

**Eighteenth session**

The Hague, 2-7 December 2019

Interim report of the Office of the Prosecutor in response to paragraph 140 of resolution ICC/ASP/17/Res.5*

1. In response to paragraph 140 of resolution ICC/ASP/17/Res.5,¹ the Office of the Prosecutor (“Office” or “OTP”) is pleased to provide the following interim report updating the Assembly on the steps taken by the Office to date, and identifying follow-up action by the Assembly for its consideration. In accordance with the above-referenced paragraph, a Court-wide report, which also outlines the measures already in place as well as the steps taken and planned to further strengthen the professional and ethical framework for elected officials, will be furnished to the Assembly at its nineteenth session.

I. Steps taken by the Office of the Prosecutor

2. Further to the briefings the Prosecutor provided to the Hague Working Group in May and November 2018,² respectively, the following outlines the steps taken by the Office of the Prosecutor to date in its comprehensive response to the media allegations *European Investigative Collaborations* (“EIC”) and 12 participating media outlets reported in September 2017, and highlights where the limitations for further action lie, and how these can be potentially addressed.

3. Second, this interim report provides an update concerning the disciplinary cases involving two of staff of the Office implicated in the media allegations, in line with the practice of other international organizations and the jurisprudence of the Administrative Tribunal of the International Labour Organization.

4. The Office recognises the importance of providing appropriate, sufficient and satisfactory information on the Office’s response to those allegations, and it has endeavoured to do so in this interim report.

5. The issues raised in the media relate, for the most part, to the alleged conduct of the former Prosecutor, Mr Luis Moreno Ocampo, but also to two members of staff of the Office of the Prosecutor.

6. The measures taken by the Office may be summarized, as follows:

(a) The Office was pro-active and *immediately* put in place an internal mechanism, or working group, to:

* Submitted to the Secretariat on 13 November 2019.

¹ “140. *Emphasizes* the importance of adherence to the highest professional and ethics standards by all Court staff and elected officials, *notes* the need to further strengthen the professional and ethical framework for elected officials, *acknowledges* the essential role played and work done by the Independent Oversight Mechanism, *welcomes* the steps taken by the Court to investigate the potential impact on the Court’s work in light of allegations of misconduct surrounding former officials and *urges* the Court to take further steps to complete this investigation fully and transparently, to identify any necessary follow-up action for the Court and/or the Assembly, and to report to the Assembly in advance of its eighteenth session”: resolution ICC/ASP/17/Res.5.

² ICC-ASP/17/INF.5.

(i) Process and promptly respond to and manage media queries arising from the EIC network of journalists and other media inquiring about the allegations; and

(ii) Map-out, process and address the different aspects of the allegations that required action by the Office, and on which the Office could act.

In these efforts, the Office was led by a firm conviction in the crucial importance of the Office's mandate and its reputation, as well as a firm commitment to professional and due diligence obligations.

(b) The Office took immediate steps internally to ensure the integrity of databases and provided the necessary public assurances through a press statement in October 2017, confirming that there is no indication that the systems of the International Criminal Court ("Court" or "ICC") have been compromised.

This step was crucial to ensure the Office continues to protect the confidentiality of the Court's operations and to meet duties towards victims and witnesses.

(c) In parallel, out of due diligence and as per the Office's duty of care obligations, the Office also attempted to obtain from the media the documents on which they were relying, partly to assess any risk to victims and witnesses. The Office made repeated requests, including through formal letters, to achieve this aim.

(d) The EIC media reports also contained serious allegations affecting two of staff members of the Office. The allegations as reported in the media were news to and unknown by the Office.

(e) The proper process under the circumstances was carefully assessed by the Office and the allegations were referred to the *Independent Oversight Mechanism* ("IOM") to establish whether, following a preliminary review, the matter ought to be investigated by the IOM.

(f) As stated publicly in the Prosecutor's press statement of 5 October 2017, the IOM determined that the allegations of misconduct ought to undergo a full investigation, and proceeded accordingly. In the Office's assessment, this was the most efficient and fair manner to deal with the matter.

(g) When the results of the IOM investigation were received, the Office then vigilantly followed the Court's internal processes governing staff conduct.

(h) As the relevant proceedings are ongoing, confidentiality of the process must be respected and the Prosecutor is duty bound to do so as per the applicable legal regime governing such matters at the Court. Throughout, the Office has done its utmost to protect the integrity of the proceedings, and the rights of the staff implicated to due process.

(i) The appropriate steps have been taken by the Office in an objective and fair manner in accordance with the Court's legal framework.

7. In line with the practice of other similar organisations, and in keeping with the Office's on-going confidentiality obligations, the OTP is now in a position to provide the following information:

(a) Following the IOM investigation and findings, the Prosecutor referred both cases to the Court's Disciplinary Advisory Board.

(b) Throughout all related proceedings, the Prosecutor ensured that the serious allegations implicating the two staff members are fully assessed, objectively and impartially, with full respect for due process rights.

(c) Following a lengthy disciplinary process and on the basis of a thorough and careful consideration of the recommendations of the Disciplinary Advisory Board, on 3 and 10 of August 2018, respectively, the Prosecutor decided to dismiss the two staff members implicated, with immediate effect, for serious misconduct on their part.

