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Annual report of the Head of the Independent Oversight Mechanism

Executive summary

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 at its own discretion into reports received of suspected misconduct, serious misconduct, or unsatisfactory behaviour concerning elected officials, staff members, and other Court personnel.

This report consolidates the quarterly activity reports on its operations provided directly to the Bureau by the IOM during the period 1 October 2016 to 30 September 2017. The IOM has received full cooperation and assistance from the Court during the period in question and is now fully operational with respect to its investigation, inspection and evaluation mandates.

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

I. Introduction

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.² It is an operationally independent office reporting to the President of the Assembly of States Parties.

2. The purpose of the IOM (the office) 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 at its own discretion into reports received of suspected misconduct, 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. The IOM is required to submit quarterly activity reports on its operations to the Bureau of the Assembly. This annual report consolidates the quarterly activity reports provided directly to the Bureau by the IOM during the period October 2016 to 30 September 2017.

II. IOM staffing and administrative matters

A. Staffing

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

5. With the exception of the Administrative Assistant, who took up post in late 2016, the Senior Evaluation Specialist and the Associate Investigator took up post during 2017. The Mechanism is now fully staffed. As noted previously, the staffing strategy of the IOM is based around the employment of a small core of established staff augmented by specialist inspection, evaluation and investigation staff as and when needed. This approach will enable the office to react in an efficient and effective manner to changing and demand led activities.

B. Administrative matters

6. IOM operational manuals have been developed for investigation, inspection and evaluation activities and in order to ensure both accountability and transparency have been made available widely. Office procedures have also been established to guide and govern interactions with the organs of the Court so as to ensure the independence of the Mechanism whilst also ensuring an effective and efficient means of working.

7. The office has continued to work closely with the Court to assist in the revision of the Court's Whistleblowing and Whistleblower Protection Policy and to ensure that the role of the IOM in advising on, receiving and acting on reports of misconduct and/or retaliation is clearly stated and communicated.

8. During 2017, the office has revised and promoted a comprehensive internal web-site to communicate the role of the IOM and to facilitate misconduct and retaliation reporting procedures. This communication initiative will continue in 2018 as the Mechanism further develops the implicit preventative side of its mandate.

² Ibid.

III. Investigation activities

A. Activity report

9. Table 1 below summarises investigation activity undertaken during the period of this report by type and activity.

Table 1: IOM investigation activity - Oct 2016 to Sept 2017

	Oct. 2015 - Sept 2016	Oct. 2016 - Sept 2017
Reports of alleged misconduct received:	9	15
- Named source	8	14
- Anonymous	1	1
Preliminary reviews:	9	15
- Undertaken	8	15
- In progress	1	0
Reports not pursued to full investigation:	7	12
- Not within IOM legal mandate	1	1
- Insufficient evidence of misconduct	4	7
- Referred to alternative resolution processes	2	4
Investigations undertaken:	1	3
- Completed	1	2
- In progress	0	1

10. During the period covered by this report, the office received 15 reports of misconduct or unsatisfactory conduct, of which three were referred to it by the Presidency, with the remainder being received directly through the IOM complaint receipt process.

11. The number and categories of complaints received by the IOM are consistent with and on the lower end of what might be expected for an organization of the Court's size. In a significant number of cases, the IOM was able to determine at a preliminary review stage that the allegation did not on its face merit pursuance to investigation. Guidance and other materials on the Court's regulations and definitions concerning misconduct are, as a consequence, being strengthened on the IOM intranet site.

12. In addition to the formal complaints received, the IOM has held many informal preliminary discussions with third parties, a majority of which have enabled non-investigative resolutions to be encouraged. It is encouraging that staff and other personnel have felt confident in the independence and confidentiality of the Mechanism in such cases.

B. Whistleblower policy

13. In conjunction with the above, the IOM has invested staff time during the year into developing comprehensive and practical guidance materials for all categories of staff and personnel concerning the reporting of unsatisfactory conduct and of serious alleged inefficiencies or poor use of resources in Court processes and Procedures. The Mechanism has attempted to reinforce the "economy" objective of its oversight mandate by clearly incorporating such issues into its guidance on the Court's Whistleblowing and Whistleblower Protection Policy, such that inefficiencies can be reported in addition to suspected misconduct.

