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Annual report of the Head of the Independent Oversight Mechanism

Executive summary

1. Major Programme VII-5, the Independent Oversight Mechanism (IOM), was established by the Assembly at its eighth session in accordance with article 112, paragraph 4, of the Rome Statute.¹ The purpose of the IOM is to provide meaningful oversight of the Court through its mandate to conduct inspections and evaluations at the request of the Assembly or its Bureau, and to undertake investigations into reports of suspected misconduct, serious misconduct, or unsatisfactory behaviour concerning elected officials, staff members, and other Court personnel.
2. This report covers the IOM's operations during the period 1 October 2018 to 30 September 2019.

¹ *Official Records...Eighth session...2008* (ICC-ASP/8/20), vol. I, part III, ICC-ASP/8/Res.1.

I. Introduction

1. The Independent Oversight Mechanism (IOM) was established by the Assembly of State Parties at its eighth session in accordance with article 112, paragraph 4, of the Rome Statute.² It is an operationally independent office reporting to the President of the Assembly.

2. The purpose of the IOM is to provide meaningful oversight of the Court through its mandate to conduct inspections and evaluations at the request of the Assembly or its Bureau, and to undertake at its own discretion investigations into reports of suspected misconduct, including serious misconduct, or unsatisfactory behaviour concerning elected officials, staff members, and other Court personnel.

3. The IOM became operational in late October 2015 with the appointment of its first permanent Head of Office. Since then, the IOM has continued to enhance oversight at the Court by carrying out its mandate with professionalism, impartiality and efficiency.

II. Policy matters

A. Review of the Mandate of the IOM

4. During the reporting period, the Hague Working Group of the Assembly continued its Review of the work and Operational Mandate of the IOM, under the facilitation of Ambassador Rodriguez Veltzé (Bolivia). The first meeting of the Working Group took place on 10 July 2019, at which the Head of the IOM was invited to provide his views to State Parties regarding potential changes in the Operational Mandate of the IOM. The Head of the IOM suggested areas where the Mandate could be reviewed to streamline the IOM's reporting obligations and operational independence. The States Parties invited the IOM to draft a revised operational mandate for consideration.

5. The IOM prepared the requested draft, which was circulated in advance of the second meeting of the Working Group on 12 September 2019. The proposed amendments generally covered the following areas: reflecting the amendments to rule 26 of the Rules of Procedure and Evidence; granting the IOM explicit authority to investigate former elected officials following the end of their service for the Court; requiring the Court and the IOM to balance and take into account competing interests and providing for possible mechanisms to resolve disagreements; streamlining of the investigation and evaluation mandate; and clarifying the accountability regime of IOM staff members. At this second meeting, State Parties requested the proposed revised mandate be shared with the Court organs to receive their comments in anticipation of the following Working Group meeting.

6. Comments from the Presidency and the Prosecutor were not received in time to be considered at the third meeting of the Working Group, which took place on 17 October 2019. The President of the Court participated in the meeting and shared with State Parties some observations regarding the new Rule 26 and the IOM mandate with respect to elected officials, which were noted by the States. The final report from the facilitation will be submitted to the Assembly.

² *Ibid.*

B. Legality of the mandate of the IOM

7. In February 2018, the International Criminal Court Bar Association (ICCBA) published a paper where it opined that the IOM was illegal because the ASP resolutions establishing it had not been promulgated by way of a Presidential Directive. This argument was repeated in different contexts, including in filings before the International Labour Organization Appeals Tribunal (ILOAT), arguing that disciplinary decisions based on IOM investigations should be set aside on that basis. While the IOM found it difficult to accept that an ASP resolution creating a body contemplated by the ICC Statute could only be lawful if promulgated by the President of the Court, which would in essence give the ICC President a *de facto* veto to any ASP resolution on the subject, the IOM nevertheless retained the services of a specialised legal consultant to examine the arguments presented by the ICCBA on the issue. The consultant found that the IOM did not lack a legal basis to operate even in the absence of Presidential Directive formally promulgating the relevant ASP resolutions. The complete legal opinion was circulated to State Parties in May 2019.

8. On 16 May 2019, the President of the Court wrote to the President of the Assembly on this issue, upon the latter's invitation, and unequivocally stated that "[t]he IOM has all the powers that the ASP has given to it" in accordance with the Rome Statute, and that "[t]o that extent, no Presidential Directive is required" to give force to the resolutions.

