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Report of the Bureau on an independent oversight mechanism

Note by the Secretariat

Pursuant to paragraph 24 of resolution ICC-ASP/6/Res.2, of 14 December 2007, the Bureau of the Assembly of States Parties hereby submits its report on the issue of an independent oversight mechanism for consideration by the Assembly. The report reflects the outcome of discussions held by the New York Working Group, pursuant to the mandate assigned to it by the Bureau at its first meeting on 11 February 2008.

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Part I: General

Introduction

1. The present report is submitted pursuant to the mandate given to the facilitator on the establishment of an independent oversight mechanism of the International Criminal Court by the Bureau of the Assembly of States Parties (“the Assembly”). The objective of the report is to outline the scope of the issue, familiarize States Parties with its parameters, elaborate on a number of considerations that must be taken into account in the process of establishing this oversight mechanism and giving discussions a direction so that the next facilitator can embark on a more focused task of identifying what must be done, with what order and within what timeline, so as to enable the Assembly to make concrete decisions and proceed with their implementation.

A. Background

2. Article 112, paragraph 4, of the Rome Statute stipulates that “The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.”

3. In 2005 (ICC-ASP/4/Res.4¹), the Assembly of States Parties to the Rome Statute of the International Criminal Court invited the submission of proposals on an independent oversight mechanism. To this end, the Bureau appointed, at its 13th meeting on 5 April 2006, Ambassador Zeid Ra’ad Zeid Al-Hussein (Jordan), as facilitator of the New York Working Group on oversight, taking also into account the corresponding mechanism of the United Nations System and the ongoing efforts to fill gaps in this mechanism.

4. At its first meeting, on 11 February 2008, the Bureau appointed Ambassador Andreas D. Mavroyiannis (Cyprus), facilitator for the oversight mechanism of the Court. On 2 June 2008, the facilitator circulated a non-paper on the issue, to States Parties (see annex). With the submission of the present report, the facilitator has fulfilled his mandate and, as a result of the relinquishment of his post on 30 July 2008, the Bureau must appoint a new facilitator who would produce draft decisions for the seventh session of the Assembly.

B. Principles governing the establishment of an independent oversight body at the Court

5. The primary aims of the oversight mechanism should be to ensure that:
- (a) Impunity would not be tolerated with respect to misconduct by staff of the Court;
 - (b) All staff shall have their right to due process fully respected; and
 - (c) All complaints will be investigated and an effective remedy will be provided.
6. The establishment of an independent oversight mechanism serves the best interest of the Court. It would make it less prone to criticism if a case of misconduct arose and it would guarantee the affected parties access to independent proceedings. The establishment of the mechanism is not an attempt to usurp competences currently undertaken by existing

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth session, The Hague, 28 November – 3 December 2005* (International Criminal Court publication, ICC-ASP/4/32) part III, resolution ICC-ASP/4/Res.4, paragraph 24.

departments of the Court; it is pursued purely because it is inappropriate that the authority and the object of oversight are the same entity.

7. For the oversight mechanism to be able to execute its functions, it must enjoy the full cooperation of States Parties, which as sovereigns, enjoy the authority to administer justice. It is important, therefore, that everything relating to the oversight mechanism be regarded within the confines of the powers that the oversight mechanism could have, as an organ of an international institution.

8. It is crucial for the success of the oversight mechanism that it not only to be afforded full cooperation by States but that it also be extended the necessary assistance and cooperation by the Court.

9. The oversight mechanism should ensure that there is no vacuum in terms of types of violations or categories of personnel covered, regardless of jurisdiction or the nationality and/or location of the accused, while fully respecting relevant privileges and immunities of the Court and its officials.

10. It is crucial for the success of the oversight mechanism that it be guaranteed full operational independence and that its size, set-up and *modus operandi* guarantee its efficiency and versatility. Regardless of who appoints the Head of the oversight mechanism, the appointing organ shall have no authority or influence over its operational activities. The oversight mechanism should be custom-made to the structure, size and nature of the Court and adjusted to its projected work load, rather than follow existing paradigms that may not serve its purposes.

11. The oversight mechanism should have competence to receive and investigate internal complaints as well as to launch investigations in cases where there have been allegations or where there is a legitimate suspicion against a staff member. In any case, the oversight mechanism will be under the obligation to investigate all complaints submitted to it.

12. The oversight mechanism must ensure the accountability of all staff of the Court and other agents acting on its behalf in all instances that might involve serious misconduct. It should be in a position to address all allegations or accusations of misconduct, whether disciplinary or criminal in nature (including financial) on the part of staff of the Court, both at Headquarters and while on mission. The scope *ratione personae* and the *ratione materiae* of the oversight to be decided by the Assembly should cover all possible permutations and situations of misconduct, regardless of where that occurs.

