the end of 2017. The Experts did not make a finding as to the accuracy or validity of these concerns. Again, the Experts were careful not to identify those who raised these “issues of concern”.’
- ‘... The focus of the relevant paragraphs, the findings and recommendations, is not on any individual, but rather on the provisions implicated.’
- ‘There is nothing in the relevant paragraphs or elsewhere in the Report that imputes any transgression or wrongdoing by the Presidency, the

President or any judge. Referencing allegations or claims is neither their affirmation, nor confirmation.'

- 'There is also nothing in the Report that found the calling to serve of new judges in 2018 was lacking in transparency. ...'

## Annex III

*Document provided by the Office of the Prosecutor:*

### **IER Report Response: Impact of a Tenure System on the Office of the Prosecutor**

#### ***Introduction***

1. The response of the Court to the recommendations of the IER Report on Tenure (see IER Report, p. 81, paras. 248-253; Recommendations R104-R105), which is set out in the main body of this document, speaks for the whole Court, including the Office of the Prosecutor (“OTP”). This brief paper only serves to develop more fully concerns of particular importance for the operations of the OTP, as the “engine” of the Court, concerns which, it is submitted, ought to be carefully weighed should implementation of any tenure system be contemplated.

#### ***Tenure (p. 81, paras. 248-253)***

2. In their **Findings**, among other measures, the Experts propose, as a more far-reaching and effective way to address “the challenge of staff stagnation at the Court,” though admittedly with more administrative difficulty, the introduction of “a policy of tenure for all staff above a certain grade.” While not wishing to be prescriptive, the Experts suggest a tenure limit of between five and nine years that would apply for all officers of P-5 level and above. This term limit would have to be applied strictly, with few, if any, exceptions.

3. Given the difficulty of applying a new tenure system to staff already in the Court, the Experts suggest that the system be applied only to new recruitments. They also advise that this should not preclude the Court from encouraging senior staff, who have served for a long time, to consider taking early retirement, including through offering financial packages.

4. The benefits of implementing the tenure proposal, the Experts say, would be to introduce “fresh thinking, a different managerial dynamic in the work unit, and a diffusion of power currently held at that level in the different organs.” The purpose would be to “bring fresh approaches and thinking, as well as more dynamism into the Court across all its Organs.”

5. Although the Experts believe the benefits of introducing a tenure system outweigh the work disruption this would cause, they do sound a note of caution:

“The Court could choose to apply a tenure system across the board to all staff of the Court, as occurs in the organisations [cited by the Experts]. On balance, however, the Experts consider that the downsides of this could weigh too heavily on the system, at least in its early years of application. These include the complexity and longevity of cases being dealt with in the OTP and thus the need for a degree of continuity at the working level, as well as the challenge of having to run constant recruitment campaigns.” [Paragraph 249.]

6. Concern over these downsides, however, should also extend to take into account senior management positions, because officials at that level, not only take decisions, but do real work affecting OTP operations.

7. Whether or not the ASP and the Court decide to apply a tenure policy, the Experts recommend that the Court should develop a solid knowledge management framework that includes mechanisms and strategies to retain and transfer knowledge, a suggestion that makes good sense.

8. However, would implementing a tenure system genuinely enhance the performance, efficiency and effectiveness of the Court? There are compelling reasons to believe it would not, and so the question deserves careful thought before any move is made to shift the top tier of the Court’s management to tenure limits.

9. The recommendations below are now addressed from the perspective of the OTP.

**R104.** *The Court should develop a comprehensive strategy on knowledge management, to ensure that critical information and experience is not lost every time a member of staff moves out of the work unit on transfer, secondment, retirement or resignation, and to inform the training program across the Court, including the induction training for new recruits.*

10. This is an actionable recommendation, independent of the recommendation on tenure. It has already been addressed in the main body of the Court's response, and needs no further elaboration here.

**R105.** *In order to encourage fresh thinking and bring more dynamism to the Court, a system of tenure should be adopted by the Court, applicable to all positions of P-5 and above. The system should stipulate a maximum tenure in positions of these levels of somewhere between five and nine years, and should admit few, if any exceptions. For reasons of procedural fairness, the limitations should not be applied to those occupying these positions currently and would only apply to those newly appointed to the positions. Nonetheless, long serving officers of P-5 or Director level might be encouraged to retire early to allow the new system to be established as quickly as possible.*

11. Implementation of a tenure system, as proposed in the above recommendation, would not enhance the performance, efficiency and effectiveness of the Court, but would, from the OTP's perspective, be harmful to operational capabilities, place a heavy burden upon already strained resources, and prove inimical to the achievement of the OTP's mandate. Moreover, a tenure system is unnecessary; the benefits which it is supposedly designed to achieve can be generated more effectively in other ways.

#### ***What posts in the OTP would be affected?***

12. Tenure is not an issue for the OTP's top leadership, namely, the Prosecutor (USG) and Deputy Prosecutor (ASG), who are each elected by the ASP for fixed, non-renewable terms of nine years; change therefore occurs cyclically at the most senior level of the OTP's leadership.

13. A tenure system would, however, have a significant impact on the top tier of OTP management, which, as it is currently structured, comprises the following posts:

- three D-1 Directors of Division, and
- 19 P-5 posts, namely,
  - two Senior Appeals Counsel;
  - eight Senior Trial Lawyers;
  - four senior managers in ID (one Investigations Coordinator and three Heads of Section);
  - two senior managers in JCCD (one International Cooperation Coordinator and one Head of Section); and
  - three senior managers reporting directly to the Prosecutor (one Head of Section for each of Services Section, IKEMS and LAS).
- Two posts, those of Senior Legal Advisor in JCCD and Chef de Cabinet in the IOP, may be reclassified to the P-5 level, so the number of posts at the P-5 level in the OTP could reach 21.

