



ICCBA LEGAL ADVISORY COMMITTEE

LEGAL ANALYSIS: ICC INTERNAL ACCOUNTABILITY MECHANISMS AND POLICIES

The present Legal Analysis is submitted to the EC for its review, endorsement, and publication on the ICCBA website. It should be read in conjunction with the LAC's "Index of ICC Administrative Issuances of Relevance for Counsel and Support Staff", which was submitted to the EC in November 2017.

The goal of the present legal analysis is to enhance the knowledge and understanding of Counsel and Support Staff in relation to ICC internal accountability mechanisms, some limited aspects of which apply to them (namely, the Court's [Anti-Fraud Policy](#) and [Whistleblowing and Whistle-blower Protection Policy](#)). The present legal analysis is also a contribution to the fulfilment of the ICCBA's mandate, pursuant to Article 2(5) of its [Constitution](#), to seek to "enhance the quality of justice at the ICC as required under the provisions of the Rome Statute and other recognized texts".

I. Main Provisions Governing Internal Accountability Mechanisms within the ICC

As part of its administrative and policy framework, the ICC has promulgated a set of administrative issuances which govern: (i) the conduct of its staff members; (ii) the definition of "unsatisfactory conduct", which may constitute disciplinary offences in the case of ICC staff members; and (iii) the disciplinary regime and procedures applicable to staff members before the Court. This internal accountability scheme is distinct from the one applicable to Counsel and Support Staff under the ICC Code of Professional Conduct for counsel. The latter is not addressed here. However, as discussed at point 4 below, certain administrative issuances falling within the ICC's internal accountability scheme do apply to Counsel and Support Staff.

The procedures and substantive rules of the internal accountability scheme is common to all staff members within the ICC, regardless of whether they are staff of the Office of the Prosecutor ("OTP"), Registry,¹ Chambers, or Presidency. Administratively, disciplinary action against staff members of the OTP falls under the ultimate authority of the Prosecutor, while all other staff members are placed under the Registrar's authority, including staff of the Presidency and Chambers.

The main provisions governing the internal accountability scheme within the Court² are the following:

¹ For administrative and disciplinary purposes, the Registry includes the staff members of the Secretariat of the Assembly of States Parties, the Secretariat of the Trust Fund for Victims, and the Office of Internal Audit.

² Under the present analysis, these do not include the provisions governing audit (conducted by the Office of Internal Audit and outside auditors), which have no direct impact on the accountability of staff members.

1/ **For Staff Members:** The [Staff Regulations](#) (adopted by the ASP) and [Staff Rules](#), which together define basic standards of professional conduct for staff members and establish a disciplinary procedure that is applicable in the event of an alleged breach of relevant standards. The Staff Regulations and Staff Rules are complemented by administrative issuances governing the internal disciplinary procedure applicable to staff members within the Court ([Rules of Procedure of the Disciplinary Advisory Board](#)), a [Code of conduct for staff members](#) adopted in 2011 that provides rules regarding conflicts of interest and a list of unsatisfactory types of conduct that may incur disciplinary action, and additional Administrative Instructions addressing specific types of unsatisfactory conduct, such as [discrimination](#) and [harassment](#). In 2013, the OTP also enacted a separate [Code of Conduct for the OTP](#), which applies to all members of the OTP, as well as interns, visiting professionals and gratis personnel working for the OTP. This code comes in addition to the [Code of conduct for staff members](#). Staff members have the right to submit disciplinary decisions for final review to an external and independent body, the [International Labour Organisation Administrative Tribunal \(“ILOAT”\)](#), in Geneva.

2/ **For Judges only:** A [Code of Judicial Ethics](#) provides guidelines on the conduct of Judges, relating both to their professional roles and their activities outside the Court. These guidelines are advisory in nature and no procedural mechanism is provided to enforce the provisions of this code.

3/ **For Elected Officials only (Judges, President, Prosecutor, Deputy Prosecutor, Registrar, Deputy Registrar):** Rules 26 to 32 of the ICC Rules of Procedure and Evidence (“RPE”) provide a specific disciplinary procedure applicable in cases of “serious misconduct” as defined under rule 24 and “misconduct of a less serious nature” defined under rule 25.

4/ **For all persons working at or practicing before the Court (including Counsel and Support Staff):** In 2014, the ICC Presidency promulgated two Presidential Directives governing the following important issues within the Court’s accountability framework: an [Anti-Fraud Policy](#) and a [Whistleblowing and Whistle-blower Protection Policy](#). These two policies apply to all elected officials and staff members, as well as others practicing before or working at the ICC, “such as Counsel” (section 1.1 of the [Anti-Fraud Policy](#); section 1.1(a) of the [Whistleblowing and Whistle-blower Protection Policy](#)), contractors, consultants, visiting professionals, interns and vendors.

