

Investigation mandates at the International Criminal Court

1. The purpose of this briefing paper is to set out and clarify the different investigation¹ mandates within the International Criminal Court (the Court), and to explain where potential ambiguities or mandate overlaps exist.

A. Investigation

2. There are three different investigation mandate sources:

(a) Rule 26 of the Rules and Procedures of the Court (RPE)² assigns an investigation and disciplinary authority to the Presidency concerning elected officials of the Court (defined as judges, the President, the Prosecutor, Deputy Prosecutor, Registrar and Deputy Registrar³). This does not apply to staff members and other personnel of the Court. Under this regulation⁴ the Presidency⁵ may:

(i) Initiate proceedings on its own motion;

(ii) Form a panel of three judges⁶ to investigate and to advise the Presidency on whether the complaint is manifestly unfounded or whether the complaint should be forwarded to the competent organ⁷ or the Bureau Assembly for appropriate action⁸.

(b) Chapter X of the Staff Rules of the Court⁹ assigns an investigation and disciplinary authority to the Heads of Organs, i.e. the President, Prosecutor and Registrar, concerning staff and personnel of their respective Organ. Each Head of Organ can receive and if necessary investigate a complaint against staff members and personnel contracted to work within their respective organ.¹⁰

(c) Assembly resolution ICC-ASP/12/Res.6¹¹ assigns an investigation mandate authority to the IOM concerning both elected officials and staff and personnel of the Court. In fact, the resolution clearly states that “all reports” of misconduct should be passed to the IOM for consideration;¹² however, there is not complete clarity as to whether this was intended to mean that the mandates contained in the Rules of Procedure and Evidence,¹³ Regulations of the Court¹⁴ and the Staff Regulations¹⁵ and Rules¹⁶ (both also adopted by the Assembly) are no longer applicable.

3. Thus, in practice, a complaint against an elected officer could in theory be pursued to investigation by both the Presidency and/or the IOM, while a complaint against a staff member could be investigated by either the Head of Organ and/or the IOM.

4. What in fact happens under IOM standard operating procedures is that all reports of misconduct against an elected official are referred to the Presidency, which then requests the IOM to investigate on behalf of the panel of judges to whom the complaint has been referred. A formal revision to the Court’s Rules of Procedure and Evidence to resolve this

¹ Excluding evaluation and inspection work.

² <https://www.icc-cpi.int/resource-library/Documents/RulesProcedureEvidenceEng.pdf>.

³ As defined at ICC-ASP/12/Res.6, section C1.

⁴ Rule 26(2) of the Rules of Procedure and Evidence.

⁵ Defined as the President and the two Vice Presidents, as elected by the Judges.

⁶ Regulation 120 (1) of the Regulations of the Court.

⁷ Rule 26(2) of the Rules of Procedure and Evidence.

⁸ Applicable to the Prosecutor as interpreted by regulation 121 (2)(a) of the Regulations of the Court; and for a deputy Prosecutor subject to pecuniary sanction under Rule 30(3)(b) of the Rules of Procedure and Evidence.

⁹ <https://www.icc-cpi.int/NR/rdonlyres/56F9B14B-B682-4D9C-8762-A25B944FA214/140109/270715AmmedSREng.pdf>.

¹⁰ ICC/AI/2008/001 Disciplinary Procedures.

¹¹ https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res6-ENG.pdf.

¹² Paragraph 33 of Assembly Resolution ICC-ASP/12/Res.6.

¹³ Rule 26(2) of the Rules of Procedure and Evidence.

¹⁴ Regulations 119-125 of the Regulations of the Court.

¹⁵ Regulation 10 of the Staff Regulations.

¹⁶ Chapter X of the Staff Rules.

issue was presented as an annex to the Head of the IOM's 2017 Annual report to the Assembly.¹⁷

5. All reports concerning Registry and Chambers staff are, in practice, passed to the IOM for investigation unless the IOM refers them back to the Head of Organ for investigation. The IOM has also received two reports of misconduct referred to it from the Office of the Prosecutor. The ability of the IOM to review all reports of misconduct is important because it provides a control over possible favoritism or inconsistency in investigation approaches.

B. Disciplinary Action

6. Disciplinary authority is restricted to the Presidency¹⁸ and the Bureau / Assembly¹⁹ in respect of elected officials, and to the Heads of Organs in respect of staff and personnel of the Court.²⁰ Heads of Organs act upon the advice²¹ of a Disciplinary Advisory Board,²² and the Presidency upon the advice of a panel of three judges. Disciplinary sanctions range from dismissal through to verbal warning for staff members²³ and from reprimand / pecuniary sanction²⁴ to removal from office²⁵ for elected officials

7. The IOM can recommend to the Presidency or to a Head of Organ that disciplinary action be considered,²⁶ but it is the Presidency or Head of Organ who takes the administrative decision to proceed to disciplinary action after receipt of an IOM investigation report.

C. Constraints on Investigation Mandates

1. Article 70 complaints

8. Article 70 of the Rome Statute²⁷ concerns "offences against the administration of justice", including "obstructing, interfering with... or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties...".

9. Article 70 can apply to any category of person, including staff and former staff members. The IOM is expressly forbidden to receive or to investigate article 70 complaints²⁸.

2. Former elected officials and staff

10. The Court's regulatory body references former staff members at Rules 101.4(d) and 109.1(d) of the Staff Rules. In these regulations, it is clearly stated that the requirement for confidentiality concerning knowledge acquired whilst a staff member does not end upon leaving the Court. A similar clause is contained in the Code of Professional Conduct for Counsel. There is no other reference to former staff members in the Court's rules and regulations.