13. Regulations will have to be formulated and adhered to by the oversight mechanism for the launch of complaints, the gathering of evidence, the cooperation with the host State and State of nationality, the handing over of evidence to the relevant jurisdiction and the repercussions on staff (when criminal proceedings are not in order). Beyond responding to official complaints however, the oversight mechanism should also have a *proprio motu* power to verify information alleging misconduct without prior submission of a complaint in writing. As such, the structure and function of the mechanism prescribed below is equally valid whether an investigation is based on an official complaint or is *proprio motu*. In the latter case, it is recommended that the oversight mechanism be obliged to notify the Registry when its self-initiated investigation suggests that a violation has occurred.

Part II: Facilitation process

C. Facilitator objectives

14. The aims of the facilitator were to:
- (a) Provide perspectives of the topic from every angle and identify all relevant elements so as to ensure a comprehensive approach;
 - (b) Identify what the establishment of the oversight mechanism would encompass;
 - (c) Propose a possible structure and working methods that would enable it to respond to its mandate;
 - (d) Identify the number and categories of personnel it would cover and in which instances;
 - (e) Draw from best practices and lessons learned in similar contexts; and
 - (f) Compile a study of the issues involved in a manner that would assist States Parties in their thinking process and decision-making.

15. Above all, the objective of the facilitator was to convey the message that the Court is vulnerable to criticism so long as it does not possess such a mechanism. Thus, the facilitator was primarily guided by the need to afford maximum protection to the image of the Court and avoid any scenario where it would find itself accused of not having addressed misconduct in a transparent and authoritative manner. Considering that the Court does not at this point possess an oversight mechanism that is independent from Court structures, it could only (for its part and regardless of national jurisdiction) deal internally with allegations of misconduct, which is not objectively credible.

D. Methodology

16. The facilitator met with officials of the Court, States Parties, United Nations officials and NGOs in the process of preparing this report. To assist States as well as the Court in their input, he prepared a comprehensive non-paper (see annex), the content of which is extensively reflected in the present report. The facilitator also held two sessions of informal consultations with States Parties, on 5 June and 22 July 2008.

17. The Chief of the United Nations Office of Internal Oversight Services (OIOS) stressed that if any oversight service is to be effective and credible, it must enjoy full operational independence. She alluded to the United Nations system of oversight, which encompasses both auditing and investigation of possible misconduct, the operation of a hotline so that misconduct may be reported anonymously and the current revision of certain methodologies that would transform the United Nation's oversight practices.

18. The Registrar of the Court underlined that the Court already has mechanisms to address misconduct and thus, in the view of the Registry, an independent oversight mechanism would be unnecessary. The facilitator clarified at the outset that the States Parties were not trying to usurp the competences of the Court, nor to upset the latter's functioning. He stressed that, in accordance with the Rome Statute, the States Parties must establish an independent oversight mechanism that would safeguard the image of the Court and assist it to not only administer justice in cases of misconduct but also to be seen to do so. He underlined that it would be insufficient for the Court to only internally deal with misconduct if it is to convincingly address such cases.

19. On 15 July 2008, the Court transmitted to the New York Working Group a non-paper containing its views on the matter. The Court proposed that its current auditing body (the Office of Internal Audit) be expanded to cover also investigation of misconduct, under the authority of the Head of that Office. The Court also suggested that that Assembly pass a resolution calling upon States Parties to ensure that criminal misconduct of staff does not go unpunished.

20. 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. They also cautioned against any amendment to the Rome Statute (to which the facilitator clarified that an amendment to the Statute was neither required nor proposed for the establishment of the oversight mechanism but that a possible amendment had only been mentioned with respect to extradition). One State Party proposed that extending the Court's current auditing function to cover oversight functions as well would address the problem. Other States Parties alluded to the importance of the views of the Court on this matter and its proposals which seemed to put forward a lighter mechanism. The facilitator agreed that the oversight mechanism would have to be light and cost-effective, but expressed doubt as to whether the mechanism proposed by the Court was lighter or more cost-effective than that proposed by him. He added that the most important flaw of the Court's proposals is that they do not create an independent body, and clarified that this is a mandate for States Parties deriving from the Rome Statute and, as such, could not be disputed.

21. Several NGOs submitted views following the circulation of the facilitator's non-paper. They agreed with the need to establish an independent oversight mechanism, noting that article 112 of the Rome Statute is clear in this respect. They supported, *inter alia*, the creation of a mechanism custom-made for the Court; they pointed out that oversight should also focus on waste, fraud and abuse; supported that the Assembly and not the oversight mechanism should draft the latter's regulations; that the oversight mechanism must be accountable to the Assembly; stressed the difference between auditing and oversight; and supported developing staff regulations to address cases of sexual violence and abuse.

