



## ***RECOMMENDATIONS FOR THE ESTABLISHMENT OF AN INDEPENDENT OVERSIGHT MECHANISM FOR THE ICC***

This paper explains why it is necessary for the Assembly of States Parties (ASP) of the International Criminal Court (ICC) to establish an independent oversight mechanism and describes the proposal it is now considering. Further, it will review previous steps taken by the ASP toward establishment of an independent oversight mechanism as well as other forms of oversight at the ICC. Lastly, it describes and analyzes the current recommendations for an independent oversight mechanism to be considered, and likely adopted, at the Eighth Session of the ASP in The Hague in November 2009.

### What Is an Independent Oversight Mechanism?

Under the Rome Statute, the ASP may establish subsidiary bodies, including an independent oversight mechanism. Specifically, Article 112(4) of the Rome Statute refers to the establishment of an independent oversight mechanism as one of those bodies. The mechanism could be mandated to carry out inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

The Court especially needs oversight because, as the first permanent international criminal court, it needs long-term transparent managerial and organizational methods and oversight to maintain its integrity. This independent oversight mechanism would monitor how the activities of the Court are conducted and hold staff to the highest standards of professionalism, integrity and ethics, beyond the current mechanisms. An oversight mechanism would enhance and expand the transparency and professional standards of the Court.

### Current Oversight of the ICC

Two forms of oversight are internal and external. The first performs internal oversight by providing advice, expertise and requires reporting; the latter provides a systematic and objective review of an organization's activities, specifically by addressing violations of discipline.

#### *Current oversight within the Assembly of States Parties*

The ASP is the management oversight and legislative body of the ICC. It is composed of representatives of the countries that have ratified or acceded to the Rome Statute. The Rome Statute grants the ASP the power to establish standing committees and subsidiary bodies to oversee the workings of the Court. In addition, the ASP reviews and decides on issues such as the budget and financing of the Court.

The current ASP subsidiary committees include the Standing Committee on Budget and Finance (CBF) and the temporary Oversight Committee on the Permanent Premises. The ASP established the CBF in 2002. Its role is to examine any document submitted to the ASP that contains financial or budgetary implications. The CBF reports often make ultimate far-reaching recommendations to the ASP about matters whose importance and substance go far beyond their financing, such as treatment of victims, assistance for defense counsel and the nature of prosecutorial investigations.

The ASP established the Oversight Committee on the Permanent Premises in 2007. The committee is responsible for overseeing the financing and construction of the new permanent premises of the Court and the





related costs, identification and estimation of other costs related to the project and the continuous monitoring of the function and operations of the governance structure for the project. If necessary, the committee provides recommendations to the ASP. This temporary oversight mechanism will conclude its work once the permanent premises project is completed.

In addition to subsidiary committees, the ASP has temporary subsidiary bodies that report to it, including the New York Working Group and The Hague Working Group. Both have equal standing. The New York Working Group deals with geographic and gender balance at the Court, arrears of countries' financial contributions to the Court and preparations for the 2010 Review Conference. The Hague Working Group covers issues such as the budget of the Court, cooperation, strategic planning and legal aid.

### *Current oversight within the Court*

The existing oversight activities of the ICC include the Office of Internal Audit (OIA) which is integrated in the Registry of the Court. The OIA was created during the second session of the ASP in 2003. The OIA provides the heads of organs of the Court with objective and timely information about the financial accounting and auditing of the Court's internal controls, management systems and practices. It also performs an in-depth performance audit of the Court.

In addition, in 2003, the Bureau and the ASP announced that the National Audit Office (NAO) of the United Kingdom would serve as an external auditor of the Court. The NAO audits the financial statement of all UK government department and agencies and many other public bodies including international institutions and organizations. The NAO has experience with international public organizations including the UN World Food Programme, Pan-American Health Organization, the International Labor Organization and the International Atomic Energy Agency.

More information about other forms of oversight at the ICC as well as other international organizations, visit the AMICC website at <http://www.amicc.org/docs/Oversight.pdf>.

### Previous Steps Toward Establishment of an Independent Oversight Mechanism

On April 5, 2006 the Bureau appointed Prince Zeid Ra'ad Al-Hussein, then Jordan's permanent representative to the UN, as the facilitator of the oversight mechanism with the New York Working Group. In February 2007, Ambassador Al-Hussein stepped down from his position as facilitator. In December 2007, the Bureau deferred the matter of establishing an oversight mechanism at the Court because no State Party representative volunteered to assume the role of facilitator.