14. It is obvious from the above that the impact of imposing tenure limits on OTP senior management would be significant, even if it were felt on a staggered basis. The consequences, having regard to the concerns the Experts themselves voiced about imposing a tenure system, would be detrimental to the ability of the Office to achieve its unique mandate. These consequences would not operate in isolation, but would combine to amplify one another.

***The downsides of imposing a tenure system would weigh too heavily on the system, given factors, such as the complexity and longevity of cases being dealt with in the OTP and thus the need for a degree of continuity at both senior management and working levels.***

***A tenure system would be harmful to OTP operations:***

15. The tenure proposal tends to lose sight of the unique nature of the Court's mission and the OTP's mandate, which are fundamentally different from those of any of the organisations the Experts refer to that have adopted a tenure model. This difference is primarily due to the inherent length of international criminal investigations and prosecutions and the unpredictable pace of the arrest and surrender of suspects.

16. Imposing tenure limits would harm the operational capacity of the OTP to investigate and prosecute crimes within the Court's jurisdiction, for the sake of theoretical benefits. A hypothetical example, but one based on a real-life case, will serve to illustrate the point.

17. Ali Muhammad Ali Abd-Al-Rahman (aka Ali Kushayb) voluntarily surrendered to the ICC, after crossing into Central African Republic, on 9 June 2020. A warrant of arrest had been outstanding for him since 2007 for crimes against humanity and war crimes committed in Darfur, Sudan. The surrender resulted from patient teamwork in a complex operation spanning four years that was led by an experienced Senior Trial Lawyer. The lawyer, a senior prosecutor at the P-5 level, had been responsible for the case since his arrival at the OTP seven years before. Over these years, he has developed a deep familiarity with the Darfur context and a knowledge of the Abd-Al-Rahman case. He has engaged personally with victims, witnesses and representatives of affected communities. He was therefore in a unique position to reactivate the case, after the suspect's arrest, and to coordinate the follow-up investigations and preparation that were necessary to get the case ready for court, and all this within the extremely tight time-limits imposed by the Pre-Trial Chamber.

18. The Experts have suggested that term limits of between five and nine years be imposed. Suppose the term applicable in this case was seven years (the tenure limit seen, for example, in the OPCW). If this Senior Trial Lawyer was subject to such a tenure limit, the OTP would be losing him just when it needs him most, on the eve of a confirmation of charges hearing and a trial, because he would be completing his seventh year on post.

19. The possibility of an exceptional contract extension in such a case provides no sufficient remedy, for this Senior Trial Lawyer's situation would not be an isolated one, due to the inherent length of the criminal investigations and prosecutions that the OTP does, and the unpredictable pace of arrest and surrender of fugitives. In such circumstances, are contract extensions to become the rule, rather than the exception? This would be a practice the Experts are strongly against. So, in the case of this Senior Trial Lawyer, at a time of high demand on his professional skill, knowledge, time and energy, he would no longer enjoy stable employment, but would be facing an uncertain future.

20. In effect, a tenure system would mean that the OTP would see a much needed senior lawyer pushed out of the Office on the eve of an important prosecution, without any adequate compensation for the resulting loss of skill, experience, case and situation knowledge, and personal commitment to the mission. The Office would simply have to accept this loss and try to control the ensuing damage. Moreover, such events could occur at any critical moment during investigations or court proceedings, with disruptive negative consequences for OTP operations and output. This is hardly the way to enhance the performance, efficiency and effectiveness of the Court.

21. Replacing a stable and predictable contractual system for a precarious and unstable one would thus damage the operational capacity of the OTP to discharge its mandate. This risk would not be adequately mitigated by resort to knowledge management and transfer systems. The personal knowledge and skill that the Senior Trial Lawyer in the example will bring to the prosecution of the Abd-Al-Rahman case cannot be imparted meaningfully to another person through the use of electronic documents and files. This must be one reason why national systems normally do not impose any comparable tenure limit on the employment of career prosecutors.

22. A system that requires the periodic changeover of the whole senior management tier of the prosecution service, including the senior prosecutors tasked with bringing cases to court, would appear, as far as the OTP can verify, to be unknown in national jurisdictions. In national jurisdictions prosecutors

are “nonpartisan career public servants who are expected to make decisions independently of public and political opinions.” (See Voigt & Wold, What makes prosecutors independent? Analysing the institutional determinants of prosecutorial independence, in: Journal of Institutional Economics, May 2017, p. 4.) Tenured positions are typically reserved for the head of the prosecution service (for example, the Attorney General or the Director of Public Prosecutions).

23. Thus, the proposed tenure system, if applied to the OTP, would mean that, in contrast with national practice, the segment of stable career positions in the OTP would stop at the P-4 level, leaving a mass of critical decisions, both tactical and strategic, concerning investigations and prosecutions, in the hands of a rotating pool of senior officers having, potentially, more limited institutional experience and knowledge. This consequence, in and of itself, should signal the need for careful consideration before a tenure system is imposed on a prosecutorial institution, such as the OTP.

24. Individual members of OTP senior management, including senior prosecutors, do leave the Court from time to time; there is turn-over in staff (at the moment, at least four P-5 posts need to be filled in the OTP, three vacant due to staff turn-over and one vacant due to budgetary constraints). What is addressed above is the negative impact of a cyclically imposed turn-over of the entire senior management complement, even if that were a staggered occurrence.

25. Furthermore, in the ICC, where judges are not permanent, in contrast to national criminal jurisdictions, but rotate every nine years, it is important to maintain a reasonably stable body of senior lawyers in the OTP, because they contribute to the consistency of the Court’s legal practice and the development of its case-law. These are objectives that the Experts believe to be of central importance (see Recommendations R216-R218 of the IER Report). These objectives will be undermined, if, to the cyclical change in composition of the judiciary, is added a parallel change in composition of the OTP’s team of senior lawyers.

