

Resolution ICC-ASP/9/Res.5

Adopted at the 5th plenary meeting, on 10 December 2010, by consensus

ICC-ASP/9/Res.5 Independent Oversight Mechanism

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,

Recalling its resolution ICC-ASP/8/Res.1 establishing the Independent Oversight Mechanism,¹

Welcoming the report of the Bureau on the Independent Oversight Mechanism,²

Welcoming the appointment of the Temporary Head of the Independent Oversight Mechanism,

Welcoming the decision of the Bureau to appoint the Selection Panel to carry out the recruitment procedure for the Head of the Independent Oversight Mechanism,³

1. *Decides* that, pending a decision on the operationalization of the inspection and evaluation functions of the Independent Oversight Mechanism, this mechanism shall perform only its investigative function and consist of two staff members, i.e. one staff member who will head the office at the P-4 level and one further staff member at the P-2 level. If the Assembly decides to operationalize the inspection and evaluation functions of the Independent Oversight Mechanism, it shall also review, as it deems necessary, the staffing capacity and grade of the head and other staff members. If the evaluation and inspection functions are not operationalized, the staffing capacity and grades of the investigative function of the Independent Oversight Mechanism may be reviewed by the Assembly once the mechanism has been operational for a reasonable period of time, in accordance with established procedure;
2. *Decides* that the investigative function of the Independent Oversight Mechanism shall operate in accordance with the provisions of the annex to this resolution (Operational Mandate) and that the Operational Mandate shall be kept under review;
3. *Invites* the Temporary Head and, once appointed, the Head of the Independent Oversight Mechanism, to continue to work on the development of functions, regulations, rules, protocols and procedures of the investigative function of the Independent Oversight Mechanism and to submit them to the Assembly for approval at its next session;
4. *Invites* the Court to continue to work with the Temporary Head and, once appointed, the Head of the Independent Oversight Mechanism, on the amendments to existing legal instruments, with a view of the adoption, at the next session of the Assembly, of all the amendments necessary for the full operationalization of the investigative function of the Independent Oversight Mechanism;
5. *Reiterates* its request, as contained in resolution ICC-ASP/8/Res.1, that a memorandum of understanding be concluded between the Court and the United Nations Office of Internal Oversight Services;

¹ *Official Records ...Eighth session... 2009* (ICC-ASP/8/20), vol. I, part II.

² Report of the Bureau on the Independent Oversight Mechanism (ICC-ASP/9/31).

³ Decisions of the fifteenth meeting of the Bureau of 19 October 2010: <http://www.icc-cpi.int/Menu/Go?id=98da805c-eebf-42cc-ab97-bfe8a714f4b1&lan=en-GB>.

6. *Welcomes* the decision of the Bureau to commission an assurance mapping study into the existing oversight mechanisms of the Court⁴ as a step forward towards a decision on the operationalization of the inspection and evaluation functions within the oversight mechanism and, in this regard, *expresses* its intention to consider the findings thereof also in the context of the discussion on the overall governance framework of the Court, including in the context of the study group on governance;

7. *Decides further* that the Bureau shall prepare a report on the operationalization of the investigative function of the Independent Oversight Mechanism, including staffing issues, and the operation of the inspection and evaluation functions within the oversight mechanism, including the terms of reference, staffing issues and related financial implications, with a view to a decision on its adoption at the next session of the Assembly;

8. *Decides* to delegate to the Bureau to decide, should the need arise, upon consultation with the United Nations Office of Internal Oversight Services and with due regard to the memorandum of understanding to be concluded by the Court, on whether to extend the mandate of the Temporary Head of the Independent Oversight Mechanism, after taking into consideration possible budgetary implications of that decision and, if necessary, consulting the Committee on Budget and Finance.

⁴ Decisions of the sixteenth meeting of the Bureau of 28 October 2010: <http://www.icc-cpi.int/Menus/Go?id=4caf7ae0-8500-4546-88e3-5ca56e077f09&lan=en-GB>.

Annex

Operational Mandate of the Independent Oversight Mechanism

The Independent Oversight Mechanism shall assume the functions prescribed in the Assembly of States Parties resolution ICC-ASP/8/Res.1,¹ as amended by the present resolution and subject to the modalities defined below, with a view to ensuring effective and meaningful oversight of the International Criminal Court (hereinafter “the Court”):

I. Function

1. The purpose of the Independent Oversight Mechanism is to ensure the effective and meaningful oversight of the Court through the exercise of the following function:

Investigations

2. The Independent Oversight Mechanism may receive and investigate reports of misconduct² or serious misconduct, including possible unlawful acts by a judge, the Prosecutor, a Deputy Prosecutor, the Registrar and the Deputy Registrar of the Court (hereinafter “elected officials”), all staff subject to the Staff and Financial Regulations and Rules of the Court (hereinafter “staff” or “staff member”) and all contractors and/or consultants retained by the Court and working on its behalf (hereinafter “contractors”).³

3. All reports of misconduct or serious misconduct, including possible unlawful acts, made against an elected official, staff member or contractor shall, if received by the Court, be submitted to the Independent Oversight Mechanism.⁴ Any person submitting such reports may also elect to submit a copy to the Presidency of the Court for informational purposes only. Likewise, staff members submitting a report against other staff members may elect to submit a copy of their report to the Prosecutor or Registrar, as appropriate.

