International Criminal Court

ICC-ASP/22/30

Assembly of States Parties

Distr.: General
28 November 2023

Original: English

Twenty-second session
New York, 4-14 December 2023

Report of the Bureau on the Review of the work and the Operational Mandate of the Independent Oversight Mechanism

I. Introduction

1. At its nineteenth session, the Assembly adopted the revised operational mandate of the IOM.[1] The Assembly requested the Bureau at its twentieth session[2], to remain seized of the review of the work and the operational mandate of the Independent Oversight Mechanism, with a view to considering recommendations of the Independent Expert Review.[3] At its twenty-first session the Assembly requested the Bureau to continue its work and to report thereon to the Assembly at its twenty-second session.[4]

2. On 31 January 2023 the Bureau of the Assembly decided to appoint H.E. Ms. Beti Jacheva (North Macedonia) as facilitator to review the work and the operational mandate of the Independent Oversight Mechanism.

3. The facilitator conducted consultations and briefings in order to exchange information between States Parties, Organs of the Court, the Independent Oversight Mechanism and other interested parties.

II. Review of the work and the Operational Mandate of the Independent Oversight Mechanism

4. In 2023, The Hague Working Group ("the working group") held 5 meetings, on 28 March, 18 April, 22 May, 14 September, and 17 October. The facilitation was open to States Parties, Observer States, the Court and civil society.

5. The meetings provided, amongst others, an opportunity for States Parties to conclude the assessment and continue discussions on the implementation of the Independent Expert Review (IER) recommendations allocated to the review of the work and operational mandate of the Independent Oversight Mechanism by the Review Mechanism's Comprehensive action plan.[5]

First meeting:

6. At the first meeting of the facilitation held on 28 March 2023, the facilitator presented the programme of work and continued the discussion from the previous year on the assessment of recommendations R116, R117 and R120. The Registry presented an options

[1] ICC-ASP/19/Res.6, annex II.
[2] ICC-ASP/20/Res.5, annex I, para 15 (a).
[3] ICC-ASP/19/16.
[4] ICC-ASP/21/Res.2 annex I, para 15 (a).
[5] https://asp.icc-cpi.int/Review-Court/Action-Plan.

paper summarizing the different potential options available to the Court and the potential implications, in particular the pros and cons of moving the Court's settlement of disputes from the Administrative Tribunal of the International Labour Organization (ILOAT) to the United Nations Appeals Tribunal (UNAT) and the differences between the two jurisdictions. The Registry clarified that the main difference between the IOLAT and the UNAT systems was that the latter applied to staff members only and not elected officials.

7. The paper proposed two possible options. Option A would entail keeping the system as it is, and option B changing the system. With regards option A, the Appeals Board (AB) and the Disciplinary Advisory Board (DAB) would continue to make recommendations and the Court would continue to recognise the jurisdiction of the ILOAT. The Registry added that in keeping with the spirit of the IER recommendations, as well as the proposals made by the Staff Union Council (SUC), the Court could consider improving the functioning of the AB and DAB by introducing some or all changes proposed. With regards option B, on the one hand, a First Instance Judge or a mixed body composed of an external independent judge and staff representatives would make decisions on administrative and disciplinary matters for staff, which could be then appealed before the UNAT. On the other hand, an independent and impartial Last Instance Panel of three judges would replace ILOAT for both administrative and disciplinary matters for elected officials. Such a change, however, could raise incompatibility issues with the Rome Statue (Articles 46 and 47). Concerning efficiency and costs, the Registry indicated that while the time and cost of judgements by ILOAT and UNAT are similar, resources would need to be secured to fund the new First Instance Judge modality, which would deal with all administrative and disciplinary cases of staff and come on top of the UNAT costs.

