



INDEPENDENT OVERSIGHT MECHANISM TEAM
COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)
COMMENTS AND RECOMMENDATIONS¹
TO THE EIGHTH SESSION OF THE ASSEMBLY OF STATES PARTIES
18 - 26 NOVEMBER 2009, THE HAGUE

The Coalition for the International Criminal Court's Independent Oversight Mechanism Team (Team) was formed in 2008 to follow the development of an oversight mechanism. With the increase of the ICC's overall operations, including field activities, the necessity of such a mechanism has become increasingly important to address potential allegations of serious misconduct that cannot be addressed by current procedures. The Team wishes to underscore the important role that oversight mechanisms play in enhancing the transparency and accountability of institutions such as the ICC, as well as the public confidence that such mechanisms engender.

In this regard the Team welcomes the extensive work of the Bureau Facilitator, Mr. Akbar Khan, former Legal Adviser to the British Ambassador to The Netherlands, whose report as adopted by the Bureau recommends the establishment of an independent oversight mechanism with *proprio motu* investigative powers. The Team also notes with appreciation the previous work in the context of the New York Working Group facilitated by Ambassador Andreas D. Mavroyiannis of Cyprus.

The Team notes the Report of the Bureau on the establishment of an independent oversight mechanism² and urges the Assembly of State Parties ('ASP') to proceed with the establishment of the mechanism at its Eighth Session. The mechanism should be mandated to begin its work as soon as possible so that it can investigate any incidents of misconduct by ICC staff and elected officials, including fraud, corruption, waste, sexual violence, harassment and exploitation, and liaise as appropriate with national jurisdictions where investigations reveal the possible commission of criminal offences. While the Team generally supports the recommendations contained in the Report, it does so with the following important caveats and additional recommendations:

(i) Independence of the prospective Oversight Mechanism

The oversight mechanism should be truly independent, that is separated both physically and bureaucratically from the Court. This would entail separate resources and staff, **secure office space accessible only by the mechanism's staff** and the creation of a separate major program in the Court's annual budget. In this regard the Team takes note of the Bureau's

¹While the work of the Independent Oversight Team reflects the positions of those Coalition members most active on particular issues, this paper cannot be construed to represent the views of all organizational members of the CICC. Since the Rome Diplomatic Conference, Coalition members have organized themselves into teams, one to follow each working group or theme of the intergovernmental process. Coalition teams now follow issues addressed by the Assembly of States Parties or its subsidiary mechanisms and by the International Criminal Court. Teams provide a forum within which interested members discuss issues, follow developments, elaborate relevant research and positions in response to developments, and elaborate and implement advocacy strategies in relation to those positions. All Coalition members are welcome to join any teams and all Coalition members are regularly apprised of the work of the teams.

² ICC-ASP/8/2

recommendations to grant the prospective mechanism financial independence by establishing a major program budget to cover the start-up and ongoing costs associated, a recommendation that the Team itself advocated for. Conversely, the Team is concerned by the recommendation that the office for the oversight mechanism be “co-located” with the Office of Internal Audit (OIA). The Team is concerned that the term “co-locate” may be subject to misinterpretation and requires clarification so as to ensure that there is no risk of compromising the mechanism’s operational and perceived independence or an exchange of culture and practices between the respective offices. The Team’s view is that, given the independence and confidentiality of the mechanism is vital to its effective operation, the mechanism must, at a minimum, have its own secure office space, filing and IT systems. To ensure that there is no breach of the confidentiality of the mechanism, it would be inappropriate for the mechanism to share support staff with other offices. The Team is, therefore, strongly opposed to the recommendation of the Committee on Budget and Finance to pool resources, such as support staff and infrastructure for securing documents and evidence.

The Team is also concerned about the mechanism’s independence regarding the reporting lines recommended by the Bureau’s report. Article 112(4) of the Rome Statute envisions the mechanism as a subsidiary body, thus it should report directly to the ASP or a committee of it. Reporting through the Bureau without any provision for full, direct reporting to the ASP may lead to questions about and the appearance of a lack of transparency and independence. The full ASP should be entitled to receive complete, non-consolidated reports of the mechanism.

(ii) Tailor-made Mechanism

The oversight mechanism must be established with the Court functions and processes in mind. While the Team does not in principle oppose the recommendation of the Bureau to second staff from the UN Office of Independent Oversight Services (OIOS) to set up the mechanism in its first year, the secondment of expertise should not result in a simple ‘cut and paste’ of the practices of its UN counterpart. Nor should the Addendum to the Bureau’s Report, which states that “*[s]trong consideration...be given to seconding the head of the office from the OIOS during the first year of the office, with a view to transferring knowledge and experience to the staff member to be recruited by the Court*”, be construed in the same vein.³ The International Criminal Court is an independent and unique institution and the development of the mechanism should be tailored specifically to the Court. The staff member recruited by the Court to work with the person seconded by OIOS should acquire technical knowledge relevant to the establishing the ICC’s mechanism and investigation of it as a single-purpose organization, and not to carryover of the UN’s institutional culture or the OIOS’s approach to investigating the UN’s far-reaching and multi-purpose organizational structure. The draft memorandum of understanding to be negotiated with the UN and the corresponding terms of reference for the seconded staff should clearly indicate this.

(iii) Funding and Resources

The Team notes that the CBF have endorsed the recommendations of the Bureau in its report on its thirteenth Session, acknowledging that the ultimate decision to establish the mechanism rests with the ASP. It is imperative that the mechanism, which is envisaged by

³ ICC-ASP/8/2/Add.2, Report of the Bureau on the establishment of an independent oversight mechanism, Addendum, 29 July 2009, para. 12 (italics connote an amendment to the original report).

the Article 112(4) of the Rome Statute as a key oversight mechanism, be established as soon as possible and not delayed for budgetary purposes. Furthermore, it should be allocated the necessary resources to perform its functions, including investigations in the field. The Team opposes any system where the Court is vested with the authority to alter the costs of the mechanism. As an independent body, the mechanism should prepare its own budget which may then be consolidated into the budget in accordance with the Financial Rules and Regulations.

(iv) Achieving the full mandate of the mechanism

The Team notes that the investigative role of the mechanism represents only part of the mandate envisaged by the drafters of Article 112(4). This is also recognized in the Bureau's Report, which states that additional tasks of inspection and evaluation should be added "in due course."⁴ To ensure that the development of its full mandate remains on the agenda of the Assembly, the Team urges the Assembly to reaffirm its commitment to establish the other elements of the mechanism specified in the Rome Statute, and, as a first step, to mandate a study to consider the additional tasks that the mechanism could perform.

(v) Rules and Regulations

As specified in Recommendation 3 of the Bureau's report, the mechanism will be expected to develop the rules governing its work, to be approved by the ASP. These rules should support the existing rules and regulations providing for investigation, disciplinary proceedings and measures for misconduct.

The Team reminds the ASP that staff members found to have committed criminal offences or other serious misconduct must be held accountable (including, if appropriate, termination of employment). The Staff Rules and the Staff Regulations should therefore ensure that all staff be provided with training so that there can be no misunderstanding regarding conduct that is not acceptable and the potential consequences of such misconduct. "Serious misconduct" in this regard should be defined in applicable rules and regulations to expressly include, but not be limited to sexual violence, rape, abuse and harassment.

The rules of the mechanism, to the extent possible, should be explicit about its relationship to national authorities and its obligation to refer cases to jurisdictions where the acts in question would be considered criminal, particularly in relation to sexual violence given the variations in national jurisdictions regarding the definition of rape.

⁴ ICC-ASP/8/2, para. 43 (a).