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**Report of the Bureau on the establishment
of an independent oversight mechanism****A. Introduction**

1. This final report is submitted pursuant to the mandate given to the facilitator, Mr. Akbar Khan (United Kingdom), on the issue of establishing an independent oversight mechanism for the International Criminal Court, upon his appointment by the Bureau of the Assembly of States Parties (“the Assembly”) at its fifth meeting, on 4 December 2008.
2. At the seventh session of the Assembly, held from 14 to 22 November 2008, the representative of Jordan, H.R.H. Ambassador Zeid Ra’ad Zeid Al-Husseini, chaired informal consultations on the report of the Bureau¹ regarding the establishment of an independent oversight mechanism for the International Criminal Court (“the Court”).
3. While noting that considerable progress had been made by the New York Working Group, most States expressed the view that further consideration of the issue would be required and that it would be premature to agree on the establishment of an independent oversight mechanism at the seventh session of the Assembly. In particular, it was important to examine first, as suggested by the Committee on Budget and Finance (“the Committee”) in the report on the work of its eleventh session, the existing mechanisms for the investigation of misconduct in order to determine the need for, as well as the budgetary implications of establishing a new mechanism.
4. During the informal consultations, it was recalled that the Court had proposed the establishment of an independent unit with investigative capacity within the Office of Internal Audit to perform the function of oversight, but that such suggestion had been met with concern by some States regarding the lack of independence. The possibility of the Court entering into a memorandum of understanding (MOU) with the United Nations Office of Internal Oversight Services (OIOS) as a way of ensuring access to an independent investigative capacity with minimum budgetary outlay for the Assembly was also raised during the informal consultations. In response, the Court stated that OIOS had indicated that it would not be a position to include the Court in its activities due to its current workload, but that it would be willing to provide guidance and assistance in the consideration of the issue.

¹ Interim report to the Bureau of the Assembly of States Parties by the facilitator on the issue of establishing an independent oversight mechanism for the International Criminal Court (ICC-ASP/7/INF.2).

5. While noting that the New York Working Group had exhausted its discussions, it was recalled that The Hague Working Group had already been mandated by the Bureau to continue discussions. In order to prepare for a decision to be taken (sooner rather than later) at the resumption of the seventh session, The Hague Working Group would hold consultations, in particular, on recommendation 2 of the Report of the Bureau² and the recommendations contained in the report of the Committee on the work of its eleventh session. In consultation with the Court, the Working Group would determine the estimated budgetary implications of setting up an independent oversight mechanism. The Committee could then address the issue at its April 2009 session, allowing for the budgetary implications to be included in the proposed programme budget for 2010. It was further suggested that the Court consult with OIOS and report, *inter alia*, on the manner in which OIOS could assist and provide guidance.

B. Organization of work

6. In accordance with the request made by the President of the Assembly at its seventh session, the Bureau was requested to submit proposals to the second resumption of the seventh session of the Assembly on the issue of establishing an independent oversight mechanism.

7. The Working Group held four meetings, on 8 and 27 January, 2 March and 6 April 2009, respectively, during which the facilitator conducted discussions in accordance with his submitted discussion papers. At the meeting held on 2 March, the Working Group heard the views of the Coalition for the International Criminal Court (CICC) on the issue. Some discussions on the issue were also held outside of the Working Group between the facilitator and Court officials.

8. On 12 February 2009, the facilitator held bilateral consultations with States Parties and civil society groups in the margins of the second resumption of the seventh session of the Assembly, held in New York from 9 to 13 February 2009, and also presented an interim report on the progress made by the Working Group on the issue of establishing an independent oversight mechanism.

9. Subsequent to the presentation of the facilitator's interim report, the second resumption of the seventh session of the Assembly extended the mandate of the Bureau and invited it, in consultation with stakeholders, to urgently continue its consideration of the issue, including its programme budget implications, with a view to presenting its recommendations to the twelfth session of the Committee in order to obtain the financial and administrative advice of the Committee and taking into account the views of the Committee, to report to the eighth session of the Assembly with a view to the establishment of an independent oversight mechanism. In light thereof, this final report represents the views and recommendations of the Working Group.