8. The Independent Oversight Mechanism (IOM) indicated that the current system at the Court was similar to the one that was abolished by the UN in 2009, which was found to be flawed. The question was about finding the right alternative. For the UN it was UNAT, which implied additional costs by adding an additional layer, either a first instance judge or the United Nations Dispute Tribunal (UNDT). The IOM noted also to consider the potential implications of having either the ILOAT or an independent Panel of Judges potentially overruling an ASP decision to remove an elected official.

9. The Registry warned delegations that leaving elected officials with no judicial remedy would not only leave the ICC, an international court, in a situation which would appear to be in violation of the norms of customary international law, it would also represent a risk of litigation for the Court due to the potential change of conditions of service for the Elected officials.

10. In response to a question regarding the implications Option A, the Registry noted that the legal implications would only require changes in the staff rule and regulations of the Court and the proposed improvements could have some financial implications, both of which would require the approval of the Assembly.

Second meeting:

11. At the second facilitation meeting held on 18 April 2023, delegations continued the discussion on the possible options A and B. Some States while recognising the potential financial implications, showed preliminary support for option B, citing some of the benefits that freeing staff from DAB and AB demands and adding an element of professionalism would bring. It was noted that other international tribunals like the Kosovo Specialised Chambers used this model and worked well. It was noted that the issue regarding legal remedy for elected officials could be addressed by establishing a panel structure like the one used at the Permanent Court of Arbitration. Other states preliminarily supported option A due to concerns of potential costs-effectiveness implications that creating a new system with option B would entail. The idea was also supported because the SUC supported it.

12. Some States proposed improving the existing system for now and only then see how to change the system if that didn't work, other States proposed if feasible to combine option A and B. This could entail, assessing R116 and R117 positively and R120 negatively, but that an assessment of the pros and cons of such an approach would be necessary. States parties agreed that if Option B was chosen, then Court officials should be consulted and the issue of compatibility with the Rome Statute should be assessed. Finally, the Court was requested to present a common position ahead of the following meeting to facilitate decision making on this matter by States Parties.

13. With regards the group of recommendations R122-R126, R128 and R131, the Registry noted that the Court had implemented some of these recommendations, such as the recruitment of an Ombuds person, as well as a focal point for gender equality but that it was not clear how this set of functions as look like as part of the same office. The Registry added that the Court did not have a position on this matter, and that such changes would have budgetary implications for States to consider. However, the Registry noted that the Court lacked an ethics function, and that the intention would be to create such a function to complete the Court's framework.

14. The IOM indicated that States Parties needed to decide whether they wanted these functions and where to house them. The IOM warned that while there was an appeal and it was possible to have these functions under one structure, such action should be carefully considered due to the diversity of functions, confidentiality issues and effectiveness considerations.

15. The establishment of an ethics function was welcomed by States. The point was made that given the issues of workplace culture in the Court serious consideration should be given to these recommendations. It was also noted that while some changes had been made within the internal justice system of the Court since the IER recommendations were issued, it would be useful to see how they work before establishing anything new. The facilitator indicated that the assessment discussion would resume at a subsequent meeting.

Third meeting:

16. At the third facilitation meeting held on 22 May 2023, the facilitator recalled that R108 had been assessed positively with modifications by the facilitation in 2022 with the caveat that it could be implemented once the judges had considered the matter and that the IOM produce a non-paper regarding R108 and R109 specifying in greater detail the modalities for possible implementation with different options for the consideration of the States Parties. The facilitation concluded in 2022 that R108 could be seen as a pilot to determine if R109, which would require amending the Rome Statute, is necessary or if R108 would suffice.

