



## *AN INDEPENDENT OVERSIGHT MECHANISM FOR THE INTERNATIONAL CRIMINAL COURT*

### Summary

The purpose of this paper is to present possible organizational developments within the International Criminal Court (ICC) which will help to ensure its credibility, accountability, and transparency.

This paper explains the ICC's need for a system of independent oversight within the Court's governing body, the Assembly of States Parties (ASP or Assembly), and at the Court and describes elements of such an oversight system. Discussion of this issue at the ICC uses the term 'independent oversight mechanism', from Article 112 of the Rome Statute, which this paper will also use hereafter. The system or mechanism refers to a combination of offices or bodies and processes. The matter of the oversight capacity of the ASP is important for US advocacy because many ICC opponents state that the Court lacks a neutral and independent supervision of its activities. New institutional arrangements within the ASP could lessen the US criticism of the Court and contribute to its stable and solid organization.

The following paper describes the current institutional structure of the ICC's ASP and shows the Court's new organizational and managerial challenges. Finally, the paper makes recommendations on the form, functions and responsibilities of the future independent oversight mechanism of the ASP.

### Introduction

Established in July 2002, the International Criminal Court (ICC) has been functioning for more than five years. To ensure its continuous success and world-wide recognition, it must show that it governs itself effectively, productively and with integrity. Such 'good governance' requires a clear delegation of authority and accountability. This delegation must clearly delineate individual responsibilities, duties and reporting lines. If the Court's officials are to carry out their responsibilities effectively, administrative flows and processes must be unambiguous, inclusive and effective.

A neutral and 'independent oversight mechanism' can provide this 'good governance' by monitoring all of its aspects, internally as well as externally. In general terms, the mechanism would evaluate the Court's overall performance and functioning, inspect its work and activities and investigate situations involving the Court's personnel (for instance, cases of misconduct or violations of the Court's rules and regulations) and cases involving the Court's operations (for instance, cases of knowingly mismanagement of the Court's resources).

A function of investigation would be a key component of an independent oversight mechanism. The Court employs a number of its staff members who carry out their responsibilities not only in The Hague, but also in the four current 'situation countries' where the ICC is investigating, prosecuting or both. Even in an organization as well respected as the ICC, it is just a matter of time before serious cases of misconduct, including sexual exploitation and abuse, occur. The independent oversight mechanism would hold the Court's staff members accountable for these violations whether criminal in nature or deriving from noncompliance with the Court's regulations. This swift holding to account would also act as a form of prevention.





## Current Institutional Structure of the Assembly of States Parties to the ICC

Every organization or institution strives to function efficiently and effectively in order to achieve its goals. To realize that, the governing legislative bodies of such entities may establish oversight mechanisms. Oversight mechanisms help organizations in performing their functions and in preserving their discipline by providing advice and by reviewing operations and incidents. Standing subsidiary committees of the governing bodies perform legislative oversight by providing advice and expertise and by requiring reporting. Independent oversight bodies with an autonomous status in the governing bodies perform independent oversight by providing a systematic and objective review of an organization's activities, specifically by addressing violations of discipline. Both categories of oversight help organizations to effectively and efficiently perform their functions and achieve their goals.

The most important provision of the Court relating to organizational development of the Assembly of States Parties (ASP or Assembly) is set out in Article 112(4) of the Rome Statute:

The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

### *ASP existing standing subsidiary committees*

**Committee on Budget and Finance.** Prior to the sixth session of the ASP in December 2007, the Committee on Budget and Finance (CBF) had been the only standing subsidiary body of the ASP since its establishment in 2002. The Committee is composed of twelve "experts of recognized standing and experience in financial matters at the international level". Its role is to examine any text 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 proper treatment of victims, assistance for defense counsel, and funds for prosecutorial investigations. The CBF finds itself making these recommendations because there are no ASP standing committees to consider these matters, making some of its members uncomfortable. The CBF should not be asked to pronounce on issues outside its mandate.

Some ASP members and observers have seen this problem in the recent recommendations of the CBF to limit some funds for legal aid for both defense and victims' representation. This is a sign of the need to establish a new standing committee of the ASP on legal aid and generally on the needs, roles and status of counsel for victims and defendants.

**Oversight Committee on Permanent Premises.** During its latest sixth session, the ASP established another committee functioning as a subsidiary body of the Assembly. An Oversight Committee to provide strategic oversight for the permanent premises project was established under resolution ICC-ASP/6/25. The Oversight Committee has the same status as the CBF.

The tasks of the Oversight Committee on Permanent Premises are included in the resolution and they encompass, among others, consideration of options for financing the construction of the permanent premises and related costs, identification and estimating the other costs related to the project, and continuous monitoring





of the functioning and operations of the governance structure for the project. If necessary, the Committee would provide recommendations to the Assembly on any adjustments in these activities that it considers to be required.

There are calls for other standing committees of the ASP that could provide a legislative oversight of other departments and programs of the ICC. Such bodies would be established under Article 112(4) of the Statute – they would report to the ASP, would be composed of members of States Parties and would have the same status as the CBF and the Oversight Committee on Permanent Premises.