C. Approaching the issue of establishing an independent oversight mechanism

10. In approaching the issue of establishing an independent oversight mechanism, the underlying approach taken by the facilitator and the Working Group has been to consider and develop the issue within the parameters of the earlier views expressed by the States Parties at paragraph 20 of the Bureau's report, namely, "States Parties stressed the need for a light oversight mechanism that corresponds to the needs of the Court and does not significantly increase its financial burden". In this context, the Working Group has engaged in discussions with the Court aimed at ensuring that progress can be made to meet the mandate provided by

² Report of the Bureau on an independent oversight mechanism (ICC-ASP/7/28), para. 24.

the Assembly and that a decision can be taken pursuant to the most comprehensive and complete information available on the subject matter. In this regard substantive discussions have focused on the following clusters of questions:

Cluster 1

Nature and scope of an independent oversight mechanism

- a) Explanation by the Court of the existing legal framework and structural mechanisms for investigating and addressing misconduct of Court staff and elected officials, together, with the identification of any gaps or inadequacies that should be addressed through the creation of an independent oversight mechanism;
- b) Explanation by the Court of the frequency and nature of allegations of misconduct against Court officials since the Court's establishment in 2002 and how these allegations have been addressed to date and how they would be addressed differently in the future if a dedicated investigative team is created in the Office of Internal Audit;
- c) What is the legal basis for creation of an independent oversight mechanism?
- d) Which Court personnel (i.e. recruited court staff, elected officials, contractors) should be covered by the scope of an independent oversight mechanism?
- e) What categories of misconduct (i.e. disciplinary and/or criminal) should be covered by the independent oversight mechanism?

Cluster 2

Independence and oversight of an independent oversight mechanism

- a) How would the creation of a dedicated investigative function in the Office of Internal Audit be able to demonstrate the objective requirements of being "operationally independent" and being seen as "independent" from the Court?
- b) Can an "independent oversight mechanism" be established through the Court entering into a MOU with the United Nations Office for Internal Oversight Services or some other international judicial/investigative body that would allow the Court to use professional and independent investigators at a much lower cost than attempting to create a new mechanism for the Court which would have the disadvantage of needing to be financially supported and staffed even when there are no on-going investigations?
- c) What further steps (i.e. terms of reference, selection of staff, reporting lines) can be taken to ensure the operational independence of the independent oversight mechanism?

Cluster 3

Budgetary implications

What are the budgetary implications of establishing an independent oversight mechanism in line with the parameters agreed in clusters 1 and 2 above?

D. Views of the Working Group

1. Nature and scope of an independent oversight mechanism

11. As regards the nature and scope of an independent oversight mechanism the Working Group heard views from the Court in line with its two papers, dated 15 July 2008 (Court's non-paper on the Independent Oversight Mechanism) and 7 January 2009 (Discussion outline of the Court on an Independent Oversight Mechanism), respectively.

12. In considering the Bureau's report on an independent oversight mechanism and the Court's proposals, the Working Group expressed a preference for a "lighter" mechanism than the structure proposed by the Bureau and suggested that a balance be struck between the Bureau proposal and the very "light" Court proposal by taking relevant elements from both and crafting a middle ground which would respond proportionately to both the needs of the Court and the States Parties. In this regard the facilitator indicated that it was the role of the Assembly to establish an independent oversight mechanism according to the structure it deemed most appropriate.

13. In considering the broad parameters for establishing an independent oversight mechanism regarding investigations, the Working Group agreed that it needed to be functionally independent from the Court; it had to have adequate capacity to provide robust and effective oversight; the oversight function had to be credible, accountable and transparent to withstand external scrutiny; the mechanism needed to have "teeth" through *proprio motu* investigative powers and whistleblower procedures and there should be no impunity for criminal misconduct. In addition, the process of investigations had to respect the rights of individuals covered by the mechanism and act in accordance with due process. Finally, the mechanism had to have an adequate budget programme to meet the Court's needs.