E. Conclusions

22. Through the contacts of the facilitator, it transpired that it is rather premature for States Parties to consider the issue in detail at this point. Notwithstanding the fact that States understandably require time to pronounce themselves on an issue of such complexity, the establishment of the oversight mechanism in the near future remains a necessity and thus the present report adopts a result-oriented approach with respect to action needed by the Assembly, particularly during its seventh session.

Part III

Recommendations on operationalizing the outcome of the facilitation process

Recommendation 1:

Establishment of an independent oversight mechanism

23. The Assembly must establish an independent oversight mechanism in the Court as a matter of priority. The Court must be in a position to investigate credibly, in a non-internal fashion, any serious allegation which it may face. It is strongly recommended that the decision on the establishment of this body be made at the seventh session of the Assembly.

Recommendation 2:

Setting up the independent oversight mechanism

24. It is recommended that the decision to establish the oversight mechanism incorporate a decision to recruit two oversight mechanism staff. These will begin work six months before the oversight mechanism becomes officially operational so as to chart all its functions, regulations and procedures and submit them to the Assembly. For this reason, it is important that an experienced and supremely qualified oversight mechanism director with a strong background in investigations is recruited. The recruitment process, including the hiring authority, position level, and length and renewability of contract must be decided by the Assembly. After this initial phase, the oversight mechanism may submit, after it has been operational for at least one year, a request to the Assembly for additional posts as appropriate and in proportion to its workload.

Recommendation 3:

Structure of the independent oversight mechanism

25. As the oversight mechanism itself will be expected to elaborate the rules governing its work, recommendations 3 and 5 are for purposes of guidance.

26. The facilitator proposes a three tier structure for the oversight mechanism:

- a) A tier dealing with internal misconduct, involving only members of staff, that cannot be addressed through administrative measures imposed by management;
- b) A tier dealing with all serious misconduct by staff, whether internal or external for which the oversight mechanism carries out investigations in view of prosecution; and
- c) A tier dealing with any misconduct of agents acting on behalf of the Court in the performance of their functions.

In all cases, if criminal activity is found in the course of an investigation, the oversight mechanism must notify national authorities, at least of the State where the crime was committed, while remaining the point of contact vis-à-vis the judicial process.

Recommendation 4:

Functions of the independent oversight mechanism

27. The mandate of the oversight mechanism shall be restricted to oversight and shall exclude staff management. If a complaint, which seems *prima facie* to pertain to management, is launched, it shall be considered not to fall within the purview 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.²

28. 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 mechanism's investigative capacity in respect of:

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

29. In the case of paragraph (b) of regulation 10.2, however, the function described therein³ will have to be subsumed by the oversight mechanism. To the extent that the possibility of summary dismissal arises from a case referred to and investigated by the oversight mechanism, this shall be dealt with by the administration of the Court if it pertains, at least *prima facie*, to staff management. In cases, however, where misconduct of a criminal nature warrants dismissal, this will be dealt with by the oversight mechanism, in accordance with its own procedures.

Recommendation 5: Scope and competence of the oversight mechanism

30. The following is proposed as regards the categories of offences, without prejudice to what the oversight mechanism itself will propose to the Assembly.⁴

Category A offences

31. The scope of this category covers all internal misconduct of a serious nature that may not be punishable through purely administrative measures but which, at the same time, may not require judicial proceedings. It may also cover the investigation of violations punishable under paragraph (a) of regulation 10.2, the results of which it must refer to the Registrar or Prosecutor for disciplinary action. It covers all categories of personnel who are on the roster of the Court, including those recruited locally. Examination of complaints submitted could be conducted by a panel, which could also decide if interim measures are required. The oversight mechanism shall investigate the complaint and collect evidence in a manner that would guarantee their subsequent admissibility in Court. The panel may then reconvene and decide on definitive measures. These measures may be appealed before a judicial body such as the appellate instance tribunal of the United Nations or the International Labour Organization Administrative Tribunal, for final judgment. If personnel are afforded only two instances, then the appeal could draw on both matters of fact and law.

² The oversight mechanism could become involved in cases where management malpractice may amount to misconduct and investigate such cases, provided that it refers the results of its investigation to the management of the Court if its investigation finds that the case before it is a question of management and/or the misconduct can be addressed through administrative (i.e., non-disciplinary) measures under paragraph (a) of Regulation 10.2 of the Staff Regulations in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Second session, New York, 8-12 September 2003* (United Nations publication, Sales No. E.03.V.13), (ICC-ASP/2/10), Part III, resolution ICC-ASP/2/Res.2, annex.

³ Regulation 10.2 (b): "The Registrar or the Prosecutor, as appropriate, may summarily dismiss a member of the staff for serious misconduct, including breach of confidentiality."

⁴ In addition to other regulations it will elaborate, the oversight mechanism should look into the feasibility of mediation, to the extent that it serves the best interests of justice and ensures that there will be no impunity, as well as legal assistance and/or advice to the parties.

