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Report of the Secretary-General on the activities of the Office of Internal Oversight Services

Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994

Report of the Office of Internal Oversight Services on the investigation into possible fee-splitting arrangements between defence counsel and indigent detainees at the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia

Note by the Secretary-General

1. Pursuant to General Assembly resolutions 48/218 B of 29 July 1994 and 54/244 of 23 December 1999, the Secretary-General has the honour to transmit, for the attention of the General Assembly, the attached report, conveyed to him by the Under-Secretary-General for Internal Oversight Services, on the investigation into fee-splitting at the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia.

2. The Secretary-General takes note of its findings and concurs with its recommendations.

Investigation by the Office of Internal Oversight Services into possible fee-splitting arrangements between defence counsel and indigent detainees at the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia

Summary

In response to a request from the Assistant Secretary-General, Programme Planning, Budget and Accounts, Controller of the United Nations, in June 2000, the Office of Internal Oversight Services (OIOS) conducted an investigation into possible fee-splitting arrangements between defence counsel and indigent detainees at the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia.

The request to OIOS followed the report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (A/54/634), which made reference to "fee-splitting arrangements" between indigent detainees and their counsel at the International Tribunal for the Former Yugoslavia. The report of the Expert Review Group did not cite any allegations of fee-splitting at the International Criminal Tribunal for Rwanda, although it did note some general matters on this issue that were not attributed to either Tribunal.

Based on documents examined and interviews conducted, OIOS investigators found evidence that:

(a) Several former defence counsels assigned at both the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia have either been solicited and/or have accepted requests for fee-splitting arrangements made to them by their respective clients;

(b) One current defence counsel at the International Criminal Tribunal for Rwanda rejected a detainee's request for fee-splitting and informed the Registrar accordingly;

(c) Some defence teams at the International Criminal Tribunal for Rwanda have made arrangements for gifts to their clients, their clients' relatives and other forms of indirect support and maintenance detailed in the report;

(d) Some defence teams at both Tribunals have hired friends or relatives of their clients as defence investigators.

The International Tribunal for the Former Yugoslavia had announced to the press that the Registry was aware of certain rumours to this effect and had been looking into them. OIOS investigators determined that efforts by both Registries to address this issue have not yet produced evidence to substantiate ongoing fee-splitting arrangements at the two Tribunals. However, OIOS found credible information about possible ongoing fee-splitting arrangements between detainees and selected counsel currently assigned to both Tribunals. This information needs to be further developed, refined and corroborated by specific investigative steps. Because of the limited time available to conduct the present review and the continuing efforts

by the Registries to address this issue, OIOS will continue to pursue this area in consultation with the Registries and report as appropriate and necessary.

The present report shows that the issue of fee-splitting is linked with other related matters, such as: the problems in verifying claims for indigence submitted by the suspect/accused; the process of selecting and changing assigned counsel; the fees paid to defence teams; and the use of frivolous motions and other delaying tactics before the Trial Chambers.

Both Tribunals and the Controller have been provided with draft copies of this report. Their comments and suggestions have been evaluated and incorporated accordingly.

The International Criminal Tribunal for Rwanda noted that the investigation was carried out with due transparency and collaboration from the Tribunal.

The International Tribunal for the Former Yugoslavia is of the view that the current problems would be resolved by having a stringent and well-formulated Code of Professional Conduct for Defence Counsel, the creation of which is under way.

Contents

I. Introduction

1. In June of 2000, the Investigations Section of the Office of Internal Oversight Services (OIOS) received a request, made to the Under-Secretary-General for Internal Oversight Services, from the Assistant Secretary-General, Controller, for an inquiry into fee-splitting arrangements of defence counsel assigned to suspects/accused persons at the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia.

2. Specifically, the Controller requested OIOS to inquire further into matters raised in the report by the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (A/54/634), which was established by the Secretary-General to review the functioning of the two Tribunals pursuant to General Assembly resolutions 53/212 and 53/213 of 18 December 1998. The report of the Expert Group made reference to allegations of "fee-splitting", that is the sharing by defence counsel of the fees paid by the two Tribunals with their clients, with particular reference to the International Tribunal for the Former Yugoslavia. The concern was that United Nations funds, used to finance the two Tribunals, were being used for a non-authorized purpose and, in fact, were being wasted by a fee-splitting practice that forwarded United Nations money to the suspect/accused or their families. Further, as noted by the International Tribunal for the Former Yugoslavia, there is the possibility that funds paid in fees were being used in an inappropriate manner for a potentially unethical purpose, negatively affecting the administration of justice and raising unwarranted suspicion and disapproval of the work of the Tribunal.

II. Methodology

3. OIOS investigators reviewed internal Tribunal documents related to defence counsel, including billings of defence counsel, counsel assignment details and changes of defence counsel; rules, guidelines and memoranda on the qualifications, conduct and role of defence counsel; documents on the management of defence counsel; financial records of payments to defence counsel; and correspondence concerning the replacement of defence counsel. Additionally, OIOS consulted members of the Expert Group.

4. Subsequently, in September 2000, a team of OIOS investigators visited both the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia to conduct interviews, including interviews with persons in the three organs of both Tribunals: The Chambers, the Office of the Prosecutor and the Registry. Additionally, on a voluntary basis, detainees and defence counsel agreed to speak with OIOS investigators on the topic of fee-splitting arrangements. Their cases before the Tribunals were not discussed.