14. There was agreement on the merit of establishing an enhanced professional investigative capacity situated within the Court's existing internal disciplinary structures, since investigations conducted by staff members not professionally trained for this function could compromise the legitimacy of the process, especially given that their recommendations could lead to summary dismissals. It was agreed that the competence of the independent oversight mechanism would relate to the conduct of investigations for allegations of misconduct and that it was not part of the envisaged role for the oversight mechanism to recommend appropriate sanctions arising from any investigation.

15. The point was made, however, that this structure would not entirely meet the requirements of article 112, paragraph 4, of the Rome Statute which envisaged the oversight mechanism having full powers of investigation, evaluation and inspection, given that the proposal's sole focus was on enhancing the Court's investigative capacity, rather than developing the broad oversight of the Court as envisaged by the Rome Statute. It was therefore proposed that the mandate should also involve an oversight function, and that it would be acceptable to initially develop the independent oversight mechanism with a narrow focus on investigations of misconduct on the understanding that the mechanism would evolve at a later stage to include evaluation and inspection so as to ensure in the fullness of time the creation of a comprehensive and coherent structural and substantive oversight mechanism.

16. A strong preference was expressed for a lean, cost-effective mechanism which could be expanded on a needs basis. In this context, it was suggested that a more careful study be explored in respect of the option of outsourcing the investigative function, such as to OIOS or another similar body, as a lighter, least costly option than the Bureau proposal. States Parties present at the informal consultations held on this issue at the seventh session of the Assembly had initially been informed by the Court that due to the high demand on the services of OIOS it was unlikely it could assist the Court through the establishment of a memorandum of

understanding. Subsequently, the Working Group was presented with additional reasons such as the high cost and the need for the Court to develop its own capacity rather than relying on the United Nations as the principal basis for not pursuing this option. Notwithstanding the various reasons advanced by the Court regarding the undesirability of entering into an MOU with OIOS, the Working Group thought it desirable to re-examine this option in greater detail and invited the facilitator to enter into direct consultations with OIOS.

17. In light thereof, the facilitator held bilateral discussions with the Acting Head of OIOS, Mr. Michael Dudley, on 13 February 2009, to explore the possibility of outsourcing on a cost recovery basis the investigative function of the independent oversight mechanism to OIOS through the establishment of a relationship agreement between the Court and OIOS. The Court also held separate meetings with OIOS in support of the facilitator and the desire of the Working Group to further explore this issue. From the outset, the Acting Director stated to the facilitator that OIOS was very keen to support the Court in anyway possible; OIOS had significant investigative capacity and resources available which could easily absorb a high number of cases arising from the Court per year (i.e. from 1 to 30 cases per year) without even denting its capacity. In this context, it was noted that to date the Court had only received 23 allegations of unsatisfactory conduct, 22 of which had been subject to a preliminary investigation, nine referred to the Disciplinary Advisory Board (DAB) resulting in two staff members being suspended pending the results of investigations and three summarily dismissed following the results of the preliminary investigation.

18. Three possible options were discussed with OIOS, namely, the total outsourcing to OIOS of the Court's investigations into allegations of misconduct, alternatively the Court undertaking all investigations itself or the Court developing a lean investigative unit supported by OIOS services. Having considered the various options, OIOS recommended that the best option was for the Court to develop its own lean investigative capacity staffed by one investigator at the professional level of P-4/5 supported by one junior professional member of staff at P-1/2 level who could then be supported by OIOS services on a cost recovery basis through the conclusion of an MOU. Services offered by OIOS to the Court would include, inter alia, integration of OIOS investigative procedures, protocol and rules into the Court's internal rules including on *proprio motu* and whistle-blowing, investigative support on cases and training for the staff working in the independent oversight mechanism, together with participation in selection of cases for investigation.

19. Pursuant to the discussions undertaken with OIOS, the Working Group agreed to follow its recommendation and invited the Court to obtain from OIOS a cost estimate on an annual recovery basis in respect of the services that it would be able to offer the Court with operationalizing the independent oversight mechanism.

