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9-13 February 2009**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****A. Introduction**

1. The present interim report is submitted pursuant to the mandate given to the facilitator, Mr. Akbar Khan (United Kingdom of Great Britain and Northern Ireland), 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 of States Parties (14-22 November 2008) the representative of Jordan, H.R.H. Ambassador Zeid Ra’ad Zeid Al-Hussein, chaired informal consultations on the Report of the Bureau¹ regarding the establishment of an independent oversight mechanism for the International Criminal Court (hereinafter “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 in the report on the work of its eleventh session², 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

¹ Report of the Bureau on an independent oversight mechanism (ICC-ASP/7/28).

² *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14 - 22 November 2008* (International Criminal Court publication, ICC-ASP/7/20), vol. II, part B.2, paras. 35-40.

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.

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 discussions³. 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 Bureau⁴ and the recommendations contained in the report of the Committee on Budget and Finance on the work of its eleventh session.⁵ In consultation with the Court, the Working Group would determine the estimated budgetary implications of setting up an independent oversight mechanism. The Committee on Budget and Finance 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 the OIOS and report, inter alia, on the manner in which the OIOS could assist and provide guidance.

6. At the first and second meetings of The Hague Working Group, held on 8 and 27 January 2009, respectively, the facilitator conducted discussions in accordance with his submitted discussion papers. In addition, some discussions on the issue were held outside of the Working Group between the facilitator and Court officials.

B. Approaching the issue of establishing an independent oversight mechanism

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

³ Agenda and decisions, Eleventh meeting of the Bureau, held on 9 September 2008.

⁴ Recommendation 2 of the Report of the Bureau on an independent oversight mechanism (ICC-ASP/7/28) states: "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, procedures and submit them to the Assembly. For this reason, it is important that an experienced and supremely well-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".

⁵ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14 - 22 November 2008* (International Criminal Court publication, ICC-ASP/7/20), vol. II, part B.2, paras. 35-40.

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 staff (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 an memorandum of understanding 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 ongoing 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?

Budgetary implications

- (a) What are the budgetary implications of:
 - i) Recommendation 2 of the Report of the Bureau and
 - ii) The Court's alternative proposal to create an investigative capacity in the Office of Internal Audit

C. Organization of work

8. In accordance with a request made by the President of the Assembly of States Parties at its seventh session the Bureau is required to submit proposals to the second resumption of the seventh session of the Assembly of States on the issue of establishing an independent oversight mechanism. This interim report prepared by the facilitator sets out the progress made by the Working Group together with its findings to date and recommendations to the second resumption of the seventh session of the Assembly.

D. Tentative views of The Hague Working Group

Nature and scope of an independent oversight mechanism

9. 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.

10. 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.

11. 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. The point was made, however, that this structure would not entirely meet the requirements of article 112, paragraph 4, of the Rome Statute, since its sole focus was the Court's investigative capacity, rather than oversight. It was therefore proposed that the mandate should also involve an oversight function, and that the mechanism could evolve at a later stage to include evaluation and investigation.

12. 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. The 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. However, the Working Group was subsequently 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 these apparently contradictory reasons advanced by the Court, the Working Group thought it desirable to re-examine this option in greater detail.

13. On the question of the jurisdiction of the Court in instances where an investigation led to a finding of criminal conduct, the Working Group noted that the Court would have no jurisdiction and that it would be necessary to establish a mechanism to ensure cooperation by the Court with the State of nationality of the staff member concerned.

14. As regards the staff to be covered by an independent oversight mechanism, 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. In this regard, it was suggested that contractors could be covered by a code of conduct or a manual of best practices, but it was noted such a code of conduct had not yet been established by the Court. On the other hand, attention was drawn to the potential effect that the exclusion of contractors could have with respect to undermining the authority of the Court, since this category of persons also operated on behalf of the Court.

Independence and oversight of an independent oversight mechanism

15. There was wide agreement that the oversight mechanism should be operationally independent and seen to be independent. 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.

16. It was proposed that the independence of the oversight mechanism could be safeguarded through, for example, establishing its terms of reference, with reporting lines to the Assembly via the Bureau, conferring *proprio motu* powers upon the investigator and ensuring the participation of the Assembly in the recruitment of the investigator. 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 mechanism. In this regard, the point was made that the perception of independence would be difficult if the investigation was undertaken by the Court itself.

17. The proposal was made that a reporting requirement to the Bureau be instituted, which would be consistent with the oversight nature of the mechanism and ensure its establishment as a subsidiary body of the Assembly, as envisaged by article 112, paragraph 4, of the Rome Statute.

18. As regards the location of the independent oversight mechanism, it was proposed that it be situated within an existing office whose independence had already been established, such as the Office of Internal Audit or the Secretariat of the Assembly of States Parties. It could be either co-located within one of these offices, or it could take the form of an individual professional investigator located within the Office of Internal Audit. The Working Group was of the view that the overriding consideration was the independence of the mechanism, not its location.

E. Conclusions

19. The Working Group met on two occasions pursuant to the mandate conferred by the Bureau. Although significant progress has been made on this issue, in terms of reaching a broad consensus on the nature and scope of a possible independent oversight mechanism, together with proposals on how to safeguard its independence, further deliberation is needed to refine and flesh out the areas of tentative agreement, to consult with interested civil society stakeholders and to consider the programme budgetary implications of the final recommendations to be made to the Assembly. Accordingly, the facilitator invites the Assembly to take note of the significant progress that has occurred and to extend the mandate of the Bureau to continue its consideration of the issue with a view to presenting a full report to the eighth session of the Assembly scheduled to take place in November 2009.

Annex

Draft decision

Takes note of the report of the Bureau on an independent oversight mechanism and the report of the facilitator presented to second resumption of seventh session of the Assembly, and

Requests the Bureau to continue its consideration of the issue, including in particular its nature and scope as well as the programme budget implications, and to report to the eighth session of the Assembly of States Parties.

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