

**Tenth session**

New York, 12-21 December 2011

**Report of the Bureau on the
Independent Oversight Mechanism****Note by the Secretariat**

Pursuant to paragraph 7 of resolution ICC-ASP/9/Res.5, of 10 December 2010, 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 facilitators, Mr. Cyril Borlé (Canada) and Ms. Nataša Šebenik (Slovenia), on the issue of the Independent Oversight Mechanism (“the IOM”), upon their appointment by the Bureau of the Assembly of States Parties (“the Assembly”) at its meeting held on 1 February 2011.
2. At its eighth session, the Assembly adopted resolution ICC-ASP/8/Res.1, by which it was decided to establish an independent oversight mechanism in accordance with article 112, paragraph 4, of the Rome Statute. It was decided that the independent professional investigative capacity would be implemented immediately, while the inspection and evaluation elements would be brought into operation subject to a later decision of the Assembly.
3. At its ninth session, the Assembly adopted resolution ICC-ASP/9/Res.5, by which it was decided that the investigative function of the IOM shall operate in accordance with the provisions in the appendix to that resolution (“the Operational Mandate”), and decided further that the Bureau shall prepare a report on the operationalization of the investigative function of the IOM 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.
4. Resolution ICC-ASP/9/Res.5 also invited the Temporary Head to 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. It also invited the Court to continue to work with the Temporary Head on the amendments to existing legal instruments, with a view of the adoption, at the next session of the Assembly, of all amendments necessary for the full operationalization of the investigative function of the IOM.

5. The Bureau decided that the issue of the IOM should be further discussed within The Hague Working Group in 2011. The Working Group discussed the IOM at its meetings held on 29 March, 11 May, 7 July, 8 September, 27 October and 9 November 2011. The IOM was also discussed in informal consultations of The Hague Working Group held on 23 March, 13 April, 30 May, 16 June, 23 June, 30 June, 14 July, 13 October, 24 October, 27 October, 3 November and 8 November 2011.

II. Recruitment of the Temporary Head and Head of the IOM

6. At its meeting of 12 April 2010, the Bureau approved that Ms. Beverly Ida Mulley (Australia) be seconded from the United Nations Office of Internal Oversight Services (“the OIOS”) to act as the Temporary Head of the IOM for a period of one year. Ms. Mulley assumed her duties on 19 July 2010 and left on 18 July 2011, upon the completion of her contract.

7. The Bureau appointed a Selection Panel on 19 October 2010 to carry out the recruitment procedure for the Head of the IOM with a view to having a candidate in place by the time of the completion of the contract of the Temporary Head. On 10 May 2011, the Selection Panel concluded the selection procedure and recommended to the Bureau that Mr. Ben Swanson (United Kingdom) be appointed as the permanent Head of the IOM. Unfortunately, Mr. Swanson declined the offer due to his personal circumstances. Subsequently, the Selection Panel re-considered all the original applicants and the Bureau, upon the recommendation of the Selection Panel, made an offer to Ms. Madeline Schwartz (Canada) on 15 July 2011. However, she too was not in a position to accept the offer due to her personal circumstances.

8. Thereafter, on 4 August 2011, the Bureau mandated the Selection Panel to consider, by way of an expedited recruitment process, hiring a Temporary Head to the IOM, whilst at the same time considering the longer-term issue of the Head of the IOM.

9. On 30 August 2011, upon the recommendation of the Selection Panel, the President of the Assembly requested the Registrar to proceed with the recruitment of Ms. Kristina Carey (United States) as the Temporary Head of the IOM. She has accepted the offer and is due to formally assume her post on 21 November 2011. However, it is noted that, during the intervening period, Ms. Carey has agreed to assist with the IOM facilitation and has attended meetings of The Hague Working Group.

10. As regards the permanent Head of the IOM, the Selection Panel is due to report back to the Bureau before the tenth session of the Assembly of States Parties.

III. Operationalization of the investigative function of the IOM

A. IOM Manual of Procedures

11. In fulfilling the above mandate, the IOM prepared a Manual of Procedures which set out guidelines on the technical aspects of investigations that will be utilized by the IOM in undertaking its investigative function pursuant to the mandate that it was given under the resolution ICC-ASP/9/Res.5. The latest version is dated 4 July 2011 and is available on the Assembly’s Extranet¹.