III. Background

A. Tribunal obligations to pay fees

5. Defence counsels and their team members (i.e., co-counsel, investigators and legal assistants), who are paid for their services privately, are entitled to make their own fee arrangements with suspects and accused persons. This is not the case for those paid by the two Tribunals. By statutory authority, suspects and accused persons in both Tribunals are entitled to have legal assistance and, if deemed to be "indigent" by the Registrars, to have counsel assigned to them with the legal fees and costs borne by the Tribunals.

6. The Rules of Procedure and Evidence ("the Rules") and the Directive on the Assignment of Counsel ("the Directive") of the Tribunals provide generally for the appointment, qualifications and duties of counsel for the indigent suspect/accused by the Registrars. To fulfil this obligation, the Registrars maintain lists of qualified counsel from which the indigent suspect/accused may select. Both Registrars also allow the indigent suspect/accused to provide names of counsel who are not already on their lists. While their respective rules and directives vary somewhat (see A/54/634), both Registrars seek to ensure that qualified counsel acceptable to the indigent suspect/accused is assigned.

B. Registry management of defence counsel teams and fees

7. Both Registries provide for the management of the needs and requirements of defence counsel teams

via their respective defence counsel management offices. These offices are responsible for the day-to-day interaction with the teams. As all suspect/accused persons in both Tribunals are allowed, under specified circumstances, to engage co-counsel, investigators and legal assistants, their management requires not only maintenance of the lists of qualified counsel and advice to the Registrars, but also the resolution of problems and the review of all billings. Moreover, both offices have published and are responsible for the operative effect of the respective codes of professional conduct for defence counsel. Failure by a counsel to adhere to the codes may lead to withdrawal by the counsel or a decision by the Trial Chamber.

8. One of the critical issues for which the defence counsel management offices hold delegated responsibility is the establishment of the indigence of those suspects and accused persons who have claimed that status.

IV. Investigation

A. Indigence

9. The question of indigence is particularly pertinent in the context of fee-splitting as it forms the basis for the assignment and the remuneration of counsel by the Tribunals. While a suspect/accused person may select the qualified counsel of his choice and make fee arrangements when he is paying for those services, the Rules provide for the Registrars to assign counsel who will be paid by the Tribunals for any suspect or accused who is certified to be indigent.

10. The Registrars are required to establish criteria for the designation of indigence. Pursuant to article 4 of the Directive on the Assignment of Defence Counsel of the International Criminal Tribunal for Rwanda "a person shall be considered to be indigent if he does not have sufficient means to engage Counsel of his choice and to have himself legally represented or assisted by Counsel of his choice". Similarly, article 5 of the Directive of the International Tribunal for the Former Yugoslavia provides that, "a suspect or an accused shall be considered to be indigent if he does not have sufficient means to retain counsel of his choice".

11. OIOS has noted that these provisions do not provide a clear definition of indigence. The phrase, "sufficient means", quoted in the two articles above, is nowhere defined. The system as it presently stands is open to abuse. In one instance, OIOS was advised that detainee of the International Criminal Tribunal for Rwanda had privately retained counsel before being transferred to the detention facility. The detainee claimed indigence on arrival at the facility and was assigned that same counsel. OIOS also learned that another detainee of the Criminal Tribunal had approximately $250,000 reflected in his bank statement when he arrived at the detention facility, but within a month the same account reflected a zero balance. Although both Registry offices have sought to curb abuses, the issue of "counsel of his choice" has been cited to prevent some of the corrective measures suggested by the Tribunals.

12. Article 9 of the Directive on the Assignment of Defence Counsel of the International Criminal Tribunal for Rwanda and article 10 of the Directive of the International Tribunal for the Former Yugoslavia provide that in assigning counsel to an indigent suspect or accused, the Registrars "may request the gathering of any information, hear the suspect or accused, consider any representation, or request the production of any documents likely to support the request".

13. Both Tribunals reported difficulties in establishing whether the criteria for indigence are met or not. To the extent possible, efforts are made by the Registrars to verify with governmental authorities the representations of the accused. However, due to the lack of investigators experienced in tracing assets, most decisions of the Registrars on this matter are necessarily based on representations of the suspect/accused persons themselves. As a result, all of the detainees of the International Criminal Tribunal for Rwanda and all but four of the detainees of the International Tribunal for the Former Yugoslavia have claimed indigence, and these claims have been accepted by the two Tribunals. Consequently, $8.5 million was expended in 1999 by the United Nations and it is anticipated that another $8.5 million will be expended in 2000 in payment for defence fees for hours charged by lead counsel, co-counsel, investigators and legal assistants, as well as for their expenses, although it is possible that some detainees or their families have the means to pay for legal defence.

14. *The International Criminal Tribunal for Rwanda noted that the programme of legal assistance has been set up in the interest of justice in order not to jeopardize the rights of the accused claiming to be*

indigent. Thus, even though the report points out that the system as it presently stands is open to abuse, as of now there is no actual proof that there has been any abuse. No systematic Tribunal investigation has yet been carried out because of the fact that the Tribunal lacks the means to employ an investigator.

15. OIOS notes that, in the light of the findings of this investigation, as detailed in the present report, there is evidence upon which the Tribunal can begin to take corrective actions as outlined in the recommendations below (see paras. 78-93).