11. All three mandates use the current tense when detailing who the above three investigation mandates apply to. The terms used are "elected officials" or "staff" of the

¹⁷ ICC-ASP/16/8.

¹⁸ Rule 29(1) and 30(1) of the Rules of Procedure and Evidence.

¹⁹ Rule 30(2) of the Rules of Procedure and Evidence.

²⁰ Chapter X of the Staff Rules and Regulation 10 of the Staff Regulations.

²¹ In accordance with consideration 8, of ILOAT judgement # 3863, "The executive head of an international organisation is not bound to follow a recommendation of any internal appeal body nor bound to adopt the reasoning of that body. However an executive head who departs from a recommendation of such a body must state the reasons for disregarding it and must motivate the decision actually reached".

²² Rule 110.3 of the Staff Rules.

²³ Rule 110.6 of the Staff Rules.

²⁴ Rule 32 of the Rules of Procedure and Evidence.

²⁵ Rule 31 of the Rules of Procedure and Evidence.

²⁶ ICC-ASP/12/Res.6. Section C, 4.

²⁷ Article 70, Rome Statute 1998.

²⁸ Section C1 of ICC-ASP/12/Res.6.

Court. In none of the mandates does the word “former”, “past”, or “ex” prefix these terms. Legal opinion received is that an explicit reference to “former” elected officials and staff may be required for certainty of mandate over such persons.

12. The above is reflected in the Court’s disciplinary regulations, none of which explicitly refer to “former” or “ex” elected officials and staff. The fact that the highest level of disciplinary sanction is dismissal reinforces this lack of certainty.

3. Applicability of staff rules and regulations to elected officers

13. The staff regulations and staff rules apply to all staff members, but do not apply to judges, including the President. While certain provisions within the staff rules and regulations, for instance those pertaining to leave arrangements, appear to include elected officials, it is unclear if the Staff Rules and Staff Regulations as a body automatically apply to the Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar. There is no explicit statement to this effect that could be relied upon for investigative or disciplinary purposes.²⁹

4. Judicial and prosecutorial independence

14. The IOM does not have a completely free hand to investigate at its own discretion staff and personnel of the Court. In all cases, Assembly resolution ICC-ASP/12/Res.6 is very clear that confirmation must first be obtained by the IOM from the relevant Head of Organ that an investigation will not compromise judicial or prosecutorial independence. In case of disagreement between the Prosecutor and the Head of the IOM, a final and binding decision may be sought from the Presidency. If permission is not so obtained, the IOM cannot investigate.

5. Contractual and human resource management complaints

15. The IOM is explicitly prohibited from investigating “contractual disputes or human resource management issues, including work performance, conditions of employment or personnel-related grievances”. Any such complaints are received and managed through Staff Rules and Regulations and Administrative Instructions promulgated by the Heads of Organs. If investigation is required, this will be through the Head of Organ mandate noted above.

6. Conflicts of interest

16. In part due to the uncertainty concerning the applicability of the Court’s Staff Rules and Staff Regulations to elected officials, there is a lack of clarity concerning whether elected officials should automatically, i.e. not just voluntarily, be included within the scope of the Court’s Financial Disclosure reporting process. It is also unclear whether a similar provision, perhaps extending to a “Register of Interests” concept, is required for the judges.

17. If the IOM was for any reason prevented from investigating a report received due to an actual or perceived conflict of interest, the Head of the IOM would refer the report to the relevant Head of Organ to consider and to investigate under their Chapter X of the Staff Rules mandate.

7. Proactive investigation

18. Section C1 of ICC-ASP/12/Res.6 states that the IOM may “receive and investigate reports” of misconduct. There is no explicit mandate for the IOM to proactively seek out misconduct through preventative or ‘exploratory’ investigation work.

19. The requirement of a formal complaint/report of suspected misconduct before an investigation can be considered is a common control mechanism designed to ensure that an investigative function does not go on so-called ‘fishing expeditions’ and that it is seen to be

²⁹ For instance concerning a reported breach of rules 101.4(d) and 109.1(d) of the Staff Rules, as noted above.

exercising complete impartiality. For this reason it is dangerous to imply that such an authority exists unless it is explicitly stated that it does within the investigative mandate.

D. Conclusion

20. There are advantages and disadvantages to the current mixture of investigation mandates. On balance, it is my opinion that retaining investigation routes 2 and 3 provides a good practical coverage provided that it is made clear that all reports of misconduct in all organs should be passed to the IOM for consideration, even if they are to be investigated under Head of Organ authority. I am also of the opinion that, provided the suggested revisions concerning rule 26 are implemented, there is no practical problem with mandates 1 and 3 running in parallel.

21. Notwithstanding the above, there are ‘uncertainties’ in the Court’s investigation mandates and rules and regulations which do require further consideration and action. These include the following:

- (a) Explicit reference to the investigation of reports of alleged misconduct committed by former staff members;
- (b) Explicit reference to the investigation of reports of alleged misconduct committed by former elected officials;
- (c) Clarification of the applicability of the staff rules and regulations with respect to elected officials;
- (d) Explicit reference to the requirement for elected officials to be included within the Court’s Financial Disclosure programme (and/or to the requirement of a Register of Interests for judges);
- (e) Explicit reference to the applicability (or non-applicability) of disciplinary proceedings with respect to former staff members and elected officials and
- (f) Clarification that, notwithstanding the authority given to investigation mandates 1 and 2, all reports of misconduct should be referred to the IOM for consideration.

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