12. This Manual was drafted by the Temporary Head in consultation with different focal points within the Court, including the Staff Union Council representatives and the inter-organ legal working group which included representatives from all three Court organs. There are some areas that have not yet been unanimously agreed to (which are clearly identified), although for the most part these are administrative in nature and awaiting Court processes. These areas include definitions on sexual exploitation and sexual abuse, harassment, discrimination, Court’s amendments to the Standard Terms and Conditions applicable to contractors and vendors, and changes to administrative issuances and regulations of the Court in order to harmonize procedures with the IOM.

¹ <https://extranet.icc-cpi.int/asp/ASP10session/default.aspx>.

13. More fundamentally, in the Working Group's consultations, it became evident that State Parties had differing interpretations of the meaning of "on its own motion" (paragraphs 20-25 of the annex to the resolution ICC-ASP/9/Res.5, hereinafter known as the Operational Mandate), which refers to the manner in which IOM investigations can be initiated and on whether recourse may be made to an independent third party with judicial or prosecutorial experience.

(a) The IOM, the Staff Union Council, and a number of States Parties have interpreted the Operational Mandate to provide for a "three-pronged" approach for the IOM to initiate investigations; through the receipt of all reports of misconduct or serious misconduct (paragraphs 3 and 18 of the Operational Mandate), or through Head of Organ referrals (paragraph 14 of the Operational Mandate), or through initiating a case "on its own motion" (that is, in the absence of a referral or receipt of a report or complaint), which would be subject to an external third party ruling in case of disagreement between the Head of the IOM and the Organ Head on whether initiating such an investigation would undermine judicial or prosecutorial independence (paragraphs 20-25 of the Operational Mandate); and

(b) The Office of the Prosecutor (OTP) and some other States Parties have interpreted the Operational Mandate to provide for a "two-pronged" approach for the IOM to initiate investigations: one being through Head of Organ referrals (paragraph 14 of the Operational Mandate), while the initiation of investigations in all other instances, in the absence of Head of Organ referral, would constitute an "own motion" investigation by the IOM, which would be subject to an external third party ruling in case of disagreement between the Head of the IOM and the Organ Head on whether initiating such an investigation would undermine judicial or prosecutorial independence (paragraphs 20-25 of the Operational Mandate). Under this interpretation, paragraph 18 is a notification requirement, and any IOM investigation of a received complaint is considered to be done "on its own motion" and could be referred to an external third party.

14. During a meeting in June 2011, the Registry and the Presidency expressed the view that they could accept the "three-pronged" interpretation, subject to further developments in the discussions.

15. The OTP has prepared two contribution papers, dated 5 August 2011 and 12 October 2011, respectively, to clarify their interpretation of what was meant by the term "on its own motion" in resolution ICC-ASP/9/Res.5. The OTP considered that the "three-pronged" approach circumvents the resolution and has no legal basis in the Statute. The OTP considered that the oversight role of the Assembly should be consistent with the Statute in accordance with which the Prosecutor is accountable to the Assembly but independent, and the staff of the OTP is accountable only to the Prosecutor and not to the Assembly or its subsidiary bodies.

16. The Staff Union Council also prepared a paper, dated 26 October 2011, to provide their observations on the draft Manual of Procedures and clarify their interpretation of what was meant by the term "on its own motion" in resolution ICC-ASP/9/Res.5. Besides expressing support for the "three-pronged" approach, the paper also addressed issues relating to the need for whistleblower protection and a policy on protection from retaliation, the right of a suspect to have legal support, the staffing of the IOM, the transparency and publicity of recommendations made by the IOM and proper deadlines for the investigation process.

17. In informal Working Group discussions throughout the year, it became apparent that no consensus could be reached on the matters referred to above.

18. In the absence of a consensus on the interpretation of the Operational Mandate, affecting as it does the fundamental question of deciding on a procedure to deal with the submission of complaints, the Working Group decided that it was not advisable to submit the Manual of Procedures to the tenth session of the Assembly, and to invite the Temporary Head, and Head when appointed, to continue to work on the Manual of Procedures with a view to obtaining a consensus as quickly as practicable. In particular, a procedure must be agreed to that will allow the submission of complaints which respects the independence of the IOM, as proscribed under article 112, paragraph 4, of the Rome Statute and paragraph 12 of the Operational Mandate, as well as judicial and prosecutorial

independence, as proscribed in the Rome Statute under articles 40, paragraph 1, and article 42, paragraphs 1 and 2, of the Statute.