20. On the issue of addressing suspected criminal misconduct on the part of a staff member, an elected official or a contractor, the Working Group noted that, save for the limited exceptions specified in article 70 of the Statute relating to "Offences against the Administration of Justice", the Court would in principle have no jurisdiction to deal with these matters which properly belong to national authorities and that it would be necessary for the investigative unit of the independent oversight mechanism to promptly notify national authorities where internal investigations reveal the possibility of criminal misconduct. In order to ensure that this would be done in a timely and effective manner when required, the Working Group proposed that the independent oversight mechanism establish procedures and protocols to ensure cooperation by the Court with national authorities so as to avoid impunity.

21. In circumstances where common crimes were committed at the seat of the Court the Working Group observed that the Court would need to waive the immunity of the staff member or elected official so as to enable jurisdiction to be exercised by either the host State or the suspect's state of nationality. Alternatively, where the crime is alleged to have been committed outside the seat of the Court it was understood by the Working Group that jurisdiction should be exercised by the suspect's State of nationality or by the State on whose territory the criminal conduct took place or by the victim's State of nationality.

22. As regards the potential individuals to be covered by an independent oversight mechanism in respect of conducting investigations into alleged misconduct, there was broad support that it should apply to staff members and elected officials, but divergent views were expressed on whether it should extend to contractors. Some States stressed the primacy of the contractual relationship between the Court and the contractor as governing both the investigation and resulting sanction regime applicable to any misconduct rather than the Court's staff rules and regulations. In addition, it was suggested that contractors be covered by a code of conduct or a manual of best practices, but it was noted that such a code of conduct had not yet been established by the Court.

23. On the other hand, attention was drawn to the potential damaging effect that the exclusion of contractors could have with respect to undermining the image and authority of the Court, since this category of persons also operated on behalf of the Court. It was observed by some States that in the perception of the wider public it was often difficult to distinguish between acts executed by Court staff on the one hand and contractors acting on behalf of the Court on the other. It was therefore important to ensure that there was no impunity in cases of misconduct and that the Court's image was protected in the face of allegations against contractors through an effective, independent and credible investigation into any allegations. Accordingly as a compromise, the Working Group agreed that the investigative unit of the independent oversight mechanism should be used to investigate allegations against a contractor with the findings of that investigation being used to determine the relevant sanction, if any, in accordance with the applicable contractual regime applicable between the Court and the contractor. Where the investigation revealed criminal misconduct on the part of a contractor and/or a staff member/elected official the applicable Court's procedures and protocols dealing with co-operating with national authorities should be followed.

2. Independence and oversight of an independent oversight mechanism

24. There was wide agreement that the oversight mechanism should be operationally independent from the Court and also perceived to be so. The importance of public perception as well as internal staff confidence in having a truly independent disciplinary process, coupled with the need to protect the image of the Court were highlighted as critical features of the oversight function.

25. It was proposed that the independence of the oversight mechanism be safeguarded through, for example, its location away from Court's structures, establishing robust terms of reference, with reporting lines directly to the Assembly or via the Bureau, conferring *proprio motu* investigative powers upon the investigator together with whistle-blower procedures and ensuring the participation of the Assembly in the recruitment of the senior investigator/head of the investigative unit. The latter would avoid the selection by the Court of both the Disciplinary Appeals Board and the investigator, and would lead to greater transparency and confidence in the independence of the mechanism.

26. Regarding the terms of reference for the oversight mechanism, it was proposed that while the oversight mechanism should be established in accordance with the broad parameters mentioned at paragraphs 13 and 24 above, the Working Group did not consider that it was within its mandate to take upon itself the task of drafting the detailed terms of reference and

governing rules for the oversight mechanism which would initially fall to be developed by the staff members hired for the oversight mechanism in conjunction with OIOS and others, and which would subsequently need approval from the Assembly.