Category B offences

32. The scope of this category covers all serious internal misconduct and all violations of an external character against non-staff of the Court, i.e. all violations with a penal dimension. In those cases where an allegation of violation of a criminal nature is made against staff of the Court, either by staff or non-staff, the oversight mechanism must launch an investigation. At the same time, the oversight mechanism must notify the host State and State of nationality. The Court shall complete its own investigation and proceed to take relevant action on the basis of its findings. Once criminal jurisdiction has been asserted in respect of the alleged act, the oversight mechanism will provide the evidence gathered. If criminal jurisdiction has not been asserted, the oversight mechanism shall make all efforts in that direction. The State exercising jurisdiction will be obliged to keep the Court informed of the progress and outcome of its investigation and proceedings.

Category C offences

33. The scope of this category covers all misconduct, internal and external, on the part of individuals acting as agents of the Court who are not on its roster (*dédoulement fonctionnel*) i.e. all personnel not covered by the above two categories, for example, agents of national police carrying out an arrest upon request of the Court. Subject to immunity waivers, the same procedure as in the first two categories of violations might be *mutatis mutandis* applicable, as regards investigation in accordance with the seriousness of the crime and its internal or external character but any prosecution has to be coordinated with the sovereign authority of such personnel. The primary objective of the oversight mechanism in these cases is to bring the violation to light, to provide the evidence to the jurisdiction of the perpetrator and to insist that there be prosecution.

**Recommendation 6:
Jurisdiction**

34. Jurisdiction is one of the tools at the disposal of the oversight mechanism to ensure prosecution. Beyond observing the basic *jus cogens* rules that grant priority to the jurisdiction of the State in whose territory the crime has been committed, the oversight mechanism must focus on building necessary capacity, particularly in situation countries and States hosting Court missions, for the assertion of jurisdiction by the host State. The oversight mechanism must also engage in dialogue with States of nationality, as an alternative jurisdiction, as well as explore the possibility of a State exercising universal jurisdiction. The oversight mechanism must also examine the implications for asserting jurisdiction in cases where the perpetrator does not hold nationality of State Party and/or the crime has been committed in non-State Party territory. Equally, the implications for extradition in such cases must be contemplated by the oversight mechanism.

**Recommendation 7:
Immunities**

35. The work of the oversight mechanism will be without prejudice to the privileges and immunities enjoyed by officials of the Court 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, as it deems appropriate and advisable, according to standard criteria. As such, the oversight mechanism must chart the immunity regimes afforded to Court staff, including former staff, and elaborate rules and procedures for waiving these in case of criminal violations, drawing on existing treaty law. The above applies also to privileges and immunities of the Court and its material, including evidentiary material, from legal process and any measure of execution.

**Recommendation 8:
Accountability of the oversight mechanism**

36. The Assembly must establish a subsidiary body to which the oversight mechanism will periodically report and be accountable. This body will have no executive power over the oversight mechanism. This could be an Oversight Committee that would receive periodic reports and meet on an *ad hoc* basis. Its mandate and function must be decided simultaneously with the appointment of the first oversight mechanism staff, along with the method of appointment/election of its members. The oversight mechanism oversight body itself will propose its link with the Assembly and the Bureau in more detail. The oversight mechanism shall have to deem what information pertaining to ongoing investigations it may disclose to its oversight body.

**Recommendation 9:
Budget implications**

37. The Assembly should request estimates for the budgetary implications arising from the establishment and operation of the oversight mechanism and request the Court to incorporate these estimates in the next budget.

**Recommendation 10:
Delays in establishing the oversight mechanism**

38. If a decision to establish the independent oversight mechanism is not made during seventh session of the Assembly, the Assembly should consider possible interim measures for tackling misconduct as well as consider requesting the Court to develop further the code of conduct of its officials, in particular when on mission, and of individuals acting on its behalf.

**Recommendation 11:
Pending tasks for oversight mechanism staff**

39. Once composed, the oversight mechanism must address a number of issues not elaborated by the present report, such as the construction of the legal personality of the oversight mechanism, the methods and procedures of launching and responding to complaints, criteria for assessing complaints, procedures for co-operation with national authorities and other Court departments, developing policy that deals with whistleblowers, making binding on all personnel the obligation to:

- a) Report information pertaining to violations that comes to their attention; and
- b) Co-operate with the oversight mechanism.

40. The oversight mechanism should also consider whether it has a role in ensuring the execution of sentences that confer responsibility on the Court, for instance in terms of awarding damages resulting from the unlawful conduct of its staff. Lastly, the oversight mechanism should assess the capability and readiness of situation countries to investigate and prosecute in accordance with due process and minimum standards of justice and seek ways to ensure the extradition of offenders where they may be prosecuted.