17. The IOM clarified that the non-paper merely provided options for the States Parties to decide to amend or not the Rome Statute. Option A would have an Ad Hoc panel, following an IOM report, having an advisory role to the decision-maker, both in cases of removal from office and other disciplinary measures. This option would keep the role played by Judges currently in deciding or making recommendations to the ASP. This option would not require an amendment to the Rome Statute or the RPE. Option B would provide a more expansive role to the Ad Hoc panels which would receive the IOM report and exhibits and conduct the same process as in Option A, but instead would make the decisions or the recommendations to the ASP. This option would require an amendment to both Article 46 of the Rome Statute and the related RPE. In Option C the Ad Hoc panels or Judicial Council would be responsible for both the investigation and discipline of elected officials. It would require amendment to the same provisions of Rome Statute and the RPE, with the addition to Rule 26. Option D was presented even though it was not included in the non-paper. This option would entail replacing the IOM with Ad Hoc panels.

18. The focal points of the three Organs of the Court indicated that their respective elected officials had not had an opportunity to assess and reflect upon the non-paper and would still need time for consultation. In this regard, they highlighted that these recommendations concerned accountability for elected officials while respecting their judicial independence, as set out in Rome Statute.

19. A representative from the SUC inquired whether it would not make more sense to continue with the existing system and have elected officials subject themselves to a similar process as the rest of staff of the Court. This was echoed by some delegations also indicating that this should not become a heavy process. The point was made that preliminarily there was no strong support for options B, C and D since they would require substantive changes and didn't seem to be justified. With regards option A the Ad Hoc Panels could be used on a need basis.

20. With regards the assessment of R116, R117 and R120 the facilitator recalled the two possible options proposed by the Court, the Registry indicated that that there would be a cost of moving to UNAT relating to having to set up a panel of Judges to look into cases affecting elected officials as well as the cost of hiring single Judges for administrative and disciplinary cases of staff. These costs would be complex to calculate. Regarding the potential savings

of abolishing the AB and DAB, the Registry indicated that they would be indirect in the sense that staff members in those boards would not need to devote anymore part of their time to work on administrative and disciplinary cases. In response to a question regarding combining the two options the Registry indicated that the ILOAT had been approached and indicated that this would not be possible to keep elected officials at the ILOAT while moving the staff of the Court to UNAT.

21. The Registry added that elected officials still needed to be consulted on both options. The point was made that the views of elected officials would be of assistance to the States Parties decision making process given the relevance of moving forward with R109 in case the Court were to move to the UNAT system. The facilitator indicated that it would be preferable to have a common position from all elected officials and that the discussion would continue at a subsequent meeting.

Fourth meeting:

22. At the fourth facilitation meeting held on 15 September 2023, the IOM gave an update on developments of Courts regulatory framework and consistency with the revised IOM mandate. The IOM noted that when the IOM was created and operationalized the Court had already existing procedures that were contradictory with the revised IOM mandate, creating as a result concurrent jurisdictional issues that needed streamlining. Following discussions led first to the new IOM Operational Mandate adopted by the Assembly at its 19th Session, and then to two administrative instructions adopted by the Court in 2022. One dealt with investigations of unsatisfactory conduct and the second one with the disciplinary process after an investigation is concluded. There was a third one dealing with the outdated anti-harassment process, but that was part of a much larger review process. There were other documents and Administrative Instructions related to the work of the IOM that still need to be streamlined with the mandate of the IOM, the most important of which is the outstanding whistle blower and protection against retaliation one, which is also outdated and inadequate when compared with current standards and practices. The IOM indicated that work on this document could be completed by the end of the year and highlighted two additional ones that require updating and streamlining, namely one on anti-fraud and another one on conflict of interests which would require more time.

23. With regards the finalization of the assessment of R116, R117 and R120, the Registry indicated that the three organs were in favour of option A, staying in ILOAT and reforming the AB and DAB in order to capture some of the concerns express in the IER report. In view of this common Court position the States agreed to assess this group of recommendations negatively, opting for option A, noting the commitment by the Court would improve the functioning of the AB and the DAB, in consultation and collaboration with the SUC.

24. Concerning the discussion on R108 and R109, the ICC Presidency presented a non-paper containing the position of all elected officials. The Presidency of the Court clarified that the main reason behind this recommendation was that, like in national systems, judicial and prosecutorial independence required that questions of misconduct be handled by the peers of the ICC elected officials.