C. Harmonisation of the IOM mandate with existing Court rules and regulations

9. The IOM has continued to coordinate with the Court with a view to harmonising and updating the Court's regulatory framework to reflect the IOM's Mandate. The IOM has noted how portions of the Court's regulatory framework give other bodies concurrent jurisdiction to conduct investigations into possible misconduct, and explored the practical repercussions and potential legal exposure in that regard. The different organs of the Court have been receptive to these concerns and have committed to working on reviewing and revising the relevant documents. Issues to be discussed include whether the IOM should have exclusive jurisdiction over any misconduct investigation, and the role of the Disciplinary Appeals Board in the investigation of cases of sexual and other forms of harassment, as provided for by the current anti-harassment policy of the Court.

10. During this reporting period, the Registry Legal Office has consulted the IOM and drafted a revised administrative instruction on the disciplinary process, to better reflect the various aspects of the process and clarify the responsibilities of different bodies. This revised instruction is currently being reviewed by the IOM. The IOM is also, in parallel, finalising an Investigation Policy aimed at formalising the rights and responsibilities of all those involved in investigations, and establishing governing principles for all misconduct investigations at the Court. Together, these two documents will provide a more robust framework, modelled upon those of various United Nations Organizations, for dealing with all stages of reviewing misconduct allegations, from reporting to investigation and possible discipline. Formal consultations within the Court will follow the finalization of the drafts.

11. The IOM is also aware of work undertaken within the Registry Legal Office, in collaboration with the Staff Union Council and Human Resources Section, regarding revisions of the policy against harassment, including sexual harassment, and looks forward to participating in the revision of this policy with a view to bringing it line with current best practices in international organizations.

III. Summary of IOM activities

A. Investigation

1. Statistics

12. The IOM receives reports of potential misconduct. If the allegation falls within its mandate, *i.e.* if the facts alleged would actually amount to misconduct, it can conduct a preliminary review of the allegation and formally record the matter as a case. A preliminary review assesses whether the allegation merits a full investigation, generally by assessing its credibility, materiality, and verifiability.

13. In addition, the IOM also agrees to meet with personnel (or former personnel) who wish to discuss a potential matter and seek the IOM's guidance in terms of the applicable process should a formal complaint be made. If a consultation does not lead to a formal complaint, it is recorded separately as a "consultation" for the purposes of the IOM's statistics.

14. During the reporting period, the IOM received a total of 43 matters, as detailed in Table 1 below:

Table 1: IOM's Investigative Caseload, 1 October 2018 to 30 October 2019

Matters received (total: 43)	<ul style="list-style-type: none"> • Consultations: 11 • New cases: 32
New Cases Outcome (total: 32)	<ul style="list-style-type: none"> • Cases closed before Preliminary Review: 5 • Cases closed after Preliminary Review: 13 • Preliminary Reviews Leading to Investigation: 7 • Cases where Preliminary Review remains pending: 7
Investigations (total: 7)	<ul style="list-style-type: none"> • Completed: 3 (details below) • Pending: 4

15. The five cases closed before a Preliminary Review included: i) two cases that were sent back to the Registrar for lack of capacity by the IOM to review them; ii) one case that was found to fall outside the mandate of the IOM, as it did not allege misconduct by ICC personnel or elected officials; iii) one case that was referred for informal resolution with the consent of the complainant; and iv) one case concerning an elected official which was received before the amendment to Rule 26 of the Rules of Procedure and Evidence, and is therefore being reviewed by the Presidency.

16. For the thirteen cases closed after a Preliminary Review, this was typically on the basis that the IOM did not find the allegation to be sufficient credible, material, or verifiable to warrant a full investigation. While these cases were closed without a full investigation, three gave rise to separate recommendations to the relevant Head of Organ. Two such cases alleged inappropriate behaviour against the same OTP staff member, including one allegation of sexual harassment. However, the complainant (a former personnel) did not want to pursue the allegation because their name would need to be disclosed in the process. On the facts of that specific case, the IOM would not have been able to conduct an investigation while respecting the due process rights of the accused staff member without disclosing identifying information of the complainant. The IOM, therefore, rather than investigating the matter, informed the Prosecutor generally of the allegations and recommended that the Prosecutor remind the staff member in question of his obligations under the Court's Regulatory Framework, while respecting his privacy rights and noting that no formal investigation was conducted. The complainant had agreed to this course of action. The IOM also notified the Registrar, in another case, that while it did not find a conflict of interest with respect to one staff member and their association with their former employer, it recommended that measures be taken to mitigate the risk of a perceived conflict of interest from other staff.

17. In two cases, despite having found that an investigation may have been warranted, the IOM closed the case on the basis that it concerned individuals who had left or were soon to leave the Court. Accordingly, the IOM exercised its discretionary authority to not investigate those cases with a view to the efficient use of its resources.