Representatives of women’s NGOs, such as the Women’s Initiatives for Gender Justice, have called for a committee of the ASP to monitor implementation of the gender mandates in the Rome Statute and to assist the Court in ensuring gender-inclusive justice. Such a committee could also deal with issues of gender in the Court’s recruitment and its personnel system.

In addition, civil society representatives note that an external oversight mechanism should be created in the form of a standing subsidiary committee as well, as discussed below.

#### *Temporary bodies reporting to the Bureau of the ASP*

**Working Groups of the Bureau of the ASP.** The Bureau of the ASP consists of a President, two Vice-Presidents and 18 members elected by the Assembly. It assists the Assembly in the discharge of its responsibilities and presides over its meetings. To effectively deal with arising matters relevant to the functioning of the Court, in 2004 the Bureau of the ASP established under resolution ICC-ASP/3/Res.8 two Working Groups of the Bureau of the ASP.

The two Working Groups of the Bureau have equal standing. One is based in New York and the other one in The Hague. The mandate of the New York Working Group covers, among others, consultations on proposals for an independent oversight mechanism and consultations on preparations for the Review Conference, in particular on the applicable rules of procedure and practical and organizational issues. The mandate of The Hague Working Group covers the budget of the Court, while respecting the special role of the Committee on Budget and Finance, and equitable geographical representation and gender balance in the recruitment of staff members.

These Groups report to the Bureau of the ASP since they are not permanent bodies. They do not report to the ASP as the CBF does. The Bureau reviews their activities and decides about the length of the mandates of the Working Groups. As a consequence of reporting to the Bureau, the findings and recommendations of the Groups do not have the same level of importance as the reports of the CBF.

**Facilitators of the Working Groups.** A facilitator helps a group of people to understand and to achieve their common objectives. Facilitators, without taking a particular position in the discussion, assist the group in planning how to achieve these goals. Also, facilitators assist the group in reaching a consensus on any disagreements that may emerge during the meetings.





The Bureau of the ASP, by adopting proposals of the President of the ICC, appoints coordinators and facilitators of the Working Groups. The functions of coordinators and facilitators are not permanent. Currently, the Bureau has appointed several facilitators within its Working Groups. Within The Hague Working Group, the Bureau has appointed, among others, facilitators on equitable geographic representation and gender balance in the recruitment of staff members, on interim premises and on permanent premises. Within the New York Working Group, the Bureau has appointed, among others, facilitators on participation in the ASP, on an independent oversight mechanism, on assistance in setting up the New York Liaison Office and on cooperation matters.

Prince Zeid Ra'ad Al-Hussein, Jordan's former permanent representative to the UN, previously served as the Facilitator on the oversight mechanism within the New York Working Group. In February 2007 he stepped down from his function and no one has been appointed to fulfill this position.

**Focal points.** The Bureau appoints a focal point as a representative to gather and coordinate the views of member states on emerging issues in the Assembly. The focal points are designed to be any center of activity, interest and attention. The focal points' terms are temporary and their lengths depend on the assigned issues.

In February 2003, the President of the Assembly appointed a focal point on the establishment of an international criminal bar. The focal point's responsibilities concerned contacting delegations, consulting with them the matter of the international criminal bar, collecting responses and comments, as well as reporting on his findings and recommendations to the Bureau.

At the third and fourth sessions of the ASP, it appointed a focal point on the issue of the Review Conference upon the recommendation of the President.

During the sixth ASP session, in statements to the Assembly, several representatives of civil society, including Amnesty International and Human Rights Watch, expressed their opinion that the Bureau should appoint a focal point on outreach and public relations. There is also a considerable support in the Court and in the Assembly for a focal point on cooperation.

### *'Independent oversight mechanism' of the Court*

Article 112(4) of the Statute provides that the Assembly may establish 'an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy' as a subsidiary body. So far, the Court has not developed an independent oversight mechanism performing fundamental oversight services.

'Oversight' in management jargon, is equated with 'supervision' in the sense of being a general review of institutional performance with particular attention to failures to carry out mandates and to inefficiency and poor productivity. 'Oversight' is also a term used to refer to 'a variety of techniques' that monitor the performance or operation of a person or a group (a definition developed in a recent study concerning the US Congress). According to the Joint Inspection Unit of the UN (JIU), which is responsible for the independent external oversight of the UN, "Oversight is a shared responsibility among Member States, Secretariat, and external oversight mechanisms".





Oversight is the primary responsibility of member states of an organization. They delegate some authority for oversight to a secretariat of the organization ('internal oversight') and some to the external oversight bodies ('external oversight'). Article 112(4) does not specify whether the ASP's independent oversight mechanism should be internal or external. However, every organization needs a system of internal and external oversight mechanisms in order to enable it to ensure its transparent and proper functioning. Establishing such a system of oversight ensures that the activities of the organization are fully in accordance with legislative mandates, that the funds provided to the organizations are fully utilized, that the activities of the organizations are conducted in the most efficient and effective manner, and that the staff and all other officials of the organization adhere to the highest standards of professionalism, integrity and ethics.