5/ **For Elected Officials, Staff Members and Contractors:** In November 2009, through Resolution [ICC-ASP/8/Res.1](#), the Assembly of States Parties (“ASP”)³, which is the management oversight and legislative body of the Court, additionally established an Independent Oversight Mechanism (“IOM”). The possibility of establishing an IOM, which is a subsidiary body of the ASP whose Head reports to the President of the ASP, is specifically mentioned in Article 112(4) of the Rome Statute. However, it was not until November 2013, that the ASP adopted, by its [Resolution ICC-ASP/12/Res. 6](#), the Mandate of the Independent Oversight Mechanism (“IOM”), which only became operational in 2017. The purpose of the IOM is to provide *meaningful oversight* of the Court through its mandate to conduct internal Court inspections, evaluations and investigations at the request of the Bureau of the ASP (a 20-member elected body of States Parties’ representatives mandated to assist the ASP in the discharge of its responsibilities) or the

³ The ASP is the management oversight and legislative body of the Court, and is composed of all of the States that are parties to the Rome Statute.

ASP itself.⁴ The IOM mandate also allows it to undertake, subject to available resources, evaluations and inspections at the request of a Head of Organ (President, Prosecutor, Registrar), as well as to provide guidance and support to assist with internal evaluation and inspection oversight activities. Under its “Investigation” mandate, the IOM reviews and, if necessary, undertakes investigations at its own discretion into any report of misconduct – whether of a serious or less serious nature – that it receives concerning an elected official, staff member, or contractor. Such reports can be received from any source, internal or external, including the media and members of the public. Section 28 of the IOM Mandate defines “misconduct” as encompassing those acts or activities defined under rules 24(1)(b) (serious misconduct) and 25(1)(b) (misconduct of a less serious nature) of the RPE as well as “unsatisfactory conduct” as defined in the Staff Rules, 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.

Pursuant to paragraph 40 of the IOM Mandate, the results of an IOM investigation must be transmitted to the Presidency, Registrar, or Prosecutor, as appropriate, along with recommendations, which may include possible disciplinary action. In the event IOM investigations indicate possible criminal acts are reasonably suspected to have been committed by elected officials, staff members or contractors, the IOM must likewise provide the results of the investigation to the Court, and may recommend that the Court refer the matter to relevant national authorities for possible criminal prosecution.

II. Strengthening ICC Internal Accountability Mechanisms

The general disciplinary framework applicable to ICC staff members (see 1/ above) is well-developed and, though always perfectible, equivalent to what can be found at other international organisations. Although a final appeal of a disciplinary decision by a staff member to the [ILOAT](#) is a lengthy often years-long procedure, the possibility of appealing before the ILOAT constitutes an important guarantee of fairness, impartiality and independence in the ICC disciplinary regime. The submission of a review application to ILOAT is not, however, a ground for suspension of a disciplinary action under normal circumstances.

Although the [Code of Judicial Ethics](#) is not binding on ICC Judges (see 2/ above), the addition in 2013-2014 of provisions on the accountability of Judges for “Misconduct”, as comprehensively defined under section 28 of the [IOM Mandate](#) (see 5/ above), contributes to filling this gap in the ICC’s accountability framework to a certain extent – with the caveat submitted below regarding the applicability of the IOM Mandate. The definition of “Misconduct” under rules 24 and 25 of the RPE is illustrative and non-exhaustive. Section 28 of the IOM Mandate adopted by the ASP extends the definition of such “Misconduct” to all relevant unsatisfactory types of conduct as defined for staff members and violations of relevant administrative issuances. The specific disciplinary procedure set up under rules 26 to 32 of the RPE (see 3/ above) now applies to all these instances of Misconduct, as defined under section 28 of the IOM Mandate.

A. Independent Oversight Mechanism

The promulgation of the [IOM Mandate](#) (see 5/ above) by a resolution of the ASP in November 2013 still requires its subsequent implementation within the internal legal framework of the Court by way of a

⁴ See “Independent Oversight Mechanism (IOM)”, at <https://www.icc-cpi.int/iom>.

Presidential Directive in order to ensure its proper, effective and efficient functioning. Indeed, pursuant to section 2.1 of [Presidential Directive ICC/PRES/D/G/2003/001](#), which defines the “Procedures for the Promulgation of Administrative Issuances”, “[a] Procedural Directive shall be required for the promulgation of procedures for the implementation of regulations, *resolutions and decisions adopted by the Assembly of States Parties*” (emphasis added), with specific mention made of ASP issuances dealing with (a) financial regulations and rules, (b) staff regulations, and (c) “regulations and rules governing programme planning, the programme aspects of the budget, *the monitoring of implementation and methods of evaluation*, and publication of consolidated texts thereof” (emphasis added).