On February 11, 2008 the Bureau appointed Ambassador Andreas D. Mavoroyiannis of Cyprus as facilitator. He served as facilitator until July 30, 2008. In November, the Seventh Session of the ASP concluded that, based on the report received from the Bureau, it was premature for States Parties to consider the issue in detail. Therefore, no action was taken at that session toward establishing an oversight mechanism.

Following the Seventh Session of the ASP, the ASP's Bureau appointed Mr. Akbar Khan of the United Kingdom as the new facilitator on this issue for The Hague Working Group. At the second resumption of the





Seventh Session in New York, he held informal consultations with governments and NGOs regarding the establishment of an independent oversight mechanism. He consulted with the NGOs in The Hague in March and invited NGOs to provide papers on establishing an independent oversight mechanism. AMICC participated in NGO consultations with facilitator, contributed to a Coalition for the ICC (CICC) team paper in response to his interim report and submitted a paper directly to him.

The facilitator's interim paper recommended that the investigative function of the mechanism be independent from the Court, though it could be co-located physically in the ASP Secretariat or the Court's Office of Internal Audit. Also, it recommended that the independent oversight mechanism have the authority to initiate its own investigations, have a whistleblower capacity and report directly to the ASP or the Bureau. The whistleblower capacity would allow individuals to come forward to report to the mechanism any wrongdoing at the Court, such as sexual harassment, money laundering or abuse of power.

On April 15, 2009 the ASP issued the Report of the Bureau on the establishment of independent oversight mechanism<sup>1</sup> for consideration at its Eighth Session in November. The report is based largely on the facilitator's interim report, having taken into account further consultations with states and NGOs as well as decisions of The Hague Working Group on the matter. It also includes a cost estimate by the CBF of 421,295 Euro, or about \$600,000, for the mechanism for 2010,<sup>2</sup> if the ASP takes a decision to establish it.

The final report offered recommendations based on three principles. First, the investigative mechanism must be independent from the Court. Second, the mechanism must be able to provide meaningful and effective oversight. Finally, the mechanism must have adequate resources to meet the Court's needs.

## Recommendations of the Bureau's Report

### *Nature of the independent oversight mechanism*

The Bureau proposes the ASP establish an oversight mechanism that is independent from the Court. Independence from the Court includes considerations such as the location of the mechanism, its reporting obligations, staff selection and budget issues including investigative costs.

To maintain its independence, the mechanism should not be integrated with an existing body of the Court. The report recommends that the mechanism be co-located with the Office of Internal Audit (IOA). The mechanism would share only office space with the OIA. This recommendation is made with the understanding that the location of the mechanism may be reviewed at anytime by the ASP.

The report maintains that if the mechanism shares office space with another office of the Court, it will maintain its independence. However, opponents of the Court may still question the mechanism's independence if it shares office space with the OIA. Further, the mechanism may not be perceived as independent if it is co-located with another office and may be influenced by that office's culture and existing practices.

<sup>1</sup> [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/ICC-ASP-8-2-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-2-ENG.pdf)

<sup>2</sup> [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/ICC-ASP-8-2-Add.1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-2-Add.1-ENG.pdf)





Although States Parties have voiced concerns over budgeting and finance, the ASP should provide the mechanism with its own office space to maintain its neutrality. By having its own space, the mechanism would truly be independent, and perceived to be, from other offices of the Court.

The report also discussed three possible options regarding the investigative capacity of the mechanism. First, the mechanism could outsource to the United Nations Office of Internal Oversight Services (OIOS) all of the Court's investigations into allegations of misconduct. The second option would be for the court to undertake all investigations itself. Finally, the Court should develop its own "lean" investigative unit supported by OIOS services.

In July 1994, OIOS was established as an operationally independent office that assists the UN Secretary-General in fulfilling his internal oversight responsibilities monitoring, auditing, inspecting, evaluating and investigating the staff and resources of the UN. The office has the authority to initiate, carry out and report on any action it considers necessary to fulfill its responsibilities with regard to its oversight functions.

The Bureau's report explains that ICC States Parties have expressed concern that the mechanism would not be seen as independent if the OIOS handled all of its investigations. Further, funding the mechanism to handle its own investigations would be costly for States Parties. Therefore, the report proposes that the OIOS provide services on a cost recovery basis through a memorandum of understanding entered into with the mechanism.