The primary objective of internal oversight is to assist the executive heads of an organization by providing advice on internal control and management practices based on a systematic and independent review of the organization's entire operations.

External oversight bodies play a fundamental role in advising and assisting the member states of the organization to discharge their oversight responsibilities. Also, the external oversight acts as 'a guardian of a guardian', supervising the internal oversight mechanism and its activities.

**Background of the development of an independent oversight mechanism.** The ASP has undertaken some steps towards creation of the independent oversight mechanism. In 2005 during its 4th session, the ASP adopted resolution ICC-ASP/4/Res.4 which states that the ASP "decides to invite the Court, in consultation with the Bureau, to submit proposals about an independent oversight mechanism". In 2006, the ASP in resolution ICC-ASP/5/Res.3 took "note of the interim report by the Court and [invited] the Court, in consultation with the Bureau, to submit concrete proposals for the establishment of an independent oversight mechanism to the next regular session of the Assembly of States Parties". In December 2007, the ASP in resolution ICC-ASP/6/Res.2, "renewed its invitation to the Court, in consultation with the Bureau, to continue to consider concrete proposals for the establishment of an independent oversight mechanism to the next regular session of the Assembly of States Parties".

The Bureau of the ASP has been also discussing the possibility of developing this mechanism. In its decision of April 5, 2006 the Bureau recognized proposals for independent oversight mechanism, facilitated by Prince Zeid, Jordan's former permanent representative to the UN. The Bureau decided on August 31, 2006 that it would "await the outcome of discussions on related matters taking place within the context of the United Nations". In February 2007, Prince Zeid stepped down from his Facilitator function and since then the Bureau has been facing difficulties with identifying and appointing a new facilitator. In July 2007, the Bureau in its decision stated that the difficulties had remained 'due to the importance and sensitivity of the matter and that there was the need for wider consultation to ensure the right person would be selected'. Finally, the Bureau's decision from October 15, 2007 deferred the matter for two reasons. First, no delegation had volunteered to assume the role of facilitator. Second, the Registrar indicated that it would be preferable for the Court to await the outcome of ongoing consultations on a similar mechanism being considered by the UN. As this was written, there was no available information about the outcome of the UN consultations on that matter.





**What does oversight do?** The UN Joint Inspection Unit has described various elements of oversight as follows: audit, investigation, inspection, evaluation, and monitoring. However, international organizations often use these specific elements in different ways. Sometimes, they integrate all five elements under one umbrella, but often they separate audit, investigation, and evaluation functions. In a majority of cases, oversight is based on whatever combination best suits the overall managerial arrangement of the organization.

The elements of oversight are:

- **Audit:** an independent review, examination and verification of an organization’s financial and accounting records and ensuring compliance with established policies and operational procedures. Audit processes concern units/departments.
- **Inspection:** closely examines and improves the relevance, efficiency, effectiveness and management of programs and administrative practices of departments in the organization.
- **Evaluation:** focuses on a single, cross-cutting theme or activity. It can provide valuable input into policy, planning, and managerial decision-making at the legislative and executive level.
- **Monitoring:** is aimed at improving the ability of program managers to conduct self-monitoring, and reports on implementation of planned program activities and achievement of results.
- **Investigation:** reports on possible violations of rules or regulations, mismanagement, misconduct, waste of resources or abuse of authority. Assesses the potential for fraud and other violations. The process begins with individuals and first concerns individual behavior, but also reports and recommends on structures, processes and circumstances which encourage violations.

**Existing ICC oversight activities.** The International Criminal Court has already established its external and internal audit units.

The role of an internal auditor is performed by 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. At this session, the ASP decided that: “the internal auditor should be able to decide his/her annual work program independently, including any issues raised by the Committee on Budget and Finance; the internal auditor shall submit an annual report about the activities of the Office to the Assembly, through the Committee”.

The role and tasks of the OIA have been specified in the Rule 110.2 of the Financial Regulations and Rules of the Court. The Office’s objectives are, among others, to provide the heads of organs of the Court with objective and timely information about the Court’s internal controls, management systems and practices, composing a framework of risk management of the Court, and undertaking an in-depth performance audit. The role of the Office of Internal Audit is very technical, limited only to financial accounting and auditing.

In 2003, the Bureau of the ASP announced that the National Audit Office (NAO) of the United Kingdom would serve as an external auditor of the Court. The UK National Audit Office audits the financial statements of all UK government departments 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, as well as with the International Labor Organization and the International Atomic Energy Agency.





**Existing ICC rules and regulations relating to staff and cases of misconduct.** The existing provisions regarding various types of violations of the Court’s rules and cases of misconduct before the ICC are in Articles 46 and 47 of the Rome Statute, in Rules 23-32 of the Rules of Procedure and Evidence (RPE) as well as in the Regulations 119-125 of the Regulations of the Court. They relate to situations that may affect the functioning of the Court:

- serious misconduct,
- serious breach of duty, and
- misconduct of a less serious nature.

Also, the provisions set out the disciplinary measures in a case of committing those crimes.