27. It was observed that one aspect of the oversight mechanism's independence was its location and that the perception of its independence would be compromised if it was located within the Court's structures. In order to guard against this perception while at the same time ensuring efficiency and economy through a pooling of office space and administrative support from the Registry, the Working Group considered that the oversight mechanism could be co-located, but not integrated with either the Office of Internal Audit (OIA) or with the Secretariat of the Assembly of States Parties ("the Secretariat"). In discussing this issue further, the Working Group observed that ensuring the "operational independence" of the mechanism was more important than its actual location and given the desire in the future to evolve the mechanism to cover evaluation and inspection certain beneficial synergies could be achieved through co-location with the OIA rather than with the Secretariat. In reaching its view, the Working Group noted that the CICC had submitted views to the effect that the OIA was not entirely independent of the Court's structures given that its Charter states that the OIA forms part of the organization. However, the Working Group recalled that the mechanism would be co-located with and not integrated or subordinated to the OIA management structure and therefore its co-location and sharing of physical infrastructure and administrative support with the OIA should not compromise the mechanism's operational independence. It was also stressed by the Working Group that its proposal on location could always be reviewed and revised in the future once the oversight mechanism was fully operational.

28. Another aspect of ensuring the independence of the oversight mechanism discussed by the Working Group related to reporting lines. A suggestion was made that a reporting requirement to the Bureau should be instituted, which would be consistent with the oversight nature of the mechanism. An alternative proposal consistent with the oversight mechanism being a subsidiary body of the Assembly was to establish an "Oversight Committee" similar to that established for the permanent premises project comprising 10 States Parties elected by the Assembly upon recommendation by the Bureau with each member serving for a term of two years, the intention being that the head of the oversight mechanism would submit a quarterly report directly to the Oversight Committee, together with a consolidated annual report to the Assembly transmitted via the head of the Oversight Committee. In each instance of quarterly reporting made by the oversight mechanism to the Oversight Committee, the Court would be given a reasonable opportunity to provide a written response to the Oversight Committee on any points arising. This procedure would also apply *mutatis mutandis* to the consolidated annual report submitted by the oversight mechanism to the Assembly via the Oversight Committee. It was agreed that the reporting obligation referred to would include information on the cases and investigations under the remit of the oversight mechanism together with any recommendations thereon and/or on the management of the oversight mechanism, but without inclusion of individual names or any other identifying personal details of individuals under investigation. Regarding the frequency of reporting, the point was made that quarterly reporting would helpfully ensure that the bi-annual meetings of the Committee would be able to consider any budgetary implications arising from the reports of the oversight mechanism.

29. Following consideration of the modalities for implementation of the possible reporting lines, the Working Group proposed that a "lighter" and "less bureaucratic mechanism" should be adopted and agreed that the head of the oversight mechanism should submit written reports directly to the Bureau (copied to the Presidency, the Office of the Prosecutor, the Registrar and the Committee on Budget and Finance) commencing on a

quarterly basis, with the frequency of reporting to be reviewed once the oversight mechanism is fully operational, together with a further consolidated annual written report submitted to the annual session of the Assembly via the Bureau on the understanding that in each instance of quarterly or annual reporting made by the head of the oversight mechanism, the Court would have a reasonable opportunity to respond in writing to any points raised. It was further agreed that any written responses submitted by the Court to the Bureau and/or the Assembly, as applicable, be copied to the head of the oversight mechanism.

30. Two further aspects of ensuring the independence of the mechanism were also discussed by the Working Group, namely:

- a) The selection of the head of the oversight mechanism; and
- b) Allocation of a major programme budget.

31. Regarding sub-paragraph (a), “The selection and appointment of the head of the oversight mechanism”, the Working Group proposed that the Assembly, via delegated authority to the Bureau, participate in the recruitment process. It was proposed that the Bureau in co-ordination with the Court, as necessary, conduct a recruitment process for the position of head of the independent oversight mechanism and to determine, inter alia, the job description, the hiring, renewal, non-renewal, suspension and termination of the said position. It was agreed by the Working Group that the Registrar should be entitled to participate alongside members of the Bureau in the complete recruitment process. It was also considered desirable to grant observer status on the recruitment panel to one representative from civil society and one representative from OIOS.

32. The Working Group also considered the level of staffing for the oversight mechanism with a strong preference being expressed for the recruitment of a highly experienced P-5 member of staff to head the office of the independent oversight mechanism to assure its independence, supported by one junior P-1 or P-2 level staff member. These preferences were indicated on the understanding that the Registry would provide routine administrative support to the oversight mechanism.