This requirement has been observed by the Court with respect to other resolutions of the ASP, for instance regarding the internal promulgation of [Staff Regulations](#) adopted by the ASP, but not in the case of the IOM Mandate. To date, no Presidential Directive has implemented any aspect of Resolution ICC-ASP/12/Res. 6, promulgating the [IOM Mandate](#), within the internal policy framework of the Court. This lack of an implementing directive has direct and concrete consequences on the internal accountability scheme of the Court, because the pre-existing disciplinary procedural rules have not been adapted to include the establishment of the IOM, which remains un-provided for in the procedural regime. The step of implementing the ASP Resolution establishing the IOM is yet to be completed. As long as this is not achieved, the existence and activities of the IOM might be challenged by persons who are subject to IOM investigations and / or litigants as to their lack of legal basis. Also, the absence of a clear and detailed procedure applicable to the IOM activities and consistent with the general procedural framework of the Court applicable to internal disciplinary cases may additionally be a source of procedural challenges to the IOM’s functioning. In a judgment issued on 24 January 2018 in a case related to the ICC, the Administrative Tribunal of the International Labour Organisation (“ILOAT”), which is the ultimate forum for the determination of staff appeals and disciplinary cases, affirmed its jurisdiction to review the legality of the promulgation of ICC administrative issuances, in particular their compliance with [Presidential Directive ICC/PRES/D/G/2003/001 on the Procedures for the Promulgation of Administrative Issuances \(ILOAT Judgment No. 3907 at 26\)](#). Any claim based on the absence of implementation of the [IOM Mandate](#) within the internal legal framework of the Court would find support in this judgment. This is cause for major procedural and legal uncertainty as regards the effective functioning of the IOM. In its [Report to the 16th session of the ASP](#) (ICC-ASP/16/8), the IOM has acknowledged, at least partially, the need to reconcile the IOM Mandate with existing Court rules and regulations (Chapter III-C, p. 4) and administrative procedures (Chapter III-D, p. 4), as well as its lack of reporting and communication policy (Chapter III-E, pp. 4-5). This Report sheds light on the current operational limits of the IOM, whose interventions remain a matter of exception and derogatory procedure, without proper legal and policy basis and largely inconsistent with the general procedural framework of the Court applicable to internal disciplinary cases.

The ICCBA thus deems it useful to raise awareness of the urgent need for a proper implementation of the IOM Mandate within the internal legal framework of the Court and for the promulgation of procedures applicable to IOM processes and actions.

In light of the recent developments regarding the former Prosecutor of the ICC (see [ICCBA’s Statement on allegations against former ICC Prosecutor, 29 November 2017](#)), the ICCBA would also encourage the extension of the current mandate of the IOM to investigate allegations against former Elected Officials

and former staff members, as well as the deletion of section 30 of the [IOM Mandate](#), which currently excludes from its jurisdiction the investigation of offences under Article 70 of the Rome Statute. These amendments may, according to the ICCBA, usefully contribute to reinforcing accountability within the ICC legal framework.

B. [Anti-Fraud Policy and Whistleblowing and Whistle-blower Protection Policy](#)

The ICC [Anti-Fraud Policy](#) and [Whistleblowing and Whistle-blower Protection Policy](#) have not – with the one exception mentioned below – yet been implemented by appropriate administrative instructions defining the procedural framework applicable to these policies. The two Presidential Directives of 2014 promulgating these policies only set up the basic principles governing the prevention of fraud, the obligation to report fraud – which applies to all elected officials, staff members and others serving at the ICC, including Counsel – and the protection of whistle-blowers. Both Presidential Directives provide, in their sections 6.1 and 5.1, respectively, that they “shall be translated into relevant administrative issuances so as to ensure a comprehensive system” combatting fraud and encouraging and protecting whistle-blowers. This is also consistent with the purpose of administrative instructions under section 3.1(a) of [Presidential Directive ICC/PRES/D/G/2003/001](#). In October 2015, the ICC promulgated [an Administrative Instruction on financial disclosure](#), which is one of the aspects of the Anti-Fraud Policy, but to date, none of the required administrative issuances have been promulgated with respect to other important aspects, such as the specific procedures regarding the reporting of fraud, the reporting of other disciplinary offences and unsatisfactory conduct, and the protection of whistle-blowers within the Court. The absence of the applicable procedure may arguably act as a deterrent against the reporting of fraud and other unsatisfactory conduct, as potential whistle-blowers are not provided with a clear picture of the kind, and procedural modalities of, the protection they can receive against retaliation. It significantly undercuts the main objective of these two Presidential Directives – namely, to combat fraud and waste by encouraging and facilitating through specific procedures, processes and protections the reporting of suspected fraud and other unsatisfactory conduct as well as to prevent retaliation against whistle-blowers.

III. CONCLUSION

The ICCBA draws the attention of Counsel and Support Staff to the abovementioned internal accountability mechanisms applicable within the ICC to all elected officials, staff members and contractors, and, in certain very specific circumstances, to Counsel and Support Staff in addition to the specific disciplinary regime provided under the Code of Conduct for counsel. The ICCBA also invites the ICC’s management, as a matter of priority, to undertake the steps identified in the present analysis in order to strengthen its internal accountability mechanisms and looks forward to participating in the consultation thereon as far as the interests of Counsel and Support Staff are concerned.