B. Fee-splitting

16. When referring to fee-splitting arrangements between the suspect/accused and their counsel, the Expert Group alleged that it had only received "indications" of "financial arrangements between accused and their counsel under which a portion of the amounts received by counsel from the International Tribunal for the Former Yugoslavia are shared with the accused through, for example, contributions by counsel to the defendant's relatives".

17. The Expert Group did not confirm the existence of fee-splitting arrangements at the International Tribunal for the Former Yugoslavia. However, based on the indications it had received, the Group felt the need to "invite the attention of the Registrar's Advisory Panel of the International Tribunal for the Former Yugoslavia to the matter for consideration of a possible modification of the Code of Professional Conduct [for defence counsel]."

18. In the absence of specific information on fee-splitting arrangements at the International Tribunal for the Former Yugoslavia, OIOS first proceeded to a thorough examination of the various media reports that have referred to the matter and requested assistance from the Registry on their related reports/information. Upon careful review of the information received, the OIOS investigators obtained and reviewed additional documentation at the International Tribunal for the Former Yugoslavia and conducted interviews with Tribunal staff members, current and former defence counsel and with one detainee.

19. In the absence of any specific information from the Expert Group, the OIOS team sought the assistance of the Registry of the International Criminal Tribunal for Rwanda for any reports of such activity received there. OIOS investigators conducted a careful examination of all of the documents provided by the Tribunal in order to ascertain whether there are indications of fee-splitting. As with the International Tribunal for the Former Yugoslavia, the OIOS investigators conducted interviews with staff members of the International Criminal Tribunal for Rwanda current and former counsel and several detainees.

20. During these interviews, it was recognized that fee-splitting may manifest itself in formal arrangements between a detainee and his counsel, for example the regular apportionment of a percentage of the counsel's fees. However, it may also take the form of gifts to the detainee, his relatives and other forms of indirect support and maintenance.

1. Interviews of detainees

(a) The International Tribunal for the Former Yugoslavia

21. OIOS sought to interview detainees at the Detention Unit of the International Tribunal for the Former Yugoslavia. However, despite arrangements made to facilitate the interview process through the Commanding Officer of the Detention Unit, who had advised all detainees in writing that OIOS wished to visit them in order to discuss allegations of fee-splitting between detainees and counsel at the Tribunal, all but one refused to meet with the OIOS investigators. In fact, OIOS was told that upon being thus notified, some of the detainees had replied: "We're not that stupid!"

22. The only detainee who met with the OIOS investigators provided useful and relevant information. Although some of the information provided was partially verified by separate corroborative reports, including by documentary evidence, further verifications by OIOS and the Registry are required.

(b) The International Criminal Tribunal for Rwanda

23. During its inquiry into the defence counsel arrangements of the International Criminal Tribunal for Rwanda, the Commanding Officer of the United Nations Detention Facility in Arusha verbally advised the detainees that the OIOS team wished to meet with them concerning their defence counsel relationship. Unlike the case at the International Tribunal for the

Former Yugoslavia, all but one of the detainees agreed to meet with OIOS investigators. Interviews with the detainees were held at the Detention Facility, in the presence of the managers of the Facility and only with the voluntary agreement of the detainees themselves. Again, their cases before the Tribunal were never discussed.

24. OIOS investigators met with 10 of the 42 detainees. During these interviews, one detainee impliedly admitted fee-splitting to OIOS. In responding to the question, "Had his defence counsel made payments to him or his family?", the detainee qualified the question as "stupid" and repeatedly asked, "If the United Nations High Commissioner for Refugees would not support my exiled family, who else would?".

25. The rest of the detainees interviewed denied receiving continuing financial support for themselves or their relatives from members of the defence team. One detainee acknowledged soliciting such support from his counsel but said that his request was turned down by the counsel.

2. Interviews of defence counsel and other members of defence counsel teams

26. As indicated above, OIOS also interviewed former and current defence counsel at both Tribunals. Most told OIOS that they had only heard rumours about fee-splitting and denied having engaged in fee-splitting arrangements with their respective clients and/or their clients' relatives.

(a) The International Tribunal for the Former Yugoslavia

27. As at the International Criminal Tribunal for Rwanda, former defence counsel expressed different views from that of current counsel. For example, one former counsel for a detainee at the Tribunal admitted to OIOS that he had been under pressure from his former client, who, upon querying the Registry about his counsel's monthly fees, requested counsel to provide monthly financial assistance to his family. The counsel refused to comply with the request, advised the Registrar in writing about the demand by his client and ultimately resigned.

28. The same counsel further told OIOS investigators that he was aware when he made his assignment that some of his other colleagues had been less scrupulous and had accepted similar offers from their clients. However, when asked to elaborate further on this point, the counsel refused to provide their names or information that could lead to their identification, merely stating, "Don't ask me their names because I'm not going to tell you! What I can tell you, however, is that their arrangement is still going on".

29. Furthermore, OIOS investigators obtained copies of correspondence indicating that another counsel, formerly assigned to the International Tribunal for the Former Yugoslavia, wrote to the Registrar at the time of his assignment and sought replacement for alleged problems with his then client. However, several months later, upon withdrawal of his assignment, that same counsel advised the Registrar in writing of the true reasons which led to his request, namely that he had been under constant pressure to accept, but managed to reject, a solicitation for fee-splitting from his former client.

