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Report of the Bureau on the Independent Oversight Mechanism

Note by the Secretariat

Pursuant to paragraph 2 of resolution ICC-ASP/8/Res.1, of 26 November 2009, the Bureau of the Assembly of States Parties hereby submits for consideration by the Assembly the report on the Independent Oversight Mechanism. The present report reflects the outcome of the informal consultations held by The Hague Working Group of the Bureau with the Court.

I. Background

1. This report is submitted pursuant to the mandate given to the facilitator, Mr. Vladimir Cvetković (Serbia), on the issue of the Independent Oversight Mechanism (“the IOM”), upon his appointment by the Bureau of the Assembly of States Parties (“the Assembly”) at its meeting held on 19 January 2010.

2. At its eighth session, the Assembly adopted resolution ICC-ASP/8/Res.1 (“the resolution”), by which it decided to establish an independent oversight mechanism in accordance with article 112, paragraph 4, of the Rome Statute.¹ It was decided that the independent professional investigative capacity would be implemented immediately, while the additional elements of oversight, as provided for in the Statute, such as inspection and evaluation, would be brought into operation subject to a decision of the Assembly at its next session.² In that sense, the Assembly decided that the Bureau, in coordination with the Court, should prepare a report on the operation of the inspection and evaluation functions within the oversight mechanism, including the terms of reference and related financial implications, with a view to a decision on its adoption at the next session of the Assembly.³ The Bureau decided that the issue of the IOM should be further discussed by The Hague Working Group (“the Working Group”) in 2010.

3. Taking the resolution as the starting point, the Working Group discussed the IOM at its meetings held on 3 and 29 March, 5 July, 10 September, 7 and 28 October, and 4 November. The IOM was also discussed in informal consultations held on 17 March, 23 and 30 September, 5, 19 and 26 October, and 2 November.

4. In his discussion paper, dated 9 March 2010, the facilitator identified the issues on which the Working Group should focus in 2010:

- (a) The completion of the process of secondment of the temporary Head of the IOM;
- (b) Drafting of regulations, rules, protocols and procedures of the IOM, as well as of amendments to the existing regulations of the Court (if required);
- (c) The recruitment of the staff member at the P-2 level;
- (d) The recruitment of the new Head of the IOM; and
- (e) Inspection and evaluation functions of the IOM.

5. Apart from the issues identified above, discussions were also held on the Temporary Head’s proposal, dated 6 September 2010, for amendment of Major Programme VII-5 of the proposed programme budget for 2011.⁴

II. Secondment of the Temporary Head of the IOM

6. The resolution provides that, in the initial set-up phase of the IOM, one P-5 staff member, who would head the IOM, would be seconded from the United Nations Office of Internal Oversight Services (“the OIOS”).⁴ The resolution also provides that “the Registrar shall, for an initial period of one year, enter into a memorandum of understanding with the United Nations Office of Internal Oversight Services to provide support services on a cost recovery basis for the operationalization of the oversight mechanism”.⁵

7. After the eighth session of the Assembly, the Court contacted the OIOS and, according to the information provided by the Court to the members of the Working Group at the informal consultations held on 17 March 2010, the OIOS had offered to second a person whom was found to be the most suitable for the position of the Temporary Head of the IOM. The members of the Working Group were of the view that the Bureau, as the

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighth session, The Hague, 18-26 November 2009* (ICC-ASP/8/20), vol. I, part II, ICC-ASP/8/Res.1, para. 1.

² *Ibid.*, annex, para. 6 (a).

³ *Ibid.*, para. 2.

⁴ *Ibid.*, annex, para. 3.

⁵ *Ibid.*, annex, para. 17.

organ competent for the appointment of the Temporary Head of the IOM, should accept the proposal of the OIOS. Accordingly, the Working Group, at its third meeting, on 29 March 2010, decided to request the Registrar to submit the proposal of the OIOS to the Bureau for a decision on the appointment of the Temporary Head of the IOM, together with any observations on the proposed candidate that the Registrar might find appropriate.⁶

8. On 1 April 2010, the Registrar submitted to the Bureau the Curriculum Vitae of Ms. Beverly Ida Mulley, a national of Australia, whom the OIOS proposed for the position of the Temporary Head of the IOM. At its eighth meeting, held on 12 April, the Bureau appointed Ms. Beverly Ida Mulley as the Temporary Head of the IOM for a period of one year, effective on the date to be agreed upon by the OIOS, the Registrar and Ms. Mulley. The Bureau also requested the Registrar, pursuant to resolution ICC-ASP/8/Res.1, to enter into a memorandum of understanding with the OIOS to provide support on a cost recovery basis for the secondment of Ms. Mulley. Ms. Mulley assumed duty on 19 July 2010.

III. Recruitment of the staff member of the IOM

9. In accordance with the resolution, the Temporary Head of the IOM initiated the recruitment of the P-2 staff member. The vacancy announcement was published and the deadline for applications was 3 October 2010. The Temporary Head, in coordination with the Court, is currently in the process of short-listing candidates for interviews and it is anticipated that the recruitment process will be finalized by the end of 2010.

IV. Recruitment of the new Head of the IOM

10. The resolution provides that the recruitment process for the position of Head of the IOM shall be conducted by the Bureau in coordination with the Court.⁷ At its sixth meeting, on 10 September, based on the discussion paper submitted by the facilitator, the Working Group discussed various options for the recruitment procedure, including the composition of the selection panel and the involvement of the Court and the Temporary Head of the IOM in the recruitment process. It was agreed that the Working Group recommend to the Bureau the appointment of a selection panel, which would comprise one representative from each regional group. The Temporary Head of the IOM would assist the selection panel and provide the necessary expertise, while the Court would also assist in the recruitment process.

11. The Working Group discussed the “Draft decision of the Bureau on the appointment of the Selection Panel to carry out the recruitment procedure for the Head of the Independent Oversight Mechanism” at the informal consultations on 23 September and expressed its general support for the draft decision and the opening of the recruitment process. While consensus could not be reached on the staffing level of the Head of the IOM (see below for more on these discussions), there was broad agreement among the delegations that it would be useful to appoint a selection panel before the ninth session of the Assembly, in order for this panel to conduct preparatory work for the recruitment process, so that the vacancy could be posted on the website of the Court immediately following the decision of the Assembly on the staffing level for the Head of the IOM.

12. Accordingly, a slightly revised version of the draft decision was discussed at the eighth meeting of the Working Group. The Working Group reiterated the desirability of geographical representation on the Selection Panel and decided to recommend to the Bureau the appointment of the following persons as members of the panel: Mr. Pavel Caban (Czech Republic), Ms. Yolande Dwarika (South Africa), Mr. Kanbar Hossein Bor (United Kingdom), Mr. Tsuyoshi Ideta (Japan) and Mr. Guillaume Michel (Mexico).

13. It was agreed to include in the draft decision a requirement that the Selection Panel report regularly to the Working Group on the progress of its work. It was further agreed that the Court would have the opportunity to present its views on the short-list of candidates, although such views would be of no binding effect. Concerning the final decision on the appointment of the Head of the IOM, it was stressed that the decision would be taken by the

⁶ Hague Working Group, third meeting, Agenda and Decisions, page 3.

⁷ *Official Records ...Eighth session... 2009* (ICC-ASP/8/20), vol. I, part II, resolution ICC-ASP/8/Res.1, para. 1.

Bureau, taking into account the recommendation of the Selection Panel, while the formal appointment, for administrative purposes, would be done by the Registrar.

14. The Working Group agreed to convey to the Bureau its recommendation on a draft decision of the Bureau on the appointment of the Selection Panel to carry out the recruitment procedure for the Head of the Independent Oversight Mechanism. The decision was adopted by the Bureau on 19 October 2010. It is expected that the Selection Panel will hold its first meeting at the beginning of November 2010.

