

REVIEW MECHANISM

Proposal for a Comprehensive Action Plan for the assessment of the recommendations of the Group of Independent Experts, including requirements for possible further action

Introductory note

I. Introduction

1. The Review Mechanism, established under the auspices of the Assembly of States Parties (“Assembly”) to the Rome Statute of the International Criminal Court (“Court”) by Assembly resolution ICC-ASP/19/Res.7, is mandated to transmit to the Assembly in writing and submit to the Bureau a proposal for a comprehensive action plan for the assessment of the recommendations of the Group of Independent Experts, including requirements for possible further action by 30 June 2021.¹ The proposed action plan as set out in the resolution includes the allocation of the recommendations, the prioritization of recommendations, based on annex I of the Independent Experts Report (IER) report, and timelines for the consideration of the recommendations.²
2. The Review Mechanism, in accordance with Assembly resolution ICC-ASP/19/Res.7, hereby submits the “proposal for a comprehensive action plan for the assessment of the recommendations of the Group of Independent Experts, including requirements for possible further action”, attached hereto as an annex.
3. At the outset, the Review Mechanism would like to point out that the comprehensive action plan is intended to provide a roadmap for the assessment of the recommendations in conformity with the Assembly resolution, and further matches the ambition of the Assembly by opting for an ambitious approach whereby many of the recommendations should be assessed within a year of finalization of the comprehensive action plan. This translates into the Court, the States Parties, Assembly mandates and other stakeholders undertaking much work in the assessment of the recommendations to keep the momentum of the review process, taking into account the importance attached to the review, in order to strengthen the Court and improve its performance. We realize this is putting a lot on the plate of the Court after transitions in the Judiciary and Office of the Prosecutor. However, given the importance of the review process to the Assembly and the Court, the Review Mechanism thinks a fine balance has to be struck between making progress with the review and continuing the core work of the Court. Consequently we have to be ambitious in the process to strengthen the Court and improve its performance.
4. The Review Mechanism, as far as practicable, given the challenges of the COVID-19 pandemic, has carried out its work on the comprehensive action plan in an inclusive and transparent manner, engaging and consulting States Parties, Assembly mandate holders, the Court (focal points and independent offices), civil society and other relevant stakeholders, in the process of preparing the proposal for the comprehensive action plan. The majority of the meetings of the Review Mechanism were held virtually, in light of the COVID-19 pandemic, with the co-Chair based in The Hague meeting with one of the Assembly mandate holders in-person in The Hague.
5. To continue the inclusive and transparent manner of its work, the Review Mechanism invited all States Parties and other relevant stakeholders to submit comments in writing on the three elements of the comprehensive action plan. In addition to the written comments, the Review Mechanism considered the views received from various stakeholders, including the then Prosecutor-elect (now Prosecutor),³ the International Criminal Court Bar Association (ICCBA), and civil society organizations.⁴ A total of 25 submissions were received by the Review Mechanism and are posted on the webpage of the Assembly.⁵

¹ Resolution ICC-ASP/19/Res.7, para 4(b).

² Ibid, para 4(b) (i), (ii), (iii) and (iv).

³ Mr. Karim Asad Ahman Khan.

⁴ Coalition for the International Criminal Court (CICC), as well as the American Bar Association (ABA), Asian Justice and Rights (AJAR), Human Rights Watch (HRW), International Federation for Human Rights (FIDH), and World Federalist Movement (WFM).

⁵ https://asp.icc-cpi.int/en_menus/asp/Review-Court/Pages/Review-Mechanism.aspx

6. The Court, through the focal points, was duly informed of the call for comments. The Review Mechanism also met with the Court focal points on 24 February, 24 March, 12 April, 11 May and 11 June 2021 and discussed the three components of the action plan set out in the resolution, i.e. the allocation of the recommendations; the prioritization of recommendations, based on annex I of IER report; and timelines for the consideration of the recommendations. The Court focal points also made two written submissions to the Review Mechanism, including the format for the comprehensive action plan, which was eventually adopted by the Mechanism. The Review Mechanism accordingly gave due consideration to the submissions of the Court focal points and further took note of the 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 and information on relevant activities already taken by the Court (the “Overall Response”) of 14 April 2021.