4. The results of investigations conducted by the Independent Oversight Mechanism shall be transmitted to the Presidency, Registrar or Prosecutor of the Court, as appropriate, together with recommendations for consideration of possible disciplinary or jurisdictional action.

5. The Independent Oversight Mechanism will not investigate contractual disputes or human resource management issues, including work performance, conditions of employment or personnel-related grievances.

6. The Independent Oversight Mechanism will not investigate offences under article 70 of the Rome Statute.

¹ Establishment of an Independent Oversight Mechanism, adopted at the 7th plenary meeting on 26 November 2009, by consensus. See: *Official Records ...Eighth session... 2009* (ICC-ASP/8/20), vol. I, part II.

² Misconduct, also described in the Staff Rules as “unsatisfactory conduct”, which includes any act or omission by elected officials, staff members or contractors in violation of their obligations to the Court pursuant to the Rome Statute and its implementing instruments, Staff and Financial Regulations and Rules, relevant administrative issuances and contractual agreements, as appropriate.

³ The term “contractor” or “consultant” does not include an “intermediary”, who is broadly defined as an individual or entity that facilitates contact between the Court and a witness, victim or other source of information. Therefore the scope of the Independent Oversight Mechanism does not extend to the activities of an “intermediary” and any reported misconduct received by the mechanism regarding an “intermediary” shall be duly referred to the relevant organ head for their information.

⁴ The Independent Oversight Mechanism shall duly consider all reported misconduct claims submitted to it, however, the mechanism retains discretionary authority to decide which matters to investigate. Those matters which the Independent Oversight Mechanism does not intend to investigate will be referred to the relevant entity for their appropriate action.

II. Appointment – Head of office

7. All staff of the Independent Oversight Mechanism are considered staff members of the Court. As such, their appointment, conditions of employment and standard of conduct must be in accordance with the Staff and Financial Regulations and Rules and relevant administrative issuances of the Court. Therefore, as part of the Court, the staff of the Independent Oversight Mechanism shall enjoy the same rights, duties, privileges and immunities and benefits of all staff members, and any administrative requirements shall be facilitated by the Registry.

8. The Head of the Independent Oversight Mechanism shall be selected by the Bureau of the Assembly in coordination with the Court.

9. The Head of the Independent Oversight Mechanism may be removed only for cause and by the decision of the Bureau of the Assembly.

10. Evaluation of the work performance of the Head of the Independent Oversight Mechanism shall be undertaken by the President of the Assembly.

11. Any complaints regarding the actions of the Head of the Independent Oversight Mechanism shall be submitted to the President of the Assembly, who shall assess such complaints for impact on any investigation and the possibility of investigative misconduct, as well as any performance implications.⁵ The President of the Assembly shall submit a copy of all such complaints and a report of the outcome thereof to the heads of organs. Such reports will be treated as confidential.

III. Mode of operation

A. Operational independence

12. The Independent Oversight Mechanism shall exercise operational independence under the authority of the President of the Assembly.

13. In the conduct of its duties, and in accordance with article 112, paragraph 4, of the Rome Statute, the office shall have the authority to initiate on a reasonable basis, carry out and report on any action which it considers necessary to fulfil its responsibilities with regard to investigations without any hindrance or need for prior clearance, except as provided in paragraphs 20 to 25 and as set forth in the present resolution.

14. The Independent Oversight Mechanism may accept requests for its services from the Presidency, Registrar or Prosecutor of the Court, as appropriate, and act with maximum dispatch but it may not be prohibited from carrying out any action within the purview of its mandate.

15. The staff of the Independent Oversight Mechanism shall have direct and prompt access to all elected officials, staff and contractors, and shall receive their full cooperation. Failure to provide such cooperation, without reasonable excuse, shall be duly reported upon and may result in disciplinary action.

16. Additionally, staff of the Independent Oversight Mechanism shall have access to all (electronic or otherwise) Court records, files, documents, books or other materials, assets and premises, and shall have the right to obtain such information and explanations as they consider necessary to fulfil their responsibilities.