33. As regards the length of the contract of the head of the office, there was support for a three-year appointment, with the possibility of one renewal. The Court indicated that the limitation on contract terms *ab initio* was not in accordance with the Staff Rules and Regulations. On the other hand, it was observed that this practice had been followed for the recruitment of the Project Director for the permanent premises, whose term was linked to the duration of the permanent premises project and that the Human Resources Section could look into the modalities of addressing the limitation of the contract. It was suggested that, in order to avoid conflicts of interest, former staff members of the Court should not be recruited to this office, nor should the staff of the office take up employment within the Court after their terms of office.

34. Regarding sub-paragraph (b), “Allocation of a major programme budget”, it was noted that the main consequences of opting to establish a major programme budget for the oversight mechanism would be a higher cost and a lack of financial flexibility that it would otherwise enjoy by being part of an already existing major programme budget. However, notwithstanding these drawbacks, there was a broad consensus in the Working Group that only through granting financial independence to the oversight mechanism would its operational independence be truly guaranteed. Accordingly, the Working Group proposed that the Assembly establish a major programme budget (“Office of the Independent Oversight Mechanism”) with an adequate budget in order to establish the oversight mechanism and to cover staff costs and other costs associated with the office.

E. Budget implications of establishing an independent oversight mechanism

35. The facilitator recalled that in previous discussions with the Working Group and during informal consultations with States Parties in New York, a broad consensus had been expressed that although budgetary considerations were important in establishing the oversight mechanism, cost should not be a determinative factor and that the overall budgetary allocation should follow the parameters agreed by the Assembly for establishing the oversight mechanism so as to ensure adequate resources to allow the office to properly fulfil its mandate. In this context, the facilitator observed that the establishment of the oversight mechanism would very likely result in additional budgetary implications to States Parties which might not easily be absorbed through savings and efficiencies made by the Court through its budget. In this regard, while welcoming the establishment of the oversight mechanism, one State in the Working Group reserved its position on the financial implications while some other States suggested that the redeployment of posts within the Court might be one way to help reduce operating costs.

36. With respect to the budgetary implications of establishing an independent oversight mechanism, the Working Group noted that OIOS had submitted an estimate of US\$105,000 plus additional costs, for the first year of support, i.e. for initial, continuing and additional support which, if accepted, by the Assembly would form the basis of an MOU between the Court and OIOS for the provision of OIOS services on an annual cost recovery basis. In addition, the Registry had indicated that office space and support services to the oversight mechanism would amount to €100,000 annually. The Working Group noted that these costs, taken together with the estimated annual salary costs for the recruitment of a P-5 officer (approximately €50,300) and one additional P-1 or P-2 officer (approximately €85,600) would amount to approximately US\$500,000 in the first year.

37. In considering the overall annual start up costs, the facilitator noted that the OIOS proposal would be more costly in the first year, to reflect start-up costs, but would decrease in subsequent years. He also noted that the proposal was based on a maximalist approach, i.e. on 30 cases per year, whereas the Court had, in fact, had a total of approximately 23 cases since 2006. It would therefore be open to the Assembly to provide guidance on an annual basis to the head of the oversight mechanism with regard to the number of cases that the Assembly was prepared to fund through OIOS services in order to control the overall annual operating costs to the oversight mechanism.

38. In light of the budgetary implications mentioned above, the Court was asked to prepare a new proposed major programme budget for the independent oversight mechanism as an annex to this report for consideration by the Committee and the Assembly.

F. Conclusions

39. This report represents the views and recommendations of the Bureau to the eighth session of the Assembly on the issue of establishing an independent oversight mechanism. In accepting his appointment as facilitator of this issue in December 2008, the facilitator was mindful of the fact that a great deal of valuable work had already been done on this issue by Ambassador Andreas D. Mavroyiannis (Cyprus) acting as facilitator in the New York Working Group. Accordingly, the approach taken by the current facilitator as already outlined in this report has been to build upon the previous work done in New York while engaging further with stakeholders from within and outside the Court to concretely advance this issue, taking into account the previously expressed concerns raised by the Committee, States Parties and the Court regarding the proposals outlined in the earlier report of the Bureau.³ The wide

³ Report of the Bureau on an independent oversight mechanism (ICC-ASP/7/28).

consensus reached in the Working Group on the recommendations set out below resulting from constructive engagement with the Court and other stakeholders demonstrates fully, in the opinion of the facilitator, that the additional time provided by the seventh session of the Assembly to allow States a further opportunity to consider this matter has been amply justified given the complexity of the issue and the need for States Parties, the Court and civil society groups to fully contribute their views.