2. Breakdown of Cases

18. Table 2 below provides a breakdown of the new cases by categories of misconduct.

Table 2: Breakdown of cases by type of misconduct

<i>Type of misconduct</i>	<i>Number of cases</i>
Alleged misconduct by elected official *	4
Harassment and/or abuse of authority *	8
Conflict of interest	2
Recruitment irregularities	2
Breach of confidentiality	1
Retaliation *	1
Fraud (including entitlement fraud)	4
Sexual harassment and/or sexual exploitation and abuse	5
Violation of local laws	2
Other unsatisfactory conduct *	3
Total	32

* Pending investigation within the relevant category of cases.

3. Elected Officials

19. During this reporting period, the IOM considered four cases of alleged misconduct or serious misconduct by Elected Officials. As noted above, one such case is currently being dealt with by the Presidency. Another case which was closed and not investigated by the IOM is referred to in the Confidential Annex to this Report. Two cases remain pending.

4. Completed Investigations

20. The IOM investigated one case where a staff member had been arrested and charged by the local prosecutor for domestic violence, and was conditionally discharged. The local prosecutor informed the IOM that the victim's spouse "showed various signs of physical violence." In its report dated 20 February 2019, the IOM concluded that there was sufficient evidence to conclude that the Staff Member had breached applicable local laws related to assault and that he had failed to report this arrest and charge to the Court, despite being aware of his obligation to do so. The IOM accordingly recommended to the Registrar that appropriate disciplinary action be taken with respect to the staff. The Registrar issued the disciplinary measure of a **written censure** to the Staff Member.

21. The IOM also investigated a case concerning a driver who was involved in a car accident injuring himself as well as a third person, and causing serious damage to ICC property. The IOM found that the driver had diverted from his mission without authorization and had significantly exceeded the applicable speed limits. The IOM found that it was a "minor miracle" that no individual had been more seriously hurt or killed and that there was sufficient evidence to conclude that the Staff Member had violated applicable local laws and had failed in his duties to use ICC property and equipment for official purposes only. The IOM recommended to the Registrar on 9 April 2019 that appropriate disciplinary action be taken with respect to the staff member. The disciplinary process in that case is **pending** and should be completed shortly.

22. The IOM also received an allegation of sexual harassment from a former intern at the OTP, who alleged that a senior OTP Staff Member behaved towards them in a manner that amounted to sexual harassment and abuse of authority. Specifically, the complaint alleged a series of meetings and communications, which included conversations of a personal nature, comments deemed sexually suggestive, and a contemporaneous offer from the senior staff member to consider the intern for a forthcoming paid junior position on their team and under their supervision. The IOM completed its investigation and transmitted its findings, conclusions and recommendations to the Prosecutor on 17 September 2019.

B. Evaluation

23. An evaluation is a rigorous, systematic and objective assessment of the relevance, appropriateness, effectiveness, efficiency, impact and sustainability of a project or programme, based upon agreed criteria and benchmarks.

24. At the request of the ASP at its seventeenth session in December 2018, the IOM conducted an evaluation “of the administration of the Secretariat of the Trust Fund for Victims (STFV) with a view to increasing its efficiency and effectiveness in implementing its mandate as set out in resolution ICC-ASP/3/Res.7.” The purpose of the evaluation was to provide the ASP and the Board of Directors of the Trust Fund for Victims, who performs an oversight role towards the STFV, with an independent assessment of the activities of the Secretariat, focusing on the implementation of reparations, the extent to which these activities are effective and coordinated with internal stakeholders, lessons learnt and areas that need improvement.

25. Following initial formal consultations with relevant stakeholders, including the President and one of the Vice Presidents of the ASP, the TFV (Chair of the Board of Directors and Executive Director) and the Registrar, as well as the review of significant amount of materials related to the TFV, the IOM prepared Terms of Reference for the evaluation in February to conceptualise the focus and scope of the evaluation.

26. An examination of the key challenges facing the TFV, as well as the limited time given and resources available to the IOM to conduct this evaluation, informed the decision to focus the evaluation on the implementation of the reparation mandate of the TFV. The evaluation looked at the Secretariat’s role in the reparations mandate; human and financial resources available to carry out said mandate; the activities/projects and outputs produced to date; responsiveness to Court-ordered reparations; internal organisation and coordination with the Court stakeholders; resource mobilisation capability and efforts; and the oversight mechanisms of the STFV in terms of accountability, reporting and communication on reparation activities and results.

27. Given the limited resources available to the IOM, the evaluation was limited to a high-level review of the issues identified above, and sought to clarify, analyse and categorise the various challenges faced by STFV, and by extension the Court, in implementing reparations, and to identify where further work and analysis may be necessary. The completion of the evaluation was delayed given the IOM’s limited capacity, including the absence on maternity leave of the IOM’s sole evaluation expert. A consultant was hired for a limited period to assist in the completion of the evaluation.

