



**INDEPENDENT OVERSIGHT MECHANISM TEAM
COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)**

**COMMENTS AND RECOMMENDATIONS¹
TO THE SEVENTH SESSION OF THE ASSEMBLY OF STATES PARTIES
14 - 22 NOVEMBER 2008, THE HAGUE**

31 OCTOBER 2008

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

The Team welcomes the work of the New York Working Group facilitator, Ambassador Andreas D. Mavroyiannis, former Permanent Representative of Cyprus to the United Nations, where discussions on the development of a mechanism progressed under his leadership.

While there are internal mechanisms that address staff accountability for instances of misconduct,² no independent body currently exists to address this function. A single authority is required to address issues that affect the institution as a whole and deal with concerns regarding the most senior level officials of the ICC in which organ-level institutions would be insufficient or inappropriate.

The success of the oversight mechanism will depend on, inter alia:

- its actual independence;
- strength of its mandate and functional competence;
- adequate resources (quantity and quality);
- the transparency of its decision making.

The Team therefore recommends that the mechanism address the following issues:

1. Independence of the Mechanism

Any oversight mechanism that is devised for the Court must be sufficiently independent to allow for impartiality and fairness in any investigatory process. This will allow for unbiased procedures and protocols in matters to investigate and the conduct of investigations.

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

² Staff Regulation 10.2 and Chapter X of the Staff Rules provide procedures for dealing with all types of misconduct.

The Team is concerned that under the current system, the responsibility for investigation and disciplinary proceedings has been spread through different entities including the Disciplinary Advisory Board, the Safety and Security Section, the Legal Advisory Services Section, the Office of Internal Audit, ad hoc boards of inquiry, and program managers. The Team notes the Court's assessment that reliance on such ad hoc entities may lead to "delays in investigations, mishandling of evidence, overlooking significant factors and/or committing procedural irregularities which would render the evidence inadmissible in court."³ The Team believes that there should be a single, independent body with a clear mandate to provide such oversight.

a. Office of Internal Audit and other internal entities

The Team however disagrees with the Court's recommendation to expand the mandate of the Office of Internal Audit to include investigations of misconduct, including the creation of professional investigative units to handle all complaints. Such a method will not only continue the ad hoc character of investigations, but will not achieve the level of independence foreseen in Article 112(4) of the Rome Statute⁴ to ensure the legitimacy of any findings.

We agree with the Committee on Budget and Finance that "different skills than individuals employed primarily as auditors" would be necessary to conduct investigations and provide recommendations and disciplinary actions.⁵ However, we disagree with the CBF that an internal section such as the Human Resources Section or the Legal Advisory Section should be tasked with this role due to the need for sufficient independence of the oversight entity.

b. UN Office of Internal Oversight Services

The Team disagrees with the CBF recommendation that the Court should consider entering into a memorandum of understanding with the United Nations Office of Internal Oversight Services (OIOS). The Team is particularly concerned that the OIOS, which is located in New York, would not be able to provide the necessary investigative functions to deter wrongdoing, assure accountability, and maintain confidence of stakeholders in the integrity of the Court. Though costs may be reduced through this arrangement, the OIOS has been subject to frequent criticisms by those organizations which rely on its professional investigatory services.⁶ In addition, the Team believes that engaging the OIOS to provide oversight of the Court would run contrary to Article 112(4) of the Rome Statute which contemplates the independence of the oversight mechanism and may undercut the independence of the ICC itself.

2. Structure of the Mechanism

³ Court's Non Paper on the independent oversight mechanism, 15 July 2008, paragraph 12.

⁴ Under Article 112, paragraph 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."

⁵ Report of the Committee on Budget and Finance on the work of its eleventh session, 25 September 2008, http://www.icc-cpi.int/library/asp/ICC-ASP-7-15-advance_English.pdf

⁶ The integrity and adequacy of the processes within the OIOS Investigation Division have recently been called into question, where the diluted competencies of investigators, absence of administrative and legal infrastructure, and the informal nature of procedures, have led to failures in the investigatory process. The lack of impartiality and public confidence; inadequate resources, tools, and expertise; and secrecy through central control of information, which has resulted in managers being shielded from external review; have downplayed the ability of OIOS to function effectively. Details from Michel Girodo, *A Culture Review of the Investigations Division of OIOS*, Consultant's Report Submitted to Inga-Britt Ahlenius, Under-Secretary General, Office of Internal Oversight Services, 13 July 2007, <http://www.hrw.org/pub/2008/un/Culture.Review.OIOS.Inv.Div.pdf>

The Bureau's report provides a number of structural recommendations on the creation of an independent oversight mechanism. The report recommends a three-tiered structure. The first tier would deal with internal misconduct that cannot be addressed through administrative measures imposed by management (category A offenses). The second tier would deal with all serious misconduct by staff, whether internal or external, for which the mechanism carries out investigations for prosecution (category B offenses). The third tier would address any misconduct of agents acting on behalf of the Court in the performance of their functions (category C offenses). If criminal activity is found in the course of an investigation, the mechanism would notify national authorities and remain the point of contact with respect to the judicial process. In this regard, it is unclear to the Team whether under the Bureau's proposal the oversight mechanism would defer to national criminal proceedings or remain seized of its investigations and unable to take disciplinary action. The Team welcomes that the NY Working Group has done a great deal of thinking on the structure which is a good start for future discussions.