40. The recommendations reached and outlined below point to the wide consensus reached on the urgent need for the Assembly to agree at its eighth session to establish an independent oversight mechanism consistent with article 112, paragraph 4, of the Rome Statute to investigate alleged misconduct of staff members, elected officials and contractors in accordance with three basic principles:

- a) The investigative mechanism must be independent from the Court;
- b) The mechanism must be able to provide meaningful and effective oversight; and
- c) The mechanism must have adequate capacity and resources to meet the Court's needs.

G. Recommendations on implementing the outcomes of the facilitation process

Recommendation 1

Establishment of an independent oversight mechanism

41. The Assembly is invited to establish an independent oversight mechanism in the International Criminal Court as a matter of priority, as envisaged in paragraph 2 of the decision made on 13 February 2009 at the second resumption of the seventh session of the Assembly (ICC-ASP/7/Decision 1).⁴ In deciding to establish an independent oversight mechanism pursuant to article 112, paragraph 4, of the Rome Statute, the Assembly is mindful that the scope of such mechanism will initially only embrace investigations and therefore it is expected in the fullness of time that the independent oversight mechanism will fully evolve to also embrace the other aspects of article 112, paragraph 4, of the Rome Statute, namely, evaluation and inspection.

Recommendation 2

Setting up the independent oversight mechanism

42. It is recommended that the decision to establish the oversight mechanism incorporate a decision to recruit two oversight mechanism staff, i.e. one staff member who will head the office at the P-5 level and one further support staff member at the P-1 or P-2 level. These staffing levels and grades may be reviewed again by the Assembly once the oversight mechanism has been fully operational for a reasonable period of time. These individuals will begin work six months before the oversight mechanism becomes officially operational so as to develop all its functions, regulations, rules, protocols and procedures and submit them to the Assembly for approval. The recruitment process for the position of head of the oversight mechanism shall be conducted by the Bureau in co-ordination with the Court. The

⁴ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19–23 January and 9–13 February 2009* (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, part II, decision ICC-ASP/7/Decision 1.

independent oversight mechanism shall be co-located (but not integrated or subordinated to) with the Office of Internal Audit.

Recommendation 3

Scope of the independent oversight mechanism

43. The oversight mechanism itself will be expected to develop the rules governing its work, with the following recommendations being provided for purposes of guidance only:

- a) The scope of the independent oversight mechanism will initially embrace only the establishment of an independent professional investigative capacity on the understanding that additional elements of oversight such as inspection and evaluation as envisaged in article 112, paragraph 4, of the Rome Statute shall be added in due course.
- b) It is envisaged that the investigative unit of the newly established independent oversight mechanism will have *proprio motu* investigative powers and incorporate whistle-blower procedures and protections.
- c) It is envisaged that the individuals covered by the oversight mechanism will include all Court staff subject to the Staff Rules and Regulations of the International Criminal Court, together with elected officials. It is also envisaged that the investigative unit of the oversight mechanism will be utilised for the conduct of investigations of any allegations of misconduct made against contractors retained by the Court and working on its behalf. Such investigations should be carried out in accordance with the terms of the contract. In circumstances where a contract is silent on the manner and/or the modalities of any investigation, the oversight mechanism will conduct its investigation in accordance with its own established procedures and recognized best practice. The findings of any investigation will be used to determine the applicable sanctions, if any, under the existing contractual regime between the Court and the contractor. Within this context, it is recommended that the Court develop and incorporate into its procurement contracts a code of conduct and also appropriate disciplinary procedures to be followed in circumstances of alleged misconduct.
- d) In all cases, if criminal activity is suspected in the course of an investigation, the oversight mechanism must notify the relevant national authorities, such as the State where the suspected crime was committed, the State of the suspect's nationality, the State of the victim's nationality, and where applicable, the host State of the seat of the Court.