V. Proposal for amendment of the proposed programme budget for 2011

15. The Temporary Head of the IOM proposed the amendment of the proposed programme budget for 2011 and recommended that the post of the Head of the IOM be staffed at the P-5 level instead of P-4 as provided by the resolution.⁸ The Temporary Head explained that, at the time of commencement of her duties, the proposed 2011 budget for the IOM had already been submitted by the Coordination Council of the Court and, therefore, she did not have the opportunity to make any submissions to the Committee on Budget and Finance (“the Committee”) regarding the appropriateness of the P-4 grade for the permanent Head of the IOM. She also referred to the discussions held in the Working Group throughout 2009, when broad support and strong preference had been 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. She also pointed out that the IOM mandate extends to the elected officials and that the power and authority vested in the IOM and its Head, by virtue of the *proprio motu* powers, should be utilized by a person with the requisite experience and seniority in conducting complex and sensitive investigations, which is best reflected in the P-5 grade. Finally, she pointed out that most, if not all, investigation arms of oversight bodies of the United Nations Common System are headed by a P-5 senior investigator, while the Heads of the larger investigation units, including OIOS and United Nations Development Programme (UNDP), are at the D-2 and D-1 levels, respectively.

16. The proposal of the Temporary Head of the IOM was discussed in several formal and informal meetings of the Working Group and the views of delegations were divided. The delegations which do not support the amendment pointed out that the Assembly had already decided to have the Head of the IOM staffed at the P-4 level and referred to paragraph 3 of the annex to the resolution, which provides:

“Although in its initial set-up phase one P-5 staff member would be seconded from the United Nations Office of Internal Oversight, the oversight mechanism will consist of two staff members, i.e. one staff member who will head the office at the P-4 level and one further support staff member at the 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.”

17. These delegations stressed that the IOM was not fully operational and that, accordingly, the conditions for the review of the staffing levels have not yet been met. These delegations also pointed out that the decision of the Assembly was taken in accordance with the recommendation of the Committee and that the Working Group should not deviate from the Committee’s mandate (ICC-ASP/1/Res.4, annex, para. 3) and detract from the established practice that decisions with budgetary implications should not be taken without prior consultation with the Committee. Several delegations expressed the view that the P-4 level is, at least at this moment, appropriate for the post of the Head of the IOM. In that regard, some delegations argued that the grade of the Head of the IOM should be reviewed only after the Assembly decides to operationalize the inspection and evaluation functions of the IOM.

⁸ The amendment proposed by the Temporary Head of the IOM, dated 6 September 2010.

18. Delegations which support the proposed amendment submitted that the Assembly is not bound by the recommendations of the Committee and that resolutions have been amended in the past and accordingly proposed that the decision on the proposed amendment be taken at the ninth session of the Assembly. These delegations recalled the discussions held in 2009, referred to by the Temporary Head of the IOM, and indicated that the Committee had not provided reasons for its recommendation to have the post of the Head of the IOM staffed at the P-4 level. It was pointed out that the decision on the staffing level of the Head of the IOM is not *stricto sensu* a reclassification, but primarily a policy decision and, as such, it should be taken by the Assembly, taking into consideration the bigger picture and not only the financial implications. In that regard, the delegations which support the amendment expressed their concern that, if the post is kept at the P-4 level, the Assembly would not be able to attract the best candidates for the job during the recruitment process which was soon to commence. Mention was also made of the non-financial long-term consequences of a decision to adopt or reject the amendment and it was argued that, if a reclassification is to be decided only after the IOM becomes fully operational, this could imply that the recruitment procedure for the Head of the IOM should be initiated again, which would in turn modify the structure already in place, with the risk of losing some of the valuable experience gained by the first appointed Head of the IOM. Several delegations pointed out that perhaps even the P-5 level might not be appropriate and that similar posts in various international organizations are often staffed at the D-1 or D-2 level.

19. Having in mind that the Working Group was unable to reach consensus, the Working Group decided to recommend to the Bureau to defer the discussions on the staffing level of the Head of the IOM to the ninth session of the Assembly. In connection with this, however, several delegations pointed out that the decision on this issue had already been taken at the eighth session of the Assembly and that consensus is only needed for changing the grade of the Head of the IOM and not for keeping it at the P-4 level.

20. In order to provide the Assembly with more information on the issue, the Working Group further decided to request the Committee to present its views on the proposed amendment before the ninth session of the Assembly. In doing that, the Working Group was aware that the Committee would not hold a formal session before the ninth session of the Assembly, but was nevertheless of the view that, taking into consideration the specific character of the issue and the fact that, for objective reasons, the Temporary Head of the IOM was unable to submit her proposal in time, the Committee should endeavor to consult in electronic or some other appropriate form and provide its views as requested.

VI. Inspection and evaluation functions of the IOM

21. At its eighth session, the Assembly decided that the Bureau, in coordination with the Court, should prepare a report on the operation of the inspection and evaluation functions within the oversight mechanism, including the terms of reference and related financial implications, with a view to a decision on its adoption at the next session of the Assembly.⁹ Paragraph 6 (a) of the annex to the resolution provides that the additional elements of oversight, such as inspection and evaluation, will be brought into operation subject to a decision of the Assembly at its next session.

22. Taking into account that the resolution provides that the report of the Bureau on the operation of the inspection and evaluation functions within the oversight mechanism should be prepared in coordination with the Court, whilst on the other hand, the exchange with the Court on the topic of the IOM was in the past years focused on the investigation function of the IOM, the Working Group decided, at its third meeting held on 29 March 2010, to invite the Court to submit its views on the operationalization of the inspection and evaluation functions of the IOM. In particular, the Working Group specified that the views of the Court should include the appraisal of the existing mechanisms, if any, which perform the inspection and evaluation of the Court and its functions (excluding the judicial functions), both internal and external, together with an overview of the lines of reporting of such mechanisms.¹⁰

⁹ *Official Records ... Eighth session... 2009* (ICC-ASP/8/20), vol. I, part II, ICC-ASP/8/Res.1, para. 2.

¹⁰ Hague Working Group, third meeting, Agenda and Decisions, page 3.

23. The Court submitted its views in the paper entitled “Inspection and Evaluation within the Current Oversight Framework of the International Criminal Court”, dated 30 June 2010. The analysis of the Court looked into the existing oversight bodies, namely the Office of Internal Audit, the External Auditor, the Audit Committee, the Committee on Budget and Finance and the IOM, their mandate, but also the functions they perform in practice.

24. The Court concluded that “within the current oversight framework, some inspection and evaluation elements already exist in the work of existing oversight bodies, but there is no single entity which is fully undertaking these functions in a coherent and functional manner.”¹¹ Earlier in the paper, while analyzing the work performed by the Committee, the Court said the following: “Whilst its focus is usually on the financial impact of specific decisions or policies, and more generally on good administrative practices, in reviewing these policies, decisions and practices and in making specific recommendations to management thereon, the CBF does touch upon elements that should normally be undertaken by inspection and evaluation functions.”¹²

25. The Court also stated that “when deliberating on the operationalization of the inspection and evaluation functions of the Independent Oversight Mechanism, it is essential to avoid any duplication or cross over of mandates of different oversight bodies, which could give rise to conflicting recommendations and an undue burden on the Court and States Parties, leading to inefficiency and confusion.”¹³ The Court thus submitted that “should States consider that adding an inspection and evaluation function to the oversight framework of the Court is necessary ... these functions be centralized in one body, which is crucial to avoid conflicting recommendations and excessive reporting obligations for the Court.”¹⁴ Finally, the Court concluded that it “sees benefit in having [inspection and evaluation] functions within the scope of the Independent Oversight Mechanism, which itself is co-located with the Office of Internal Audit and that housing of these oversight functions under a common roof would provide valuable synergies, which have already been exploited in other organizations such as the United Nations, where the OIOS houses all these functions.”¹⁵

26. In addition, the Court explained that its analysis was not “a full study of the assurance mechanisms in the Court and how these interact into a coherent oversight structure for the purposes of risk mitigation and good governance”¹⁶ and suggested that “should the Working Group consider that such a study is necessary, ... an independent, external expert be retained for this purpose.”¹⁷

27. The Working Group discussed and welcomed the Court’s paper at its fifth meeting, held on 5 July 2010. The Working Group paid particular attention to the Court’s suggestion that a further in-depth study of the existing oversight mechanisms might be necessary and requested the Court to enquire from its existing oversight bodies, i.e. the Office of Internal Audit, the External Auditors, the Audit Committee and the Committee on Budget and Finance, whether they would be prepared to undertake an assurance mapping study and if so, the cost of this study.

28. The Court submitted its answer to the request of the Working Group in the paper dated 3 August 2010, entitled “Responses to Hague Working Group query on the Independent Oversight Mechanism”. The responses to the query have been received by the Head of the Office of Internal Audit and the Audit Committee. Both bodies supported the idea of the study but informed that they were not able to undertake it.

¹¹ Inspection and Evaluation within the Current Oversight Framework of the International Criminal Court, para. 35.