II. Rationale for allocation, prioritization of the recommendations, and timeline for consideration

7. On the allocation of recommendations, the Mechanism requested all stakeholders to provide their views on which entities they consider responsible for the consideration of the recommendations and possible further action,⁶ depending on the nature and purpose of the individual recommendations and having due regard to the independent statutory mandates of the Court organs and the Assembly.⁷ In this regard, a preliminary suggested format along with a model allocation prepared by the Review Mechanism was circulated. The Mechanism decided to work through existing Assembly structures in order to avoid burdening the Assembly with new structures. As far as possible, the Mechanism allocated recommendations on the basis of the existing platforms. As per the resolution, the residual issues for which there was no specific allocation, will be taken up by the Review Mechanism itself.⁸
8. The Review Mechanism has not allocated the remaining review issues as contained in Assembly resolution ICC-ASP/18/Res.7,⁹ since it was not required in paragraph 4 (b) (i) of resolution ICC-ASP/19/Res.7. It is duly recognized that the remaining review issues are already allocated on the basis of the statutory mandates of the relevant Assembly mandates in resolution ICC-ASP/19/Res.7.
9. On the prioritization of recommendations, the Review Mechanism took note that the IER Experts had indicated areas of priority in its annex IA, while also recognizing that States Parties, the Court, civil society and other stakeholders might have additional or other priorities. Annex IA was therefore a starting point, and the Mechanism adopted an approach to prioritize the recommendations based on the Group of Independent Experts’ annex and the stakeholders’ submissions. The prioritization is also reflective of the timeline for assessment.
10. On the basis of the submissions by States Parties, the Court, civil society and other stakeholders, all 384 recommendations would have been prioritized. Since prioritizing all 384 recommendations would neither be useful nor practicable, the Mechanism while still using annex 1A as a starting point, has identified as priorities those recommendations identified by a great number of stakeholders, and also those whose assessment may impact the assessment of other recommendations, for example, the recommendations on unified governance. Where the Review Mechanism considers a recommendation or cluster of recommendations as a priority, it has proposed the timeline for consideration to be by the second half of 2021. The Mechanism further notes that for some of the prioritized recommendations the conclusion of the assessment may take more time and therefore a different timeline for assessment is mentioned but the Mechanism assumes the discussion will start early, e.g. on unified governance.
11. As regards the timelines for consideration of the recommendations, the Review Mechanism considers this to mean the time for the assessment of the recommendations, including the completion of the

⁶ Ibid., para. 4 (b) (i)

⁷ Ibid, see preamble paragraph thus: “Stressing the statutory mandates of the Organs of the Court and of the Assembly of States Parties and that these independent mandates should inform the assessment of the recommendations of the Group of Independent Experts and possible further action, as appropriate, by the Court, the Assembly, or both depending on the nature and purpose of the individual recommendations, and the entity identified as responsible for implementation”.

⁸ Ibid., para. 4 (b) (ii).

⁹ Para.18 and annex I, appendix II, para. 5.

assessment and decision to take possible further action. The Mechanism proposes to indicate timelines on a half-yearly basis, which would allow for flexibility but also introduce the important element of time constraint.

12. The comprehensive action plan does not give an indication of when the recommendations, if positively assessed, will be implemented. Since the Mechanism realizes that the objective of the exercise is to strengthen the Court and that the assessment of the recommendations is only the beginning of that process, it recommends that at the completion of the assessment with a decision to take further action, there should be clear timelines attached to the completion of the implementation process.