The Rome Statute: Articles 46 and 47 of the Rome Statute lay out briefly the implications of serious misconduct or a serious breach of duty by a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or by the Deputy Registrar. These acts result in removal of these senior officials. For a misconduct of a less serious nature, the senior officials are subject to disciplinary measures in accordance with RPE, the relevant provisions of which are set out at the end of the paper.

The Rules of Procedure and Evidence and Regulations of the Court: The RPE and the Regulations of the Court provide precise definitions of these crimes.

‘Serious misconduct’ concerns behavior that is incompatible with official functions and causes or is likely to cause serious harm to the functioning of the Court. Such act may involve:

- disclosing facts or information of judicial proceedings of the Court,
- concealing facts or circumstances that may preclude such a person from holding an office,
- abusing the function in order to obtain favorable treatment, or
- an act outside the course of the person’s official duties if such an act is of a grave nature and affects or may affect seriously the functioning and standing of the Court (Rule 24).

‘A serious breach of duty’ occurs when a person ‘has been grossly negligent in the performance of his or her duties or has knowingly acted in contravention of those duties’ (Rule 24). This breach may include, among others:

- not complying with duties the person has been requested to fulfill, ‘knowing that there are grounds for doing so’, or
- repeatedly causing delays in the initiation, prosecution or trial of cases, or in the exercise of judicial powers.

Rule 25 defines ‘a misconduct of a less serious nature’, stating in detail how misconduct occurs. In the course of official duties, it causes or is likely to cause harm to the proper administration of justice before the Court or the proper internal functioning of the Court. This may happen as a result of:

- interfering in exercising the functions of a person referred to in Article 47 of the Rome Statute,
- repeatedly failing to comply with or ignoring requests made by the Presiding Judge or by the Presidency in the exercise of the lawful authority,
- failing to enforce the disciplinary measures to which the Registrar or a Deputy Registrar and other officers of the Court are subject when a judge knows or should know of a serious breach of duty on their part, or





- a behavior outside the course of official duties that causes or is likely to cause harm to the standing of the Court.

Crimes defined in the Rules 24 and 25, committed by a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or a Deputy Registrar, must be transmitted to the Presidency which may also initiate proceedings on its own. Pursuant to the Regulations, the Presidency may set aside anonymous or manifestly unfounded complaints and transmit the other complaints to the competent organ. If a complaint relates to a member of the Presidency, he or she shall not carry out any function as a member of the Presidency with regard to the complaint and his or her functions in that respect shall be exercised by the next available judge having precedence (Regulation 120(4)).

Further Rules and Regulations, set out at the end of this paper, specify in detail the procedures of a request for removal from office, of a request for disciplinary measures (reprimands or a pecuniary sanction) and procedures relating to suspension from duty.

Staff Regulations for the ICC: Pursuant to Article 44(3) of the Rome Statute, “the Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed”. The ASP during its second session in 2003 adopted the Staff Regulations in response to the need to establish a flexible, efficient and fair system for the appointment, remuneration and dismissal of staff of the Court.

The Staff Regulations deal with duties, general rights and obligations, and privileges of the staff members of the ICC. They identify in detail core values and principles of the Court, emphasizing that staff members must uphold the highest standards of confidentiality in exercising their duties. The Regulations describe cases of conflicts of interest, outside employment and activities, and use of ICC property and assets by staff members. The Regulations lay down, among others, salary allowances, appointment and promotion, social security, travel and staff relations, disciplinary measures, and appeals.

Regulation 10.1 of Staff Regulations states that the Registrar or the Prosecutor shall establish ‘administrative machinery’ including staff members which shall advise staff members in disciplinary cases. Regulation 10.2 sets out that the Registrar or the Prosecutor may impose disciplinary measures on staff members whose conduct is unsatisfactory. Also, these senior officials of the Court may summarily dismiss a member of the staff for serious misconduct, including breach of confidentiality. In a case of an appeal, the Administrative Tribunal of the International Labor Organization shall ‘hear and pass judgment upon applications from staff members alleging non-observance of their terms of appointment (Rule 11.1)’.

Thus far, the International Criminal Court has not developed any staff rules on sexual violence and abuse.

## UN Oversight as a Model for the ICC?

There is a view that the ICC should copy, or at least adapt, parts of the UN’s oversight structure, especially its internal oversight solutions. Opponents say, however, that the key factor is how well an oversight mechanism





fits into the overall system of administration of an organization. It is the structure, organization, purposes and goals of the Court that should determine the creation of its own independent oversight mechanism.

UN governance and oversight is conducted both internally and externally. The Office of Internal Oversight Services (OIOS) operates as an internal mechanism, whereas the Joint Inspection Unit (JIU) has been established to conduct external independent evaluations, inspections and investigations.