26. While the example chosen, to illustrate the potential harm that imposing a tenure system on OTP senior management will do, has focused on senior lawyers, the disruptive impact of such a system on other components of OTP senior management should also be evident; this is most obviously true of senior managers in the ID and JCCD, which are the operational Divisions, but this would also be the case for other senior managers in the Office who lead vital services that support OTP operations.

27. The benefits to be sought from a tenure system can be generated in other ways, without damaging consequences for OTP operations.

***The downsides of imposing a tenure system would also weigh too heavily on the system, given factors, such as the challenge of having to run constant recruitment campaigns.***

28. Senior managers would presumably reach their tenure limits at different times, depending on when they were appointed, so that turn-over at the senior level would be felt on a staggered, although cyclical, basis. This would require the Court to run constant recruitment drives, creating an additional drain on scarce resources. Recruitment takes time. It takes effort. It necessarily draws the staff members involved away from operational tasks.

29. In addition, tenure systems are costly to implement from a financial and knowledge retention perspective. This would be the case, even if tenure limits were to apply only to senior levels of management. Tenure systems are burdensome both administratively and financially, given the cost of on-boarding staff and the expense of repatriation at the end of tenure, especially for senior staff members in the categories concerned. Add to this the cost of the time taken to recruit and of the investment in training and skills development. All these cost outlays are increased, if the turn-over of senior managers is even higher, because tenured staff, anxious to move to more stable employment, leave ahead of their term limits.

30. Moreover, tenure systems that are anticipated to bring fresh ideas and perspectives, more diversity, and greater flexibility and agility to an organisation may instead result in a bureaucratic, rigid and stagnant system, which creates little benefit and much strife. Apart from failing to realise key objectives as expected, tenure systems may also be characterised by the need for frequent exceptions. They may suffer from a lack of knowledge sharing, poor internal communication, inadequate application of performance management systems, and negative impacts on staff morale, motivation and engagement. For example, staff may begin to “check-out” within the final two years of employment, when they must seek, against a

ticking clock, the continuation of their livelihood and that of their families. And all of this at increased cost, organisational disruption and heavier administration, with little realisation of the intended benefits.

31. It is also worth noting that the Experts did not see value in the Court withdrawing from the UN Common System (see paragraph 215 of the IER Report). In managing its human resources, the Court has avoided deviating from the Common System, with respect to recruitment, compensation levels, benefits, the pension system and other conditions of employment. Introducing a tenure system to one category of ICC staff, namely, senior managers at the P-5 level and above, would be a major deviation from the Common System, at odds with the approach the ICC has so far taken to the treatment of its staff. It would remove an entire category of staff members from the Common System, creating a lack of parity of conditions that the Common System was designed to avoid. Such a major deviation is undesirable.

32. Furthermore, it is important not to lose sight of the overall purpose of the UN Common System, which is to regulate and standardise the conditions of service of tens of thousands of UN staff members serving in hundreds of locations around the world. In a nutshell, the Common System is designed to ensure consistency, remove discrepancies between institutions and organisations, avoid competition in recruitment based on remuneration, and allow easier mobility for staff across agencies. A tenure system, such as that proposed would not, at least for the ICC, advance these goals.

33. There are other reasons why introducing a tenure system would be harmful to the performance, efficiency and effectiveness of the OTP, the “engine” of the Court, and these go to the particular mandate of the Office under the Rome Statute.

***A tenure system would be harmful to the long-term achievement of the OTP’s mandate:***

34. Put simply, the mandate of the OTP is to examine information relating to allegations of international crimes, investigate such crimes and prosecute the perpetrators, to ensure accountability, by ending impunity, and deterring the commission of these crimes. The OTP is statutorily bound to discharge its mandate independently, impartially and objectively. There is a genuine risk, however, that a tenure system, such as that proposed, would undermine the OTP’s capacity to achieve its mandate in accordance with these values.

35. A reason why national jurisdictions embrace stability as a key feature of their prosecution services is to further cement their independence. Part of the rationale behind offering stable positions with tenure until the age of retirement and a career trajectory to aspiring prosecutors is to ensure that, once in office, they will not be distracted by financial or job security considerations, or be vulnerable in a way that might impair their independence, impartiality and objectivity. This goal sits alongside other ones, such as the ability to attract talented candidates, who can enhance the quality of the prosecution service and who might otherwise be inclined to go instead into private practice.

36. The interplay between professional stability and independence has been highlighted in numerous studies and international reports. For example, the European Network of Councils of the Judiciary made the following recommendations in a report on the independence of prosecutors:

*19. The careers of prosecutors have to be governed by the same rules applicable to judges and be based on competence, merits, integrity and experience.*

*20. The independence of prosecutors must be protected by compliant recruitment procedures, the incompatibility of appointment with other public or private functions, adequate and protected levels of remuneration, and protections in relation to removability and promotion, discipline and dismissal.*

*[...]*

*33. Prosecutors should enjoy certain stability in their office similar to the irremovability of judges. Being appointed for limited periods of time, with the discretion of an external body to renew the mandate may affect their independence. Therefore, tenure in office must be guaranteed until the retirement age.*

*(See Independence and Accountability of the Prosecution, ENCJ Report, 2014-2016.)*

37. Very similar observations apply with respect to national law enforcement services, such as the police, and also to the public service generally. By extension, they have application to the international public servants who work at the ICC.

38. The recent experience of the Court with the US Executive Order and the sanctions imposed on the Prosecutor and one of her Directors serves to demonstrate that efforts to undermine the Court's independence may target its senior management, including both elected and career officials. In this context, it is imperative to strengthen the Court's framework, in order to ensure that it is robust enough to protect its senior officers so they may perform their role, and make the sensitive decisions that they must make, free of any external interference or pressure. A system that erodes the professional stability of the OTP's senior lawyers and managers goes in the opposite direction, and should not be adopted.

***A tenure system could be harmful to staff upward career mobility:***

39. Another way, in which tenure limits could weigh too heavily on the system, is the harm it might do to staff upward career mobility, with an incidental negative impact on staff morale. It could have the effect of defeating career trajectories and development opportunities.