25. The Presidency of the Court indicated that their understanding was that the IOM non-paper's options A to B did not address the core concern underlying R108, and options C and D did so but would require either statutory amendments or wholesale replacement of the IOM. For this reason, they decided to develop option E, by which the IOM is to conduct the fact finding and the investigation under the supervision of an ad hoc panel of international judges and prosecutors who are not from the Court that will also assess whether the IOM findings warrant further action. The Presidency of the Court concluded noting that there must be a careful balance between accountability on the one hand, and judicial and prosecutorial independence on the other hand.

26. The IOM noted that the perception, also from the IOM's evaluation in the Judiciary, was that judges would cover for their peers, and that while this may not have been the intention with the proposed option, there is certainty that this perception would be strengthened. The IOM noted that the use of judicial and prosecutorial independence as a shield from wrongful behaviour must be prevented. The IOM added that there was also a risk of the IOM position becoming politized if the Head of the IOM did not take the function or the judicial and prosecutorial independence seriously.

27. One State Party expressed a view in favor of option E as presented by the elected officials as it would uphold the specific status of elected officials, the know-how of the IOM in terms of investigations, it would not entail additional costs and it would not require an amendment of the Rome Statute. Many other views raised some concerns with such an option, highlighting that the idea behind the recommendation was to provide the IOM with an additional tool to develop its investigations and not for the IOM to become a tool of a new panel. It was noted that the main objective was to streamline the process, and that having each ad hoc panel handling or directing investigations would create different and inefficient models of the process on the one hand. It was also noted that while preserving judicial and prosecutorial independence is crucial, it was also essential to preserve the independence of the IOM.

28. The Registry indicated that the intention behind the elected officials' proposal was not to be above the law and noted that the elected officials' proposal provided for a continuation for the IOM to investigate all elected officials, but because some of the investigations may touch upon judicial and prosecutorial independence matters, the panel would have some discretion in this regard, as it is done within the national systems. The Registry added that any system that it's agreed to could be misused, either at the IOM level or at the panel level, but it had to be assumed that the appointed individuals would do the job as expected. In any event, the IOM could, for example, report a potential misuse of power by the panel in their yearly report to the ASP.

Fifth meeting:

29. At the fifth facilitation meeting held on 17 October 2023, delegations had a compilation of discussions on R108 and R109 which was circulated by the Secretariat at the request of the facilitator. The facilitator noted that States Parties had agreed that an independent mechanism such as the IOM could investigate and be cost efficient in terms of investigation of misconduct of elected officials to accommodate the spirit of R108. However, States had stressed in 2022 that an initial assessment of the options and potential implications would be needed for further clarifications. For this reason, the facilitation had requested the IOM to produce a non-paper regarding R108 specifying in greater detail the modalities for possible implementation with different options for the consideration of the States Parties.

30. The facilitator noted that the IOM had then presented the non-paper accordingly on 22 May 2023 and then Court subsequently presented a non-paper on 14 September 2023, reflecting the position of elected officials. The facilitator emphasized that while the proposal of the Court was indeed in line with the language of the IER recommendation, it did not seem to be in line with the agreement reached at the facilitation the previous year on the modifications. The facilitator noted that while the Assembly could indeed change its mind regarding the implementation of R108, it should be clear then that doing so would be inconsistent with what was already agreed in 2022. The facilitator further clarified that with R109 the Assembly of States Parties would be relinquishing the powers to remove and apply disciplinary measures to elected officials and delegating them to an independent and impartial Judicial Council. The facilitator also stressed that these two recommendations were intrinsically linked to recommendations R125, R126 and R127.

31. Following some discussions delegations agreed to assess R109 as negative with a comment indicating that the possible implementation of R108 could be seen as a first step towards a potential implementation of R109 in the long-term, and depending on how this system will function, the Assembly can come back to R109 and consider its implementation at a later stage. In addition, as indicated by the independent experts, given that such a change would require amendments to the Statute, emphasis should be placed on strengthening prevention in the short-term.