The UN's internal oversight services are conducted by OIOS, established in 1994 by General Assembly resolution 48/218 B. The aim of OIOS is to enhance oversight within the UN as well as to strengthen the organization's programs, funds, operations and tribunals. The Office performs numerous aspects of oversight: it provides world-wide audit, investigation, inspection, program monitoring, evaluation and consulting services to the UN Secretariat. OIOS assists the UN Secretary-General in fulfilling his internal oversight responsibilities. It submits reports to the Secretary-General that provide insight into the effective utilization of the resources of the Organization and the protection of its assets. It also makes these reports available to the General Assembly. Also, OIOS makes recommendations to relevant departments, programs or individuals on how to improve internal controls and correct obstacles to organizational efficiency and effectiveness.

The scope of activities of OIOS required by the numerous purposes and activities of the UN is very broad. It is organized accordingly. Opponents of using OIOS as model for the Court's oversight mechanism note that the ICC is a single-purpose institution that an oversight mechanism which is tightly focused and organized.

Also, OIOS and its activities have been recently the subject of frequent criticism because of the imperfections and constant improvement it needs. The ICC and the ASP should keep that in mind in its discussions about future independent oversight mechanism. In 2005, the UN General Assembly decided that there are additional measures needed to enhance the independence of the oversight structures of the UN. As a result, the Independent Audit Advisory Committee (IAAC) was established and started its work on the beginning of November 2007. The IAAC's activities include advising the General Assembly on the effectiveness of the UN's audit and other oversight functions, examining the work-plan and budget of OIOS, advising the General Assembly on the effectiveness of risk management procedures and identifying deficiencies in the UN's internal control framework. Finally, it gives advice to the General Assembly on operational implications of issues and trends of UN's financial statements and reports and on accounting and disclosure practices. In addition, the latest decisions of the head of OIOS, the Under-Secretary-General for Internal Oversight Services, about restructuring of OIOS Investigation Division indicate that OIOS is still developing and needs more adjustments.

Finally, the ICC should also take into account the recent criticism of the UN's internal oversight claiming that it lacks the tools, the expertise, the public confidence, and – above all – the independence to conduct effective, transparent, and impartial investigations, for instance in cases of allegations of large-scale fraud and mismanagement within the UN (see Brett D. Schaefer's speech about 'The Status of the UN reforms', available at: <http://www.heritage.org/Research/InternationalOrganizations/h1966.cfm>).

The JIU is the only independent external oversight body of the UN. The JIU provides an independent review of the efficiency of UN services, programs and proper use of funds. It was created by General Assembly





resolution 2150 (XXI) (November 4, 1966) and extended its mandate by resolutions 2735 A (XXV) (December 17, 1970) and 2924 B (XXVII) (November 24, 1972). Resolution 31/192 (December 22, 1976) established the JIU as a standing subsidiary organ of the General Assembly. The JIU is mandated to conduct external evaluations, inspections and investigations in the UN System. It helps the UN System in meeting its organizations' governance responsibilities, in improving their efficiency and effectiveness, in achieving 'the legislative mandates and the mission objectives', in promoting greater coordination among the UN System, in identifying best practices, and in facilitating information-sharing throughout the system.

Representatives of civil society say that the development of the oversight mechanism of the International Criminal Court has become too dependent on the discussions in the UN. The Court has a very specific nature and its oversight created by its special needs shall be developed to address its challenges and singular nature and purpose. Also, the argument for a different ICC oversight system stems from various natures of responsibilities of the ICC's field workers and of the UN peacekeepers. The Court's staff members have relevant expertise on legal issues and those who could be implicated in sexual abuse may face forms of accountability which differ from those applicable to UN peacekeepers.

### Administrative and Management Problems of the UN Tribunals as a Lesson for the ICC

The establishment of a new organization or institution, including international tribunals, is especially risk-prone. That was one of conclusions of OIOS after it conducted its review of two UN *ad hoc* Tribunals – the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Establishment of these both entities shared some difficulties, for instance, time pressure, lack of experience, inadequate and poor planning, delayed or insufficient delegation of authority, and late availability of resources. As a result, the UN Tribunals faced accumulations of problems and severe efficiency losses in the initial phases of the operations.

The lessons learned from the OIOS examination of these two international tribunals may serve to assist in better development and management of the ICC and its oversight mechanism.

#### *Administrative and management problems of the ICTY*

The ICTY, unlike the ICC, is a part of the UN Secretariat. It was established under the UN Security Council resolution 827. Its mandate is to prosecute serious crimes committed during the wars in the former Yugoslavia since 1991, and to try their alleged perpetrators.

OIOS has conducted a comprehensive oversight services within the ICTY's structures since its establishment. OIOS reviews of the ICTY revealed several problems in all of its organs (the Chambers, the Office of the Prosecutor and the Registry).

The ICTY had difficulties with establishment of an administrative support system. The system at its early stages was marked by a number of problems, for instance, the inefficient and non-transparent arrangements for the construction, rental and maintenance of the office building and detention facilities. Also, the ICTY faced delays in delegation of procurement authority and in establishing an administrative mechanism for procurement functions.





There were some problems in human resources management: deficiencies in the strategic planning of human resources management, duplication of the personnel and finance functions, unjustified expenditures for field interpreters, weak integration of personnel and payroll system, delayed delegation of recruitment authority, and unauthorized recruitment actions (e.g., hiring friends or relatives as defense investigators).