30. The information provided by both counsel referred to above was corroborated by additional testimony and documentary evidence obtained from the International Tribunal for the Former Yugoslavia. Furthermore, staff members at the Tribunal with knowledge of matter told OIOS that, although the above examples might constitute the only two confirmed past cases of fee-splitting solicitation involving former counsel at the International Tribunal for the Former Yugoslavia, their current internal inquiries into the issue have produced credible information, but so far no evidence, of fee-splitting arrangements.

(b) The International Criminal Tribunal for Rwanda

31. Most of the counsel for detainees of the International Criminal Tribunal for Rwanda confirmed that they had heard about fee-splitting arrangements at the Tribunal but were unable to substantiate the information. Current counsel denied any personal involvement in fee-splitting with their clients or clients' relatives.

32. Former counsel, however, told a different story. One former counsel admitted to OIOS that he was compelled to provide support to the family of his client to ensure that he continued to be retained as counsel. On one occasion, at the direction of the detainee, he gave the fees of one of his investigators to the detainee's daughter, who was living abroad. The

counsel claimed that all defence counsel at the Tribunal engage in fee-splitting in one way or another.

33. Documentation reviewed by OIOS revealed correspondence from one defence counsel complaining to the Tribunal about a direct solicitation by a client to provide maintenance for his wife and children. Despite several attempts, the counsel could not be reached for an interview with OIOS.

34. OIOS also learned that a few detainees exert pressure on new arrivals to select their counsel from one particular group, on the promise that counsel from that group would provide financial assistance to their family and supply the detainee with gifts.

C. Receipt of gifts by detainees

1. The International Criminal Tribunal for Rwanda

35. One current counsel admitted to OIOS that he had regularly given gifts to his client and that once a donation of several thousand dollars had been made to the detainee's sister, who was in financial difficulties.

36. OIOS discovered from direct observation and from interviews with detainees and counsel at the International Criminal Tribunal for Rwanda that detainees were receiving substantial gifts from defence teams, particularly from one country, who sometimes gave gifts to detainees who were not their clients. One particular indigent detainee, who told the OIOS investigators that they were welcome at his "residence", was dressed in an expensive designer suit. Many detainees adjudged to be indigent were living with an array of sophisticated and expensive computer, audio and video equipment. These were gifts provided by members of their defence teams. A review of the log of gifts received by the detainees of the Tribunal confirmed the nature of the gifts received and identified the donors of such gifts.

37. Most of the detainees only confirmed what they knew the log at the United Nations Detention Facility would reveal, that is that they had received a wide variety of gifts from members of their defence teams, including clothing, computer and audio equipment, video players and television sets. The items listed in the Facility's log as having been given by defence counsel teams to individual detainees include the following: two computers, a gold watch and eight radios. Some detainees told OIOS investigators that they also received small sums of money deposited in their commissary accounts for use at the detention facility.

38. Counsel interviewed confirmed giving various gifts to detainees, including video cassette players (VCRs), digital versatile disk players (DVDs), television sets and audio and computer equipment, including scanners and sophisticated laptops.

2. The International Tribunal for the Former Yugoslavia

39. OIOS investigators verified that detainees of the International Tribunal for the Former Yugoslavia have individual television sets in their cells, provided by the United Nations Detention Facility. Unlike the International Criminal Tribunal for Rwanda, logs are not maintained for gifts received by the detainees. However, the Commander of the Detention Unit indicated that the detainees have not received expensive gifts such as DVDs, VCRs or computer equipment. In the event that a detainee requires video or audio recording equipment, the Detention Unit Commander loans the requested equipment for reviewing material to him from the Detention Unit's stores; detainees do not have access to equipment that has actual recording capability. Although OIOS noted that sums are deposited to detainees' commissary accounts by defence counsel, these amounts, as at the International Criminal Tribunal for Rwanda, are not large.

D. Hiring of friends and relatives by defence counsel teams

40. As noted by the Expert Group, another means by which fee-splitting can be accomplished is the hiring of friends or relatives of the suspect/accused persons as investigators. Several detainees of the International Criminal Tribunal for Rwanda admitted to the OIOS investigators that defence team investigators were friends hired by the lead counsel at the request of the detainee. While none of the detainees admitted that they were related to any of their investigators, staff of the Tribunal as well as former counsel have knowledge of such relationships. According to the detainees, their friends were hired as investigators because they were knowledgeable about their specific places of origin and about the location of the alleged crimes. Such

knowledge was said to be essential in order to locate potential Rwandese witnesses, as well as to uncover additional evidence for the trial. However, OIOS investigators reviewed the defence counsel invoices provided by the Tribunal. Those invoices show that not a single investigator travelled to Rwanda to collect evidence. By way of explanation, OIOS investigators were told that these individuals are wanted in Rwanda for genocide and cannot return for fear of being arrested. This explanation however contradicts the detainees' explanation of the value of hiring a Rwandese who is familiar with specific areas in Rwanda for the collection of evidence.

41. OIOS noted that almost all of defence counsel teams at the International Criminal Tribunal for Rwanda included investigators as compared to those at the International Tribunal for the Former Yugoslavia, which had fewer defence teams with investigators. As with the International Criminal Tribunal for Rwanda, defence counsel at the International Tribunal for the Former Yugoslavia have the right to select their investigators. However, all of the investigators of the International Tribunal for the Former Yugoslavia reside in the region. Defence management staff of the Tribunals do not review the qualifications for defence investigators. These arrangements are presented by the lead counsel and are for renewable short-term periods. OIOS was told by several sources that the detainees are often the ones who make the selections subsequently adopted by defence counsel.