40. One of the ostensible objectives of the proposal to introduce a tenure limit is to promote mobility within the organisation, in particular upward mobility. Yet, if implemented, the proposal may have exactly the opposite effect, by discouraging talented internal candidates from applying for higher positions within the Office.

41. The tenure system proposed could effectively stop the OTP's career trajectory at the P-4 level, pushing down the ceiling of the highest career post from the current D-1 level. Posts at the level of P-5 and D-1 would no longer offer stable employment beyond the tenure period, and there might also be a loss of advantages that come from enjoying the staff benefits of the UN Common System. All of this would tend to discourage upward mobility, not encourage it.

42. Take, as a purely hypothetical example, a 45-year-old P-4 officer in the OTP (who could just as easily be a man, but happens to be a woman in this example), with years of experience, who decided to leave her career in her home country, in order to make one at the Court. She settled her family in The Hague, pays a hypothec for her house and school fees for her children; her health insurance covers the entire family group. Given her knowledge, experience and skills, she is an excellent candidate for a recently opened P-5 position. She would normally apply for the position, but now she must first determine whether the conditions offered under a tenure regime will still allow her to support her family as she has been doing. She needs to consider whether she will lose any advantages she enjoys within the UN Common System, including pension rights.

43. Even if this officer is satisfied on the above points, she still has to face the reality that, if successful in her application, she will have to leave the ICC at the end of a tenure period; if that period was seven years, she would be unemployed at the age of 52, with no career at home and a family to support. Some staff members will take this risk. Others may very likely not: they will stay with what is stable and predictable. So, a tenure system could have a chilling effect, discouraging upward mobility for many of the Court's internal candidates.

44. Similarly, given the staff turn-over at the most senior levels that does occur at the ICC, a tenure system could also discourage applications for employment by talented and accomplished external candidates. This will be the case, if candidates are compelled to choose between stable career positions in national law enforcement, prosecuting agencies or public service and a position as a senior officer in the ICC, but one that comes with a rigid expiry date.

45. In sum, if the OTP is to attract the best and the brightest, from both talented internal applicants keen to advance in their careers and outside candidates keen to serve the OTP's mission, a tenure system may not be the best way to enhance the performance, efficiency and effectiveness of the Office.

46. In the end, the benefits sought by introducing a tenure system can be generated in other effective ways. Moreover, tenure limits are unnecessary, if the aim is to "bring fresh approaches and thinking, as well as more dynamism into the Court across all its Organs."

*A tenure system is unnecessary to achieve the desired objectives:*

47. The Experts sought to address what they saw as the challenge of staff stagnation at the Court, by proposing a tenure system that they say would bring to it fresh thinking and more dynamism. In this regard, however, it is worth noting that no one can deny that the current Prosecutor, who had previously served as Deputy Prosecutor, and her senior management team have transformed the OTP into a far more efficient and effective Organ. One of her first acts, upon assuming office as Prosecutor in June 2012, was to strike a Task Force on Working Climate that was designed to address staff concerns and propose solutions. The Task Force was led by a Senior Trial Attorney with close to 10 years on the job.

48. On the current Prosecutor's watch, the OTP's senior management team have been agents of change, working to improve both the "soft side" of management, respecting skills such as communication, team-playing, leadership, decision-making ability and conflict-resolution, and the hard forensic skills necessary to successful investigations and prosecutions.

49. On the soft side, these innovations include the forging, in consultation with staff, of a statement of OTP core values of Dedication, Integrity and Respect, which serve as the cultural touchstone for the Office; promulgation of a Code of Conduct; implementation of management training that includes 360° reviews of senior managers and lawyers; an enhanced leadership role for Trial and Appeal Lawyers (P-4); participation in Court-wide initiatives, such as the Leadership Programme; gender awareness and mainstreaming workshops; mentoring sessions; and many other undertakings.

50. On the technical side, there have been a whole range of innovations and improvements, encompassing, among many other initiatives, cyclical strategic planning; development of KPIs; enhanced risk management; establishment of a Scientific Advisory Board (SAB) and a Technical Advisory Board (TAB); training in the PEACE model of witness and suspect interviewing; the creation of integrated teams; streamlining of the processing of information and evidence collection; remote screening and interviewing of witnesses; greater field presence; employment of local investigators, known as Situation Specific Investigative Assistants (SSIAs); and formation of networks and technical partnerships with universities, law enforcement agencies and other entities. The ID is currently drawing on this wealth of experience for the "Investigations 3.0" project, to enhance investigative capabilities even further.

51. Very many of the recommendations that the Experts directed to the OTP in their Report are a reflection of current practices within the Office or objectives the Office has set for itself.

52. One very troubling aspect of the IER Report is the observation about bullying and harassment, including sexual harassment; while the tenure proposal does not mention this concern expressly, it must have weighed on the minds of the Experts. Yet the Prosecutor has, in the clearest terms, declared zero tolerance for such behaviour. She has not hesitated to intervene where allegations of such conduct have been made, referring cases for investigation to the IOM and, depending on the findings, submitting them to the DAB and acting on its disciplinary recommendations. The willingness to intervene in such cases extends to the Directors and other senior managers. The confidentiality that surrounds the processes that are engaged may make it difficult for senior management to reassure staff with clarity that there are indeed consequences for bullying or harassing behaviour. Yet, concerns persist and must be addressed. An element of the solution will be the openness of senior management to initiatives coming from OTP staff members themselves, a process that has been actively engaged now. A tenure system is not the sort of blunt instrument that can deal with such concerns effectively.

53. Although the Experts do not refer to it specifically, there may be another concern underlying the proposal for a tenure system at the Court, and that is the concern of certain States Parties who believe the Court has not addressed geographical representation and gender balance (GRGB) with sufficient resolve. The Prosecutor, it should be noted, however, has placed great emphasis in the OTP's recruitment practices upon achieving better GRGB. In any event, tenure is a blunt instrument to address this issue, and it is questionable that it has worked to cure the problem in organisations where it has been introduced. There may be better ways to address the important matter of GRGB.