(d) The Office adheres, without exception, to the highest standards of integrity and professional conduct in the discharge of its important responsibilities, and reaffirms zero tolerance for conduct that deviates from these office norms.

(e) The two staff members have since been separated from service, but have exercised their right of appeal before the International Labour Organization Administrative Tribunal in Geneva. As this means that their cases are still *sub judice*, the Office cannot enter into further details of their cases in order to protect the integrity of those proceedings and in accordance with its ongoing confidentiality obligations.

8. The Office has further carried out a thorough mapping of the different media allegations, identifying where the OTP can and must act.

9. With respect to certain other allegations arising from the EIC media articles, the Office has initiated internal procedures to gather all the information it can; this matter is operational, and has to be dealt with in relation to a specific case that was before a Trial Chamber. In this regard, the Office requested the material in possession of the EIC network. It also undertook a comprehensive data recovery from archived systems, including internal email accounts. The reproduction of this data has been a time- and labour-intensive effort. The review of the material generated is presently ongoing. When this whole process has reached its conclusion, the Office will present a further report to the Assembly.

II. Follow-up action and recommendations for consideration by the Assembly

10. As a general remark, where allegations of sufficient concern are made about the conduct of OTP staff members, at any level, there are mechanisms available to the Office that permit such allegations to be dealt with in a way that both protects the integrity of the OTP and is fair to the staff members concerned.

11. The Office's ability to refer such matters to the IOM is part of the process available. The IOM was established by the Assembly of States Parties for just such a purpose. The IOM is an important mechanism that assists us, in a fair and proper way, to investigate allegations of impropriety against current members of staff and elected officials, to protect the integrity of the OTP and the Court. This, the Office believes is crucial.

12. As it concerns the alleged conduct of the former Prosecutor, the IOM legal framework does not allow it to examine the alleged conduct of former staff or elected officials of the Court; in fact, the Court's legal framework as a whole – similar to organisations like the United Nations, as well as other international courts and tribunals - is constrained in this regard.

13. Neither provisions in the Statute, nor the Rules and Regulations of the Court which regulate the enforcement procedure in case of misconduct by elected officials, extend the Court's disciplinary authority to former elected officials, either in respect of alleged misconduct committed while they were still in office, which comes to light following separation from service, or with respect to misconduct allegedly committed after separation.

14. It may be added here that the relevant substantive provisions and the available types of sanctions - removal from office, reprimand, fine of maximum six month's salary - seem to indicate that such extension was not intended or envisaged. Finally, the absence of enforcement mechanisms for this situation would also correspond to the situation in other, comparable international organizations.

15. In other words, the recourse for meaningful action to take concerning the alleged conduct of former elected officials is simply not there due to the current status of the Court's legal framework. To fill this legal *lacuna*, 'legislative amendments' would be required.

16. In 2017, an initial inter-organ review of the Court's various ethical rules and regulations has been conducted, with a view to exploring possibilities to strengthen them, especially in relation to the conduct of former staff members and elected officials. This was at the urging of the Office.

17. As a result of that process, the Court has come to the understanding that it has in place, compared to other similar organizations, a fairly comprehensive regulatory framework governing conduct of its sitting officials and staff. This is reassuring, and the Office makes use of this framework as effectively as possible to strengthen its culture of professional ethics.

18. Again, the legal *lacuna* or legal deficit lies with the Court's inability to act concerning the alleged conduct of its *former* officials and staff.

19. This is where the limitation lies, and this is where the Office believes more work, and the assistance of the Assembly, is required.

20. More concretely, the States are already involved in discussions on making amendments to the mandate of the IOM. One obvious area, in the Office's view, and without prejudice to the recent proposal by the President of the Court concerning the need for a "Judicial Council" presented in October 2019, is to look into the possibility of expanding the powers of the IOM, enabling it to investigate the alleged conduct of former elected officials and staff both while they were in office, and when they separated from service, to the extent such conduct has a nexus to the Court and would *prima facie* constitute misconduct.

21. That, in the Office's assessment, would be an important contribution to the institution and an appropriate response.

22. The suggestion to amend the mandate of the IOM would be helpful in creating an investigative mechanism to establish the facts.

23. The Office flags, however, that enforcement may still present challenges. Even where positive findings of misconduct are found by such an expanded investigative capacity, or through another duly constituted body, the ability of the Court to impose any sanction would be frustrated by the fact that the elected official is no longer working for the Court. For instance, how could removal from office be a feasible and effective sanction when the person is no longer at the Court?

24. That does not preclude the possibility of taking appropriate remedial action, on an *ad hoc* basis, and the results of the investigation itself, as stated earlier, could be helpful in terms of equipping the Court with a tool to respond to such instances to establish the facts, look to institute effective sanctions where possible, and hopefully also serve as a deterrent. For instance, if there is a serious finding of unethical conduct, the Court may convey that finding to the relevant governing body which has jurisdiction over the former official (e.g. national bar association), which can then trigger its own process and/or impose possible sanctions. The findings can also be communicated to relevant public ethics and/or ombudsman offices for the purposes of monitoring eligibility for, *inter alia*, holding public office. In other words, depending on the facts of a given case, there may be avenues where appropriate remedial action and sanctions can follow the findings of misconduct of former officials, established by a duly mandated mechanism at the Court.