42. The fee-splitting issue, OIOS has noted, is linked to other issues, including: the problem of verification of indigence; the issues of selection of and the accused's ability to change defence counsel; the amount of fees paid to defence teams; and the conduct of counsel before the Trial Chambers. For example, OIOS was told, and has verified, that it is not uncommon for the suspect/accused to believe that it is in their best interest to engage in obstructive and dilatory tactics before and during trial. In fact, if both the counsel and the suspect/accused engage in fee-splitting, then both would benefit from such a practice, as it would generate additional fees.

E. Financial management: payment of defence counsel fees

1. Defence team billings and payments

43. The fees received by defence counsel teams are substantial. For the year 1999, the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia paid approximately $4.5 and $4 million to defence counsel members, respectively. For the first six months of 2000, the period for which the records of the International Criminal Tribunal for Rwanda are available, the Tribunal paid approximately $2.4 million. For the first nine months of 2000, the International Tribunal for the Former Yugoslavia paid over $2.6 million to defence counsel. However, these amounts do not reflect the total costs for the latter period, as not all defence counsel had yet submitted invoices for services rendered during that time. Taking this into account in conjunction with the payment rate during the first six months of the year, annual payments to defence counsel teams at the International Criminal Tribunal for Rwanda will probably exceed $5 million by the end of 2000, while annual payments to defence counsel at the International Tribunal for the Former Yugoslavia will probably exceed $3.5 million.

44. Fees for services vary depending on defence team, and are, in one case, in excess of $300,000. While the stage of the accused's case may have some bearing on defence costs, there are substantial differences in the amounts charged by the various defence teams whose cases are at the same stage. The charts below demonstrate the wide variance between fees paid to defence teams at both Tribunals.

45. *The Registrar of the International Tribunal of the Former Yugoslavia noted there are factors such as the number of co-accused, which affect the amount of fees billed. In view of the obvious difficulty of treating all cases equally, strictly according to the figures, the fairest solution was to honour work performed within a reasonable margin and to maintain close scrutiny by the Registry.*

46. According to the Directive, in order to be remunerated, defence counsel at each Tribunal must submit to the Registrar a detailed statement of fees supported by substantial information, including the nature of the services rendered and, as appropriate, the relationship between these services and the case pending before the Tribunal.

47. Depending on the years of experience, lead counsel at both Tribunals are remunerated at a rate of between US $80 and $110 per hour, up to a maximum of 175 hours per month. Thus, an experienced counsel could earn as much as $19,250 in a single month or more than $230,000 in one year. Co-counsel receive a fixed remuneration of $80 per hour, up to a monthly maximum of 175 hours, or up to $14,000 in one month. Assistants and investigators at the International Criminal Tribunal for Rwanda are remunerated at an hourly flat rate of $25, with a monthly maximum payment of 100 hours, while at the International Tribunal for the Former Yugoslavia they are remunerated at a rate between 30 deutsche mark (DM) and 50DM per hour, depending on experience.

48. The lead counsel submit invoices for services rendered directly to their respective Tribunal Defence Management Sections. Invoices for the other defence counsel team members, such as the co-counsel, assistants and investigators, must be certified by the lead counsel prior to submission to the Registry. The invoices are reviewed by the Defence Management Sections to ensure that the charges are within guidelines. Any discrepancies are to be returned to the counsel concerned requesting his/her clarification.

49. *The International Tribunal for the Former Yugoslavia reports that, where claims appear to be excessive, they are rejected instantly, without request for further clarification.*

50. In order to ensure that the number of hours do not exceed the monthly limit, the Finance Section of the International Criminal Tribunal for Rwanda monitors the number of hours submitted for payment by each defence team member, while the same task is done by defence management at the International Tribunal for the Former Yugoslavia. At the International Criminal Tribunal for Rwanda, for example, when the Finance Section detects excess billings, they either refuse payment or deduct the overpayments from future billings. Following the Finance Section's review and certification, the payment is authorized.

51. At the International Tribunal for the Former Yugoslavia, all payments are made via wire transfer, while at the International Criminal Tribunal for Rwanda payment is made as per the payee's instructions — either by bank wire transfer or by cheque. As a matter of practice, all payments by the International Criminal Tribunal for Rwanda are made to the individual who performed the services, while at the International Tribunal for the Former Yugoslavia there are several cases in which the payee requests that the payment be made to the account of another individual.

52. Because OIOS investigators had received reports from various sources that payments to defence counsel at the International Criminal Tribunal for Rwanda were regularly late, the investigators reviewed a sample of invoices to determine processing time. However, the investigators found that, on average, it takes only 35 days for an invoice to be processed from the time it is received by Defence Management Section of the Tribunal to the time when payment is issued. For comparison purposes, a similar exercise was conducted at the International Tribunal of the Former Yugoslavia, which revealed that the same process takes an average of 36 days for completion.

53. It is also worth noting that Finance Section staff at the International Criminal Tribunal for Rwanda

reported that they receive regular visits from defence counsel inquiring about the status of their payments. This does not occur at the International Tribunal of the Former Yugoslavia. All queries are channelled through the Defence Management Section, and Finance Section staff have no contact with defence counsel.