Recommendation 4

Functions of the independent oversight mechanism

44. The mandate of the oversight mechanism shall be limited at this stage to establishing a professional investigative unit in support of the existing disciplinary structures of the Court to conduct investigations on allegations of misconduct and to ensuring effective and meaningful oversight thereof. Such investigations and oversight shall exclude staff management issues, such as staff underperformance of duties, as distinct from staff misconduct. If a complaint which seems, *prima facie*, to pertain to staff management is launched, it shall be considered not to fall within the remit of the oversight mechanism and be referred to management. Management shall refer to the oversight mechanism cases brought to its attention that fall within the latter's competence.

45. The functions of the oversight mechanism shall not affect those described in paragraph (a) of regulation 10.2 of the Staff Regulations of the Court which provides that “[t]he Registrar or the Prosecutor, as appropriate, may impose disciplinary measures on staff members whose conduct is unsatisfactory”. As the purpose of the oversight mechanism is not to perform any staff management, the above provision shall continue to apply to all disciplinary measures that fall under an administrative ambit, without prejudice to the oversight’s mechanism’s investigative capacity in respect of:

- a) Internal misconduct warranting disciplinary measures; and
- b) Investigating external penal misconduct.

46. The functions of the oversight mechanism shall not affect those described in paragraph (b) of regulation 10.2 of the Staff Regulations of the Court which provides that “[t]he Registrar or the Prosecutor, as appropriate, may summarily dismiss a member of staff for serious misconduct, including breach of confidentiality”.

Recommendation 5 Jurisdiction

47. There should be no impunity for criminal misconduct. However, it is an accepted general principle of international law that only States can prosecute for criminal misconduct, not international organizations which, in principle, lack such competence. The oversight mechanism must focus on developing a notification mechanism so as to inform national authorities of suspected criminal misconduct, together with developing co-operation procedures with national authorities so as to facilitate the possibility of national prosecutions where investigations conducted by the oversight mechanism reveal suspected criminal misconduct.

Recommendation 6 Immunities

48. The work of the oversight mechanism will be without prejudice to the privileges and immunities enjoyed by Court staff and elected officials in the exercise of their functions, but should be guided by the principle that privileges and immunities may not be invoked to justify unlawful acts. In cases where prosecutorial function is to be exercised against individuals with immunity, the oversight mechanism must recommend immunity waivers to Court management as it deems appropriate and advisable, according to established standards and practice. In determining whether to waive immunity, the Court must have regard to its duty to ensure that prior to any official being made subject to national prosecution he/she will be afforded a minimum standard of due process. The above applies to privileges and immunities of the Court and its material, including evidentiary material, from legal process and any measure of execution.

Recommendation 7 Accountability of the oversight mechanism

49. The oversight mechanism will submit quarterly activity reports directly to the Bureau of the Assembly of States and will also submit on an annual basis a consolidated report of its activities to the Assembly via the Bureau (all reports shall be copied to the Presidency, the Office of the Prosecutor, the Registrar and the Committee on Budget and Finance). The Court will have a reasonable opportunity to respond in writing to the reports submitted by the oversight mechanism. Such written responses made by the Court shall be transmitted to the Bureau and the Assembly and, as appropriate, copied to the head of the oversight mechanism and the Committee on Budget and Finance.

Recommendation 8
Follow-up by the Court

50. The Court shall provide the oversight mechanism biannually with written updates regarding the follow-up of disciplinary procedures involving cases previously investigated by the oversight mechanism, together with any information, if any, on the application of sanctions made in individual cases.

Recommendation 9
Memorandum of Understanding with the United Nations Office of Internal Oversight Services

51. It is recommended that the decision to establish the oversight mechanism also incorporates a decision for the oversight mechanism via the Registrar to enter into a memorandum of understanding with the United Nations Office of Internal Oversight Services to provide support services on an annual cost recovery basis for the operationalization of the oversight mechanism.

Recommendation 10
Budget

52. The Assembly should establish a major programme budget to cover the start-up and on-going costs associated with establishing and maintaining the oversight mechanism.

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