Annex

Non-paper Oversight mechanism of the International Criminal Court

I. Principles

1. Article 112, paragraph 4, of the Rome Statute stipulates that “The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy”.

2. There have been, since, efforts to prepare the ground for the establishment of such oversight mechanism, initially through the appointment, in 2005, by the Bureau of the Assembly of States Parties, of the then Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations, H.R.H. Prince Zeid Ra’ad Zeid Al-Husseini, as facilitator for this issue. These efforts are currently continued by H.E. Mr. Andreas D. Mavroyiannis, Permanent Representative of Cyprus to the United Nations who, on 11 February 2008, was appointed facilitator on the Court’s oversight mechanism.

3. The Assembly, in resolution ICC-ASP/6/Res.2 of 14 December 2007, renewed “its invitation to the Court, in consultation with the Bureau, to continue to consider concrete proposals for the establishment of an independent oversight mechanism to the next regular session of the Assembly”.

4. The facilitator for this topic proposes that the issue be examined under the prism of the following principles:

- a) The oversight mechanism (OM) must ensure the accountability of all ICC staff and other agents acting on its behalf in all instances that might involve serious misconduct. It should be in a position to address all allegations/accusations of misconduct whether disciplinary or criminal in nature (including financial) on the part of staff of the Court, both at Headquarters and while on (official) mission. The scope *ratione personae* and the *ratione materiae* of the oversight to be decided by the Assembly should cover all possible permutations and situations of misconduct, regardless of where that takes place.
- b) It is important also to keep in mind that for the OM to be able to execute its functions, it must enjoy the full co-operation of States Parties, which as sovereigns, enjoy the authority to administer justice. It is important therefore, that everything relating to the OM be regarded within the confines of the powers that the OM could have, as an organ of an international institution. In light of this, it becomes even more crucial to ensure that the OM be afforded full co-operation by States, which will commit their national authorities to extending all co-operation necessary to avoid impunity.
- c) The OM should operate within the structure of the Court but be independent. Regardless of who appoints the Head of the OM, the appointing organ shall have no authority or influence over its operational activities. It is crucial for the success of the OM that it be guaranteed a large degree of operational independence and that its set-up guarantee its efficiency and versatility. The OM should be customized to the structure, size and nature of the ICC, rather than follow existing examples without the necessary adjustments.

- d) The OM should not be at all involved in managing staff of the Court, nor should it be involved with cases that are, in substance, an issue of management and not oversight, even if a complaint of that sort is launched, and there are *prima facie* reasons to believe that they fall within its purview. The OM could become involved in cases where poor management may amount to misconduct and it could investigate any case, provided that it shall refer the results of its investigation to the management of the Court if its investigation finds that the misconduct can be addressed through administrative measures under par. (a) of ICC-ASP/2/10. For the competency of the OM that is other than investigative to become activated, there must be alleged conduct that, at least, warrants disciplinary measures.
- e) The functions of the OM shall not affect those described in paragraph (a) of regulation 10.2 of the ICC Staff Regulations (resolution ICC-ASP/2/Res.2, annex¹), which states that “The Registrar or the Prosecutor, as appropriate, may impose disciplinary measures on staff members whose conduct is unsatisfactory”. That is to say, the purpose of the OM is not to replace or substitute existing staff management and thus, all disciplinary measures that fall under an administrative ambit and will continue to be covered by the above provision. But the OM will have an investigative capacity a) with respect to internal misconduct warranting disciplinary measures and b) external penal misconduct.

In the case of paragraph (b) of regulation 10.2 however, the function described therein² will have to be subsumed by the OM. To the extent that the possibility of summary dismissal arises from a case referred to and investigated by the OM, this shall be dealt with by the administration of the Court if it pertains, at least *prima facie*, to staff management. In cases, however, where misconduct of a non-administrative nature warrants dismissal that will be dealt with by the OM, in accordance with its own procedures.

- f) The OM should have competence to receive and investigate internal complaints as well as to launch investigations in cases where there have been allegations or there is a legitimate suspicion against a staff member by non-staff. In any case, the OM will be under the obligation to investigate all complaints submitted to it conclusively.
- g) The primary aims of the OM should be to ensure that (i) impunity will not be tolerated with respect to misconduct by staff of the Court; (ii) all staff shall have their right to due process fully respected; and (iii) all complaints will be investigated and effective remedy will be provided.
- h) The OM should ensure that there is no vacuum in terms of types of violations or categories of personnel covered, regardless of jurisdiction or the nationality and/or location of the accused, while fully respecting relevant privileges and immunities of the Court and its officials.
- i) Regulations will have to be formulated and adhered to by the OM for the launch of complaints, the gathering of evidence, the cooperation with the host State and State of nationality, the handing over of evidence to the relevant jurisdiction and the repercussions on staff (when criminal proceedings are not in order). Beyond responding to official complaints, however, the OM should also have a *proprio motu* power to investigate information alleging misconduct without prior submission of a complaint in writing. As such, the structure and function of the

¹ Contained in ICC-ASP/2/10.