54. The most compelling way to address the issue of GRGB may be to ensure that unconscious biases do not influence recruitment practices and culture, so that vacancies are filled in a way that is sensitive to the need for GRGB. The Court – and the OTP – is not alone in facing this problem. The UN has introduced a scheme, which has not only made a difference, but has also changed the political dynamic for the better. In simple terms, what the UN has done is to designate a certain number or percentage of entry level posts

(at the P-2 level) that can only be filled by recruitment from under-represented or non-represented States. The standards for recruitment are the same as for all other posts. While this is not a short-term fix, it will over time inevitably lead to recruitment from under-represented or non-represented countries. Staff recruited in this way may eventually reach senior management levels, building strength from within the organisation.

55. The change in the political dialogue is also important, since it is acknowledged that the UN has recognised the issue of GRGB and has put in place a concrete proposal with a guaranteed performance outcome. Such an approach also has the effect of placing more onus on the States concerned to make sure they are putting forward credible candidates.

56. For such a scheme to work successfully at the ICC, there may have to be changes in recruitment processes to increase the targeting of appropriate candidates. Over time the improvements the Court brings about in recruitment generally should mean that special schemes become no longer necessary, but in the meantime the Court could put a concrete program into operation. This would need the support of States Parties. In sum, there are more reliable ways than tenure to accomplish better GRGB in the OTP and at the Court.

57. It is also important to recognise that the tenure proposal overlooks the value of building strength from within an organisation. The proposal is predicated on the premise that continuity of senior management for a prolonged period of time is not healthy, from an organisational and managerial perspective. The Experts offer no empirical or analytical support for this view. A brief research of management literature, however, points in the opposite direction: there is value in building strength from within an organisation and in ensuring continuity of senior management.

58. One may learn from the experience gained in the corporate world. In their study, *Built to Last: Successful Habits of Visionary Companies* (HarperCollins, New York, 2002), Jim Collins and Jerry I. Porras describe the research they completed in 1994. One of the key “successful habits of visionary companies” they identified is described in the chapter entitled “Home-Grown Management”, which makes a powerful case for building organisational strength from within. They conclude (at page 183):

“Simply put, our research leads us to conclude that it is extraordinarily difficult to become and remain a highly visionary company by hiring top management from outside the organization. Equally important, there is absolutely no inconsistency between promoting from within and stimulating significant change.”

59. This last sentence is of particular importance for the tenure issue. Collins and Porras illustrate amply how CEOs, who rose to the top from within, were dynamic agents of change within their companies.

60. Collins and Porras also found that visionary companies developed managerial talent from inside the company to a greater degree than the comparison companies they used for their study (page 173). They reported that “the visionary companies were six times more likely to promote insiders than the comparison companies.” (Page 173 – their emphasis.) In summing up, they observed (pages 173-4):

“In short, it is not the quality of leadership that most separates the visionary companies from the comparison companies. It is the *continuity* of quality leadership that matters – continuity that preserves the core. Both the visionary companies and the comparison companies have had excellent top management at certain points in their histories. But the visionary companies have had better management development and succession planning – key parts of the ticking clock. They thereby ensured greater continuity in leadership talent growth from within than the comparison companies in fifteen out of eighteen cases.” [Their emphasis.]

61. The study focuses on top management, but also pays attention to the management of components within the larger corporation, placing the same emphasis on a culture of continuity of management that encourages the stimulation of progress while preserving the core (see page 183). This is important for the current analysis, because OTP’s “top management” – the Prosecutor (USG) and Deputy Prosecutor (ASG) – are elected officials with fixed nine-year terms. Given this statutorily mandated change, it becomes essential to preserve some continuity of management at the level of the Directors (D-1) and Senior Trial Lawyers, Senior Appeals Counsel and Heads of Section (P-5), apart from natural attrition, something a rigid tenure system would destroy, with harmful impact on the OTP.

62. Moreover, newly elected officials, such as a Prosecutor, who may themselves arrive with fresh ideas, will need to rely on an experienced level of management to implement any new vision. At the time of writing, the OTP is preparing for the transition to a new Prosecutor, who will be able to enlist the skill, experience and openness to new ideas of OTP senior management in realising his vision as he assumes leadership of the Office.

63. In this sense too, it is important to note that the OTP takes steps to develop its staff with a view to preparing potential P-5 and D-1 managers and leaders. This is achieved through early management training, sharing of lessons learned and best practices, and mentoring and coaching programs. While budget constraints and the Covid-19 pandemic have stalled some of these initiatives, the OTP is intent on strengthening this aspect of its internal development.

64. There are other options than a tenure system to bring fresh thinking and greater dynamism to the OTP, none of which would weigh too heavily on the system; instead, they would enhance its performance, efficiency and effectiveness.

65. The initiatives designed to improve the soft side of management that are mentioned above, as well as those meant to enhance the OTP's technical capacities, will continue, as the OTP constantly renews itself and its ability to accomplish its mandate. This continuing evolution is reflected, to a significant degree, in the IER Report recommendations, notably, those directed to the OTP, since very many of them mirror current OTP practices or improvement projects.

66. The OTP renews its thinking and refreshes its operational methods in a wide variety of ways, through engagement with forensic experts on the SAB; technical experts on the TAB; law enforcement agencies; tech companies; universities; international, regional and national organisations; and many other sources. It also encourages ideas and innovation from within, with senior management being open to the creativity of staff members, whatever their grade.

67. The OTP is seeking other ways to benefit from fresh perspectives, by promoting exchanges (for instance, via the exchange program of the International Association of Prosecutors, a step that the OTP has been working to achieve), expanding secondments (an option that the Experts themselves support), and through enhanced cooperation and joint ventures with other organisations (see, for example, Strategic Goal 6 in the 2019-2021 OTP Strategic Plan, a goal which has had practical application).