14. During the period, one complaint alleging retaliation was formally investigated, with one further complaint under receipt at year-end. The IOM has found the Court to be serious in its support for its whistleblowing and protection from retaliation policies.

C. Reconciliation of the IOM mandate and existing Court rules and regulations

15. The IOM investigatory mandate was approved by the Assembly at its twelfth session. This mandate set out clear IOM investigation authority, scope and discretionary authority. However, pre-existing investigation-related authorities and procedures are contained in the Court's regulatory body that in some instances contradict or appear at odds with the IOM specific procedural mandate.

16. One such area is that relating to the administration and receipt of complaints made against elected officials. Articles 46 and 47 of the Rome Statute concern the removal from office of an elected official, as well as disciplinary measures against such persons. Rule 26 of the Rules of Procedure and Evidence (RPE) requires that all complaints made against an elected official should be transmitted to the Presidency, while regulations 119 and 120 of the Regulations of the Court outline the detailed administrative and investigatory procedures to be followed by the Presidency upon receipt of a complaint.

17. In potential contradiction of the above, the IOM investigatory mandate requires that *"all reports of misconduct or serious misconduct, including possible unlawful acts, made against an elected official...shall, if received by the Court, be submitted to the IOM."*³ In addition, the mandate is also clear that *"The IOM may receive and investigate reports of misconduct or serious misconduct, including possible unlawful acts by...elected officials"*.⁴

18. An interim set of procedures for the administration of such cases has been put in place by the IOM and the Court that protects and preserves the intent of both mandates. A suggested means of amending the RPE to seek a more permanent solution has been appended as annex I to this annual report.

D. Administrative procedures for the handling of reports received against Heads of Organs

15. As noted above, the IOM mandate includes the authority to receive and to investigate complaints made against Heads of Organs. The administration and investigation of such complaints requires additional internal protocols and safeguards for both a complainant and the subject of any such complaint, including clarity on standards of evidence required, due process and reporting. During the period in question the IOM has developed and implemented standard internal operating procedures in connection with such cases which are in the process of being made available widely within the Court for transparency purposes. It is not felt that formal revisions to IOM or Court regulations are required.

E. Reporting and communicating investigation activity

16. As a new entity the IOM is cognisant that it lacks a comprehensive reporting and communicating policy that sets out how and what ongoing and completed investigation information is communicated to external third parties⁵, including to members of the press.

17. The IOM wishes to balance the needs of confidentiality with being as transparent as possible. The requirement to maintain absolute confidentiality is a necessary default approach but it can present problems such as the risk of no information being represented as misinformation, or of an investigation not being aided by the receipt of information otherwise outside of the investigators remit to request.⁶

³ *Official Records... Twelfth session... 2013*, ICC-ASP/12/Res.6, para. 33.

⁴ *Ibid.*, para. 28.

⁵ As per its Assembly mandate IOM investigation reports are submitted to the relevant head of Organ or to the President of the Assembly if concerning the President. Once submitted the dissemination of the report is the responsibility of the relevant recipient. Internal IOM procedures also clearly set out what is reported to reporters, subjects and witnesses.

⁶ The IOM has no legal authority to request information from outside of the Court, for instance.

18. In addition, given its size and budget the IOM must necessarily rely on guidance and cooperation with the Court concerning communications activities, including responding to requests for information during ongoing investigation activities. Whilst the IOM is grateful for this assistance, there are instances where this could present a potential conflict of interests to both parties.

19. The IOM would therefore like to have in place an agreed communications policy that sets out what investigation information can be made public and when, and how this can be achieved. This should include whether formal notice of investigation activity⁷ and of investigation closure activity is made publicly available. A formal paper setting out a suggested strategy will be presented to the Bureau for guidance and approval, with any required reporting changes to the IOM mandate being incorporated into the review of the IOM proposed for Assembly consideration at its seventeenth session.

IV. Inspection and evaluation activities requested by the Bureau

20. 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.⁸ 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.

21. The IOM is mandated to undertake both inspections and evaluations of any premises or process at the direct request of the Bureau. No formal requests to the IOM to undertake evaluation activities were received from the Assembly or from the Bureau during the period in question.

22. As previously noted, the IOM does not have an explicit mandate to identify, plan or initiate inspection and evaluation activity of its own accord, nor does the Mechanism have a formal avenue through which the Head of the IOM can communicate what he considers to be areas of potential concern that in his opinion merit inspection and evaluation activity by the IOM.