2. The "phenomenon of excessive lawyering"

54. OIOS investigators were told by the staff in both Defence Management Sections that, despite improvements in the quality of the billing submissions by most defence counsel, which appear to be due mainly to closer scrutiny by the Registry staff, some counsel persist in submitting imprecise and/or inflated claims.

55. Documentation held by the International Tribunal for the Former Yugoslavia shows that some counsel have generated far more legal activity than might otherwise be anticipated in both pre-trial and trial proceedings, including during summer and Christmas recess periods, when, from an objective point of view, not much legal work is required. OIOS was informed that this practice, described in the Expert Group report as "the phenomenon of excessive lawyering", was observed to be the practice of selected counsel, nationals of countries where normal legal fees paid to counsel are substantially lower than the ones paid by the two Tribunals. Hence, there may have been a temptation for these counsel to generate more legal activity than required in order to justify claims for higher remuneration from the Tribunals.

56. Examples of the practice provided to OIOS included reference to certain defence counsel at the International Tribunal for the Former Yugoslavia, all of whom had claimed that they had studied the Nuremberg cases during the last Christmas recess, although the trial of their respective clients had ended in mid-November. When challenged by the Registry, counsel replied that they were preparing for a potential appeal. After careful review, the Registry ultimately agreed to pay only for those activities deemed reasonable and necessary for the case.

57. There are defence counsel members at both Tribunals who regularly charge the maximum allowable hours per month. Furthermore, there are some lawyers who charge 20 hours for filing a motion while others may only charge five for a similar motion. The International Criminal Tribunal for Rwanda noted that there was little they could do about this as the charges are within the guidelines.

58. *The Registry of the International Tribunal of the Former Yugoslavia noted, however, that some assigned counsel had taken fewer, and had even rejected assignments, with the explanation that the fees are less than what they would normally receive.*

59. OIOS notes that in both Tribunals, experienced counsel from developed nations are actively engaged.

60. OIOS was further advised that the practice of the International Tribunal for the Former Yugoslavia regarding assignment and payment of defence counsel was designed in late 1995 and was developed on the basis of the assessment that pre-trial and trial work in one case would last approximately nine months. However, since then, the time structure of the proceedings before the Tribunal has changed significantly, with trials lasting much longer than initially anticipated.

61. *The International Tribunal for the Former Yugoslavia noted that the Tribunal is currently in the process of amending and streamlining its legal aid system in order to allow defence teams more flexibility as to how many working hours they wish to use per month, but at the same time limiting the total number of hours charged for the entire phase of the case. By this measure, the responsibility for an efficient defence is entirely delegated to the defence, but with continuing scrutiny of invoices by the Registry.*

3. Changes in counsel

62. OIOS investigators noted that suspect/accused persons have requested and have often obtained frequent changes of their assigned counsel. The International Tribunal for the Former Yugoslavia reports only a limited number of requests for replacement of counsel, which have little bearing on costs when measured against "the accused's interest in having a counsel he trusts". OIOS notes, however, that provisions at both Tribunals require that such changes be made "only in exceptional circumstances". For example, the link between the replacement of counsel and fee-splitting arrangements has been evidenced by letters from "replaced counsel" who have indicated to the Tribunals the true reason for their replacement, that is their refusal to accept fee-splitting proposals from their former clients. Given the sums involved, these proposals should not be unexpected.

63. *The International Tribunal for the Former Yugoslavia reports that support of the policy of counsel of choice for the indigent leaves some chance that requests for the replacement of counsel will be made based on inappropriate motives.*

64. OIOS learned that some accused frequently change counsel as a delaying tactic to prolong the duration of their trials for political and/or financial motives. Their ability to change counsel virtually at will means that they can pressure counsel to support their families, supply gifts or delay trials with the threat of replacement.

65. The extent to which a detainee might go to change counsel is amply demonstrated by the case of one detainee of the International Criminal Tribunal for Rwanda, who, with another detainee, forged and transmitted a letter to the Registrar, purportedly written by his then lead counsel, seeking to withdraw from his case. OIOS obtained and reviewed the forged letter along with related documentation and interviewed the former counsel. The counsel denied being the author of the letter. Furthermore, an internal inquiry by the Registry found that the detainee, acting in concert with another detainee, forged the letter with the aid of a computer scanner belonging to the latter.

F. Impact on proceedings

66. Most of the judges of the Tribunals interviewed by OIOS indicated that, with the exception of some media reports on fee-splitting at the International Tribunal for the Former Yugoslavia, they had only heard rumours about this issue. Consequently, none was able to provide concrete examples of either actual or potential fee-splitting arrangements between defence counsel and their respective clients.

67. It is clear, however, that the judges remain concerned that some defence counsel have engaged in conduct, whatever the motive, which negatively impacts on the progress of these cases. For example, the judges asserted that delays in trial proceedings are often caused by counsel who are either inexperienced and/or insufficiently prepared for trial; who engage in frivolous or dilatory conduct (sometimes submitting “completely ridiculous motions”); or who, given the high fees some are receiving from the Tribunals, delay trial by any means available because they “wish to make as much money as possible”.