68. It has to be said that the OTP, and the Court as a whole, have demonstrated remarkable resilience over the past year and half, in the face of a budget crisis, the severe challenge of the Covid-19 pandemic, and the infliction by the previous US Administration of sanctions, under an Executive Order, on the Prosecutor and one her Directors. This resilience results from innovative thinking and adaptive behaviour running decidedly counter to the notion of a sclerotic institution that appears to underpin the proposal to introduce tenure at the ICC.

69. In sum, implementation of R105, for the purpose of achieving benefits as yet purely conjectural, would, for all the reasons developed above, do serious harm to OTP operational capabilities, place a heavy burden upon already strained resources, and be inimical to the achievement of the OTP's mandate. It will thus have a negative impact on the performance, efficiency and effectiveness of the Court itself. The benefits of fresh thinking and greater dynamism can be realised in other more effective ways.

## **Annex IV**

*Document provided by the Board of Directors of the Trust Fund for Victims:*



**Observations by the Board of Directors of the Trust Fund for Victims for  
the Attention of the Assembly of States Parties via the Review Mechanism**

**Annex IV to the Overall Response of the International Criminal Court to  
the  
“Independent Expert Review of the International Criminal Court and the  
Rome Statute System – Final Report”**

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### **I. INTRODUCTION**

1. The Board of Directors of the Trust Fund for Victims (“TFV” or “Trust Fund”) submits this document as an annex to the Overall Response of the Court pursuant to paragraph 5 of Resolution ICC-ASP/19/Res.7 of the Assembly of States Parties to the Rome Statute (“ASP” or “Assembly”, “Overall Response”).
2. Given that the ASP Resolution ICC-ASP/19/Res.7 does not specifically address the Trust Fund, the TFV held several consultations with the Review Mechanism in order to establish how best to provide its observations on the IER Report. The TFV Board of Directors (“TFV Board”) is not an organ of the Court but a subsidiary body of the Assembly, appointed to oversee the Trust Fund, which was conceived by and is a constituent element of the Rome Statute. The TFV Board welcomes the interest and responsibility that States Parties may take, mindful of the rights and interests of victims and their communities, in the further development and strengthening of the TFV as a unique reparative institution, central to the Rome Statute’s purpose to establish international criminal justice as an international public good.
3. The response of the Trust Fund is contained in two documents. First, in the spirit of close and efficient cooperation between the Trust Fund and the Court, a common standpoint in response to the IER Report has been included in the Overall Response of the Court, in particular in response to certain recommendations of Part XVIII entitled “Victims: Reparations and Assistance”. Secondly the present document “Observations by the Board of Directors of the Trust Fund” seeks to elaborate the observations provided by the TFV in the Overall Response given by the Court and present the TFV Board’s views on the issues not included in the Overall Response.
4. The TFV Board submits its observations in accordance with the four categories of recommendations relevant to Parts XVIII and XVII: recommendations that fall primarily within the judicial authority of the Court, those that fall within the authority of the ASP, those that fall within the authority of the Trust Fund, and finally those that fall within the authority of both the Court and the Trust Fund.

### **II. GENERAL APPROACH OF THE TFV TO THE IER REPORT**

5. The TFV Board welcomes the IER Report and in particular the identification of essential issues that need to be addressed, jointly and separately, by the Trust Fund, the Court and the ASP. As stated in the TFV Statement dated 13 October 2020 and TFV Chair’s address at the 19<sup>th</sup> Session

- of the ASP, the TFV Board is fully committed to address all issues raised by the IER Report relevant to its mandate and to closely and constructively engage with the ASP and the Court as well as all other relevant actors, as they address issues of mandate that impact the Trust Fund.
6. The TFV Board takes very seriously the findings of a lack of performance, mandate responsiveness and governance at the TFV. The TFV Board considers that there is an urgent need to seek further strengthening of performance, as well as greater clarity on key aspects of governance, including the relation and interaction between the TFV, the Court and the ASP.
  7. The TFV Board considers that the engagement in these areas must be conducted with a view to creating a positive impact for the victims of the most serious crimes falling within the Court's jurisdiction, which is the responsibility of the TFV. In that regard, the TFV Board considers that it is essential for all actors that they can contribute to the reinforcement of the TFV's work with proposals for initiatives and support.
  8. The engagement on these issues should consider recent measures taken to increase the responsiveness of assistance programme and reparation awards implementation, including:
    - a. a joint effort between Registry and TFV to accelerate procurement processes to select implementing partners and to improve the processes relevant to contracting between Registry, TFV and the potential partners, and
    - b. the strengthening of the management layer and capabilities at the TFV Secretariat.
  9. These measures have allowed the TFV to undertake and sustain a significant growth of its implementation portfolio across an increasing number of cases, ICC situation countries and to reach a high number of beneficiaries in five ICC situation countries. This growth in activity goes hand-in-hand with a standardization of processes within the TFV and between the TFV and its implementing partners. These improvements are not only mirrored in the TFV Management Briefs, but also apparent from the decision of the External Auditor to close recommendations relating to the internal control environment of the TFV and its implementing partners.
  10. Furthermore, the TFV Board wishes to underline the recent evolution of its own workload and activities, leading to an increased frequency of meetings of at least once a month, an improved quality and volume of management information from the TFV Secretariat, and the initiative to develop a policy to establish and clarify the working methods of the TFV Board, including its relationship with the TFV Secretariat.
  11. Also, the TFV Board wishes to draw the attention to the 8 March 2021 *Ntaganda* Reparation Order, mindful that the IER Report referred very positively to the *Ntaganda* judicial reparation proceedings and used these proceedings as a basis for many recommendations in Parts XVII and XVIII. The TFV Board considers that the *Ntaganda* Reparation Order strongly confirmed the pivotal role of the TFV at the reparation implementation stage, including in relation to victim identification and verification, and thereby addresses impliedly many of the relevant IER Recommendations.