The recommendation for the mechanism to develop its own investigative capacity sufficiently addresses the importance of the mechanism's independence. If the OIOS handled all of the mechanism's investigations, it would undercut the perception of the mechanism's effectiveness. Therefore, the goal of the ASP should be to provide the mechanism with its own investigative unit.

The report recommends that the mechanism submit quarterly activity reports to the Bureau and annual activity reports to the ASP. All reports would be copied to the Presidency, the Office of the Prosecutor, the Registrar and the Committee on Budget and Finance. The Court may respond in writing to the reports submitted by the oversight mechanism. The Court's reports would be transmitted to the Bureau, the Assembly and copied to the head of the oversight mechanism and the Committee on Budget and Finance.

Further, the Court would provide biannual written updates regarding the follow-up disciplinary procedures involving cases previously investigated by the mechanism. Further, it would provide any information on the application of sanctions made in individual cases.

The reporting requirements recommended by the report are adequate to hold the mechanism accountable to the ASP. Although it would be preferable for the independent oversight mechanism to report directly to a standing ASP committee, the reporting requirements would ensure that the mechanism uses its funds wisely and is not wasting its time and limited resources on frivolous claims. Further, the reporting requirements would guarantee that the Court submit all necessary materials to the mechanism and not prevent or hinder an investigation.

The report recommends that the staff selection process be handled by the Bureau in conjunction within the Court. The head of the mechanism should have high experience level while supporting staff may be made up of junior level employees. These officials would begin working six months before the mechanism becomes





operational to develop all of its functions, regulations, rules, protocol and procedures and submit them to the ASP for approval.

The report also recommends that the ASP establish a major budgeting program to manage the mechanism's resources. In addition to the approximate \$600,000 cost of the mechanism for 201, OIOS estimates a start up cost of \$105,000, plus additional costs, for the first year of its investigative support to the ICC.

Based on the OIOS estimate, the establishment of an oversight mechanism would result in additional budgetary implication to ICC States Parties which might not be easily absorbed through savings. Thus, all expenditures should be closely monitored to ensure the efficiency of the mechanism and avoid wasteful spending. The proposal's recommendation to closely monitor the expenses of the mechanism is reasonable and necessary to ensure the mechanism does not initiate frivolous investigations.

### *Scope of the independent oversight mechanism*

The report recommends that the mechanism initially have an independent investigative capacity that would support the existing oversight structures of the Court. The additional elements of oversight recommended by Article 112(4), inspection and evaluation, would be added later.

The ASP should establish the mechanism from the beginning to include the full range of oversight envisioned by Article 112(4). Without the power to inspect and evaluate, the mechanism would lack the very elements necessary for it to provide effective oversight. The current proposal to delay implementation of inspection and evaluation functions would undermine the effectiveness of the mechanism.

The mechanism would have jurisdiction to investigate and discipline the Court staff, subject to the Staff Rules and Regulations of the ICC, as well as elected officials at the Court. In addition, immunity or privileges of staff members could not be invoked to justify unlawful acts. Further, the mechanism would have the authority to investigate complaints and initiate its own investigations. This proposal gives the mechanism "teeth" to fulfill its obligations as intended in Article 112(4).

In situations involving criminal misconduct, the report recognizes the general principle of international law that only States can prosecute criminal misconduct, not international organizations. Therefore, the report recommends that the mechanism develop a notification mechanism to inform national authorities of suspected criminal misconduct.

In all cases involving criminal activity, the mechanism would notify the relevant national authorities, such as the States where the suspected crime was committed, the State of the suspect's nationality or the State of the victim's nationality. In addition, the mechanism would cooperate with national authorities to facilitate national proceedings.

This proposal recognizes that the mechanism may not be the proper body to handle all issues of misconduct. Therefore, it is important for the mechanism to have an effective reporting system in place to alert relevant States Parties if their nationals are suspected of violations of international or criminal law.





The mechanism would investigate any allegations of misconduct made against contractors retained by the Court and working on its behalf. Such investigations would be carried out in accordance with the terms of the contract. In those cases where the contract is silent, the mechanism will follow its own procedure.

## Possible US View of the Current Recommendations

The US has previously criticized the Court as having unchecked powers. Therefore, the US would most likely support the establishment of an independent oversight mechanism at the Court, especially one that has the full power to investigate, inspect and evaluate all functions of the Court. In addition, the mechanism would be able to investigate regardless of immunity or privilege and with whistleblower powers. These features are familiar to the US and are found within its various domestic oversight mechanisms. Therefore, the current recommendations would most likely find favor with the US.

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Updated July 28, 2009*