¹² *Ibid.*, para. 28.

¹³ *Ibid.*, para. 2.

¹⁴ *Ibid.*, para. 36.

¹⁵ *Ibid.*, para. 37.

¹⁶ *Ibid.*, para. 3.

¹⁷ *Ibid.*

29. The Working Group agreed with the views of the Court that the duplication of various oversight bodies should be avoided and, in particular, the duplication with the Committee, as another body created by the Assembly and external to the Court. Accordingly, the Working Group decided to formally request the Committee to give its views on the following questions:

“i) To what extent is evaluation and inspection of the Court, excluding its judicial functions, already covered by the mandate of the Committee? Should the Committee be of the view that it does cover evaluation and inspection, the Committee is requested to illustrate the extent and scope of these functions already performed by the Committee.

ii) What is the Committee’s position regarding the relationship between its mandate and work, and the mandate of the IOM as provided in article 112 (4) of the Statute (comprising of investigation, evaluation and inspection).”¹⁸

30. The Committee discussed the request of the Working Group at its fifteenth session and concluded the following:

“26. The Committee noted that its own mandate was clear as it had been given the responsibility for “the technical examination of any document submitted to the Assembly that contains financial or budgetary implications or any other matter of a financial, budgetary or administrative nature, as may be entrusted to it by the Assembly of States Parties.

27. In the view of the Committee, its mandate will, by necessity, include some aspects of inspection and evaluation, particularly when evaluating the proposed programme budget of the Court as well as the recommendations of the External and Internal Auditors. For example, members of the Committee had visited field offices to meet with staff, review control procedures for inventory and discuss the use of the resources. That had been very useful when considering budget requests from the Court in relation to reclassifications, capital replacements and other staffing requests.

28. At this point, there would seem to be little scope for overlap with the IOM which was currently staffed to focus on setting up investigation procedures, something that the Committee did not undertake. On the contrary, reports from the IOM on specific cases would be useful inputs to the Committee when considering governance arrangements, management practices and the review of requests for new resources. However the Committee was concerned with the potential for excessive oversight that may cause duplication and consume resources should the inspection and evaluation functions of the IOM be activated.

29. From this perspective, the Committee recommended that fuller consideration be undertaken of all the existing oversight mechanisms for the Court, their respective mandates, areas of activity and their reporting responsibilities, with a view to avoiding unnecessary duplication and potentially unnecessary costs.”¹⁹

31. Having in mind the suggestion of the Court that a further study into the oversight mechanisms might be necessary, as well as the similar recommendation of the Committee and the views expressed by the Head of the Office of Internal Audit and the Audit Committee, the Working Group discussed the idea of commissioning an assurance mapping study at its sixth meeting on 10 September 2010. The Working Group supported the idea of the study, with some delegations arguing that additional time might be needed before the Assembly takes a decision on the operationalization of the inspection and evaluation functions of the IOM.

32. Acting on the request of the facilitator, the Temporary Head of the IOM contacted the OIOS to inquire whether the OIOS could conduct the assurance mapping study. A positive response was received from both the Inspection and Evaluation Division (IED) and the Internal Audit Division (IAD) of the OIOS. However, the IED/OIOS informed that they

¹⁸ Hague Working Group, fifth meeting, Agenda and Decisions, annex.

¹⁹ Report of the Committee on Budget and Finance on the work of its fifteenth session (ICC-ASP/9/15), paras. 26-29 (footnotes omitted).

had no available capacity until at least mid-2011 and, at the same time, recommended that the study be carried out by the IAD/OIOS, as the body which possesses the requisite expertise for such a study. The IAD/OIOS was ready to carry out the study already in November 2010 and also informed that they would be ready to carry out the study free of charge, except for the daily subsistence allowance (DSA) and the travel costs.

33. The Working Group discussed the “Draft decision of the Bureau to commission the assurance mapping study into the existing oversight mechanism of the Court” in informal consultations and at the eighth meeting of the Working Group on 7 October 2010. While the proposal received a broad support from the Working Group, two delegations objected to the adoption of the draft decision. The concerns of one of the delegations were later met by the compromise language adopted by the Working Group. However, the objections of the other delegation could not be met, since this delegation, among other things, requested that the decision on the commission of the study be deferred to the ninth session of the Assembly.

34. The Working Group, with the exception of the delegation which made the objection, was of the view that the commissioning of the study into the current internal and external oversight mechanisms of the Court was in the function of “preparing a report on the operation of the inspection and evaluation functions within the oversight mechanism”, as provided by the resolution²⁰, and that, accordingly, the Bureau has the mandate to commission such a study without further authorization from the Assembly. The Working Group was also of the opinion that the IAD/OIOS is an appropriate organ to carry out such a study, that this organ possesses the required expertise and that, as an organ external to the Court and the Assembly, the IAD/OIOS would have the necessary independence. The Working Group further had in mind the possible budgetary implications and underscored that the study would be provided free of charge, except for the travel costs and DSA for the persons carrying out the study, estimated at € 8,000. Furthermore, having in mind that there were adequate funds in the 2010 budget of the IOM, the study, if performed in 2010, would be budget neutral. On the other hand, if the study were to be performed in 2011, there was a possibility that it would no longer be budget neutral, since there was a risk that the 2011 budget of the IOM might not be sufficient to cover its costs. Finally, the Working Group also had in mind the need for the study to be performed as soon as possible, in order to enable the Working Group to continue discussions on the operationalization of the inspection and evaluation functions of the IOM early in 2011.

35. The Working Group agreed to transmit to the Bureau for consideration the text of a draft decision of the Bureau to commission the assurance mapping study into the existing oversight mechanism of the Court, together with the objections to the draft decision submitted by one delegation. The Bureau adopted the draft decision on 2 November 2010.

VII. Operationalization of the investigative function of the IOM – drafting of regulations for the IOM and amendments to the existing legal instruments of the Court

36. The resolution provides that the IOM will develop all its functions, regulations, rules, protocols and procedures and submit them to the Assembly for approval.²¹ It also envisages the possibility that the current Rules of Procedure and Evidence, Staff Regulations, Staff Rules and Regulations of the Court, insofar as they relate to the disciplinary regime of the Court, be amended (if required)²² and sets up the basis on which the amendments should be made.²³ In particular, the resolution recommends that the relevant provisions of the Rules of Procedure and Evidence and the Regulations of the Court be amended to remove the investigative function of elected officials from the judges and to transfer it to the IOM,²⁴ whilst preserving the judges’ adjudicator functions over these matters.

²⁰ ICC-ASP/8/Res.1, para. 2.

²¹ *Ibid.*, annex, para. 3.

²² *Ibid.*, para. 4.

²³ *Ibid.*, paras. 7-12.

²⁴ *Ibid.*, para. 6 (e).

37. Upon taking up the office, the Temporary Head of the IOM started her work on the new rules and regulations needed for the operationalization of the IOM and commenced consultations with the Court on the amendments to the existing legal instruments. In general, it is possible to identify three categories of instruments that need to be adopted or amended in order for the IOM to become fully operational – a) amendments to the existing legal instruments of the Court; b) IOM Operational Mandate; and c) IOM Manual of Procedures.

1. Amendments to the existing legal instruments of the Court

38. The Temporary Head of the IOM identified that, in order for the IOM to become operational with respect to the elected officials, rule 26 of the Rules of Procedure and Evidence and chapter 8 of the Regulations of the Court need to be amended to ensure that the IOM will undertake the investigative functions into complaints of misconduct against elected officials. With respect to contractors, the Standard Terms and Conditions of Contractors/Consultants require minor amendments to ensure that contractors/consultants comply with duly authorized investigations by the IOM, together with additional requirements to reflect zero-tolerance of sexual exploitation and abuse by those individuals engaged by the Court. Finally, the Temporary Head of the IOM also suggested the change to the Staff Regulations and Rules to reflect the requirement that staff cooperate with the IOM duly authorized investigations.²⁵

39. The Temporary Head of the IOM informed the Working Group that she had already commenced discussions with relevant Court personnel about these issues through the Inter-Organ Legal Working Group. However, the consultation process and the procedure for the consideration and submission of the amendments would take time and the amendments thus could not be ready for the ninth session of the Assembly. It is recommended that the Working Group invite the Temporary Head of the IOM and the Court to continue the consultations with a view of submitting all the necessary amendments to the tenth session of the Assembly.