19. A consensus was reached that, given the increasing apparent inter-connectivity of the issues being discussed with relation to the full operationalization of the IOM, and the different steps and concerns that must be addressed depending upon the scope and procedures that are ultimately chosen for each function, it would be more efficient to operationalize the IOM when a comprehensive agreement is reached on the modalities of the operation of all three functions; namely investigation, inspection and evaluation, taking into account the implications of a proposed anti-retaliation/whistleblower protection policy.

20. The Working Group also believes that there is some moral justification to allow future elected officials and the Head of the IOM, once appointed, to have some input into future discussions on these issues, in particular with regard to the submission of complaints.

B. Amendments to the existing legal instruments of the Court

21. The first Temporary Head of the IOM identified that, in order for the IOM to become operational with respect to elected officials, rule 26 of the Rules of Procedure and Evidence² and chapter 8 of the Regulations of the Court³ need to be amended to ensure that the IOM will undertake the investigative functions into complaints of misconduct by 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. The Staff Rules and Regulations will also have to be amended to reflect the requirement that staff cooperate with the IOM duly authorized investigations.

22. The first Temporary Head of the IOM, in consultation with the Court, developed an amended rule 26 that, in principle, appeared to have consensus. However, until the final wording of the Manual of Procedures is agreed upon, it is premature to finalize the wording of rule 26. The final wording of rule 26 will be part of the comprehensive package viewed to be submitted to the Assembly at its eleventh session.

IV. Operation of the inspection and evaluation functions of the IOM

A. Assurance Mapping Study

23. At its ninth session, the Assembly welcomed the decision of the Bureau to commission an assurance mapping study (“AMS”) into the existing oversight mechanisms of the Court as a step forward towards a decision on the operationalization of the inspection and evaluation functions within the oversight mechanism, as per resolution ICC-ASP/9/Res.5, paragraph 6. Furthermore the Assembly decided that the Bureau shall prepare a report on the operation of the inspection and evaluation functions within the oversight mechanism, including the terms of reference, staffing issues and related financial implications, with a view to a decision on its adoption at the next session of the Assembly, as per paragraph 7 of the above resolution. The Bureau, at its second meeting on 1 February 2011, confirmed its decision regarding the AMS to be undertaken by the Internal Audit Division of the United Nations Office of Internal Oversight Services (“IAD/OIOS”).

24. The IAD/OIOS experts held a planning mission to The Hague on 14 and 15 December 2010 and a fieldwork mission from 11 until 14 April 2011. On 13 April 2011, the experts presented the plan of their work and the framework of the AMS to The Hague Working Group. The objective of the study was to map existing assurance coverage against key risks to the achievement of the Court’s objectives, and to identify potential gaps or overlaps, if any, with a specific focus on the oversight functions of inspection and evaluation. The “Report on the assurance mapping study in the International Criminal Court” was submitted on 25 May 2011.

² *Official records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (ICC-ASP/1/3 and Corr.1), part II.A.

³ Regulations of the Court, ICC-BD/01-01-04.

25. The IAD/OIOS experts concluded that the Court's risk management framework dates from 2006. In 2008, the Court carried out a comprehensive risk management exercise which ultimately resulted in the Court identifying seven strategic risks, under which 22 priority risk areas were mapped. The Court has yet to develop a formal internal control framework to support its risk management process. Independent oversight entities include the Court's Office of Internal Audit ("OIA"), the External Auditors (currently the National Audit Office of the United Kingdom), and the IOM for the investigative function (not yet operational). The IAD/OIOS experts found that some forms of inspection and evaluation functions exist within the Court, but are not conducted in a systematic or structured manner. Some work which may narrowly be considered as having elements of inspection and evaluation are performed by the Committee on Budget and Finance, the Oversight Committee of the permanent premises, the Office of Internal Audit, and the External Auditors.

26. The major gaps identified by the IAD/OIOS experts in the Court's current assurance coverage were in stakeholder support (evaluation); quality of judicial and administrative processes (evaluation, inspection and internal audit); independence and inter-dependence of the organs (evaluation); and permanent premises (evaluation and internal audit). Other minor gaps exist in the areas of credibility of the Court; business continuity; and security of the staff and witnesses.