23. At present where the IOM becomes cognisant of areas that in its opinion merit inspection and evaluation activity, this information is fed into the Court's audit and risk management processes through ad hoc means, as the IOM is independent of the Court's administrative functions.

24. An interim procedure whereby the Head of the IOM notifies the Bureau through its President of areas of concern that the IOM feels should be considered by the Bureau (or possibly the Committee on Budget and Finance, if relevant) for inspection or evaluation work has been developed and will be presented to the Bureau for consideration during the last quarter of 2017. A review of this process will also be incorporated into the review of the IOM proposed for Assembly consideration at its seventeenth session.

V. Internal inspection and evaluation exercises undertaken by the Court

25. Where its resources allow, the IOM is also mandated to conduct inspection and evaluation work at the request of a Head of Organ and to provide coordination, technical guidance, and/or assistance to other internal evaluation activities. In all such cases, the final oversight report is addressed to and owned by the relevant Head of Organ. Assembly resolution ICC-ASP/12/Res.6 requires that the IOM provide the Assembly with high level summary information concerning such internal inspection and evaluation activity.⁹

26. Table 2 below outlines inspection and evaluation work undertaken by the IOM at the request of a Head of Organ during the period in question.

⁷ With appropriate redactions and a distinction between investigations of persons and of processes.

⁸ ICC-ASP/12/Res.6, annex, section B.

⁹ *Ibid.*

Table 2: IOM inspection and evaluation activity at the request of Heads of Organs - Oct 2016 to Sept 2017

<i>Organ</i>	<i>Subject matter</i>	<i>Status</i>
Registry	Inspection of administrative arrangements at Bangui Field Office	Completed
Registry	Inspection of administrative arrangements at Abidjan Field Office	Completed
Registry	Inspection of administrative arrangements at Kinshasa Field Office	Completed
Registry	Inspection of administrative arrangements at Bunia Field Office	Completed
Registry	Inspection of administrative arrangements at Nairobi Field Office	Completed
Registry	Inspection of administrative arrangements at Mali Field Office	Completed
Registry	Inspection of administrative arrangements at Kampala Field Office	Completed
Registry	Follow-up evaluation review from a risk perspective of the "assessment of the ICC's Legal Aid System" report	Completed
Registry	Operational Evaluation of Courtroom Audio Visual Equipment Practices and Procedures	Underway

27. Assembly resolution ICC-ASP/12/Res.6 requires that the IOM provide the Assembly with summary information concerning inspection and evaluation activity undertaken exclusively by the Court (i.e. without IOM involvement).¹⁰ At the time of compilation of this report, the IOM had not received any reports of such activity. Training on what constitutes an inspection and an evaluation and on the requirement to report such activity to the IOM will be stepped up in 2018.