² Regulation 10.2 (b): “The Registrar or the Prosecutor, as appropriate, may summarily dismiss a member of the staff for serious misconduct, including breach of confidentiality.”

mechanism prescribed below is equally valid whether an investigation is based on an official complaint or is *proprio motu*. In the latter case, it is recommended that the OM be obliged to notify the Registry when its self-initiated investigation suggests that a violation has occurred.

II. Structure and function of oversight mechanism

5. The facilitator proposes a three tier structure for the OM, as outlined below: (i) the first deals with internal misconduct (involving only members of staff) that cannot be addressed through administrative measures imposed by management, (ii) the second deals with all serious misconduct, whether internal or external for which the OM carries out investigations in view of prosecution and (iii) the third deals with any misconduct for which agents acting on behalf of the Court in the performance of their functions, are responsible.

6. Insofar as the working methods of the OM are concerned, it is suggested its staff be recruited 6 months before the start of its operations so as to draft the detailed regulations of the OM and procedures to cover all cases that may arise as well as other aspects of its functions. As the staff of the OM will be expected to elaborate the rules governing their work, the procedures described below are only indicative. For this reason, it is important that an experienced and supremely qualified official with a strong background in investigations (the recruitment process, including the hiring authority, position level, and length and renewability of contract must be decided the soonest possible) is appointed as chief of the OM. After the OM has adopted its own rules, those should be approved by the Assembly.

7. In all cases below, if criminal activity is found in the course of an investigation, the OM must notify national authorities (of the State where the crime was committed), while remaining the point of contact vis-à-vis the judicial process.

Category A offenses

8. The scope of this category covers all internal misconduct of a serious nature that may not be punishable through purely administrative measures but which, at the same time, may not require judicial proceedings. It may also cover the investigation of violations punishable under par. (a) of Regulation 10.2³, the results of which it must refer to the Registrar or Prosecutor for disciplinary action. It covers all categories of personnel who are on the roster of the Court, including those recruited locally. All complaints must be made in writing and in strict confidence.

9. A panel of three, two OM staff and one designated representative from the department against whose staff the allegation was made, will examine the complaint and decide on immediate preliminary administrative measures required while processing of the complaint takes place. The OM will then proceed to investigate the complaint, gathering all relevant evidence in accordance with standards that would guarantee their subsequent admissibility in Court, if necessary. When investigation has been completed, the panel of three will reconvene, assess evidence and decide by consensus on the definitive administrative measures to be taken. If the case is deemed by the said panel as a good candidate for mediation⁴, the OM will propose that to the parties and conduct the process itself. The parties shall have access to legal advice from within a Court entity other than the OM, to be determined.

³ ICC-ASP/2/10.

⁴ Mediation may be deemed appropriate provided that it can serve the best interests of justice, that all parties will give written consent and that a deadline for conclusion of the process will be given.

10. ALTERNATIVE 1: If the concerned staff wishes to appeal these measures, the evidence will then be re-evaluated by a different panel of three (two plus one) for a definitive decision. ALTERNATIVE 2: In case of appeal, the case could be referred to a tribunal (for example the appellate instance tribunal of the United Nations or the ILO tribunal for final judgment). In such an event, both matters of fact and matters of law would fall within the tribunal's competence.

Category B offenses

11. The scope of this category covers all serious internal misconduct and all violations of an external character (against non-staff of the Court), that is all violations with a penal dimension. In those cases where an allegation of violation of criminal nature is made against staff of the Court, either by staff or non-staff, the OM must launch an investigation as prescribed for the first category of offenses. At the same time however, OM must notify the host State and State of nationality. The Court shall complete its own investigation and proceed to take relevant action on the basis of its findings. If criminal jurisdiction has not been asserted with respect to the alleged criminal act, the Court shall refer the case to the relevant jurisdiction, providing also the evidence gathered. Should criminal jurisdiction be asserted, the Court will provide the evidence gathered in any case. The State exercising jurisdiction will be obliged to keep the ICC informed of the progress and outcome of its investigation and proceedings. As regards serious internal misconduct, the OM must determine on a case-by-case basis whether mediation is feasible, advisable and consistent with the principle of ensuring that there will be no impunity. The OM itself is expected to elaborate comprehensive rules and procedures for mediation.