The ICTY's difficulties concerned its field operations and no proper consultation and coordination of them between the Office of the Prosecutor and the Registry. Also, there was a weak planning process related to investigation missions, such were no revised investigation travel procedures to make the most of available travel resources.

The OIOS recommendations were connected with the recurring problems. There were improvements needed in cash management, accounts receivables, asset management, procurement, personnel management and existing controls and procedures. Also, there was the need to prevent abuse of the legal aid system and reduction of expenditures for field interpreters.

The ICTY's officials have been responsive to the recommendations and has taken action to address most of the problems disclosed. The ICTY developed a strategic plan for human resources and established human resources system performance indicators. Also, the ICTY was able to achieve savings as well as to reduce the expenditures by strengthening existing controls and procedures. In addition, a number of initiatives had been undertaken to improve the ICTY's performance through the use of information technology and by making changes in working methods. The ICTY's Management Support Services were providing effective support services to its Chambers as well.

### *Administrative and management problems of the ICTR*

The ICTR, like the ICTY, was established by the Security Council as an international court under the auspices of the UN Secretariat. The ICTR investigates and prosecutes indictees for alleged offences committed in Rwanda during the genocide which occurred there in 1994. The court has jurisdiction over crimes which occurred between January 1 and December 31, 1994.

As in the case of the ICTY, the first reviews of the functioning of the ICTR by OIOS revealed numerous administrative problems. There was a general lack of expertise in effective management within the ICTR's organs. In addition, security needs were not adequately taken care of in construction planning. There were deficiencies in timely and proper financial reporting. Also, the administrative support functions did not operate efficiently or effectively. There were difficulties with efficient utilization of resources and with financial accounting systems. In addition, the Registry had no budget expenditure information. Finally, there were major delays in delegation of procurement authority and short-term funding arrangements.

There were revealed some difficulties in human resources management as well. The ICTR had problems with process of recruitment of investigators and with deficient quality and strength of its interpreters and translators. Also, there were no formal developed qualification criteria for recruitment. In addition, key positions in personnel management had no required qualifications and there was a limited ability to recruit experienced staff.





The ICTR faced some management errors and serious shortcomings in almost all areas of its work, for instance in witness protection, in asset and space management, in delegation of authority to the ICTR offices and in travel and information technology issues.

OIOS made various recommendations to the ICTR in relation to all areas of its work. There was the need to maintain separate, specifically assigned authorities and responsibilities unique to each of the organs: the Registry and the Office of the Prosecutor. There was the necessity to develop strategies and mechanisms for resolving internal disputes transparently and to develop controls over petty cash and the use of cash payments. Also, there had to be corrections in trust fund operations, defense counsel management, and press and public affairs.

The Registry and the Office of the Prosecutor of the ICTR took the necessary steps and were able to achieve positive results. There were noticeable improvements in financial management as well as in filling vacant positions. A task force was established which hastened the recruitment process, decreasing the vacancy rate by about 30% in 1999. Also, the Registry became more productive and the work of the Office of the Prosecutor had new vitality and a new prosecutorial strategy. As a result of all those efforts, staff morale has risen and the work of the Office had greater effect.

### *Fee-splitting*

Apart from all of the administrative and managerial difficulties the UN Tribunals faced, in 2001 OIOS investigated possible fee-splitting agreements between defense counsel and indigent detainees at both tribunals. This has been an area in which the ICTY has received the most criticism. Cases of fee-splitting agreements at the ICTR have not been cited in the OIOS report.

The issue of fee-splitting agreements was linked with other related matters, such as: the problems in verifying claims for indigence submitted by the suspect/accused, the fees paid to defense teams, and the use of frivolous motions and other delaying tactics before the Trial Chambers.

Alleged fee-splitting cases at the Tribunals have taken two forms. The first one was for the attorney, who was seeking to be assigned as counsel in a case, to agree to split his fee in some manner with the accused or his family. Once the agreement had been reached, the accused then requested the appointment of that defense counsel. Another form of fee-splitting was for the defense counsel to hire a member of the family of the accused; this practice was perhaps easier to identify and take action against. Both of these practices are now explicitly forbidden in the revised ICTY Code of Conduct.

Both Tribunals were making efforts to curb abusive practices noted by the OIOS investigators that facilitated fee-splitting arrangements. OIOS conducted a follow-up investigation into fee-splitting agreements at the Tribunals. The ICTY and the ICTR have implemented most of the OIOS investigation recommendations and have taken steps to prevent abuse of the legal aid system.

During budget discussions at the last ASP meeting in December 2007, States Parties gave their consideration and expressed their concerns about identifying various criteria to define the indigence of suspected and accused





persons. Establishing such rules could help in preventing fee-splitting agreements between the defense counsel and the suspected. Supervising such rules could be one of the tasks of the internal oversight body.