32. With regards the group of recommendations R122-R126, R128 and R131, which concerned the creation of an Ethics and Business Conduct Office (EBCO). The position of the Court with respect R122, R123 and R124 was that this set of recommendations was farfetched and complicated, going into mandates of existing bodies of the IOM, ombuds person, and focal points and would raise concerns, particularly with regards to confidentiality issues. The facilitator noted that the facilitation agreed on assessing R122 negatively; R123 positively, with a comment in the Matrix for the Court to indicate what it has already implemented, namely, which areas it intends to create focal points for and which it will not; and R124 negatively.

33. The Registry noted regarding R125 in so far as this recommendation relates to the IOM acting as permanent secretariat for the EBCO the assessment of this recommendation would also be considered negatively by the Court. Regarding R126 the Registry noted that this recommendation was a repetition of R109 and in that respect he would expect States Parties' assessment to be consistent with that other recommendation's assessment. And concerning R127 the Registry noted that it was a really far-reaching recommendation aiming at having other tribunals accepting an external Judicial Council to be recognised within their respective legal frameworks. The Registry added that the assessment of R127 would also be consistent with the assessment of R109. Based on the discussions on R125 facilitation agreed to assess this recommendation negatively, without prejudice to R108 which was similar to the first part of this recommendation. Given that R126 was literally the same as R109, the facilitation agreed to also assess R126 negatively in order to be consistent with the assessment of R109. The facilitator noted that a similar comment to the one for R109 would be added to the Matrix. Finally, the facilitation agreed to assess R127 negatively. The ICC Presidency indicated, without prejudice to the assessment decision made by the Assembly on R109 and R126, that it would like to have on record that the position of the Court on both these recommendations was positive. The facilitator agreed to also reflect this point in the Matrix.

34. With regards the assessment of R128 the Registry indicated that the Court believed it was needed and very important to increase staff confidence and trust in the IOM and the Court's internal disciplinary scheme and that the Court already was working on this. The Registry was of the view, given the previous negative assessment on the EBCO related recommendations, that these efforts could be carried out by the IOM and the Court, rather than by the IOM and the EBCO as recommended by R128. The IOM agreed with the points raised by the Court.

35. Following the discussion, the facilitator noted that there seemed to be agreement on assessing R128 positively with modifications, the modification being that the IOM and the Court, rather than the EBCO (in light of the previous negative assessments related to the establishment of this office), would be responsible for working towards increasing staff confidence and trust in the IOM and the Court's internal disciplinary scheme. However, a view was expressed that it would be more appropriate to assess the recommendation negatively, in order to maintain consistency with the negative assessments of R124 and R125, rejecting the creation of the EBCO. The point was made that a comment could be added to the Matrix, reiterating the support by States Parties for the ongoing efforts by the IOM and the Court in relation to the internal disciplinary systems. It was subsequently agreed that the recommendation would be assessed positively with modifications, with the modification as expressed above while also highlighting the importance of ongoing trust and confidence building exercises of the Court and the IOM. The view was expressed that such efforts were expected and therefore the assessment would not be creating new mandates or obligations. A State Party noted it took issue with legal consistency with respect to this set of recommendations and in particular the non-existent EBCO and the subsequent implementation of its functions. It was also agreed that an explanatory comment to that effect would be included in the Matrix.

36. Delegations agreed not to assess R131 as the way in which this recommendation was drafted did not require an assessment. For this reason, it was agreed to indicate in the facilitations report and in the matrix the assessment of R131 as not applicable.

III. Recommendations

37. The assessment of all recommendations allocated to the facilitation was concluded in 2023. Discussions on the ongoing implementation of the IER recommendations allocated to the facilitation should continue in 2024.