### **III. RECOMMENDATIONS THAT FALL PRIMARILY WITHIN THE AUTHORITY OF THE COURT**

12. Certain recommendations of Part XVIII of the IER Report fall primarily within the judicial sphere, such as R342, R343, R344, R351, the Registrar's sphere in his judicial support function, such as R350, or in the sphere of the Court (Judicial Divisions and the Registry together), such as many of the recommendations contained in Part XVII and R345, R348, R349.

13. The TFV is cognizant of the imperative of fully respecting the judicial independence and the role of the judges in deciding on judicial and procedural matters in relation to reparations.
14. The TFV is mindful that the Regulations of the Trust Fund for Victims (“TFV Regulations”) provide that the implementation of reparations, insofar as ordered through the Trust Fund, falls within the competence of the Trust Fund with the relevant Trial Chamber having the function to approve the implementation plan and to monitor the implementation of the reparations. This role and mandate of the TFV has recently been confirmed by the above-mentioned *Ntaganda* Reparation Order.
15. As judicial decisions as well as the legal framework falling under the authority of the Court have a direct or indirect bearing on the implementation of the reparations, the Trust Fund highlights the importance of establishing a collaborative coordination mechanism with all the relevant stakeholders to assess the impact of judicial decisions on the Trust Fund, on its capacity to plan and implement, and on the value and impact of reparation awards in general. Such a coordination mechanism should use the findings of the IER Report as a basis for systemic development, and thus enable the TFV, and all other actors, to present in a practical and principled manner concerns and understandings as to the challenges faced, or the lessons learned. Hearing the views of the TFV will be essential for the Court, when considering reparation principles, amendments to the legal framework, amendments to the Chambers’ Practice Manual or when deciding on the content of victim application forms insofar as they contain fields that request victims to provide information about reparations.

#### **IV. TFV MANDATE ISSUES THAT FALL PRIMARILY WITHIN THE AUTHORITY OF THE ASP**

16. Three of the recommendations, R354, R357 and R358, speak to the core of the TFV’s mandate, call for increased efficiency and effectiveness and underscore the oversight functions of the TFV Board over the TFV Secretariat.
17. Concerning the mandate of the Trust Fund, the relevant recommendations propose to separate the functions of fundraising on the hand and fund investment and implementation on the other, and to shift the latter to the Court, i.e. Chambers and Registry. Such recommendations depart from the original intention of the drafters of the Rome Statute and of pertinent Assembly resolutions (including the TFV Regulations), which saw the Trust Fund as having fund management and implementation roles. The implementation of those recommendations would require a change to the legal framework established by the ASP for the Trust Fund.
18. The Assembly may wish to consider whether investing the Court with the responsibility to allocate the Trust Fund’s resources might raise expectations of victims to receive reparations *from the Court as a judicial institution* while in fact they have a right to receive reparations *from the convicted person*. Maintaining at the TFV the integrity of the combined discrete functions of resource development, fund management and investment, and implementation of mandate related activities might be better suited to avoid the significant risk of fractured financial governance and operational inefficiencies.
19. The TFV Board considers that the States Parties of the Assembly, with participation of the Board and all stakeholders may wish to hold serious and open discussions to find a common ground and clarity on the recommendations that relate to the TFV’s mandate. In considering these issues, all stakeholders should ensure that such discussions are not detrimental to the continued work of the Fund, and do not undermine its ability to continue to raise funds and develop the Trust Fund’s financial resource base, or create uncertainty about its governance

and accountability structure, as this may affect donor interest and confidence, thus impacting the victims.

20. Concerning governance, the TFV Board proposes to address the governance issues together with the Bureau of the ASP and in consultation with the Registrar. To that effect, the TFV Board intends to engage with the Bureau to clarify and provide greater structure in the accountability relationship between the TFV and the ASP. A closer and clearer relationship of accountability between the TFV (Board) and ASP (Bureau) will allow the ASP to engage with the TFV in its policy work, to more closely monitor the work of the TFV and thereby increase its effective oversight of the TFV.
21. In regard to internal governance, the TFV Board and Secretariat have in the aftermath of the IOM Report 2019 increased their cooperation, the reporting structure and are currently working on a policy to clarify and define working methods. Further, reflecting the rapidly evolving scope and intensity of the TFV's activities and responsibilities, the TFV Board has recommended in March 2021 to the President of the States Parties to strengthen the nomination and election procedure for the TFV Board by identifying specific desirable competencies of prospective Board members.
22. As to the findings underlying these recommendations, the TFV has focused in 2020 and continues in 2021 as a matter of priority to address in particular the three areas highlighted in the IER Report: 1) need to increase efficiency and effectiveness, i.e. its impact on victims and its performance; 2) need to enhance its focus on reparations and clarify when to engage in assistance programmes; 3) need to improve its governance structure. This is reflected in the TFV's Strategic Plan 2020-2021, which identifies two strategic objectives: performance, and impact. Each strategic objective relates to distinct revenue streams: (i) assessed contributions as part of the ASP's approved budget on the one hand (performance); and (ii) the funds under the TFV Board's management, i.e. voluntary contributions, reparation awards, funds from asset recovery and fines on the other hand (impact).
23. In implementing the Strategic Plan, the TFV is drawing from the many lessons learned from the reparation implementation to date, as well as relying on the now existing close and efficient cooperation with the Registry, in particular in administrative and legal matters, in the Country Offices, and in relation to victim eligibility screening and the related data management. In addition, an adequate framework of performance, enhanced oversight, including by a stronger Board and a more involved ASP, as well as proper planning, developed with participation of stakeholders will support the Trust Fund in realizing the goals set out in the Strategic Plan.
24. As a final point, the TFV Board notes that the Trust Fund as currently construed offers inherent efficiencies that arise from its reliance on certain administrative and support functions of the Registry thereby avoiding duplication in terms of resource use, as well as from the fact that it can outsource operational functions to implementing partners. This enables the TFV with its 9 established and 18 GTA (15.13 FTE) budgeted posts to focus on core capacities, geared towards managing the increasingly complex constellation of its functions in an integrated manner, responsive to the rights and needs of victims, as well as to the expectations of the Court and States Parties - and towards ensuring appropriate donor accountability, which must be understood to be essential for the Rome Statute's reparations system.

