

Review Mechanism

Action Plan

List of the priority recommendations of the final report of the Independent Experts presented by Italy

This document contains the list of recommendations from the IER report, which, according to Italy, should be considered as priorities and fast-tracked for implementation.

In selecting, among the 384 recommendations contained in the IER report, the so-called priority ones, a double criterion has been followed, taking into account: i) the positive impact that their implementation may bring in terms of improving the overall effectiveness of the investigative and prosecutorial action of the Court; ii) the total or at least reduced financial absence of additional costs for their implementation.

In particular, in indicating for each of the clusters covered by the report the recommendations considered most urgent, Italy stresses that those relating to the prosecutor's office should have particular attention and immediate implementation since it is believed that the outcome of the entire proceeding and, consequently, the effectiveness and credibility of the institution itself depend on an investigation conducted and dealt in a professional manner and based on solid evidence and proof.

This assumption, however, presupposes that the recommendations concerning the recruitment of senior positions in the prosecutor's office are also subject to careful scrutiny, with particular regard to the need to recruit personnel with specific experience in conducting and directing investigations.

On the other hand, Italy believes that the three-layer governance model proposed by the experts is not convincing, as it raises problems of compatibility with some of the provisions of the Statute of Rome and would require a profound change to be implemented, with a very long lead time.

Governance. Chambers.

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

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.

Governance. OTP.

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.

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.

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.

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

Governance. Registry.

R76. The process of electing the Registrar should be more thorough. The ASP 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.

Governance. Human Resources.

R92. A major effort is needed to re-classify all positions in the Court in terms of their 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

R94. The Court's ability to recruit staff on a limited- or short- term basis 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.

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.

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.

Governance. Budget.

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 Experts' 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 transfers 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.

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.

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 specialized state representatives, before the political part of the conference, where high-level political participation can be encouraged.

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.

Governance. 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.

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.

Chambers.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Office of the Prosecutor. (OTP)

R226. The Prosecutor should develop a policy on the criteria relevant to the opening of a PE based on Article 15 communications and include it in an update to the Policy Paper on Preliminary Examinations.

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.

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.

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.

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').

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.

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.

R236. The OTP should consider limiting the scope of the cases temporally, geographically, and with regard to modes of liability.

R237. In line with the Court jurisprudence, the OTP should consider all modes of liability to be of equal seriousness and importance.

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.

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.

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.

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.

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.

R249. The OTP should ensure that when an investigation is opened, an implementation and completion strategy is in place.

R254. The OTP should consider carrying out the PE activities more holistically.

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.

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.

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.

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.

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.

Complementarity.

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.

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.

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 de-prioritisation, 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.

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.

R294. The OTP should consider increasing the number of Situation Specific Investigative Assistants and Country Experts.

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.

Cooperation.

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.

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.

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.

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.

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.

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.

R278. The OTP should consider strategic secondment of national law enforcement agents to assist in achieving the same goals.

Victim Participation.

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 body⁶⁴² 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 proposes to follow, the deadline set, if any, should be no more than 48 hours before the relevant hearing.

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 Chambers Practice Manual standardised, streamlined and consistent procedures and best practices applicable in the reparations phase of proceedings.

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.

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.

Trust Fund for Victims (TFV).

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.

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.

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.

R260. 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; bring clarity as to division of responsibilities between relevant actors; set out 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 also encouraged to consult with local CSOs working with victims.

ASP – Court Relations

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.

Improvement of the System of the Nomination of Judges.

R371. The procedure for the nomination and election of Judges should be amended as follows: (i) States Parties should be required to ensure the attendance of candidates in person for interview by the ACN; (ii) the Interview should be an essential element of the process and any candidate not attending should be disqualified barring exceptional circumstances; (iii) Similarly, participation in the roundtable discussions before the election should also be mandatory with failure to participate also resulting in disqualification barring exceptional circumstances.

R373. The ACN should include in the common questionnaire to be completed by all nominees provision for its accuracy to be certified by a senior member of the national-level Judiciary or of the nominations/appointments body which oversaw the nomination process.

R374. The ACN at the candidate interview should endeavor to assess the ability of the candidate to manage and conduct complex international criminal trials fairly and expeditiously and their suitability as a Presiding judge.

R375. The ACN should require the nominating state to submit along with the nomination a certificate setting the procedure followed leading to the nomination.

R376. The ASP should initiate a process leading to the harmonisation of the nomination procedures followed by States Parties. That should include requiring States Parties providing in the course of 2021 information and commentary on their own existing or prospective procedures for nomination of candidates to the Court.

R377. In time for the election of Judges in 2023, the Working Group on Nomination and election of Judges should compile a set of criteria which should be applied in national-level nomination processes along with guidelines on the conduct of the nomination process.

R378. States Parties should accord utmost respect to the assessments in the ACN report and should not cast their votes in a way that is inconsistent with any aspect of an assessment.

R379. The Working Group on Nomination and Election of Judges should consider whether it is now appropriate to review the criteria applicable to and the profiles of candidates from List B, having regard to the significance of criminal trial experience to the work of the Court.