2. IOM Operational Mandate

40. The Temporary Head of the IOM submitted for the consideration of the Working Group a draft document entitled “IOM Operational Mandate”, dated 31 August 2010. The document was also sent to the Court for comments. The IOM Operational Mandate incorporates the broad charter of the IOM, including its scope, functions, accountability through internal and external reporting avenues, authority to access persons and information, notification to national authorities for possible criminal activity, whistleblower protection through confidentiality obligations and its operational independence. Although this document is by itself not entirely sufficient for the full operationalization of the investigative function of the IOM, it is intended to serve as the basis for the future work of the IOM, as well as for the further operationalization of the IOM to be undertaken in 2011. In particular, the IOM Operational Mandate is intended to serve as a foundation from which the IOM Manual of Procedures shall be drafted and submitted to the Assembly for approval at its tenth session. Therefore, the approval of the IOM Operational Mandate at the ninth session of the Assembly is necessary in order to begin work on the IOM Manual of Procedures.

41. The draft IOM Operational Mandate, in its original form and subsequent revised versions, was discussed in several meetings and it was generally well received by the Working Group.

²⁵ Temporary Head of the IOM Update Status, 19 October 2010.

42. While no delegation submitted amendments or written comments on the text of the draft IOM Operational Mandate, written comments have been received from the Court. These comments incorporated the Court-wide comments and the specific comments from the Office of the Prosecutor (“the OTP”). The Temporary Head of the IOM accepted most of the Court-wide comments and amendment suggestions and they have been included in the draft IOM Operational Mandate. At the meeting held on 5 October, the Registry, also on behalf of the Presidency, informed that they were satisfied with the changes made in response to the Court-wide comments.

43. The comments of the OTP, on the other hand, were of a more general nature as they related to the *proprio motu* powers of the IOM and the relation of these powers with article 42 of the Rome Statute.

44. The OTP argued that article 42 establishes that “The Office of the Prosecutor shall act independently as a separate organ of the Court”, which means that it is not just the Prosecutor who is independent, but the entire office.²⁶ According to the OTP, the last sentence of article 42 (1), which reads that “A member of the Office shall not seek or act on instructions from any external source” visibly indicates that the only person that can instruct staff of the OTP is the Prosecutor. Accordingly, the OTP was of the view that, as a consequence of this article, a member of its staff could not be obliged to cooperate with an IOM investigation without the Prosecutor’s consent. The OTP also argued that the Rome Statute expressly establishes in article 42, paragraph 2, that the Prosecutor, as Head of the Office, has “full authority over the management and administration of the Office, including the staff, facilities and other resources thereof”. These words, in the view of the OTP, clearly reflect the intention by the drafters to ensure full and unfettered administrative independence of the Prosecutor.

45. The OTP further argued that the resolutions of the Assembly must be read consistently with the Rome Statute and Rules of Procedure and Evidence, which, in the event of a tension between the two, would prevail by virtue of the principles of applicable law. This, according to the OTP, means that all functions attributable to the IOM should be in harmony with the provisions of the Statute and that, consequently, its creation would be expected not to interfere with or infringe upon the Prosecutor’s independence pursuant to article 42. Accordingly, the OTP was of the view that for the mandate of the IOM to be fully in agreement with the Rome Statute, it would be necessary that the IOM investigation on the OTP staff be carried out either at the request of the Prosecutor or with his prior agreement.

46. As the way forward, the OTP proposed that the IOM, before initiating any *proprio motu* investigations, consult with, and request the agreement of, the Prosecutor, similar to the approach foreseen in article 15 of the Rome Statute for the initiation of the investigations into the crimes within the jurisdiction of the Court. According to the OTP, this type of procedure would not mean that the investigation would no longer be *proprio motu*, since it would, in fact, still be initiated by the IOM. In the event of the IOM being of the view that the Prosecutor’s agreement has been refused unreasonably or without justification, it could *proprio motu* (and without prior consultation with the OTP) investigate whether the Prosecutor’s refusal would constitute misconduct under article 46 of the Rome Statute. As an alternative procedure, the Prosecutor would be required to conduct an investigation and submit a report to the IOM. Should the IOM not be satisfied with the investigation or outcomes, the IOM could refer back to the Prosecutor with queries. If the matter were not resolved to the satisfaction of the IOM, the IOM would be at liberty to investigate the Prosecutor for failing to properly address/investigate the matter.

47. The OTP further gave practical examples that, in their view, demonstrate the need for prior agreement of the Prosecutor, such as: a) the possibility that a Court-opposing State or a defence team may try to discredit the OTP staff, for example by spreading information that staff has been involved in taking or paying bribes; b) a staff member being falsely accused of using an intermediary to collect false testimony from witnesses; c) a possible request of the IOM to the OTP to provide confidential information, the disclosure whereof

²⁶ Comments of the OTP described in paras. 44-47 are taken from the paper of 30 September 2010, entitled “Court’s Comments on the IOM Operational Mandate”, part entitled “OTP Specific Comments Questions for Clarification and Suggestions”.

may prejudice further or ongoing investigations or create risks for persons in contact with the OTP, or information received under a promise of non-disclosure of provider pursuant to article 54, paragraph 3 (e), of the Rome Statute, which without provider consent the OTP could not disclose to anyone, not even to the judges. The OTP argued that, in all these cases, the initiation of the IOM investigation without the agreement of the Prosecutor may have negative impact on the ongoing investigations into the crimes within the jurisdiction of the Court. Furthermore, the OTP argued that the IOM investigations, even if justified, may impact the proper conduct of the OTP operations by affecting the performance of the OTP staff or impacting on protection issues for persons at risk, such as staff, victims and witness, intermediaries or other third parties.

48. In her response to the comments of the OTP,²⁷ the Temporary Head of the IOM stated that the activities of the IOM, amongst other things, seek to provide a dedicated investigatory capacity for the Prosecutor and other Organ Heads, to utilize as part of a preliminary fact-finding role within the disciplinary mechanism of the Court. The resolution provides that the IOM would work within the disciplinary structures of the Court and, accordingly, the investigation reports generated by the IOM with adverse findings against the OTP staff would be transmitted to the Prosecutor for his consideration and ultimate disposition of the matter. In the opinion of the Temporary Head of the IOM, this does not in any way infringe upon the authority and independence of the Prosecutor and therefore does not in any way contradict the terms of article 42, paragraph 2, of the Rome Statute.

49. With respect to the proposal of the OTP that any investigation of the OTP staff be authorized by the Prosecutor, the Temporary Head of the IOM submitted that allowing the Prosecutor a right of veto on the *proprio motu* powers of the IOM would completely diminish the impact of these powers and clearly impede the independence of the IOM to carry out its mandate as envisaged by the resolution, for which all organs of the Court were consulted before its adoption. In the opinion of the Temporary Head of the IOM, to ensure the integrity of the Court, and to demonstrate that there is the requisite level of independence and accountability, investigations, particularly regarding possible investigatory or prosecutorial misconduct, cannot be undertaken internally by the OTP. Further, the Temporary Head submitted that to permit the Prosecutor to have any right of veto of an investigation within his own office would be contrary to the best interests of the OTP and the Court because of the real and perceived conflict of interest.

50. In connection to some particular concerns of the OTP with regard to the confidentiality of the OTP investigations and the possible impact of frivolous and malicious complaints regarding current and ongoing investigations, the Temporary Head of the IOM recognized the unique position of the OTP and the risks that may arise. However, she proposed the introduction of procedural safeguards regarding the use of *proprio motu* powers by the IOM.

51. These procedural safeguards, originally intended to be included in the IOM Manual of Procedures, were later incorporated into the draft IOM Operational Mandate and they include: a) the obligation of the IOM to notify the respective Organ Head prior to the initiation of the case to provide their views on the information obtained and any matters of factual relevance, which shall be carefully considered by the Head of the IOM; and b) if a case is initiated, the obligation of the IOM to provide to the respective Organ Head further opportunity to comment upon the investigation report compiled by the independent oversight mechanism prior to the findings being finalized to ensure all factual matters have been obtained and considered and the obligation of the IOM to attach any comments received as an annex to the investigation report. Other safeguards, concerning intermediaries, access to confidential information and operational activities of the OTP, have also been included in the draft IOM Operational Mandate.

²⁷ Comments of the Temporary Head of the IOM described in paras. 48-50 are taken from the paper of 30 September 2010, entitled "IOM response to Court's Comments on the IOM Operational Mandate".