## Possible Recommendations on the Creation of an Independent Oversight Mechanism for the ICC

### *Appointing a Facilitator*

One of the first steps the Bureau of the ASP must take in order to establish an oversight mechanism is to appoint a new Facilitator to coordinate the consultations. The Bureau has already established several of these functions to help guide negotiations and discussions on relevant issues, such as on the issue of permanent premises and on equitable geographic representation and gender balance in the recruitment of staff members, both of which have been established within The Hague Working Group.

### *Location of the Working Group on oversight mechanism*

Initially, one of the responsibilities of the New York Working Group was to develop proposals for an independent oversight mechanism. However, representatives of civil society, including the Women's Initiatives for Gender Justice, support the consultations on the independent oversight mechanism in The Hague Working Group instead of the New York Working Group because such a solution would provide regular consultations and involvement about the independent oversight mechanism between the Bureau and the ICC. In addition, some observers believe that development of the mechanism in New York has become too dependent on the discussions taking place in the UN on a similar mechanism and that dependence would be reduced by moving the issue to The Hague.

### *The need to develop staff regulations on sexual violence and abuse*

To date, among existing ICC rules relating to staff members and cases of misconduct before the Court, there are no staff rules on sexual violence and abuse. Establishing such provisions would create clear and transparent relationships among the staff members and help to provide a safe and comfortable work environment. These regulations could be included in the existing ICC staff regulations in order to avoid overlapping provisions.

To develop staff regulations on sexual violence and abuse, terms relating to these violations, such as 'sexual exploitation' and 'sexual abuse' must be defined and clear provisions relating to prohibition of those crimes should be created. Also, the new standards should not be an exhaustive list and any forms of these violations should be grounds for administrative actions or disciplinary measures.

Those responsible for committing crimes of sexual exploitation and abuse should be held accountable. The procedures should describe in detail how such a case should be handled and what punishment its perpetrators should face.

Also, heads of the Court's organs, units, divisions and offices should be responsible for creating and maintaining an environment that is free from cases of sexual exploitation and abuse. The heads of the divisions should organize trainings and meetings for staff members to keep them familiarized with any changes in rules and procedures relating to these crimes. In addition, the supervisors should be responsible for taking any appropriate action in cases where relevant standards have been violated and such a crime has occurred.





Cases of sexual violence and abuse would be addressed and revealed by the independent oversight mechanism, especially by its investigation division. This matter will be discussed subsequently in this paper.

### *Mandate and structure*

As already mentioned in this paper, a key factor in the composition of the oversight mechanism is whatever combination of elements best suits the overall managerial arrangement of the organization.

According to Article 112(4) of the Rome Statute, an independent oversight mechanism would conduct inspections, evaluations and investigations. The article does not specify whether it should be internal or external. However, every organization needs a system of internal and external oversight mechanisms in order to ensure its transparent and proper functioning. The mandate of the future independent oversight mechanism for the Court would be included in a resolution of the ASP.

The mechanism would exist in two dimensions: internally and externally. The structure of the internal oversight could be created either by establishing an internal oversight office or, alternatively, by creating a single Inspector General function. The external oversight would be performed by a standing oversight committee to the ASP.

The external oversight would consist of a joint team of auditors and investigators. It would submit its reports to the Assembly and would serve as the staff of a standing oversight committee, like the CBF or the Oversight Committee on Permanent Premises and would have the same status in the ASP as these two already existing committees. It would serve States Parties in discharging their oversight responsibilities and would enable an external, systematic, and objective inspection and evaluation of the Court's activities which are essential for its efficient functioning and for the ASP's adequate knowledge of them.

The internal oversight, however organized, would have direct access to records, data, sites and staff without any hindrance or need for prior clearance, while fully respecting judicial and prosecutorial independence.

One option would be an internal oversight office consisting of independent experts appointed by the Presidency of the Court with an excellent knowledge and experience relating to oversight and governance matters. The office would submit reports on its activities and findings and on corrective actions periodically to the ASP. Also, it would assist the President of the Court, by providing advice and information based on a systematic and independent review of the Court's entire activities.

As an alternative, the ASP could establish a single internal Inspector General's office for the purpose of internal oversight. The Inspector General would be appointed by and report to the President of the Court. The Inspector would require sufficient well-qualified staff to be able to perform his or her responsibilities.

### *Functions and responsibilities*

The external oversight performed by the standing oversight committee of the ASP would be accountable to States Parties for providing objective information and advice regarding the management of the Court. Also, it would function as 'a guardian of the guardian' by monitoring and controlling the internal mechanism. The





external oversight would assure proper functioning of internal controls and submit appropriate recommendations when the internal controls are found to be inadequate or missing.

However, establishing such an external mechanism in the shape of a standing committee to the ASP requires the exercise of strong political will by States Parties. Usually governments are reluctant to spending money on establishing new administrative units. In addition, besides the costs factor, establishment of such a mechanism requires a fair representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

As mentioned above, the internal oversight could be created in two ways. Each of these two solutions would have a different combination of oversight services, discussed in turn:

**Internal oversight office.** The option of an internal oversight office would integrate oversight elements under one umbrella. Several international organizations have applied such a structure of internal oversight which integrates all of its elements. Examples include: OIOS of the UN, the Office of Internal Audit of the UN Children's Fund (UNICEF) or the Internal Oversight Office of the World Health Organization (WHO).