⁵ Investigative misconduct is any material deviation from prescribed norms, procedures or practices in an investigation that is perpetrated intentionally or with reckless disregard for proper practices. In some instances, investigative misconduct may also constitute unsatisfactory conduct as provided for in the Staff Regulations and Rules of the Court and such conduct shall be duly addressed within the existing disciplinary structure of the Court by the Registrar upon the recommendation of the President of the Assembly of States Parties.

17. Notwithstanding the provisions outlined in paragraphs 15 and 16 above, the right of access granted to the Independent Oversight Mechanism shall be subject to confidentiality considerations envisaged by the Rome Statute in the context of judicial proceedings, a pre-existing obligation of confidentiality to the originator of the information or document, the safety and security of witnesses, victims and third parties, and the protection of national security information of State Parties.⁶

18. The Independent Oversight Mechanism shall notify the Presidency, Registrar or Prosecutor of the receipt of a report that merits an investigation of misconduct or serious misconduct, including possible unlawful acts, by staff and contractors under their respective authority. Such notification does not include revealing the identity of the information source or any such circumstance which might lead to its identification, and such notification must be treated as strictly confidential. Any unauthorized disclosure of this information or reprisal action taken against any person suspected of having submitted a report, provided information or otherwise cooperated with the Independent Oversight Mechanism shall constitute misconduct, for which disciplinary measures may be imposed.

19. Notwithstanding its operational independence, the functions of the Independent Oversight Mechanism shall not affect the Presidency, Registrar or Prosecutor's power to impose disciplinary measures pursuant to the relevant regulations and rules.

20. The authority of the Independent Oversight Mechanism to initiate a case on its own motion does not in any way impede the authority or independence granted by the Rome Statute to the Presidency, judges, Registrar or Prosecutor of the Court. In particular, the Independent Oversight Mechanism fully respects the notions of judicial and prosecutorial independence and its activities will not interfere with the effective functioning of the Court.

21. In case of an objection by a head of organ that an investigation initiated by the Independent Oversight Mechanism on its own motion would undermine judicial or prosecutorial independence of that organ,⁷ the head of the organ shall notify the Independent Oversight Mechanism and the Independent Oversight Mechanism shall take into consideration these concerns.

22. Should the Independent Oversight Mechanism, notwithstanding such concerns, still consider that there is a need for an Independent Oversight Mechanism investigation, the matter of whether an Independent Oversight Mechanism investigation would proceed shall be determined by a third party with judicial or prosecutorial experience appointed by the Bureau.⁸

23. In the event that the third party determines that an Independent Oversight Mechanism investigation would not undermine judicial or prosecutorial independence of the relevant organ, the Independent Oversight Mechanism shall proceed with the investigation.

24. If, however, the third party determines that the Independent Oversight Mechanism investigation would undermine judicial or prosecutorial independence of the relevant organ, the matter in question shall be subject to an investigation by the relevant organ head, who shall conduct its own investigation of the matter and submit a report to the Independent Oversight Mechanism. Should the Independent Oversight Mechanism not be satisfied with the investigation or its outcome, it can seek consultations with or clarifications from the relevant organ head. Should the matter not be resolved to the satisfaction of the Independent Oversight Mechanism, it can apply its oversight powers to investigate the organ head for failing to properly address the specific concerns of the Independent Oversight Mechanism and it can bring the issue, as appropriate, to the attention of the Assembly.

25. Should the outcome of an Independent Oversight Mechanism investigation of the organ head be a finding that the investigation of the staff or contractors under their respective authority was not conducted properly, the matter shall be referred back to the

⁶ This includes articles, 54, 57, 64, 68, 72 and 93 of the Rome Statute.

⁷ Judicial and prosecutorial independence is regarded as the independent performance of judicial or prosecutorial functions.

⁸ The procedural framework, including confidentiality provisions, concerning the implementation of this paragraph shall be set out in the Operational Manual of the Independent Oversight Mechanism.

third party, who shall determine whether the Independent Oversight Mechanism should proceed with the initial investigation.