38. The facilitation discussions on the regulatory framework of the Court and consistency with the revised IOM mandate should also continue in 2024.

Annex

Language to be included in the omnibus resolution

Independent Oversight Mechanism

1. *Recalls* its decision in resolution ICC-ASP/~~19~~**21**/Res.~~6~~**2** ~~adopting the revised Operational Mandate of the Independent Oversight Mechanism and~~ requesting the Bureau to remain seized of review of the work and operational mandate of the Independent Oversight Mechanism **and to follow up on the recommendations content in the report of the facilitation**, with a view to considering **also** recommendations of the Independent Expert Review in this regard, ~~subject to relevant decisions of the Assembly on the implementation of the Report of the Independent Expert Review,~~[1] and to report thereon to the Assembly at its twenty-~~first~~**second** session;

2. *Welcomes* the discussions held during 202~~2~~3 on the review of the work and operational mandate of the Independent Oversight Mechanism, which is a subsidiary body of the Assembly of States Parties;

3. *Takes note* of the Final Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System,[2] in particular its recommendations related to the work and operational mandate of the Independent Oversight Mechanism, which deserves thorough discussions among States Parties and consideration and may call for further revisions of the mandate;

4. *Recalls that* the revised Operational Mandate of the Independent Oversight Mechanism applies provisionally until, and without prejudice to, any decision of the Assembly to amend or replace the mandate after its consideration of the report and the recommendations of the Independent Expert Review;

5. *Welcomes* the complementary initiatives undertaken by the Bureau, the Assembly oversight bodies and the Court to try to ensure that the different organs of the Court have streamlined and updated where required, and, to the extent possible, consistent ethics charters and codes of conduct;

6. *Reiterates* the critical importance of the Independent Oversight Mechanism in carrying out its work in an independent, transparent and impartial manner free from any undue influence;

7. *Welcomes* the annual report of the Head of the Independent Oversight Mechanism;[3]

8. *Reaffirms* the importance of the Independent Oversight Mechanism reporting to States Parties on the results of its activities;

9. *Emphasizes* the importance of adherence to the highest professional and ethics standards by all Court staff and elected officials, *acknowledges* the essential role played and work done by the Independent Oversight Mechanism, and that the revised operational mandate of the Independent Oversight Mechanism[4] enables it to investigate the alleged conduct of former elected officials and staff both while they were in office and when they separated from service as prescribed in its paragraph 10, *takes note* of the status report provided by the Office of the Prosecutor, and *invites* the Court to provide at the earliest opportunity in advance of the twenty-~~second~~**third** session of the Assembly any relevant update and recommendation on any necessary follow-up action for the Court and/or the Assembly;

10. *Welcomes* the progress made in formally aligning the regulatory framework of the Court with the operational mandate of the Independent Oversight Mechanism, in particular Administrative Instruction on Investigation of Unsatisfactory Conduct and Administrative Instruction on Unsatisfactory Conduct and Disciplinary Proceedings as well as the

[1] ~~ICC-ASP/19/16.~~
[2] ICC-ASP/19/24.
[3] ICC-ASP/2~~1~~/8**21**.
[4] ICC-ASP/19/Res.6, annex II.

Administrative Instruction on Discrimination, Harassment, including Sexual Harassment, and Abuse of Authority, and *encourages* the Court, with the support of the Independent Oversight Mechanism, as necessary, to continue working to ensure that all relevant documents are updated and aligned with the mandate of the Independent Oversight Mechanism in order to harmonize the applicable rules.

Mandates of the Assembly of States Parties for the intersessional period

15. With regard to the Independent Oversight Mechanism,

(a) Requests the Bureau to remain seized of the review of the work and the operational mandate of the Independent Oversight Mechanism and to follow up on the recommendations contained in the report of the facilitation report, with a view to considering also recommendations of the Independent Expert Review in this regard, and to report thereon to the Assembly at its twenty-~~second~~**third** session.