27. The IAD/OIOS experts found only minor overlaps in the mandates and scope of work of the independent oversight functions, but noted that the permanent premises is a unique project of significant risk and that continuous assurance coverage of this project until its completion is essential. IAD/OIOS experts also noted the advisability of a specialized Construction Auditor, and of providing the Office of Internal Audit with consultant funds to assist in audits or evaluations requiring specific skills and knowledge (such as information technology and legal matters).

28. The IAD/OIOS experts recommended that the Court should recommend an appropriate level of risk tolerance for each of the significant risks for consideration by the Assembly, to assist in determining the level and type of internal control and assurance desired (recommendation 2). The Court should ensure that mechanisms are in place to:

(a) Enable the Registrar to obtain assurances from all major programmes of the Court, as well as the work performed by the oversight functions, that the financial control systems are adequate and operating effectively; and

(b) Ensure that all major programmes will be able to provide the required assurances for the Statement of Internal Control on the control systems underlying all the significant risks of the Court (recommendation 3).

29. IAD/OIOS experts additionally recommended that the Court should consider establishing a Court-wide, centralized Monitoring and Evaluation ("M&E") function and develop an Evaluation Policy to assist with mainstreaming the M&E processes in the context of results-based management (recommendation 5); that the Court should ensure that the system of recommendation monitoring is linked to the Court's risk management and internal control framework (recommendation 8); and that the Oversight Committee of the permanent premises should consider developing a separate assurance map for the risks related to the permanent premises (recommendation 7).

30. Furthermore, IAD/OIOS experts recommended to the Assembly to consider expanding the scope of work of the Study Group on Governance to include a review of the existing bodies dealing with external governance to ensure their mandates are clear and do not overlap (recommendation 1). In addition the Assembly should consider establishing a Risk and Compliance function, at a senior level, to facilitate efficient and effective governance and management of the Court's significant risks, and related internal control and assurance mechanisms (recommendation 4). The Assembly should also consider expanding the capacity of the oversight functions of internal audit, inspection and evaluation to eliminate the gaps in the Court's assurance coverage (recommendation 6).

31. Regarding the implementation of the evaluation and inspection functions, the IAD/OIOS experts recommended that the Assembly should consider operationalizing the inspection and evaluation functions under the Office of Internal Audit. This may require the creation of a permanent P-4 post for evaluation, a temporary P-4 post to provide continuous audit of the Permanent Premises, and one permanent P-2 post to conduct inspections (recommendation 9). In addition to this the experts recommended that the Assembly should ensure the independence of the oversight functions irrespective of their reporting lines. In particular, the critical role of the Audit Committee in ensuring the effectiveness, quality and performance, and independence of the oversight functions should be formally recognized (recommendation 10).

B. Discussion in The Hague Working Group

32. The Hague Working Group held discussions on the operationalization of evaluation and inspection functions on 16 June, 13 October and 24 October 2011.

1. Discussion in The Hague Working Group on 16 June 2011

33. The subject matter of the discussion was the AMS, prepared by the IAD/OIOS experts; a discussion paper, entitled “Options to establish the inspection and evaluation functions of the Independent Oversight Mechanism”, “Facilitators’ summary of the Assurance Mapping Study”, and “Assurance Mapping Study recommendations”, all of which were prepared by the facilitators and dated 15 June 2011.

34. The facilitators noted that the scope of the AMS was very wide and that many recommendations fell within the scope of several working groups. The facilitators indicated that the discussion will focus on the parts of the AMS which are within the mandate of this facilitation.

35. In the discussion it was noted that the AMS seemed to give priority to evaluation over inspection as most recommendations related to evaluation. In respect of the AMS recommendation 9, that the Assembly should consider operationalizing the inspection and evaluation functions under the OIA, a concern was expressed that OIA was not a fully independent body as it reported to the Audit Committee, whose members included the three heads of organs of the Court. The facilitators noted that the AMS recognized the problem and that changes to the Audit Committee would be necessary if it was decided to adopt that recommendation. They also noted that it was for the Working Group to suggest solutions. A view was expressed that one of the options would be to change the composition, functions or mandate of the Audit Committee in order to make it more independent. Alternatively, it was proposed that the reporting in respect of inspection and evaluation functions could be done by the OIA to another committee than the Audit Committee.