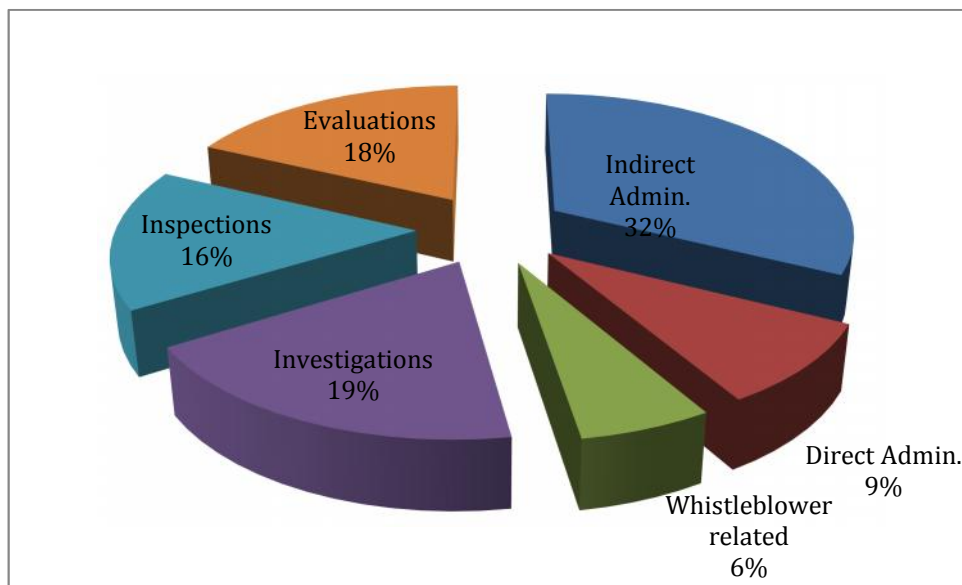
VI. Additional activities undertaken

28. Whilst always having due regard to its operational independence, the IOM is also committed to fulfilling its responsibility to support the objectives of the Court. In this regard and in compliance with the request of the Committee on Budget and Finance that all elements of the Court should explore synergies to improve overall court-wide economy, the IOM has also undertaken other activities where compatible with its mandate and its skillsets and not adjudged to create a potential conflict of interests. These activities have included assisting in the development of the Court's ethics and values strategy, the conducting of induction training on ethics and values to new Court staff, the provision of interpretation and translation assistance with a case-related language, and assistance with relevant Court administrative panels and recruitment exercises.

VII. IOM activity breakdown

29. The following diagram shows a breakdown of IOM staff time by activity during the period in question. Direct administration includes planning, communications, developing standards and guidance notes, and reporting. Indirect administration includes leave, closure days, recruitment and budget work, and office administration.

¹⁰ *Official Records ... Twelfth session ... 2013*, ICC-ASP/12/Res.6, section B.

Diagram 1: IOM staff time breakdown by activity - October 2016 to September 2017

30. The percentage of total staff time spent on indirect administration represents no change from the prior year. However, included in the 2017 figure is a considerable amount of recruitment work, which it is hoped will be available for direct oversight work in 2018.

Annex I

Proposed amendments to rule 26 of the Rules of Procedure and Evidence

A. Introduction

1. The IOM investigatory mandate was approved by the Assembly at its twelfth session.¹ The IOM mandate with regard to the receipt and investigation of claims of misconduct against judges, the Prosecutor, a Deputy Prosecutor, the Registrar and a Deputy Registrar (“elected officials”) does not fully accord with the procedures set out at rule 26 of the Rules of Procedure and Evidence (RPE) of the Court.

2. An interim set of procedures for the administration of such cases has been temporarily put in place by the IOM; however, it is necessary to seek a more permanent solution by aligning the RPE with the IOM’s mandate.

3. To this end, this paper sets out a proposed revision to rule 26. The suggested revision has been prepared by the IOM itself, in view of its expertise on in its own mandate and has been prepared by the IOM with the aim of minimising changes to the existing procedure in rule 26 to the extent that this is possible and practicable. If agreed by the Bureau, the IOM is recommending that the amendment copied as an appendix to this paper be submitted to the Assembly for consideration at its sixteenth session.

B. The IOM mandate

4. As noted below, the IOM mandate allows it to receive and investigate claims of misconduct made against elected officials, including judges. Furthermore, the Assembly resolution requires that all complaints made against elected officials should be passed to the IOM for consideration, and that the IOM has discretionary authority over whether or not to pursue such claims to investigation:

“The IOM may receive and investigate reports of misconduct or serious misconduct, including possible unlawful acts by a judge, the Prosecutor, a Deputy Prosecutor, the Registrar and the Deputy Registrar (hereinafter “elected officials”),...”. (ICC-ASP/12/Res.6, paragraph 28).

“All reports of misconduct or serious misconduct, including possible unlawful acts, made against an elected official...shall, if received by the Court, be submitted to the IOM.” (ICC-ASP/12/Res.6, paragraph 33).

“The IOM 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 IOM does not intend to investigate will be referred to the relevant entity for their appropriate action.” (ICC-ASP/12/Res.6, footnote 8).

C. Rule 26

5. Articles 46 and 47 of the Rome Statute concern the removal from office of a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar, as well as disciplinary measures against such persons. Rules 24 and 25 of the RPE provide a definition of serious misconduct and misconduct for the purposes of articles 46 and 47. Rule 26 of the RPE requires that all complaints made against an elected official should be passed to the Presidency. Regulations 119 and 120 of the Regulations of the Court outline the detailed procedures to be followed by the Presidency upon receipt of a complaint.

¹ *Official Records ... Twelfth session ... 2013* (ICC-ASP/12/20), vol. I, part III, resolution ICC-ASP/12/Res.6.