52. The Working Group discussed the comments of the OTP at the informal consultations held on 5 and 19 October 2010. The Working Group recognized legitimate concerns of the OTP that the IOM investigations may have some unwanted effects on the OTP investigations. However, the Working Group, with the exception of one delegation, was of the opinion that these concerns were sufficiently addressed with the procedural safeguards proposed by the Temporary Head of the IOM, especially after the inclusion of the safeguards in the draft IOM Operational Mandate.

53. The Working Group also discussed the OTP comments in connection to article 42 of the Rome Statute and the independence it granted to the OTP and the Prosecutor. While recognizing that resolutions adopted by the Assembly must be in accordance with the Rome Statute, the Working Group, with the exception of one delegation, was not convinced that the resolution establishing the IOM or the IOM Operational Mandate infringed upon the independence of the Prosecutor or his office. In that regard, a reference was made to article 112, paragraph 4, of the Rome Statute, which provides 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”, and to article 34 which identifies the OTP as one of the organs of the Court. Accordingly, it was argued that article 42 provides for the independence of the Prosecutor and his office with respect to the other organs of the Court, but not for the independence of the OTP with respect to the Assembly, especially not in administrative matters. In connection to this, a point was also made that the interpretation of the Rome Statute is primarily the task for the States, since it was the States who adopted the Rome Statute.

54. The Working Group further emphasized the importance of the existence of the *proprio motu* powers for the IOM as a guarantee of the independence of that office. The point was also made that the *proprio motu* powers are essential as a strong deterrent for possible misconduct, even if those powers are never used in practice. It was also stated that the analogy with article 15 of the Rome Statute is inappropriate, since the investigations of the OTP deal with most serious crimes known to mankind, while the investigations of the IOM deal with the administrative misconduct.

55. Following the informal consultations of 19 October 2010, the OTP submitted on 22 October 2010 its further comments which consisted of a cover page and a document entitled “OTP Proposed Operational Mandate”. The cover page reiterated some of the main concerns of the OTP, in particular with respect to article 42 of the Rome Statute, while the “OTP Proposed Operational Mandate” consisted of number of drafting amendments to the draft IOM Operational Mandate as proposed by the Temporary Head of the IOM. With these amendments, the OTP put in a concrete form its previously expressed concerns and the request that the initiation of the IOM investigation be made dependent on the prior authorization of the Prosecutor. The OTP also proposed that, if the Prosecutor refuses to authorize the investigation and the IOM insists on conducting the investigation, the matter be referred to the Assembly for consideration. According to the OTP, if this approach were to be adopted, the IOM would still have the necessary independence while respecting the full authority of the Prosecutor over the OTP staff, as provided for in the Rome Statute, and the oversight role of the Assembly would be ensured.

56. The amendments proposed by the OTP on 22 October 2010 were not limited to the Prosecutor and the requirement for prior authorization by respective Organ Heads was envisaged for all IOM investigations into the staff of the OTP, as well as of the other organs of the Court. On 25 October 2010, the comments of the President of the Court and the Registrar concerning the OTP Proposed Operational Mandate were circulated to the Working Group. The document reads as follows:

“The President and the Registrar have noted the suggested amendments to the IOM mandate proposed by the Office of the Prosecutor. The President and the Registrar were not consulted on the proposed amendments and confirm that they dissociate themselves from the amendments. In particular, the President and the Registrar confirm that they do not need to be consulted before initiation of investigations for misconduct of judges and staff.”²⁸

²⁸ Comments of the President of the Court and the Registrar on the proposed OTP amendments to the IOM Operation Mandate, dated 22 October 2010.

57. The Temporary Head of the IOM also responded to the OTP Proposed Operational Mandate.²⁹ In this response, the Temporary Head stated that the OTP's amendments regarding how the IOM should undertake its activities are not in line with the mandate that was approved for the IOM by the Assembly and that most of the suggestions do not offer anything new or different from the OTP position expressed in their previous papers. She concluded that the amendments simply develop the right of veto of the Prosecutor and thus cannot be supported. In particular, addressing the OTP proposal that, in case of a disagreement between the Prosecutor and the IOM on the initiation of an investigation, the IOM has an "appeal" right to the Assembly, the Temporary Head stated that this proposal is problematic for many reasons, including confidentiality breaches, the contravention of staff members' due process rights and States Parties engagement in an independent investigation which is counter-productive to all stakeholders. She emphasized that the operational independence of the IOM is based on the notion that it cannot take instructions from any entity or person regarding case initiation or its work programme, which also includes the Assembly. The Temporary Head, however, did accept a few minor amendments proposed by the OTP and included these amendments in the 25 October 2010 version of the draft IOM Operational Mandate.

58. The Working Group discussed the OTP Proposed Operational Mandate at the informal consultations held on 26 October 2010. Requested to clarify its proposal in the view of the position of the President of the Court and the Registrar, the OTP explained that there was a slight misunderstanding with the other organs of the Court, since the OTP thought that the other organs wanted the same treatment as the OTP. The OTP further stated that their position with regard to *proprio motu* investigations into the OTP staff had a legal basis in the Rome Statute. They had thought that for policy reasons it was better to have one system for all organs of the Court but, if the other organs did not want to have the right to consent to the IOM investigations, that would be their prerogative and the OTP did not attempt to speak for them.

59. In the discussions that followed, the Working Group, with the exception of one delegation, was of the view that the proposal of the OTP did not bring anything particularly new to the discussions, but simply specified the position already expressed by the OTP. The large majority of the Working Group was thus of the view that there was no need for further and detailed discussion of the OTP proposal. The delegations took note of the position of the President of the Court and the Registrar, who disassociated themselves from the OTP proposal and stated that they did not need to be consulted before the initiation of an investigation. In that regard, it was stated that accepting the amendments only with respect to the staff of the OTP would create a dual regime within the IOM – one for the staff of the OTP and another for the rest of the staff of the Court, which would not be acceptable and was clearly not an intention envisaged either by article 112 of the Rome Statute or the resolution which established the IOM.

60. Most delegations emphasized that the crucial issue is that of independence – on the one hand the independence of the Prosecutor and on the other the independence of the IOM. These delegations expressed their continuing support for the independence of the Prosecutor in accordance with the Rome Statute but, at the same time, explained that they do not see that the IOM Operational Mandate, as proposed by the Temporary Head of the IOM, infringes on that independence. It was also pointed out that the proposal of the OTP – to have the Assembly decide on a disagreement between the IOM and the Prosecutor on the initiation of an investigation – would actually infringe on the independence of both the Prosecutor and the IOM. In that sense, it was argued that the IOM was created to enable that the oversight of the Court, as envisaged by article 112, paragraph 4, of the Rome Statute, is performed by a body independent from the Assembly and that this solution only reinforces the independence of the Court and its organs. A point was also made that the interpretation of the Rome Statute lies in the hands of the Court and that the Court has expressed its position through the comments submitted by the President of the Court and the Registrar, who did not accept the proposal of the OTP. It was further argued that the proposal of the OTP that the Assembly take the final decision on the initiation of an IOM investigation would be problematic because it would affect the confidentiality of both the

²⁹ IOM Response to OTP Mandate Proposals, 25 October 2010.

IOM and the OTP investigations, while the regime proposed by the Temporary Head of the IOM provides all necessary guarantees that the process would remain confidential.

61. Concerning the independence of the IOM, the delegations emphasized its importance and pointed out that the inclusion of the right of veto of the Prosecutor would deprive the IOM of its independence and make the IOM subservient to the OTP, which is why it could not be accepted. It was further stated that the acceptance of the OTP proposal would deprive the IOM of its purpose and that States would no longer be interested in maintaining the IOM without the crucial feature of operational independence as part of its mandate.

62. Taking all the above into consideration, the Working Group, with the exception of one delegation, was of the view that the matter had been sufficiently discussed and proposed that the Working Group forward the draft IOM Operational Mandate, as proposed by the Temporary Head of the IOM, to the Bureau as a part of the resolution on the IOM to be adopted at the ninth session of the Assembly. One delegation was of a different view and it proposed that the discussions continue until a solution satisfactory for all parties was reached. This delegation also indicated that, if a decision on the IOM Operational Mandate had to be taken at the ninth session of the Assembly, they would be ready to support the proposal of the OTP, since this proposal adequately addressed the concerns of the OTP that the IOM investigations may have adverse effect on the OTP investigations.