B. Confidentiality

26. The Independent Oversight Mechanism may receive from any person reports of misconduct or serious misconduct, including possible unlawful acts, by elected officials, staff members and contractors. These reports shall be received and handled in complete confidence. The procedures and related arrangements described below are designed to protect individual rights as well as to protect against reprisals for reporting:

(a) Staff of the Independent Oversight Mechanism shall be responsible for safeguarding the reported allegations from accidental, negligent or unauthorized disclosure, as well as for ensuring that the identity of the staff members and others who submitted such reports to the office is not disclosed, except as otherwise provided in the present resolution;

(b) Unauthorized disclosure of the said reports by staff of the Independent Oversight Mechanism shall constitute misconduct, for which disciplinary measures may be imposed;

(c) The identity of a staff member or other person who submits reports to the Independent Oversight Mechanism may only be disclosed by the office where such disclosure is necessary for the conduct of proceedings, whether administrative, disciplinary or judicial and only with their consent. However, such protection will not be provided when a staff member or other person discloses their own identity to a third party, including the Court, or submits a knowingly false or wilfully reckless report to the office;

(d) Confidential reports of misconduct or serious misconduct, including possible unlawful acts, may be used in the official reports of the Independent Oversight Mechanism, without attribution directly or indirectly as to the source or identity of the individuals involved or implicated;

(e) No action may be taken against staff or others as a reprisal for submitting a report, providing information or otherwise cooperating with the Independent Oversight Mechanism; and

(f) Disciplinary proceedings shall be initiated and disciplinary action shall be taken in respect of any elected official or staff member who is proven to have retaliated against a staff member or other person who has submitted a report, provided information or otherwise cooperated with the Independent Oversight Mechanism.

C. Due process

27. Investigations shall respect the individual rights and all conditions of employment for elected officials, staff members and contractors, and shall be conducted with strict regard for fairness and due process for all concerned.

28. The Independent Oversight Mechanism conducts preliminary fact-finding administrative investigations and will operate in support of the existing disciplinary structures of the Court.

29. Investigations into reported misconduct or serious misconduct, including possible unlawful acts, by contractors will be undertaken pursuant to the terms of the contract where stipulated, otherwise the Independent Oversight Mechanism will act in accordance with its own established procedures reflecting recognized best practices.

30. The transmittal of reports of misconduct or serious misconduct, including possible unlawful acts, to the Independent Oversight Mechanism with knowledge of its falsity or with wilful disregard of its truth or falsity shall constitute misconduct, for which disciplinary measures may be imposed.

IV. Jurisdictional action

31. Where criminal acts by elected officials, staff members or contractors of the Court are reasonably suspected to have occurred, the Independent Oversight Mechanism shall hand over the results of the investigation to the Court. The Independent Oversight Mechanism may recommend that the Court refer the matter for possible criminal prosecution to relevant national authorities, such as those of the State where the suspected criminal act was committed, the State of the suspect's nationality, the State of the victim's nationality and, where applicable, of the host State of the seat of the Court.

32. The Independent Oversight Mechanism may recommend to the relevant elected officials of the Court that privileges and immunities be waived in accordance with article 48, paragraph 5, of the Rome Statute and, if applicable, the provisions of the Agreement on the Privileges and Immunities of the International Criminal Court, as well as the Headquarters Agreement between the International Criminal Court and the host State.

V. Reporting procedures

33. The Independent Oversight Mechanism will submit quarterly activity reports directly to the Bureau and will submit on an annual basis a consolidated report of its activities to the Assembly via the Bureau. Such reports shall respect the confidentiality of staff members, elected officials and contractors. All reports shall be copied to the Presidency, the Prosecutor, the Registrar and the Committee on Budget and Finance.

34. The Court will have a reasonable opportunity to respond in writing to the reports submitted by the Independent Oversight Mechanism, and such written responses shall be transmitted to the Bureau and the Assembly and copied to the Head of the Independent Oversight Mechanism and the Committee on Budget and Finance.

VI. Disciplinary follow-up

35. The Presidency, Registrar or Prosecutor, as appropriate, shall provide the Head of the Independent Oversight Mechanism twice yearly with written updates regarding the follow-up of disciplinary procedures involving cases previously investigated by the Independent Oversight Mechanism, together with information, if any, on the application of sanctions made in individual cases.

VII. Budget and personnel

36. By resolution ICC-ASP/8/Res.1,⁹ the Assembly established the Independent Oversight Mechanism as a separate and distinct new major programme budget to recognize and ensure its operational independence.

37. Future programme budget proposals for the provision of adequate resources for the effective functioning of the Independent Oversight Mechanism shall be submitted by the Head of the office for consideration by the relevant Court entities according to established procedures for final review and approval by the Assembly.

38. The Head of the Independent Oversight Mechanism shall have delegated certifying authority for all of the accounts of the office, which are subject to internal and external auditing established for the Court.

39. In keeping with the need for operational independence, the Head of the Independent Oversight Mechanism shall exercise the degree of latitude and control over the personnel and resources of the office, consistent with the Staff and Financial Regulations and Rules of the Court, that is necessary to achieve the objectives of the office.

⁹ *Official Records ... Eighth session ... 2009* (ICC-ASP/8/20), vol. I, part II.