The Team agrees with the Bureau that the mechanism should be customized to the structure, size and nature of the ICC, to the nature of the possible complaints and allegations, that a budget be created, and that two staff are recruited six months prior to the mechanism's start of work "to draft the detailed regulations of the OM [oversight mechanism] and procedures to cover all cases that may arise as well as other aspects of its functions." We feel that staff should be recruited with gender expertise at the outset of the development of procedures to ensure allegations of sexual misconduct can be effectively addressed and/or deterred by the mechanism.

The Team also agrees with the Bureau recommendation on the need to create an ASP subsidiary body for the mechanism to report to. It is recommended that the mechanism should report annually to the ASP on its work.

3. New Regulations and Rules

Without prejudice to existing rules and regulations providing for investigation, disciplinary proceedings and measures for misconduct, the ASP will need to establish clear rules and regulations for the independent oversight mechanism. The ASP should clearly specify the mandate of this process and ultimately approve the rules and regulations. Such rules and regulations will be used to determine the remit of the oversight mechanism (what types of actions, issues and problems it may investigate), provide procedures to recruit staff for the mechanism, procedures for the receipt of complaints including which individuals and/or bodies may file complaints, to respond to complaints including providing sufficient confidentiality, procedures to investigate misconduct, criteria for assessment of complaints, adequate due process, appropriate punishment and disciplinary measures, whistleblower protection, detection and handling of waste, fraud and abuse of the system and procedures for the investigation of allegations of sexual harassment, exploitation or abuse by ICC staff.

In addition, it is important for such regulations and rules to detail reporting procedures, including rules governing confidentiality of complaints, the provision of statistical information to the ASP and publicly as well as the publication of reports and decisions on individual complaints. Also, the regulations and rules might usefully explain the jurisdiction of the mechanism, e.g., that it may initiate investigations on its own motion.

Furthermore, it is important for such regulations to specify the range of measures that the investigation may take (e.g., to enable it to have more than recommendatory powers only and to be able to take other sorts of measures such as referral to prosecutors, mediation and conciliation, disciplinary action etc).

The Team agrees with the Court's outline of rules and procedures that must be addressed including:

- Incidents of criminal misconduct, in particular sexual harassment, exploitation and abuse by staff or those discharging duties under the Court's authority, must be addressed sufficiently
- The mechanism must cooperate with national authorities to ensure that crimes are fairly and effectively investigated and potentially prosecuted without delay, respecting international human rights standards in the process
- Investigations shall respect individual rights, fairness and due process
- The mechanism must have access to all persons, books, records, documents or materials necessary for its investigations, subject to confidentiality requirements in the context of judicial proceedings

4. Management Oversight

The Team believes that while procedures may exist to address management performance at the Court, the independent oversight mechanism would be in a position to address cases of indiscipline ranging up to grave criminal activity. Misuse or willful evasion of administrative procedures is not a management problem but a serious case of indiscipline. While allegations against senior Court officials are dealt with under Chapter 8 of the Regulations of the Court and rules 24 and 25 of the Rules of Procedure and Evidence, the Team disagrees with the CBF that the existing governance structure provides adequate independent oversight of the management performance of the Court, especially for dealing with acts of serious indiscipline as well as criminal activities. The external auditor and the Office of Internal Audit do not have the expertise to address serious misconduct and criminal allegations that may emerge against senior Court officials. Expertise housed in a potential mechanism should be used to allow for investigation and action against potential misconduct. At the same time, existing governance structures may also need to be strengthened to provide increased oversight of the Court's management performance generally.

5. Target Date and Appointment of a New Facilitator

Given previous delays of the adoption of a mechanism and the current legal vacuum that exists for some allegations of misconduct that may arise, the Team agrees with the Bureau that the ASP should set a target date for the establishment of a mechanism. Interim measures may need to be put in place until the mechanism begins its work.

A new facilitator also must be appointed in The Hague Working Group to take over from Ambassador Mavroyiannis who left New York in July 2008. The issue was shifted to The Hague after his departure. The Bureau should appoint a facilitator as soon as possible.