Category C offenses

12. The scope of this category covers all misconduct (of either internal or external character) on the part individuals acting as agents of the Court who are not on its roster (*dédoublément fonctionnel*), that is all personnel not covered by the above two categories (it could be, for example, agents of a security body carrying out an arrest of a Court indictee). Subject to immunity waivers in this case, the same procedure as in the first two categories of violations might be *mutatis mutandis* applicable, as regards investigation in accordance with the seriousness of the crime and its internal or external character but certainly any prosecution has to be coordinated with the authorities under which such personnel come under. The primary objective of the OM in these cases is to bring the violation to light, to provide the evidence to the authority of the perpetrator and to urge and ensure to the extent possible that there is prosecution by the jurisdiction to which the perpetrator is subject. In all cases where prosecution is not yet underway, the OM must insist with further reporting and other follow-up measures.

Jurisdiction

13. Jurisdiction being a key notion in any prosecution, fundamental principles thereon are outlined in order to guide the OM in its effort to ensure prosecution. Moreover, the issue is crucial for providing guidance to the OM to proceed with capacity-building with respect to the assertion of jurisdiction by the host State when necessary and for enabling the OM to deal with the administrative aspect of the process necessary for that to enter a judicial process.

14. The three scenarios above apply equally to the host country and to States hosting missions of the Court, priority given always to the jurisdiction of the State in whose territory the crime was committed. Considering that cases requiring OM involvement will occur either at the Court's headquarters or in situation countries, it would be advisable for the Court to formalize practice and cooperation with these States in particular so as to ensure clarity on the procedural sequencing of events to follow the launch of a complaint. In the framework of

formalizing this procedure, any necessary capacity-building of the judicial capabilities of situation States could be explored. This procedure could encompass the following sequence: 1) the automatic activation of the jurisdiction of the host State, with parallel provision of information to the State of nationality, 2) the exercise of jurisdiction by the State of nationality should the host State be unwilling or unable to exercise jurisdiction and 3) in the absence of any State having asserted its jurisdiction as above, the exploration by the OM of the possibility of any State exercising universal jurisdiction.

15. In the case where an official of the Court accused of misconduct is in a jurisdiction that is neither that of the host State nor of the State of nationality, the approach of the OM will be differentiated according to whether that third State is a State Party or not. In the case where the alleged perpetrator is in State Party territory, it would be the obligation of that State to co-operate with the Court, under its obligations to co-operate under the Rome Statute, and extradite the official in the jurisdiction of either the host State or the State of Nationality. For this, a relevant institutional and legal framework is needed, in the form of a Rome Statute amendment that would on the one hand create an obligation for States parties to extradite and on the other, enable the OM to actively encourage and advance the extradition process and provide any necessary support. Also the Statute must be amended to reflect the obligation of States to extradite agents for whom a relevant request has been made and the role of focal point that the OM would play.

16. In the case where the third State is not a State Party, then a formal extradition process must be launched between the State in whose territory the offender is and the host State and/or State of nationality. If there is no bilateral treaty governing extradition in such case, the OM should consider exercising its good offices, in line with the principle of *aut dedere aut judicare* to facilitate extradition, on the basis of relevant principles of general international law. More generally, the ASP or the Court or the OM should encourage the conclusion of bilateral extradition treaties.

Immunities

17. Horizontally applicable to all three levels above, to the extent that prosecutorial function is to be exercised outside the ICC system, is the issue of privileges and immunities enjoyed by officials of the Court in the exercise of their functions. The issue of immunities is dealt with here as it is proposed that the OM recommend to the authority designated to waive immunity in each case, when that is advisable in a case it is investigating. As such, for the purposes of the present report the different types of immunity afforded to Court staff (as well as former staff) are broadly alluded to as well as procedures that could be followed to waive immunity in the case where a crime has been committed. The OM shall be instrumental in this procedure and have significant responsibility in assessing the severity of the crime, the credibility of the evidence and the advisability of waiving an official's immunity to enable prosecution.

18. The practices of the OM must never amount to a denial of immunities but should be guided by the principle that privileges and immunities may not be invoked to justify unlawful acts.

19. The Rome Statute (article 48), the 2002 Agreement on the Privileges and Immunities of the ICC, the Headquarters Agreement and the 2003 Staff Regulations fully prescribe the immunity regime of Court officials, the method of waiving thereof and the proceedings for the removal from office. It is recommended that the OM fully map the applicable regime of immunities for all categories of Court staff, for all acts they might commit, and for all situations and countries in which they may find themselves and that it establish procedures and criteria for proposing immunity waivers. For the purposes of the present report, a rough sketch of the applicable immunities is outlined below in an oversight-specific manner:

- a) The judges, Prosecutor, Deputy Prosecutor and Registrar, as well as individuals previously holding these functions, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions. Waiving these for judges and the Prosecutor is done through absolute majority of the judges. Immunity of the Registrar may be waived by the Presidency of the Court. Immunity of the Deputy Prosecutors may be waived by the Prosecutor.
- b) The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry are covered by article 16 of the 2002 Agreement on the Privileges and Immunities of the ICC. The immunities of the Deputy Registrar and staff of the Registry may be waived by the Registrar.
- c) The Court itself enjoys in the territory of States Parties such privileges and immunities as are necessary for the fulfillment of its purposes, its premises, archives and documents are inviolable and its property, funds and assets are immune from legal process. The Court also enjoys immunity from any measure of execution. The regulations to be drafted by the OM will have to account for procedures and criteria in the handling of sensitive Court documents and other evidentiary material that might be covered by the regime of immunities.