36. In response, the Court (Registry) noted that the Audit Committee was always supposed to be an internal body that started as an internal committee of the three heads of organs and the external members were only added upon recommendation from the Committee on Budget and Finance. It was further noted that the OIA was functionally independent. Its function is to provide independent advice to the Court but it was not meant to be external in nature. It makes recommendations that need to be reported to the principals of the Court as they consider how to implement these recommendations.

37. In the discussion on the possible options, the facilitators proposed four possible options for the operationalization of the inspection and evaluation functions. The first option would be to accept current risks; not bring the inspection and evaluation functions into operation and try to address gaps as much as possible using current structures and resources. This option can be seen as the default option as the Court has so far functioned without operationalizing inspection and evaluation functions. The second option would be to have periodic and/or targeted inspections and evaluations undertaken by an external independent body into specific areas of risk that are identified as priorities. This is the most practical solution as it can be used only when needed. It also does not require many resources. The third option is to accept the IAD/OIOS recommendation in the AMS and operationalize the inspection and evaluation functions under the OIA, in order to take advantage of existing synergies and economies of scale, with safeguards to ensure that

reporting lines do not compromise independence. This option would be perhaps the most effective one but it also raises issues of independence. The fourth option would be decision on the operationalization of the inspection and evaluation functions under the IOM, while ensuring not to duplicate functions already present in the OIA.

38. The delegations expressed views that even though the first option appeared to be the least costly in the short-term, that must not necessarily be true in the long-term and that more analysis was necessary in this regard. They also asked for the views of the OIA on the AMS and the synergies between the OIA and the IOM. They also noted that the current mandate of the OIA was very limited so the new functions proposed in option 3 seemed to go much beyond the scope and nature of its current mandate.

39. Delegations also indicated that The Hague Working Group was lacking information on the financial implications of the respective options. It was noted that any recommendation by the Working Group to the Assembly must be first submitted for consideration to the Committee on Budget and Finance.

40. A point was made that it had to be assessed whether any solution chosen by the Working Group complies with article 112, paragraph 4, of the Rome Statute and the independence and legitimacy requirements included therein. It was noted by the Court (Registry) that article 112, paragraph 4, of the Statute did not mention audit. In this regard a view was expressed that inspection and evaluation were not defined and therefore they can include audit.

41. Additionally, a point was raised as to whether option 3 complies with paragraph 5 of the annex to resolution ICC-ASP/8/Res.1, entitled "Establishment of an independent oversight mechanism", which states that the IOM shall be co-located (but not integrated or subordinated to) with the OIA. In response, the facilitators indicated that the resolution refers to the physical location rather than functionality of the IOM. Furthermore, it was noted by the Court (Registry) that if The Hague Working Group decided to recommend option 3, the Assembly could adopt a new resolution in order to make such an arrangement possible.

42. Delegations also proposed two other possible options. The proposed option 5 was presented as a combination of options 2 and 4. It suggested creating a sub-unit of the IOM with combined staff. It was proposed that while the function of evaluation required permanent staff, the function of inspection could be undertaken by the existing staff of the IOM. The current Head of the IOM would be elevated from P-4 to P-5 and new P-4 post for evaluation would be created. The inspection would be carried out by the existing P-2 staff member of the IOM. As a result, it was suggested that this option would require only limited additional costs, in particular the costs of elevating P-4 to P-5 and an additional P-4 post. The proposed option 6 suggested incorporation of OIA into IOM so that OIA would have full responsibility for inspection, evaluation, investigation and also audit, similarly to the OIOS in the United Nations context. In this respect, the facilitators noted that OIA had an established structure and incorporating IOM in this structure might prove problematic. The OIA operates independently and it is part of the Court, while the IOM was established by the States Parties. As a result, this option would require a change to the structure of the Court.

2. Discussion in The Hague Working Group on 13 October 2011

43. The Director of the OIA explained that IAD/OIOS experts had reviewed all the audits performed by the OIA and, based on the audit programs, concluded that some of OIA's audits included elements of inspection or evaluation. The OIA performs comprehensive audits. These audits assess the compliance of the Court activities with rules and regulations but they systematically include an evaluation of the operational effectiveness and efficiency of these activities. Most of the audits performed since the establishment of the OIA have been "performance audits" whose objectives are to improve the operations and the strategic decision process. Internal auditors work has never been limited to the review of the financial transactions and accounts.