6. Rule 26 currently states that:

“For the purposes of article 46...and article 47, any complaint concerning any conduct defined under rules 24 and 25 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.” (Rule 26.1, RPE).

“All complaints shall be transmitted to the Presidency, which may also initiate proceedings on its own motion, and which shall, pursuant to the Regulations, set aside anonymous or manifestly unfounded complaints and transmit the other complaints to the competent organ. The presidency shall be assisted in this task by one or more judges, appointed on the basis of automatic rotation, in accordance with the Regulations.” (Rule 26.2, RPE).

D. Proposed revision to rule 26

7. It is proposed that rule 26 be amended to make it clear that all reports of misconduct against elected officials should be sent in the first instance to the IOM, copied to the Presidency. Under the revised wording it would be the IOM that would first undertake a preliminary review of such complaints in order to determine whether a complaint should be pursued to investigation. The IOM would, consistent with its discretionary authority, be permitted to set aside complaints which are anonymous or clearly vexatious. For all complaints not so set aside, it would be the IOM who would then undertake an investigation.

8. The results of an IOM investigation would then be passed to the Presidency, which would retain the decision-making authority concerning whether to set aside an allegation as manifestly unfounded or to pass it on to the competent decision-making organ for consideration (as specified in rules 29-30 of the RPE). In taking such a decision the Presidency would continue to obtain a recommendation from one or more judges based upon their review of the IOM investigation report.

9. The proposed revised rule 26 wording, shown in track changes format alongside the existing wording, is shown as an appendix to this briefing paper. If approved by the Assembly, further subsequent minor amendments to Regulations 119 and 120 of the Court (to be approved by the judges, pursuant to article 52 of the Rome Statute) would then be required.

10. The proposed revision clarifies the fact that all reports of misconduct should be submitted to the IOM for initial review and investigation prior to the submission of an investigation report to the Presidency. After receiving the report of the IOM, the Presidency maintains the responsibility to set aside complaints as manifestly unfounded or forward them to the competent decision-making organ, with the assistance of one or more judges, as currently occurs. The responsibility to set aside anonymous complaints has been transferred from the Presidency to the IOM, for the sake of expediency. To this same end, an additional power for the IOM to set aside complaints which are clearly vexatious has also been introduced

11. The proposed revision allows for a single transparent and consistent reporting, receipt of allegations, and investigation procedure for all categories of Court personnel, including elected officials.

Appendix

Proposed revised rule 26

Rule 26

Receipt and admissibility of complaints

1. For the purposes of article 46, paragraph 1, and article 47, any complaint concerning any conduct defined under rules 24 and 25 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.
2. All complaints shall be sent to the Independent Oversight mechanism, with a copy to the Presidency.
3. The Independent Oversight Mechanism shall set aside complaints which are anonymous or clearly vexatious. The Independent Oversight Mechanism shall investigate all complaints not so set aside. A report of each such investigation, together with all evidence located in the course thereof, shall be transmitted to the Presidency.
4. Upon receipt of an investigation report referred to in sub-rule (3), the Presidency shall, in accordance with the Regulations, appoint one or more judges, on the basis of automatic rotation, to consider the investigation report referred to in sub-rule (3) and transmit to the Presidency a recommendation as to whether the complaint should be set aside as manifestly unfounded.
5. The Presidency shall then determine whether to set aside the complaint as manifestly unfounded. All complaints not so set aside shall be transmitted by the Presidency to the competent organ, as set out in article 46, paragraphs 2 and 3 and rules 29 and 30.

Annex II

Draft paragraphs for inclusion in the omnibus resolution

1. *Notes* that the IOM is now fully staffed and that it is now operational in respect of its investigation, inspection and evaluation functions. The Assembly also notes that the IOM has worked closely with the Court to ensure the effective functioning of the Court's Whistleblower and Whistleblower Protection Policy.
 2. *Notes* that interim working procedures concerning areas where the current IOM mandate might conflict with the Court's Rules of Procedure and Evidence have been put in place, and that a proposal to formally align the Court's regulations with the IOM mandate have been submitted for consideration.
 3. *Notes* that discussion on and potential mechanisms for the reporting of areas where the IOM might advise the Bureau to consider requesting that the IOM undertake an inspection or evaluation will be incorporated into the full review of the IOM mandate and organisation for Assembly consideration at its seventeenth session.
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