

President Silvia Fernández de Gurmendi
President of the Assembly of States Parties
to the Rome Statute of the International Criminal Court

Date: 30 March 2021

Ref: IOM-2021-01

Dear President Fernández de Gurmendi,

I write concerning the Report of the Independent Experts in their Review of the International Criminal Court and the Rome statute system (the “Report”). Specifically, resolution ASP-ICC/19/Res.7 provides for the Court to designate Focal Points, and for these Focal Points to submit an “overall response” to the Report. However, as the IOM is a subsidiary body of the ASP, and benefits from operational independence vis-à-vis the Court, the IOM does not consider that its views on issues relating to it in the Report should be presented by the Court Focal Points.

That being said, as some of the findings and recommendations of the Independent Experts do touch directly upon the IOM (a list of relevant recommendations are presented in the Annex to this letter), the Review Mechanism, and indeed the States Parties, may benefit from the IOM’s views on these. Accordingly, and with your leave, I outline here in summary fashion the IOM’s initial thoughts with respect to these recommendations. If you deem this to be beneficial, I would have no problem with the contents of this letter being shared with the Review Mechanism for their consideration.

Proposed Changes to the Mandate of the IOM

With respect to the IOM, the Report recommends the adoption of a new internal grievance mechanism, including for the investigation and discipline of allegations of misconduct. It also proposes both an expansion of the IOM mandate to include providing support to a number of additional functions and non-permanent bodies, as well as a reduction of this mandate by essentially removing the IOM’s authority to investigate allegations of misconduct according to Rule 26 of the Rules of Procedure and Evidence, which was amended very recently (in 2018) to provide the IOM that very authority.

Any change to the IOM mandate would obviously be within the purview of the Assembly, and in that sense it is not for the IOM to take a position on these, but it may be helpful to the States Parties to consider the following in assessing these recommendations.

First, in terms of the additional proposed functions, the IOM agrees and has many times reiterated that the lack of an informal dispute resolution mechanism (e.g., in the form of an ombudsperson or mediation services) is a glaring gap in the Court's internal justice system. Staff members often do not know where to go to resolve workplace issues with colleagues or supervisors. In the context of an organization whose core business model is litigation and judicial determinations, staff often feel as if a formal complaint is the only solution, whereas frequently these issues may be able to be de-escalated and resolved informally to everyone's satisfaction. This approach has the advantage of producing a better longer-term effect for the units or sections in question, than a lengthy investigation and discipline process which will entrench everyone in their position, and affect operational efficiency and effectiveness. The IOM would accordingly strongly support the creation of such functions. Whether these should be housed within the IOM or somewhere else would need to be carefully considered, as there are some advantages to this, but also some risks that should be evaluated, such as possible conflicts of interest. This is an issue that could be further discussed in consultations.

With respect to the creation of an Ethics and Business Conduct Office, which would provide advice on prevention of conflict of interest, and also house a focal point on gender issues, sexual and other forms of harassment, and anti-fraud matters, the IOM again does not take a position, as it is a matter for the States Parties to decide. Ethics offices are common in the UN system to advise staff on potential conflicts of interest, although they do not typically have focal points as is contemplated, they do play a role in outreach in terms of educating staff in recognizing harassment, sexual harassment, and fraud/corruption matters. In that vein, the Report also identified that many staff may still not be aware of the IOM's role and that this contributes to what the Experts identified as a low level of reporting of allegations of harassment and bullying. This is a finding that the IOM has carefully noted, and, pending sufficient resources, is planning to increase its presence through more information awareness sessions. The IOM will also consult with the newly appointed Focal Point for Gender Equality and the Staff Union Council in term of conducting such sessions.

Investigations of Elected Officials

Staff lack of confidence in the IOM was mentioned as one of the Experts' justifications for not having investigations of elected officials carried out by the IOM. Essentially, the Report appears to fully adopt the previous Court President's statements made at a Hague Working Group meeting in the fall of 2019 where he had expressed his view at how allegations against judges should be investigated by other judges. Specifically, the Report recommends that misconduct by elected officials be investigated by an *Ad Hoc* Investigation Panel under the auspices of the IOM. The Report also proposes the creation, in the longer term, of a Judicial Council to look at issues relating to "the discipline and superintendence of judges and the enforcement of judicial accountability", which is, according to the Report, common in most national systems. Again, this is a matter for the States Parties, recently considered during the revision of Rule 26, and agreed to by the previous Presidency of the Court. The IOM would make the following points to assist the States Parties in their consideration of these recommendations.

First, the IOM considers that there is a distinction between judicial and non-judicial forms of misconduct; and, second, between the investigative fact-finding and disciplinary processes.

On the first issue, the IOM considers that an important distinction exists between alleged misconduct committed by judges in the exercise of their judicial function, for instance, any violation of the Code of Judicial Ethics, issues regarding judicial independence or impartiality, or any issue having a direct bearing on judicial proceedings; and misconduct not based upon the exercise of judicial functions, such as bullying or sexual harassment outside of the courtroom and not linked to any pending case, fraud/corruption, etc. The IOM considers that, depending on the circumstances, the same conduct may well fall within one or the other category. For instance, a judge making a racist or sexist comment from the bench in the course of proceedings would fall under the former, while making the same comment in the cafeteria towards a staff member would in most cases fall under the latter. In this latter example, it is unclear why an elected official should be treated differently for the same behaviour, simply by virtue of their grade level.