68. The Registry of the International Criminal Tribunal for Rwanda conceded to OIOS investigators that there are loopholes in the current procedures. As long as defence counsel reports that he/she has done case specific tasks and has provided adequate description of the work performed, he/she will be paid up to the monthly maximum. However, Tribunal Chamber judges have begun to clamp down on the practice by denying remuneration to counsel making frivolous motions that clog the courts and delay proceedings. Some of the motions held to have been frivolous by the Trial Chambers were: a defence request that the Trial Chamber order that the protection measures it previously ordered for witnesses exceeded its jurisdiction; a defence request seeking to have a rule of the Tribunal declared unlawful; and a defence request dismissing the entire proceedings against the accused owing to persistent and continuous violation of the accused’s rights. Whether such motions are intended merely to delay the proceedings in order to increase billing for legal services is difficult to say. However, the judges, in particular, have determined that the imposition of financial penalties on some of these motions will have multiple salutary effects.

69. In some instances, when a decision is issued, counsel may have already been paid for his/her services, as the invoice for the work may have been presented prior to the Tribunal’s decision. In such cases, the Defence Management Section of the International Criminal Tribunal for Rwanda reviews the invoice and tries to determine which tasks relate to the motion. The counsel is also asked to provide details as to the amount of time spent on the motion.

70. A similar practice to determine whether a motion is “frivolous” and to deny remuneration to counsel if such is the case has not been established at the International Tribunal for the Former Yugoslavia.

V. Conclusions

A. International Tribunal for the Former Yugoslavia

71. While former counsel have stated to OIOS investigators that they had been solicited by their clients to engage in fee-splitting, the review at the International Tribunal for the Former Yugoslavia did not produce tangible evidence of fee-splitting

relationships between current counsel and their clients. However, based upon interviews conducted and documents reviewed in the course of the investigation, which yielded credible information about ongoing fee-splitting arrangements between selected defence counsel at the International Tribunal for the Former Yugoslavia, OIOS cannot at this stage rule out the existence of such current arrangements at the Tribunal and will need to pursue this matter further.

B. International Criminal Tribunal for Rwanda

72. At the International Criminal Tribunal for Rwanda, although there was no direct substantiation of formal fee-splitting arrangements, OIOS found evidence of informal fee-splitting arising from the regular provision of expensive gifts to detainees and financial support to the families of some detainees. However, as at the International Tribunal for the Former Yugoslavia, information provided to the investigators that former counsel were solicited and that current such arrangements exist cannot be excluded, particularly in view of the tacit admission by one detainee.

C. Both International Tribunals

73. The selection or change of counsel at the Tribunals can be influenced by the kind of support counsel may give to the detainee, as well as the ability of counsel to inflate his/her billing to accommodate the provision of support to a detainee or his family. Efforts to address this issue by the Registry offices at both Tribunals have not produced sufficient evidence of fee-splitting to raise the matter with the Chambers.

74. It must be noted that neither Registry has the resources necessary to investigate indigency or, in the present case, fee-splitting allegations. The Registrars have gathered some useful information related to fee-splitting arrangements between some defence counsel and their clients. This information, which is both sensitive and very important, needs to be further developed, refined and corroborated with a view to converting it into credible evidence by specific investigative steps. Upon consulting with Registry staff, OIOS investigators agreed to carry out further work with the Tribunals on this matter.

75. The type and number of gifts that detainees may receive from defence teams and other visitors at the International Criminal Tribunal for Rwanda appear to be part of the problem. The existing system may result in the suspect/accused person exerting undue pressure on his defence team to supply him with gifts or may provide defence counsel with the means to solicit new clients. Under the current rules, a detainee may receive any kind of gift as long as it is not dangerous or detrimental to the good order of the United Nations Detention Facility.

76. OIOS observed that there is no means available at either Tribunal to investigate claims of indigence. Once a suspect/accused person completes the appropriate forms claiming indigence, those claims are generally accepted. OIOS has confirmed that the Registries lack the resources to conduct the necessary asset-tracking investigations into the veracity of the claims of indigence submitted by the suspect/accused persons.

77. *The International Tribunal for the Former Yugoslavia noted that, although Member States have been asked to provide assistance in the form of information on the financial status of accused, some States have provided very limited information, whereas others have stated that legal problems prevent them from cooperating with the Registry and some have not responded at all.*

VI. Recommendations

78. Both Tribunals are making efforts to curb the abusive practices noted in the present report, such as practices which effectively create funds for fee-splitting arrangements, and their efforts should be fully supported. OIOS investigators will consult with the Registries on these efforts and will undertake further inquiries as needed. In addition, based on the findings of this review, OIOS makes the following recommendations:

Recommendation 1: In an effort to curb fee-splitting arrangements as evidenced by the offering of expensive gifts, the International Criminal Tribunal for Rwanda Rules of Detention should be amended to restrict gifts to detainees by imposing a limit on gifts received and restricting the receipt of luxury goods. To the extent that computers and other electronic equipment are needed to assist in the defence, an appropriate number should be purchased by the Registry of the

International Criminal Tribunal for Rwanda for detainee use, as needed. This would reduce the opportunity for fee-splitting activity. (IV/00/125/01R)

79. *The International Criminal Tribunal for Rwanda fully supports this recommendation and notes that a system of stricter monitoring of gifts has already been instituted to control the inflow and value of gifts given to detainees in the United Nations Detention Facility.*

Recommendation 2: The International Tribunal for the Former Yugoslavia should adopt a practice of denying remuneration to counsel in connection with frivolous motions as has been done at the International Criminal Tribunal for Rwanda. (IV/00/125/02Y)

