

23. Establishment of an independent oversight mechanism (ICC-ASP/8/Res.1)

The Assembly of States Parties,

Recalling the Rome Statute of the International Criminal Court and, in particular article 112, paragraphs 2(b) and 4, of the Rome Statute,

Welcoming the report of the Bureau on an independent oversight mechanism,¹ as well as the comments contained in the Report of the Committee on Budget and Finance on the work of its thirteenth session,²

1. *Decides* to establish an independent oversight mechanism in accordance with article 112, paragraph 4, of the Rome Statute and the terms of reference set out in the annex to the present resolution;
2. *Decides further* that the Bureau, in coordination with the Court, shall prepare a report on the operation of the inspection and evaluation functions within the oversight mechanism, including the terms of reference and related financial implications, with a view to a decision on its adoption at the next session of the Assembly.
3. *Decides* to establish a new major programme (Independent oversight mechanism) with a budget of €341,600 to cover the start-up and continuing maintenance costs of the aforementioned oversight mechanism.

Annex

1. The Assembly of States Parties establishes, in accordance with the present resolution, an independent oversight mechanism.
2. The independent oversight mechanism itself will be expected to draft the rules governing its work, for final adoption by the Assembly, in accordance with the recommendations set out hereunder.

Setting up the independent oversight mechanism

3. Although in its initial set-up phase one P-5 staff member would be seconded from the United Nations Office of Internal Oversight, the oversight mechanism will consist of two staff members, i.e. one staff member who will head the office at the P-4 level and one further support staff member at the P-2 level. These staffing levels and grades may be reviewed again by the Assembly once the oversight mechanism has been fully operational for a reasonable period of time. These individuals will begin work six months before the oversight mechanism becomes officially operational so as to develop all its functions, regulations, rules, protocols and procedures and submit them to the Assembly for approval. The recruitment process for the position of head of the oversight mechanism shall be conducted by the Bureau in coordination with the Court.
4. The current Rules of Procedure and Evidence, together with the relevant Staff Regulations, Staff Rules and Regulations of the Court, insofar as they relate to the disciplinary regime of the Court, shall remain in force until such time as modifications and/or amendments thereto are approved by the Assembly or, as appropriate, the Court.

¹ Report of the Bureau on the establishment of an independent oversight mechanism (ICC-ASP/8/2, Add. 1, 2 and 3).

² *Official Records ... Eighth session ... 2009* (ICC-ASP/8/20), vol. II, part B.2, paras. 120-121.

Location of the independent oversight mechanism

5. The independent oversight mechanism shall be co-located (but not integrated or subordinated to) with the Office of Internal Audit at the seat of the Court in The Hague.

Scope of the independent oversight mechanism

6. As regards the scope of the independent oversight mechanism, the following parameters shall apply:

a) The scope of the independent oversight mechanism, as envisaged under article 112, paragraph 4, of the Rome Statute includes investigation, evaluation and inspection. The independent professional investigative capacity will be implemented immediately, subject to paragraph 3 of the present annex. The additional elements of oversight, as provided for in the Statute, such as inspection and evaluation, will be brought into operation, subject to a decision of the Assembly at its next session.

b) It is envisaged that the investigative unit of the newly established independent oversight mechanism will have *proprio motu* investigative powers and incorporate whistleblower procedures and protections.

c) It is envisaged that the individuals covered by the oversight mechanism will include all elected officials of the International Criminal Court and all staff subject to the Staff Rules and Regulations of the International Criminal Court. It is also envisaged that the investigative unit of the oversight mechanism will be utilized for the conduct of investigations of any allegations of misconduct made against contractors retained by the Court and working on its behalf. Such investigations should be carried out in accordance with the terms of the contract. In circumstances where a contract is silent on the manner and/or the modalities of any investigation, the oversight mechanism will conduct its investigation in accordance with its own established procedures and recognized best practice. The findings of any investigation will be used to determine the applicable sanctions, if any, under the existing contractual regime between the Court and the contractor. Within this context, it is recommended that the Court develop and incorporate into its procurement contracts a code of conduct and also appropriate disciplinary procedures to be followed in circumstances of alleged misconduct.

d) In all cases, if criminal activity is suspected in the course of an investigation, the oversight mechanism must notify the relevant national authorities, such as the State where the suspected crime was committed, the State of the suspect's nationality, the State of the victim's nationality, and where applicable, the host State of the seat of the Court.

e) With regard to the investigation of elected officials, it is recommended that the relevant provisions of the Rules of Procedure and Evidence and the Regulations of the Court be amended to remove this function from the judges and to transfer it to the independent oversight mechanism.

Functions of the independent oversight mechanism

7. The professional investigative unit will operate in support of the existing disciplinary structures of the Court to conduct investigations on allegations of misconduct and to ensuring effective and meaningful oversight thereof. Such investigations and oversight shall exclude staff management issues, such as staff underperformance of duties, as distinct from staff misconduct. If a complaint which seems, *prima facie*, to pertain to staff management issues is launched, it shall be considered not to fall within the remit of the oversight mechanism and be

referred to management. Management shall, however, refer to the oversight mechanism cases brought to its attention that fall within the latter's competence.