63. Accordingly, the Working Group, with the exception of one delegation, decided to recommend to the Bureau that the draft IOM Operational Mandate, in the version submitted by the Temporary Head of the IOM on 25 October 2010, be submitted to the Assembly for consideration and adoption at its ninth session. The draft IOM Operational Mandate is contained as a part of the resolution annexed to this report. The Working Group, by consensus, decided that the comments of the OTP,³⁰ the comments of the President of the Court and the Registrar to the "OTP Proposed Operational Mandate" and the comments of the Temporary Head of the IOM³¹ be compiled in an informal paper which would be available on the Assembly's extranet and emailed to the States. This compilation should also include the Temporary Head of the IOM proposal for the amendment of Major Programme VII-5 of the 2011 programme budget.

3. IOM Manual of Procedures

64. Apart from the Operational Mandate and the amendments of the existing legal instruments of the Court, full operationalization of the investigative function of the IOM requires the adoption of the Manual of Procedures that would further develop the provisions of the Operational Mandate. As explained by the Temporary Head of the IOM, this document would not be a piece of legislation like the Rules of Procedure and Evidence or the Regulations of the Court, but rather a practical guide that explains how the IOM would undertake its investigations and allow the Court personnel to have an understanding of the IOM activities. This document would seek to reflect best practices when conducting administrative fact-finding investigations, whilst recognizing the ongoing development of the jurisprudence of the International Labour Organization Administrative Tribunal regarding investigative practices. As such, the Manual of Procedures should remain a living document, which would no doubt require periodic revision of its terms.

65. Nevertheless, since the resolution provides that all of the functions, regulations, rules, protocols and procedures of the IOM shall be submitted to the Assembly for approval, the Manual of Procedures is also to be approved by the Assembly. Since taking up the office, the Temporary Head of the IOM started preparing a manual similar to the one applied by the OIOS, with a goal of submitting it to the Assembly at its ninth session.

³⁰ The OTP comments consist of the following documents: 1) Document dated 4 October 2010 entitled "A mandate for the ICC's Independent Oversight Mechanism: Considerations from the Office of the Prosecutor, 2) Document dated 13 October 2010 entitled "OTP Position on the document "Procedural Safeguards for Proprio Motu powers"", 3) OTP cover text and the tracked version of the "OTP Proposed Operational Mandate", both dated 22 October 2010.

³¹ The comments of the Temporary Head of the IOM consist of the following documents: 1) Document dated 15 October 2010 entitled "IOM response to OTP Position on the document "Procedural Safeguards for Proprio Motu powers"", 2) Document dated 25 October 2010 entitled "Draft operational mandate for the independent oversight mechanism: IOM response to the OTP proposed operational mandate of 22 October 2010".

However, she later informed the Working Group that the manual would not be ready before the ninth session of the Assembly, since there was not sufficient time to consult all relevant parties, in particular different organs of the Court. Additionally, since the Manual of Procedures should be based on the Operational Mandate, the ongoing dispute concerning the Operational Mandate needed to be resolved before the Manual of Procedures was further developed.

66. The Temporary Head of the IOM informed the Working Group that the Manual of Procedures would be ready for submission to the tenth session of the Assembly.

VIII. Possible extension of the mandate of the Temporary Head of the IOM

67. Concerning the length of the secondment of the Temporary Head of the IOM from the OIOS, the resolution provides that “The Registrar shall, for an initial period of one year, enter into a memorandum of understanding with the United Nations Office of Internal Oversight Services to provide support services on a cost recovery basis for the operationalization of the oversight mechanism. Any subsequent renewal would be subject to a decision of the Assembly of States Parties”.³² In accordance with this provision, the Temporary Head of the IOM was appointed for a period of one year and, since she assumed her duty on 19 July 2010, this means that the secondment will expire on 18 July 2011.

68. During the discussions in the Working Group, it was pointed out that a case may arise in the course of 2011 that the mandate of the Temporary Head of the IOM needs to be extended if, during the recruitment procedure, the Selection Panel was unable to find a suitable candidate for the Head of the IOM or if the candidate(s) proposed by the Selection Panel was found unsuitable by the Bureau and there was not sufficient time to complete the new recruitment procedure. Having in mind that the resolution clearly provided that any decision on the renewal of the Temporary Head’s mandate had to be taken by the Assembly, it was further pointed out that this might create a gap in the leadership of the IOM, leaving the IOM without its head for several months or longer. It was thus proposed that the Assembly delegate to the Bureau the power to take a decision on the possible extension of the secondment, should the need arise.

69. Several delegations expressed their concern that the extension of the secondment may have budgetary implications, taking into consideration that the Temporary Head of the IOM is staffed at the P-5 level, while the new Head of the IOM would be staffed at the P-4 level (unless the Assembly decides otherwise at its ninth session). Accordingly, it was proposed that, before taking a possible decision on the renewal of the secondment, the Bureau should take into consideration budgetary implications of such a decision and, if necessary, consult the Committee.

IX. Conclusions and recommendations

70. This report contains the recommendations to the ninth session of the Assembly. The recommendations have been adopted in The Hague Working Group either by consensus or by a large majority of delegations, after detailed discussions, in particular concerning the mandate of the IOM.

Recommendation 1

71. It is recommended that the Assembly adopt the “IOM Operational Mandate” drafted by the Temporary Head of the IOM as an annex to the resolution on the IOM. This document defines various aspects of the investigative function of the IOM, such as its scope, functions, accountability through internal and external reporting avenues, authority to access persons and information, notification to national authorities for possible criminal activity, whistleblower protection through confidentiality obligations and its operational independence. As an important step towards the full operationalization of the investigative

³² ICC-ASP/8/Res.1, annex, para. 17.

function of the IOM, the Operational Mandate is intended to serve as a foundation from which the IOM Manual of Procedures shall be drafted and submitted to the Assembly for approval at its tenth session.

72. This document was extensively discussed and the Working Group, with the exception of one delegation, recommends that it be adopted at the ninth session of the Assembly, for the reasons explained earlier in this report. A delegation which objected to the adoption of the document proposed that the matter be further discussed or that, alternatively, the Operational Mandate proposed by the OTP be adopted.

Recommendation 2

73. The Temporary Head and, once appointed, the Head of the IOM should continue to work on the development of functions, regulations, rules, protocols and procedures of the investigative function of the IOM and submit them to the Assembly for approval at its next session. The Court is also invited to continue to work with the Temporary Head and, once appointed, the Head of the IOM on the amendments to existing legal instruments, with a view of the adoption, at the next session of the Assembly, of all the amendments necessary for the full operationalization of the investigative function of the IOM.

Recommendation 3

74. It is recommended that the discussion on the IOM continue in 2011 in The Hague Working Group of the Bureau. For the tenth session of the Assembly, the Bureau should prepare a report which should focus on two main issues: 1) further operationalization of the investigative function of the IOM, and 2) operation of the inspection and evaluation functions within the oversight mechanism.

75. The discussions on the operation of the inspection and evaluation functions of the IOM should in particular benefit from the assurance mapping study into the existing oversight mechanisms of the Court, which is expected to be completed early in 2011 and then discussed by The Hague Working Group and other relevant stakeholders. It is further recommended that the discussions on the operation of the inspection and evaluation function, to be held in 2011, encompass the scope of these two functions, the relation between the IOM and other bodies performing similar functions, as well as the size, including budgetary implications, of the fully operational IOM, comprising of all three functions envisaged by article 112, paragraph 4, of the Rome Statute.

Recommendation 4

76. It is recommended that the Assembly decide on the proposed amendment of the proposed programme budget for 2011, concerning the staffing level of the post of the Head of the IOM. No further action by the Assembly is required to keep the post at the P-4 level. However, should a decision be taken to change the level of the post to P-5, the Assembly should reflect that decision in a resolution on the IOM.

Recommendation 5

77. It is recommended that the Assembly delegate to the Bureau the power to take a decision on the possible renewal of the secondment of the Temporary Head of the IOM from the OIOS, after taking into consideration possible budgetary implications of this decision and, if necessary, consulting the Committee on Budget and Finance. Any decision on the renewal should, of course, be subject to the previous agreement of the OIOS.