The internal oversight office would deal with the Court's overall functioning and would provide 'good governance'. It would conduct inspections of the Court's various activities and operations and it would provide a close review of the effectiveness, efficiency, and integrity of all the Court's organs. Also, it would determine if the Court's resources are efficiently and economically utilized. On these financial matters, the internal oversight office would cooperate with the Court's Office of Internal Audit. Also, the office would closely evaluate activities within the Court's policies and programs in order to determine their relevancy and effectiveness. In addition, the office would deal with management of human resources and personnel at the Court. Finally, the internal oversight office would investigate cases involving the Court's personnel (for instance, cases of misconduct, various types of violations of the ICC's rules and regulations or incidents of breaches of the Court's discipline) as well as cases involving the Court's operations (for instance, cases of knowingly mismanagement of the Court's sources etc.).

The advantage of the integrated internal oversight office is that it would perform all the oversight elements the Court needs and it would face its problems and difficulties in all fields of the Court's work. However, such an integration of oversight elements may weaken transparency and clarity of the internal office's work. The nature of its work would be very broad, namely from inspecting the effectiveness of the management and administration of the ICC's organs to investigating cases of sexual harassment.

**Inspector General.** The option of an internal Inspector General would separate oversight elements. Usually, international organizations establish such function to deal both with investigation and inspection, such as the Office of the Inspector General in the Food and Agriculture Organization (FAO) or the Inspector General's Office in the Office of the UN High Commissioner for Refugees (UNHCR). However, it appears that the Inspector General responsible only for investigations also brings positive results to an organization's functioning. The Inspector General of the ICC would deal with cases involving the Court's personnel (such as cases of misconduct, various types of violations of the Court's rules and procedures or incidents of breaches of the Court's discipline) or involving the Court's operations (such as cases of threats, forgeries, embezzlements





of funds, assaults, violations of trust, unauthorized disclosure of non-public information, and abuse of authority).

Such an institutional arrangement in the Court would enable it to perform independent investigations of reported complaints and would resolve the disputes impartially and neutrally. Also, the Inspector General would provide confidential and informal assistance to staff members of the Court. However, establishing this single Inspector General requires creating an additional function or unit to deal with other aspects of the Court's performance and functioning and their evaluation and inspection.

The investigations, conducted by either the internal oversight office or by the Inspector General, may be the result of a complaint received by the Special Hotline (similar to the UN OIOS hotline), a referral by the Office of Internal Audit, or may be initiated by the staff members of either the internal oversight office or the Inspector General's office through confidential sources of information. Also, the investigations should be confidential, complainants and witnesses should be protected in order to ensure fair and objective investigation.

After a proper investigation of cases of criminal activities and confirming that there is evidence to support them, the cases would be referred to national authorities. However, in many situations the nature of the violation would decide whether the internal oversight office or the Inspector General would deal with the case on its own or if the case should be referred to a relevant national organ. Prior to referral, the immunity of a current employee who is a criminal suspect would be waived. An especially complicated situation occurs when a case happens on the territory of more than one state. In developing the rules such a situation should be taken into account as well.

## Conclusion

The ICC, as the first independent permanent international criminal court, needs long-term and transparent managerial and organizational methods and oversight of them. The Court is a modern international organization – it has its managers, stakeholders, organizational structure as well as a major human and financial potential at its disposition.

Independent oversight mechanisms, internal and external, will help the ICC be more effective and efficient by enhancing the management of the human and financial resources and by providing more transparent assignment of responsibility and accountability. An independent oversight mechanism will contribute to the Court's independence, impartiality and neutrality. Also, internally conducted investigations within the mechanism would be its key component through facing and addressing problems of abuse and exploitation by and of the Court's staff members. Through the working principles of confidentiality and neutrality, the outcome of the investigations would enforce and expand professional standards as well as guarantee the culture of ethics and right conduct.

The future independent oversight mechanism of the ICC should learn from lessons of the UN ad hoc Tribunals' management and administrative problems. These experiences show that human resources as well as financial and administrative management are crucial for proper and efficient functioning of such entities. The ICC should avoid their mistakes and learn from their achievements.





Efficiently functioning and dynamically cooperating elements of the ICC structure will guarantee the Court's success, recognition and appreciation and will contribute to diminishing the criticisms of its opponents. The Court will be perceived as a well functioning institution and as a fair international tribunal bringing justice to the perpetrators of grave crimes, redress to their victims, and contributing to restoring and sustaining peace.

## Key Oversight Provisions

- 1) The Rome Statute (Articles 44(3), 46, 47 and 112(4)), A/CONF.183/9, July 17, 1998
- 2) Rules of Procedure and Evidence (rules from 23 to 32), ICC-ASP/1/3, September 9, 2002
- 3) Regulations of the Court (from 119 to 125), ICC-BD/01-01-04, May 26, 2004
- 4) Staff Regulations for the International Criminal Court, ICC-ASP/2/10, September 12, 2003

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