8. The functions of the oversight mechanism shall not affect those described in paragraph (a) of regulation 10.2 of the Staff Regulations of the Court which provides that "[t]he Registrar or the Prosecutor, as appropriate, may impose disciplinary measures on staff members whose conduct is unsatisfactory". As the purpose of the oversight mechanism is not to perform any staff management, the above provision shall continue to apply to all disciplinary measures that fall under an administrative ambit, without prejudice to the oversight's mechanism's investigative capacity in respect of:

- a) Internal misconduct warranting disciplinary measures; and
- b) Investigating external penal misconduct.

9. The functions of the oversight mechanism shall not affect those described in paragraph (b) of regulation 10.2 of the Staff Regulations of the Court which provides that "[t]he Registrar or the Prosecutor, as appropriate, may summarily dismiss a member of staff for serious misconduct, including breach of confidentiality".

10. The functions of the independent oversight mechanism shall replace the investigative role of the Presidency in respect of complaints received against elected officials, namely, a judge, the Prosecutor, a Deputy Prosecutor, the Registrar and the Deputy Registrar. The factual findings of the investigation carried out by the independent oversight mechanism shall be transmitted to the Presidency, which will convene a panel of three judges to consider making recommendations, as appropriate, in respect of any further action that should be taken in accordance with article 46¹ and/or article 47² of the Rome Statute.

11. In relation to the initiation of complaints made in respect of an elected official, all complaints shall be submitted to the independent oversight mechanism. The complainant may also, at the time of filing, elect to submit a copy to the Presidency, for information purposes only. The independent oversight mechanism may also initiate investigations against elected officials *proprio motu*. The complaint concerning any misconduct described in rules 24³ and 25⁴ of the Rules of Procedure and Evidence, shall include the grounds on which it is based, the identity of the complainant and, if available, any relevant evidence. The complaint shall remain confidential.

12. The procedure identified in paragraph 11 shall apply *mutatis mutandis* to complaints made by staff members against other staff members, except that the complainant may elect to submit a copy of the complaint to the Prosecutor or Registrar, as appropriate.

Jurisdiction

13. There should be no impunity for criminal misconduct. However, it is an accepted general principle of international law that only States can prosecute for ordinary criminal misconduct, not international organizations which, in principle, lack such competence. The oversight mechanism must focus on developing a notification mechanism so as to inform national authorities of suspected criminal misconduct, together with developing co-operation procedures with national authorities so as to facilitate the possibility of national prosecutions where investigations conducted by the oversight mechanism reveal suspected criminal misconduct.

¹ Article 46 is entitled "Removal from office".

² Article 47 is entitled "Disciplinary measures".

³ Rule 24 is entitled "Definition of serious misconduct and serious breach of conduct".

⁴ Rule 25 is entitled "Definition of misconduct of a less serious nature".

Immunities

14. The work of the oversight mechanism will be without prejudice to the privileges and immunities enjoyed by Court staff and elected officials in the exercise of their functions, but should be guided by the principle that privileges and immunities may not be invoked to justify unlawful acts. In cases where prosecutorial function is to be exercised against individuals with immunity, the oversight mechanism may recommend immunity waivers to Court management as it deems appropriate and advisable, according to established standards and practice. In determining whether to waive immunity, the Court must have regard to its duty to ensure that prior to any official being made subject to national prosecution he/she will be afforded a minimum standard of due process. The above applies to privileges and immunities of the Court and its material, including evidentiary material, from legal process and any measure of execution.

Accountability of the oversight mechanism

15. The independent oversight mechanism will be accountable to the Assembly. The oversight mechanism will submit quarterly activity reports directly to the Bureau of the Assembly of States and will also submit on an annual basis a consolidated report of its activities to the Assembly via the Bureau (all reports shall be copied to the Presidency, the Office of the Prosecutor, the Registrar and the Committee on Budget and Finance). The Court will have a reasonable opportunity to respond in writing to the reports submitted by the oversight mechanism. Such written responses made by the Court shall be transmitted to the Bureau and the Assembly and copied to the head of the oversight mechanism and the Committee on Budget and Finance.

Follow-up by the Court

16. The Court shall provide the oversight mechanism biannually with written updates regarding the follow-up of disciplinary procedures involving cases previously investigated by the oversight mechanism, together with any information, if any, on the application of sanctions made in individual cases.

Memorandum of Understanding with the United Nations Office of Internal Oversight Services

17. The Registrar shall, for an initial period of one year, enter into a memorandum of understanding with the United Nations Office of Internal Oversight Services to provide support services on a cost recovery basis for the operationalization of the oversight mechanism. Any subsequent renewal would be subject to a decision of the Assembly of States Parties.

Budget

18. The Assembly establishes a major programme budget to cover the start-up and continuing maintenance costs of the aforementioned oversight mechanism.