Annex I

Draft resolution on the Independent Oversight Mechanism

The Assembly of States Parties,

Recalling the Rome Statute of the International Criminal Court and, in particular article 112, paragraphs 2(b) and 4, of the Rome Statute,

Recalling its resolution ICC-ASP/8/Res.1 establishing the Independent Oversight Mechanism,

Welcoming the report of the Bureau on the Independent Oversight Mechanism,¹

Welcoming the appointment of the Temporary Head of the Independent Oversight Mechanism,

Welcoming the decision of the Bureau to appoint the Selection Panel to carry out the recruitment procedure for the Head of the Independent Oversight Mechanism,²

Welcoming the decision of the Bureau to commission the assurance mapping study into the existing oversight mechanisms of the Court³ as a step forward towards the operationalization of the inspection and evaluation functions within the oversight mechanism,

1. *Decides* that the investigative function of the Independent Oversight Mechanism shall operate in accordance with the provisions of the appendix to this resolution (Operational Mandate);
2. *Invites* the Temporary Head and, once appointed, the Head of the Independent Oversight Mechanism, to continue to work on the development of functions, regulations, rules, protocols and procedures of the investigative function of the Independent Oversight Mechanism and submit them to the Assembly for approval at its next session;
3. *Invites* the Court to continue to work with the Temporary Head and, once appointed, the Head of the Independent Oversight Mechanism, on the amendments to existing legal instruments, with a view of the adoption, at the next session of the Assembly, of all the amendments necessary for the full operationalization of the investigative function of the Independent Oversight Mechanism;
4. *Decides further* that the Bureau shall prepare a report on the operationalization of the investigative function of the Independent Oversight Mechanism and the operation of the inspection and evaluation functions within the oversight mechanism, including the terms of reference and related financial implications, with a view to a decision on its adoption at the next session of the Assembly.
5. *Decides* to delegate the Bureau to decide, should the need arise, on whether to extend the mandate of the Temporary Head of the Independent Oversight Mechanism, after taking into consideration possible budgetary implications of that decision and, if necessary, consulting the Committee on Budget and Finance.

Comment:

If the Assembly decides to adopt the proposal for amendment of the 2011 programme budget, a new operative paragraph 6 should be added, reading:

“*Decides further* that the Head of the Independent Oversight Mechanism shall be staffed at the P-5 level”

¹ Report of the Bureau on the Independent Oversight Mechanism (ICC-ASP/9/31).

² See decisions of the fifteenth meeting of the Bureau of 19 October 2010: <http://www.icc-cpi.int/Menus/Go?id=98da805c-eebf-42cc-ab97-bfe8a714f4b1&lan=en-GB>.

³ See decisions of the sixteenth meeting of the Bureau of 28 October 2010: <http://www.icc-cpi.int/Menus/Go?id=4caf7ae0-8500-4546-88e3-5ca56e077f09&lan=en-GB>.

Appendix

Draft Operational Mandate of the Independent Oversight Mechanism

The independent oversight mechanism shall assume the functions prescribed in the Assembly of States Parties resolution ICC-ASP/8/Res.1,¹ as amended by the present resolution and subject to the modalities defined below, with a view to ensuring effective and meaningful oversight of the International Criminal Court (hereinafter “the Court”):

I. Function

1. The purpose of the independent oversight mechanism is to ensure the effective and meaningful oversight of the Court through the exercise of the following function:

Investigations

2. The independent oversight mechanism may receive and investigate reports of misconduct² or serious misconduct, including possible unlawful acts by a judge, the Prosecutor, a Deputy Prosecutor, the Registrar and the Deputy Registrar of the Court (hereinafter “elected officials”), all staff subject to the Staff and Financial Regulations and Rules of the Court (hereinafter “staff” or “staff member”) and all contractors and/or consultants retained by the Court and working on its behalf (hereinafter “contractors”).³

3. All reports of misconduct or serious misconduct, including possible unlawful acts, made against an elected official, staff member or contractor shall, if received by the Court, be submitted to the independent oversight mechanism.⁴ Any person submitting such reports may also elect to submit a copy to the Presidency of the Court for informational purposes only. Likewise, staff members submitting a report against other staff members may elect to submit a copy of their report to the Prosecutor or Registrar, as appropriate.

4. The results of investigations conducted by the independent oversight mechanism shall be transmitted to the Presidency, Registrar or Prosecutor of the Court, as appropriate, together with recommendations for consideration of possible disciplinary or jurisdictional action.

5. The independent oversight mechanism will not investigate contractual disputes or human resource management issues, including work performance, conditions of employment or personnel-related grievances.

¹ Establishment of an independent oversight mechanism, adopted at the 7th plenary meeting on 26 November 2009, by consensus.

² Misconduct, also described in the Staff Rules as ‘unsatisfactory conduct’, which includes any act or omission by elected officials, staff members or contractors in violation of their obligations to the Court pursuant to the Rome Statute and its implementing instruments, Staff and Financial Regulations and Rules, relevant administrative issuances and contractual agreements, as appropriate.

³ The term “Contractor” or “Consultant” does not include an “intermediary”, who is broadly defined as an individual or entity that facilitates contact between the Court and a witness, victim or other source of information. Therefore the scope of the independent oversight mechanism does not extend to the activities of an “intermediary” and any reported misconduct received by the mechanism regarding an “intermediary” shall be duly referred to the relevant Organ Head for their information.

⁴ The independent oversight mechanism shall duly consider all reported misconduct claims submitted to it, however, the mechanism retains discretionary authority to decide which matters to investigate. Those matters which the independent oversight mechanism does not intend to investigate will be referred to the relevant entity for their appropriate action.

II. Appointment – head of office

6. All staff of the independent oversight mechanism are considered staff members of the Court. As such, their appointment, conditions of employment and standard of conduct must be in accordance with the Staff and Financial Regulations and Rules and relevant administrative issuances of the Court. Therefore as part of the Court, the staff of the independent oversight mechanism shall enjoy the same rights, duties, privileges and immunities and benefits of all staff members, and any administrative requirements shall be facilitated by the Registry.

7. The Head of the independent oversight mechanism shall be selected by the Bureau of the Assembly of States Parties in coordination with the Court.

8. The Head of the independent oversight mechanism may be removed only for cause and by the decision of the Bureau of the Assembly of States Parties.

9. Evaluation of the work performance of the Head of the independent oversight mechanism shall be undertaken by the President of the Assembly of States Parties.

10. Any complaints regarding the actions of the Head of the independent oversight mechanism shall be submitted to the President of the Assembly of States Parties, who shall assess such complaints for impact on any investigation and the possibility of investigative misconduct, as well as any performance implications.⁵ The President of the Assembly of States Parties shall submit a copy of all such complaints and a report of the outcome thereof to the Heads of Organs. Such reports will be treated as confidential.

III. Mode of operation

A. Operational Independence

11. The independent oversight mechanism shall exercise operational independence under the authority of the President of the Assembly of States Parties.

12. In the conduct of its duties, and in accordance with article 112, paragraph 4, of the Rome Statute, the office shall have the authority to initiate on a reasonable basis, carry out and report on any action which it considers necessary to fulfill its responsibilities with regard to investigations without any hindrance or need for prior clearance, and as set forth in the present resolution.

13. The independent oversight mechanism may accept requests for its services from the Presidency, Registrar or Prosecutor of the Court, as appropriate, and act with maximum dispatch but it may not be prohibited from carrying out any action within the purview of its mandate.

14. The staff of the independent oversight mechanism shall have direct and prompt access to all elected officials, staff and contractors, and shall receive their full co-operation. Failure to provide such co-operation, without reasonable excuse, shall be duly reported upon and may result in disciplinary action.

15. Additionally staff of the independent oversight mechanism shall have access to all (electronic or otherwise) Court records, files, documents, books or other materials, assets and premises, and shall have the right to obtain such information and explanations as they consider necessary to fulfill their responsibilities.

⁵ Investigative misconduct is any material deviation from prescribed norms, procedures or practices in an investigation that is perpetrated intentionally or with reckless disregard for proper practices. In some instances, investigative misconduct may also constitute unsatisfactory conduct as provided for in the Staff Regulations and Rules of the Court and such conduct shall be duly addressed within the existing disciplinary structure of the Court by the Registrar upon the recommendation of the President of the Assembly of States Parties.