44. Inspection has also been integrated in some of the audits performed (e.g. audit on staff security clearance/vetting or audit on assets) which had a wider scope than an inspection. The OIA has also performed a testing of the leave data which could be considered as an inspection.

45. Delegations asked for further clarification on the inspection and evaluation tasks.

3. Discussion in The Hague Working Group on 24 October 2011

46. Based on the previous discussions in The Hague Working Group the facilitators prepared a "Discussion Paper: Options to establish the inspection and evaluation functions of the Independent Oversight Mechanism", dated 20 October 2011, which further elaborated possible options. They presented five possible options.

47. During the discussion several delegations emphasized that they need additional clarification regarding the impact each of the possible options would have on the investigation function of the IOM. Further explanation on possible costs is also needed, as is clarification on the legal procedures necessary to implement each option. It was emphasized that evaluation would be a continuous function and that inspections could be performed as the need arises. The definition of both functions would be welcome. Several delegations emphasized the need for a comprehensive approach to all functions of the IOM, including investigation functions.

48. Option 1 was to accept the IAD/OIOS recommendation in the AMS and operationalize the inspection and evaluation functions within the OIA. The facilitators pointed out that the IAD/OIOS experts recommended this option in order to take advantage of the synergies between internal audit, inspection and evaluation, resulting in economies of scale, enhanced ability to provide overall assessment of the effectiveness of the system of internal control, enhanced professionalism, reduced overlap and better coordination (recommendation 9). It is also worth noting that there are several benefits of having internal audit, inspection and evaluation within the same office (as described in paragraph 71 of the AMS). In addition, paragraph 61 of the AMS demonstrates the close inter-relationship between these functions in providing a combination of assurance coverage over the high risk areas. The functions of internal audit, evaluation and inspection under a single structure would reflect the OIOS structure (with the only difference that OIOS also includes the investigations function).

49. However, the facilitators emphasized that should the OIA be vested with the inspection and evaluation functions, its independence is crucial. One critical question about locating the inspection and evaluation functions in the OIA is the current reporting line of that office, in light of the fact that the Director of the OIA reports to the Audit Committee, which also evaluates its performance, whilst three of the members of the Audit Committee are heads of the organs (paragraphs 16 and 80 of the AMS). It is also relevant that the external members of the Audit Committee are appointed by the President, in consultation with the Prosecutor, and with the advice of the Registrar. The role of the Audit Committee in ensuring the effectiveness, quality and performance and independence of the oversight functions is critical (paragraph 81 of the AMS). Therefore, for this option to be seen as sufficiently independent, it would be necessary for the Audit Committee to have necessary guarantees and institutional framework of independence. Therefore the facilitators suggested two possible solutions. The first one was to have sessions of the Audit Committee which are only attended by external members, during which time the Director of the OIA would be able to disclose any impediments to the OIA's independence. The Chairperson of the Audit Committee and the Director of the OIA should also have private sessions with the Committee on Budget and Finance and the Assembly. In addition, the OIA should also have periodic internal assessments and an external quality assurance assessment in adherence to the IIA Standards (paragraph 80 of the AMS). The second possible solution was to establish the Audit Committee as Assembly's subsidiary body consisting only of external members (with possible joint appointment by the Presidents of the Assembly and of the Court).

50. Regarding the staffing issue the facilitators pointed out that the costs (as presented in the AMS) have not been envisaged in the 2012 budget proposal.

51. Option 2 was to operationalize the inspection and evaluation functions within the IOM. Within this option there are two further possibilities. The first possibility is to join the OIA with the IOM in its entirety, so OIA becomes part of the IOM. In that case there would still be a need to decide on the operationalization of the inspection and evaluation function within the OIA (being part of the IOM). In this regard the independence of the inspection and evaluation function would be ensured since the OIA would be part of the IOM and not part of the organizational structure of the Court. IOM would therefore report to the Assembly also on the inspection and evaluation functions. On the other hand it would be advisable that the Assembly establishes a body which would comprise of experts with sufficient knowledge to supervise the work of the IOM (OIA). The second possibility is for the IOM to take over only inspection and evaluation functions (and not audit). Paragraph 56 of the AMS defined inspection as a subset of audit, and this function is already operationalized within the Court. Evaluation on the other hand is complementary to internal audit as it is more focused on relevance to end-users than on internal processes. The audit work has regularly included inspection and evaluation activities within its audits programs. Having these functions set up within IOM would mean extensive consultation between the two teams on the detailed programs developed to ensure that they do not duplicate work. This approach might be neither effective nor efficient.