III. The assessment process and the proposed discussion platforms

13. In its decision of 31 May 2021, the Bureau welcomed the efforts of the Review Mechanism to be inclusive and transparent in the exercise of its mandate in the State-driven process, as well as its assurance that “*States Parties will be involved in the discussions on assessment and implementation of recommendations, regardless of whether they have been allocated to the Court or to the Assembly, with respect for existing mandates as well as judicial and prosecutorial independence*”.¹⁰ This was based on the Introductory note to the proposal on categorization conveying the expressed intention of States Parties to be engaged in the discussion on the recommendations.¹¹ Therefore the Mechanism in the comprehensive action plan has made a proposal for platforms for discussion, which are essentially relevant Assembly mandates. The Mechanism has also opted to assign groups of recommendations to different mandate holders because of the internal cohesion (linked) between those recommendations.
14. The Mechanism while respecting, to the extent possible, the mandates of the various Assembly mandate holders, in some cases, however, has proceeded to propose to assign clusters of recommendations to a specific mandate to streamline the assessment process for efficiency and inclusivity, for example in the assessment of the recommendations on unified governance. The Review Mechanism has also suggested, where appropriate, joint facilitations. In cases where no appropriate mandate exists, the Review Mechanism will facilitate the assessment of the recommendation(s) or cluster of recommendations. Finally, in most cases the Review Mechanism has respected the division of the recommendations made by the Group of Independent Experts. However, the Mechanism made an exception for the recommendations that deal with working climate and culture,¹² owing to the nature of the topics. On the basis of their internal cohesion, the Mechanism proposes to cluster the relevant recommendations and assign the discussion under its facilitation.
15. The Review Mechanism, in noting the time constraint as prescribed in the Assembly resolution, admits that it was impossible to have detailed engagements on the assignment of platforms. The proposed assignments therefore suggest that there should be some flexibility, with possible further consultations, if any, including on the modalities, before the adoption of the comprehensive action plan by the Bureau.
16. The Mechanism considers transparency and inclusiveness of the review process of the utmost importance. Many States Parties and also the Bureau have underlined their importance for a successful review. The Mechanism therefore thinks it is important that all stakeholders can participate in the discussion on the assessment of the recommendations. Where there are obstacles, like in the budget consultations, we should overcome them for example by separating the “open” discussion on the recommendation from the “closed” discussion on the budget.

IV. Legal and budgetary implications in the implementation of the recommendations

17. The Review Mechanism, in the proposal for the categorization of the recommendations and remaining issues, observed that if it comes to implementation, a number of the recommendations may give rise to budgetary implications that would require the involvement of the Assembly. The case may be the same for recommendations with legal implications, including possible amendment of the Rome Statute or the Rules of Procedure and Evidence. Where the Assembly would be involved in the implementation of a

¹⁰ https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/Bureau%20decision-Categorization.31May21.2400.docx.pdf

¹¹ https://asp.icc-cpi.int/EN_Menus/asp/review-court/pages/categorization-recommendations.aspx

¹² Recommendations 14, 15, 16, 17, 18, 19, 20, 87, 88, 129 and 130.

recommendation, owing to budgetary and/or a legal implication, the Review Mechanism took the position to categorize on the basis of the entity that is formally and in practice responsible to assess and take possible further action as appropriate to commence implementation of the recommendations.

18. In this proposal for a comprehensive action plan, and in particular, for the assessment of the recommendations, including requirements for possible further action, the allocation has been done on the basis of which entity is responsible for the implementation and possible further action, depending on the nature and purpose of the individual recommendations and having due regard to the independent statutory mandates of the Court organs and the Assembly. This ensures that the substantive assessment will not be dominated by any consequent consideration of the budgetary or legal implications. The Mechanism therefore recommends that where there is a possible legal implication, the assessment of the recommendation may be proceeded with in the assigned Assembly mandate(s) identified for the discussion, and a decision on any further action will include, for instance, reference to the Working Group on Amendments.
19. On possible budgetary implications, the Review Mechanism proposes that the assessment of the recommendations may also be proceeded within the assigned Assembly mandate(s) identified for the discussion, and where a decision on any further action is to be taken, the Registrar would be invited to do a review for budgetary implications and to report on whether additional resources would be required to implement the recommendation. This will essentially be a determination on whether there is any programme budget implication for the implementation of the recommendation. Where there is a budgetary implication, the report of the Registrar should then be sent to the Committee on Budget and Finance (CBF) to advise the Assembly through the budget facilitation on the estimate of expenditures.¹³ No further action can be taken on a recommendation(s) with budgetary implications until the CBF has had an opportunity of stating the effect of the proposal upon the budget estimates of the Court. The work of the CBF has to be fluid in this regard to accommodate the requests stemming from the review process. The conclusions of the CBF will form the basis of the decisions to be considered by the budget facilitation. However, upon the issuance of the CBF conclusions, a decision on possible further action on the recommendation(s) may be taken, even before the consideration of its conclusion(s) by the budget facilitation.

V. Conclusion

20. The Review Mechanism uses this opportunity to express its deep appreciation for the support and cooperation of the States Parties, the Court, civil society and other stakeholders in the execution of its mandate and commits to concluding its work within the timeline specified by the Assembly resolution.

Annex I

Comprehensive action plan for the assessment of the IER recommendations

¹³ Where the Registrar advises that there are no budgetary implications, a decision on possible further action may be proceeded with by the Assembly before its consideration of the draft budget of the Court.