16. Notwithstanding the provisions outlined in paragraphs 14 and 15 above, the right of access granted to the independent oversight mechanism shall be subject to confidentiality considerations envisaged by the Rome Statute in the context of judicial proceedings, a pre-existing obligation of confidentiality to the originator of the information or document, the safety and security of witnesses, victims and third parties, and the protection of national security information of State Parties.⁶

17. The independent oversight mechanism may notify the Presidency, Registrar or Prosecutor, of the receipt of a report of misconduct or serious misconduct, including possible unlawful acts by staff and contractors under their respective authority.⁷ Such notification does not include revealing the identity of the information source, and such notification must be treated as strictly confidential. Any unauthorized disclosure of this information shall constitute misconduct, for which disciplinary measures may be imposed.

18. Notwithstanding its operational independence, the functions of the independent oversight mechanism shall not affect the Presidency, Registrar or Prosecutor's power to impose disciplinary measures pursuant to the relevant regulations and rules.

19. The authority of the independent oversight mechanism to initiate a case on its own motion, does not in any way impede the authority or independence granted by the Rome Statute to the Presidency, judges, Registrar or Prosecutor of the Court. In particular, the independent oversight mechanism fully respects the notions of judicial and prosecutorial independence and its activities will not interfere with the effective functioning of the Court. Therefore, procedural safeguards will be adopted by the independent oversight mechanism when deciding to initiate a case on its own motion regarding the operational activities of the Office of the Prosecutor and the execution of judicial activities.⁸

B. Confidentiality

20. The independent oversight mechanism may receive from any person reports of misconduct or serious misconduct, including possible unlawful acts, by elected officials, staff members and contractors. These reports shall be received and handled in complete confidence. The procedures and related arrangements described below are designed to protect individual rights as well as to protect against reprisals for reporting:

(a) Staff of the independent oversight mechanism shall be responsible for safeguarding the reported allegations from accidental, negligent or unauthorized disclosure, as well as for ensuring that the identity of the staff members and others who submitted such reports to the office is not disclosed, except as otherwise provided in the present resolution;

(b) Unauthorized disclosure of the said reports by staff of the independent oversight mechanism shall constitute misconduct, for which disciplinary measures may be imposed;

(c) The identity of a staff member or other person who submits reports to the independent oversight mechanism may only be disclosed by the office where such disclosure is necessary for the conduct of proceedings, whether administrative, disciplinary or judicial and only with their consent. However, such protection will not be provided when a staff member or other person discloses their own identity to a third party, including the Court or submits a knowingly false or willfully reckless report to the office;

⁶ This includes articles, 54, 57, 64, 68, 72 and 93 of the Rome Statute.

⁷ In particular the independent oversight mechanism recognizes the importance of notification to the respective Organ Head of those matters involving the operational activities of the Office of the Prosecutor, the judicial functioning of the Court and those matters more fully described in article 70 of the Rome Statute regarding offences against the administration of justice.

⁸ The procedural safeguards include: -

(a) The respective Organ Head is notified prior to the initiation of the case to provide their views on the information obtained and any matters of factual relevance, which shall be carefully considered by the Head of the independent oversight mechanism; and

(b) If a case is initiated, the respective Organ Head is provided the further opportunity to comment upon the investigation report compiled by the independent oversight mechanism prior to the findings being finalized to ensure all factual matters have been obtained and considered; any comments shall be duly attached as an annex to the investigation report.

(d) Confidential reports of misconduct or serious misconduct, including possible unlawful acts, may be used in the official reports of the independent oversight mechanism, without attribution directly or indirectly as to the source or identity of the individuals involved or implicated;

(e) No action may be taken against staff or others as a reprisal for submitting a report, providing information or otherwise cooperating with the independent oversight mechanism; and

(f) Disciplinary proceedings shall be initiated and disciplinary action shall be taken in respect of any elected official or staff member who is proven to have retaliated against a staff member or other person who has submitted a report, provided information or otherwise cooperated with the independent oversight mechanism.

C. Due process

21. Investigations shall respect the individual rights and all conditions of employment for elected officials, staff members and contractors, and shall be conducted with strict regard for fairness and due process for all concerned.

22. The independent oversight mechanism conducts preliminary fact-finding administrative investigations and will operate in support of the existing disciplinary structures of the Court.

23. Investigations into reported misconduct or serious misconduct, including possible unlawful acts, by contractors will be undertaken pursuant to the terms of the contract where stipulated, otherwise the independent oversight mechanism will act in accordance with its own established procedures reflecting recognized best practices.

24. The transmittal of reports of misconduct or serious misconduct, including possible unlawful acts, to the independent oversight mechanism with knowledge of its falsity or with willful disregard of its truth or falsity shall constitute misconduct, for which disciplinary measures may be imposed.

IV. Jurisdictional action

25. Where appropriate, and in consultation with the Court, the independent oversight mechanism shall notify the relevant national authorities where criminal acts by elected officials, staff members or contractors of the Court are reasonably suspected to have occurred. Such notification may include referral to the State where the suspected criminal act 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.

26. The work of the independent oversight mechanism will be without prejudice to the privileges and immunities enjoyed by elected officials and staff of the Court in the exercise of their function, however, such privileges and immunities may not be invoked to justify unlawful acts.

27. If a case is referred to relevant national authorities for consideration of criminal prosecution, the independent oversight mechanism may recommend to the relevant elected officials of the Court for immunity waivers in accordance with article 48, paragraph 5, of the Rome Statute and the relevant provisions of the Agreement on Privileges and Immunities of the International Criminal Court as well as the Headquarters Agreement between the International Criminal Court and the host State.

V. Reporting procedures

28. The independent oversight mechanism will submit quarterly activity reports directly to the Bureau of the Assembly of States Parties and will submit on an annual basis a consolidated report of its activities to the Assembly via the Bureau. Such reports shall respect the confidentiality of staff members, elected officials and contractors. All reports shall be copied to the Presidency, the Prosecutor, the Registrar and the Committee on Budget and Finance.

29. The Court will have a reasonable opportunity to respond in writing to the reports submitted by the independent oversight mechanism, and such written responses shall be transmitted to the Bureau and the Assembly of States Parties and copied to the Head of the independent oversight mechanism and the Committee on Budget and Finance.

VI. Disciplinary follow-up

30. The Presidency, Registrar or Prosecutor, as appropriate, shall provide the Head of the independent oversight mechanism twice yearly with written updates regarding the follow-up of disciplinary procedures involving cases previously investigated by the independent oversight mechanism, together with information, if any, on the application of sanctions made in individual cases.

VII. Budget and personnel

31. By resolution ICC-ASP/8/Res.1,⁹ the Assembly of States Parties has established the independent oversight mechanism as a separate and distinct new major programme budget to recognize and ensure its operational independence.

32. Future programme budget proposals for the provision of adequate resources for the effective functioning of the independent oversight mechanism shall be submitted by the Head of the office for consideration by the relevant Court entities according to established procedures for final review and approval by the Assembly of States Parties.

33. The Head of the independent oversight mechanism shall have delegated certifying authority for all of the accounts of the office, which are subject to internal and external auditing established for the Court.

34. In keeping with the need for operational independence, the Head of the independent oversight mechanism shall exercise the degree of latitude and control over the personnel and resources of the office, consistent with the Staff and Financial Regulations and Rules of the Court that is necessary to achieve the objectives of the office.

⁹ Establishment of an independent oversight mechanism, adopted at the 7th plenary meeting on 26 November 2009, by consensus.

Annex II

List of papers available on the Assembly's Extranet:

1. Decision of the Bureau to commission the assurance mapping study into the existing oversight mechanism of the Court;¹
 2. Decision of the Bureau on the appointment of the Selection Panel to carry out the recruitment procedure for the Head of the Independent Oversight Mechanism;²
 3. Proposed amendment of the proposed programme budget for 2011 for the Head of the Independent Oversight Mechanism, submitted by the Temporary Head of the IOM;
 4. OTP comments on the IOM Operational Mandate, including "OTP Proposed Operational Mandate";
 5. Comments of the President of the Court and the Registrar on the proposed OTP amendments to the IOM Operation Mandate;
 6. Comments of the Temporary Head of the IOM on the OTP comments.
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¹ See decisions of the sixteenth meeting of the Bureau of 28 October 2010: <http://www.icc-cpi.int/Menu/Go?id=4caf7ae0-8500-4546-88e3-5ca56e077f09&lan=en-GB>.

² See decisions of the fifteenth meeting of the Bureau of 19 October 2010: <http://www.icc-cpi.int/Menu/Go?id=98da805c-eebf-42cc-ab97-bfe8a714f4b1&lan=en-GB>.