Recommendations 3 and 4: In order to better determine the indigency claims made by the suspect/accused persons, both Tribunals should assign a full-time Investigator to the Defence Management Sections in order to investigate claims of indigence, including asset-tracing and possible relations between defence team members and the suspect/accused persons. (IV/00/125/03R); (IV/00/125/04Y)

80. *The International Criminal Tribunal for Rwanda supports this recommendation and notes that the Tribunal requested post resources for such a position in their budget submission for 2001. Furthermore, a proposal by the Registrar for an amendment of the directive on the assignment of defence counsel to enable the Registrar to request information and assistance on the indigence or otherwise of accused persons from Governments or other entities was adopted by the judges of the Tribunal in plenary session.*

Recommendations 5 and 6: Both Tribunals should formulate a working definition of indigence and define "sufficient means" in relation to maximum financial limits on the assets owned by a suspect/accused person. Even where counsel has been assigned, a suspect/accused individual with some assets may be ordered to make contributions to the cost of his/her defence using a pre-determined formula or, alternatively, consider a legal aid formula of providing staff defence lawyers rather than paying fees. (IV/00/125/05R); (IV/00/125/06Y)

81. *The International Criminal Tribunal for Rwanda supports this recommendation and notes that the option of staff defence lawyers is under careful consideration. However, the Tribunal cautions that this option has many complications and may not be compatible with the Tribunal's judicial framework. One possible complication is that such a system could affect the confidence of the relations between the client and the defence counsel, who might be perceived as not being independent of the Tribunal.*

82. *OIOS considers, however, that the statute and rules of the Tribunals do not bar such reform and, as occurs in national jurisdictions, such protection as is necessary for attorney-client privileges, may be incorporated. Moreover, potential savings need to be considered.*

83. *The International Tribunal for the Former Yugoslavia noted that the term "sufficient means" is difficult to define, in view of differing national standards and living conditions and when, in particular, viewed in relation to the costs of maintaining a defence at an international tribunal. Thus, currently, the term is interpreted as not having sufficient liquid means or means available for liquidation in order to support a defence, even on the basis of the payment rates at the place where the accused resided before his/her arrest.*

84. OIOS notes that, despite dysfunctional difficulties, numbers of national jurisdictions have enacted such provisions.

Recommendations 7 and 8: Both Tribunals should implement rules to control changes of counsel and the publication of clear guidelines on the definition of the "exceptional circumstances" ground permitting a suspect/accused person to change counsel. (IV/00/125/07R); (IV/00/125/08Y)

85. *The International Criminal Tribunal for Rwanda agrees with this recommendation, but notes that the changes in counsel are often made after a ruling of the Trial Chambers, which presumably have concluded that exceptional circumstances were prevailing.*

86. *The Registrar of the International Tribunal of the Former Yugoslavia noted that, in 2000, there were three replacements as of October 2000 and that none of these caused a significant delay in proceedings or in excessive additional cost. The nature of a relationship between counsel and client can lead to a variety of reasons for replacement requests. A too narrow definition may not leave the necessary flexibility for deciding on requests.*

Recommendations 9 and 10: Both Tribunals should revise the Code of Professional Conduct to specifically prohibit fee-splitting arrangements between counsel and their clients and should impose sanctions for breaches of same. (IV/00/125/09R); (IV/00/125/10Y)

87. *The International Criminal Tribunal for Rwanda noted that this recommendation may not be necessary as the Code of Professional Conduct contains such requirements as well as requirements of honesty, independence and integrity*.

Recommendations 11 and 12: The qualifications of defence team investigators should be subject to review by both Tribunals before being approved so as to prevent the recruitment of relatives and thereby minimize the risk of fee-splitting. (IV/00/125/11R); (IV/00/125/12Y)

88. *The International Criminal Tribunal for Rwanda reported that the implementation of this recommendation has already been instituted.*

89. *The International Tribunal for the Former Yugoslavia objected to this recommendation as it appears to be a very limited and unfair approach to exclude relatives or friends entirely from defence teams. However, should such friendship or relation jeopardize the independence of the defence, it ought to be possible to exclude attorneys who are relatives or friends from defence teams, as they are bound by the Code of Professional Conduct, in particular article 5 (b).*

90. OIOS notes that when accused persons pay for their own counsel they may name whom they wish but, as often occurs in national jurisdictions where the accused are not assuming financial responsibility, restrictions of various sorts are often imposed to limit the costs and conflict of interest.

Recommendations 13 and 14: In order to control the fees charged by defence counsel, the Defence Management Sections of both Tribunals should require a detailed breakdown of charges. (IV/00/125/13R); (IV/00/125/14Y)

91. *The International Criminal Tribunal for Rwanda noted that it is already implementing this recommendation.*

Recommendations 15 and 16: In order to curb the possibility of inflating hours and to impose uniformity regarding the hours charged by counsel, certain ranges should be established by the Tribunals for each task counsel performs. (IV/00/125/15R); (IV/00/125/16Y)

92. *The International Criminal Tribunal for Rwanda noted that a draft of a new system of payment is currently under consideration by the Registrar.*

93. *The International Tribunal for the Former Yugoslavia noted that the next plenary will include discussion on rule changes along the lines recommended in the report, in particular the recommendations made in respect of gifts to detainees and defence investigators.*

(*Signed*) Dileep **Nair**
Under-Secretary-General for Internal
Oversight Services