Reporting of oversight mechanism

20. The OM will report to an Oversight Committee of the Assembly that will be created for this purpose and will meet on an ad hoc basis. The Committee could be modeled, *mutatis mutandis*, on the structure of the Oversight Committee on permanent premises⁵ and its mandate and more detailed procedural function could be decided and adopted in the same manner as for the abovementioned Committee. The method of appointment/election of individuals put forward by States Parties on the Committee will have to be determined but expertise in oversight issues should be sought and it is envisaged that members of the Committee should be experts serving in their individual capacity. The Committee should receive an annual report on the activities of the OM and send an executive summary thereof to the Assembly, through its Bureau. It will have a mandate to scrutinize the work of the OM but have no executive powers thereon. The OM shall be under no obligation to disclose substantive information pertaining to ongoing investigations.

III. Recommendations to the Assembly

Recommendation 1:

The Assembly should set a target date for the OM to become functional and continue its work on this topic with this deadline in mind. Activating this mechanism entails prior recruitment of its staff, adopting its mandate and the regulations binding its working methods as well as its positioning within the ICC system.

Recommendation 2:

The OM should be embedded in the existing legal framework of the Court; it should be included in the Rome Statute, where its purpose, mandate and function should be explained.

Recommendation 3:

The legal construction of the OM should be complemented by the adoption of detailed rules that would govern its engagement, by the Assembly. These rules would cover

⁵ ICC-ASP/6/20, annex II.

the recruitment of OM staff, methods and procedures of launching and responding to complaints, criteria for assessing complaints, procedures for co-operation with national authorities and in general, every aspect of the OM work that will not be otherwise covered, including by the Charter amendment proposed in (2) above.

Recommendation 4:

States Parties and the Court must examine further the correlation between oversight in terms of auditing and oversight in terms of misconduct. The Court and the Assembly might wish to consider assigning these two functions to the same department to enhance oversight effectiveness. This must be assessed against the background of any complications that may arise in terms of making the establishment of the OM more cumbersome and of existing auditing practices. In either case, investigations may be initiated as a result of suspicions raised in the framework of an auditing process while auditors must have an obligation to identify red flags in the process.

Recommendation 5:

The possible ways of launching complaints shall have to be contemplated. The OM might wish to create a hotline – modeled on the one operated by the United Nations Office on Internal Oversight Services – for reporting incidents, along with other submission possibilities to be elaborated by the OM in its regulations.

Recommendation 6:

The Assembly could also consider requesting the Court to develop further the code of conduct for its officials and for individuals acting on its behalf, in particular when on mission.

Recommendation 7:

The Assembly should consider interim measures for tackling misconduct until the OM has been established.

Recommendation 8:

The Assembly should request the Court to establish a formal dialogue with situation countries, which host officials of the Court on mission more regularly, to assess the level of their capability and readiness to investigate, assert jurisdiction and cooperate with the Court in dealing with any allegations in a fair manner and in accordance with due process and minimum standards of justice.

Recommendation 9:

The Assembly must consider, also upon recommendation of the Bureau, the next steps pertaining to the consideration of this issue; the Working Group that will consider it and the appointment of a new facilitator. It is stressed that the consideration of pending matters (number of OM staff, incorporation of its establishment in the budget, finalizing its mandate, procedures and method of cooperation with the other departments in the Court, the host country, States Parties and States where missions are taking place) and the definitive elaboration of existing ones must be accelerated for the OM to enter into force in time.

Recommendation 10:

The Assembly should look into possible amendments to the Rome Statute that might be necessary to ensure extradition of offenders where they may be prosecuted. Alternatively,

the Court may want to ask States to establish quasi-universal jurisdiction and ask non-States Parties to enter into agreements of extradition with the Court in this respect.

Recommendation 11:

The Assembly should seriously consider amending the Staff Regulations in order to make binding for all personnel an obligation to a) report pertinent information that comes to their knowledge only to the OM and b) co-operate with the OM in any capacity, if and when the need arises. The Assembly should consider OM and Court policy in dealing with whistleblowers (assessment of information, protection against retaliation).

Recommendation 12:

The ASP must consider the role of the OM in ensuring the execution of sentences that confer responsibility on the Court, for instance in terms of awarding damages resulting from unlawful conduct of its staff.

Recommendation 13:

The Assembly might wish to consider requesting the Court for estimates of the budgetary implications arising from the establishment and operation of the OM.