Instances of judicial misconduct may in turn be divided in two sub-categories. There are cases that touch upon rights of parties to the judicial proceedings, which must be determined by the relevant Trial or Appeals Chamber, or Plenary of Judges. For instance, the IOM does not consider that Rule 26 gives it the mandate to investigate cases regarding whether a judge should have recused themselves, or issues of judicial independence.

Other cases may allege potential misconduct on the part of judges without any influence on an ongoing case (*e.g.*, not respecting the confidentiality of deliberations after a decision has been rendered). In such cases, a conclusion regarding whether misconduct was established should indeed be made by “judicial experts” prior to the disciplinary process being engaged, and the IOM would welcome this being done by external judicial experts, rather than the Presidency or Plenary of judges, for the reasons stated in the Report. At the same time, the IOM would like to draw the States Parties’ attention to the important fact-finding role the IOM may play, and has played to date, in the investigation of such cases.

In one case reported in the IOM Annual Report last year, the IOM received a confidential allegation from Chambers staff regarding the conduct of one judge. As the issue under investigation touched upon questions of appearance of impartiality and independence, the IOM refrained from making any conclusions on whether the conduct of the judge would constitute misconduct under the rules, *i.e.*, whether it caused harm or serious harm to the standing of the Court or to the administration of justice, as required by the Rome Statute and the Rules of Procedure and Evidence. The IOM limited its investigative activities to the allegation and presented its factual findings to the Court Presidency, which ultimately determined that there was no misconduct, and that accordingly no further action, including disciplinary action, was warranted. Without suggesting any impropriety in this specific case, it would indeed have been preferable if this determination had been made by judicial experts external to the Court, as the Report recommends, rather than the Presidency of the Court.

Most pertinently, however, the system of having the fact-finding investigation conducted by the IOM, which included the analysis of evidence in various Court electronic systems, review of documentary evidence and witness interviews, worked, in the IOM’s submission, admirably well. Such a process also has the benefit of more strictly being in accordance to the text of Rule 26, which compels the IOM to “investigate” such allegations, as long as they are not manifestly unfounded.

A similar approach could be followed in cases involving non-judicial misconduct, *e.g.*, bullying by a judge against a legal officer, which the experts identified as a concern in their Report. In such cases, the IOM could however be able to make some preliminary conclusions regarding whether the alleged bullying (or for instance sexual harassment) took place, as the standard applied would be the same as for staff members. The judicial experts could then determine whether any harm had occurred to the proper administration of justice or to the standing of the Court, and therefore whether misconduct or serious misconduct took place according to the applicable legal framework. This would not necessarily

require these experts to conduct the fact-finding investigation regarding the circumstances of the alleged bullying or sexual harassment. In addition to the risk of inconsistency in IOM investigations of staff and those carried out by *Ad Hoc* Investigative Panels on comparable facts, mandating that such an investigation be conducted by external judicial experts is also likely to prove inefficient and require the expenditure of more significant resources than if it were to be carried out by the IOM.

To make the parallel with national jurisdictions, a judge who for instance engages in an assault or sexual assault at work would be investigated by the regular law enforcement authorities, and no special privilege would arise to them by virtue of being a judge, even one at the highest court in the country. The IOM sees no reason why it should be different for judges or other elected officials of the Court in a case of bullying or sexual harassment. The disciplinary or ultimate decision on whether such action gives rise to a sanction against the judge is a separate matter, and the IOM again agrees that it would be more proper for external experts to be responsible for the decision-making in this sense, rather than Plenary of judges. But again, this does not detract from the useful role the IOM can play, and has played to date, in the underlying fact-finding and investigative process. It is also important to note that the IOM has, in the conduct of its work, interviewed a number of elected officials, including judges, in the course of investigations in all capacities (complainants, witnesses, and even subjects), and in all cases received their full cooperation. None of the elected officials interviewed have contested the IOM's authority to conduct these investigations, even if in some cases they may have disagreed with the investigation taking place.

One possibility would therefore be to limit the role of the proposed *Ad Hoc* Investigative Panels to determine whether, on the facts established by the IOM after an investigation, misconduct or serious misconduct did occur as stated by Articles 46 and 47 of the Rome Statute, and defined in Rules 24 and 25 of the Rules of Procedure and Evidence, which, as stated above, would be a welcome improvement of the process.

Bullying, Harassment, and Sexual Harassment

Finally, the IOM notes the findings made in the Report with respect to inappropriate conduct at the Court, including specifically bullying and harassment in the judiciary, and sexual harassment in the OTP. Barriers to reporting are manifold, but true confidence by staff can only be fostered by the leadership of the Court taking strong action and imposing meaningful sanctions against those having found to fall short of the acceptable standards of conduct. The IOM's ability to reach out to all staff

who may be victims of bullying, harassment, or sexual harassment, and to quickly be able to respond to and investigate these complaints is paramount to assist in addressing these behaviours. Viewed in that light, it will come as little surprise that the IOM welcomes the recommendation to enhance the IOM's authority and resources. The States Parties have already addressed part of this recommendation by enhancing the IOM's authority in the new IOM Operational Mandate adopted at last year's Assembly.

As mentioned at the outset, I would be grateful, Madam President, if you could forward this letter to the Review Mechanism if you deem it would be helpful to their work. It goes without saying that I remain at your disposal, and that of the Review Mechanism, to discuss any of these or other issues further.

Very sincerely,



Saklaine Hedaraly

ANNEX

Recommendations Directly Touching upon the IOM

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.*

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.*

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.*

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.*

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

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 Judge and the First Instance Panels. The IOM would be responsible for providing immediate support when needed, and work 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.*

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.*

R364. *The IOM and the OIA should be given enhanced authority and resources to be able to better carry out their functions.*

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.*