## V. RECOMMENDATIONS FALLING WITHIN THE AUTHORITY OF THE TRUST FUND

25. The IER Report recommended the TFV to produce a number of strategic documents. The TFV Board takes fully on board those requests and will take up and newly calibrate the following actions in response to the relevant IER Recommendations:
- a. Development of Strategic Plan 2022-2024, seeking full mutual alignment with the Court's Strategic Plan, and with KPIs, in response to R355;
  - b. Development of a Policy on Working Methods of Board and Secretariat in response to R357;
  - c. Development of a comprehensive and effective fundraising strategy as part of the Strategic Plan 2022-2024, in response to R356;
  - d. Development of a policy to simplify the conclusion of partnerships for the purpose of implementing the Trust Fund's activities, including with UN organizations in response to R353 and underlying findings included in the IER Report;
  - e. Strong engagement with national and international actors in situation countries to ensure that the Trust Fund's engagement is complementary to national or international initiatives and programmes to provide reparations, in response to R353;
  - f. A Fund Management and Investment Policy, anchored in the TFV Regulations, which will *inter alia* establish the principles and parameters guiding the TFV Board in deciding on allocation of its "other resources" to financing assistance programmes and to complementing the payment of reparation awards, in response to the foundational issues addressed in Part B.
26. All such policies will be brought to the attention of States Parties and the relevant civil society stakeholders, NGOs and their highly welcome input will be fully taken into account before adoption by the TFV Board.
27. The TFV Board makes itself accountable to the Assembly in implementing the IER recommendations.

## VI. COOPERATION AND COORDINATION

28. R336, R339, R346, R347, R352, R359 and R360 refer to the Court and the TFV equally, insofar as the reparation implementation stage is concerned. In this context, the TFV recalls that the *Ntaganda* Reparation Order recently confirmed that:
- a. it is the TFV's task "to design an implementation plan on the basis of all the identified modalities of reparations, in consultation with the victims" for the ordered collective reparations with individualised components (paras 62, 212).
  - b. the TFV shall propose how it will conduct the administrative eligibility assessment of potential beneficiaries, based on the eligibility requirements established by the Chamber and ensuring "a fair, efficient, and expeditious process, taking into consideration the Registry's capacity to assist" (para. 253);
  - c. on the basis that additional fundraising will be required for the TFV to fully complement the award, the TFV shall allow in the implementation plan for "phased and flexible approaches to implementation, including by allowing additional prioritisation and adjustments according to the availability of funds" (para. 257);

- d. it is the task of the Court as a whole, the legal representatives of victims and the TFV, depending on their roles, to manage the victims' expectations through proper outreach and communication (para. 6).
29. TFV Board is committed to ensure that the TFV fulfils its mandate of delivering reparations to the victims of the *Ntaganda* case. In this process, the TFV is not only drawing from the many lessons learned from the previous three reparation cases, but is also relying on the now existing close and efficient cooperation with the Registry, in particular in administrative and legal matters, in the Country Offices, and in relation to victim eligibility screening and the related data management.
30. In addition, the TFV Board notes that in the Overall Response, the Court expresses that it is in favour of implementing R359 and R360 and of creating a coordination and cooperation mechanism that addresses reparation matters outside of judicial proceedings. The TFV, having already identified the need for such coordination in its Strategic Plan, fully supports this mechanism as a tool to collaborate on all matters that fall equally into the responsibility of the Court and the TFV. In any such collaboration, the TFV's nature and functions need to be respected, as also set out in the above-mentioned *Ntaganda* Reparation Order, as well as the TFV Board's discretionary decision-making power.
31. With respect to the identification and verification of potential beneficiaries for reparations, Trust Fund suggests that following, the *Ntaganda* implementation plan and the *Ongwen* judicial reparation proceedings, the coordination and cooperation mechanism may be the best suited body to also address comprehensively matters relevant to this important area. To determine the best way forward, such coordination mechanism would consider issues such as costs and efficiencies in terms of resources and staff, the need to avoid any duplication of work and the victims' perspective, in particular the *do no harm* principle.

## VII. CONCLUDING OBSERVATIONS

32. The TFV Board welcomes the acute appreciation and active interest being demonstrated by States Parties in relation to the findings and recommendations in the IER Report that are crucially relevant to the mandate, governance and main functions of the Trust Fund. The TFV Board is committed to work closely with the Assembly, to which it is accountable, with the Court, and with the Registrar, in his advisory capacity to the TFV Board as well as in his capacity as a Principal of the Court, on the optimisation of efficiency and effectiveness of victim related activities, and specifically reparations and assistance to victims.
33. The TFV Board reiterates its commitment to seek the views of States Parties in regard of essential instruments pertaining to the TFV, including the Strategic Plan 2022-2024, as well as new policies in relation to resource development (fundraising), fund management and investment in reparations and assistance activities, and the working methods of the TFV Board itself. The TFV Board welcomes the engagement of the States Parties in supporting the Fund to meet its mandate, including through finding innovative ways to strengthening the TFV's fundraising capacity, and in advising the TFV as to potential donors from their respective regions, insofar as possible.
34. Subject to and in line with the Action Plan to be proposed by the Review Mechanism, the TFV Board is prepared to actively engage on finding appropriate solutions that will ensure the delivery of timely and adequate reparative value to the victims of Rome Statute crimes.