28. The evaluation report will be shared in advance of the eighteenth session of the ASP, following the receipt of comments from the Secretariat of the TFV and its Board of Directors.

29. The IOM also completed, on 15 February 2019, its Operational Evaluation of Courtroom Audio-visual Equipment Practices and Procedures, performed at the request of the Registrar. The IOM is awaiting the Registrar’s response to the IOM’s recommendations before fully finalizing its report.

C. Inspection

30. An inspection is a special, unscheduled, on-the-spot verification made of an activity directed towards the resolution of problems which may or may not have been previously identified. No inspection was conducted during the reporting period.

IV. IOM staffing and administrative matters

A. Staffing

31. Assembly resolution ICC-ASP/12/Res.6 set out a staffing structure for the IOM comprising of a P5 Head of IOM, a P4 Senior Evaluation Specialist, a P2 Associate Investigator, and one GS-OL Administrative Assistant.

32. While the IOM is now fully staffed as per its operational mandate, it is facing significant challenges in meeting its workload. The investigation function poses a particular challenge in this respect, since its workload by its very nature cannot be accurately predicted in advance, and even more so in a setting where this function is still relatively new. As indicated above, the IOM investigation function has faced a heavy workload, with an increase of 59% from last reporting period (where 27 matters were reported, including both cases and consultations).

33. To meet this heavy workload, the IOM sought the assistance of consultants or staff from United Nations Agencies on loan to conduct some of its investigations and preliminary reviews. The IOM further requested support from the President of the ASP, who asked the Registrar to support the IOM in securing the recruitment of a Senior Investigator from 1 April to 31 December 2019. The recruited staff member only started on 14 June 2019. The IOM then asked the Registrar, after having received the approval of the President of the ASP, if the unused funds from that position for the period 1 April to 14 June 2019 could be used to fund a second Senior Investigator position. The Registrar agreed, and with the Senior Evaluation Specialist on extended maternity leave, the IOM was able to recruit a second Senior Investigator from 15 July to 31 December 2019. These two Senior Investigators conducted the majority of the cases reported, in particular after April 2019, when the P2 Associate Investigator went on maternity leave as well.

34. In addition, the absence of the Senior Evaluation Specialist required the IOM to recruit a consultant to assist with the completion of the evaluation of the Secretariat of the Trust Fund for Victims (STFV), as detailed above.

35. Some of the allegations of misconduct reported to the IOM are delicate and sometimes involve senior staff members, therefore requiring significant skill and experience. The amendment of rule 26 of the Rules of Procedure and Evidence, giving IOM exclusive jurisdiction to receive allegations against elected officials, necessitates long-term solutions to the challenges arising from the IOM's staffing structure. Indeed, the External Auditor raised some concerns about the modality in which the IOM was able to find additional resources, and recommended that, in order to allow for some flexibility for small programmes such as that of the IOM to deal with urgent additional needs, the Court should "adapt financial rules which currently prohibit transfer between Major Programmes."

36. The IOM has requested, in its budget proposal for 2020, a classification of a fixed-term position of a Senior Investigator at P4 level and additional consultancy funds to be able to meet unexpected workload without resorting to managerial arrangements that may contravene the financial rules, as noted by the External Auditor, and also to safeguard the IOM's operational independence. Given that there is no reason to believe that the workload of the investigative function will decrease in 2020, the IOM and the Court could find themselves in the same situation next year.

B. Administrative matters

37. During this reporting period, the IOM participated in a meeting of the Heads of Investigative Bodies of the UN to discuss issues related to the UN-wide response to Sexual Harassment and Sexual Exploitation and Abuse. These discussions are important to ensure that the Court is in line with other UN bodies on these issues, including the revision of the IOM's operational policies. The IOM also met with the Registrar of the ILOAT and with other UN oversight colleagues to discuss the Tribunal's trends and approaches with respect to disciplinary matters. The information gathered at this meeting has been shared with the legal advisors of each Organ.

38. The IOM has also continued to assist in the achievement of the broader objectives of the Court as in previous years. It continues to assist the Human Resources Section by delivering induction training to new staff on the Court's disciplinary regime. In addition, while on an investigative mission in the field, the IOM took the opportunity to provide awareness sessions to the field staff modelled on the investigation awareness training conducted at Headquarters during the last reporting period. The limited capacity of the IOM prevents it from being able to conduct further awareness-raising activities, which would be important given that the IOM is still relatively new at the Court and many staff remain unfamiliar with its mandate.

39. The IOM also contributed to professionalisation and normative work by participating to a meeting of the United Nations Evaluation Group (UNEG) where the IOM's renewed submission for membership was well received. As a result, the ICC is now a full member of UNEG.