52. Option 3 was to operationalize the inspection and evaluation functions within the IOM and at the same time establish the IOM (with its current investigation function) as part of the OIA. Under this option, the OIA would have a mandate for audit, inspection, evaluation and investigations. This would have the benefit of maximizing operational resources under a single, existing structure. However, it would still be necessary to decide on the operationalization of the inspection and evaluation function within the OIA (with the need resolve the issues mentioned under option 1). This option would be more convenient in terms of there being no need to strictly delimit the audit functions from inspections and evaluations, but would present a significant challenge with respect to ensuring the independence of the investigations function since OIA is part of internal structure of the Court. One possibility would be to establish the OIA as part of the organizational structure of the Assembly (with the same status as IOM has now). However, it is relevant to consider that the experts have also pointed out that it is customary that oversight functions (internal audit, inspection and evaluation) are structured within the organization itself even though they have functional independence. Moreover, should the investigative functions be located in OIA, with the OIA reporting to the Assembly rather than the Court, the internal audit capacity of the OIA would be eliminated.

53. Option 4 was to operationalize of the evaluation function under the OIA and periodic targeted inspections carried out by the outside sources. This could be a cost-effective option in light of the IAD/OIOS experts' conclusion that inspections are unlikely to be a full-time function (paragraph 73 of the AMS). Furthermore, they suggested, even with the operationalization of the evaluation function, the commissioning of experts outside and independent of the Rome Statute system to look into certain politically sensitive or highly specialized areas (paragraph 75 of the AMS) - where the Assembly considers that a specific evaluation should not be conducted by the OIA. For example, it might be possible to enter into a contractual arrangement with OIOS to conduct these functions on a periodic or 'as needs' basis. This option would still require that the issue of the OIA's independence and additional staffing be addressed.

54. Option 5 was to have periodic and/or targeted inspections and evaluations undertaken by an external independent body into specific areas of risk that are identified as priorities. Main issues regarding this option are who will commission such evaluations and inspections and the issue of possible costs which could be higher than costs for other options as there would be a need to refer to experts, consultants. Indirect costs like the salaries of the people who are going to coordinate these evaluations at the Assembly level should also be considered. One of the elements is also that the oversight functions need to be close to the management and operations of the organization in order to add direct value. The Court is a complex organization and a better understanding of its functioning is probably gained by being close to the management and operations.

55. One delegation also proposed a sixth option which would be for the IOM to conduct the evaluation function (since the OIOS experts explained that operationalization of the evaluation function has higher priority), but without the additional resources implied, as it could be outsourced to an independent external consultant. Oversight on the independence and selection of the consultant would be ensured by the IOM (and/or The Hague Working Group). These services might be provided by the established actors in the field, possibly without additional costs.

V. Budgetary implications (staffing)

56. Currently, the Temporary Head and, once appointed, the Head, of the IOM is at a P-4 level. As per resolution ICC-ASP/9/Res.5, paragraph 1, if the Assembly decides to operationalize the inspection and evaluation functions of the IOM it shall also review, if deemed necessary, the staffing capacity and grade of the head and other staff members. If the evaluation and inspection functions are not operationalized, the staffing capacity and grades of the investigation function of the IOM may be reviewed by the Assembly once the mechanism has been operational for a reasonable period of time, in accordance with established procedure.

57. Under the current budget proposal, the recruitment of a P-2 staff member has been suspended for six months into 2012, to allow for the recruitment of the Head of IOM in early 2012. The Working Group suggests that the Assembly delegate to the Bureau the decision on when to commence the recruitment of the P-2 staff member, taking into consideration budgetary implications and operational requirements. The Head of the IOM would then be responsible for recruiting the P-2 staff member at such time as the Bureau decides that it is necessary to do so.

58. There has been some discussion on whether consideration should eventually be given to providing the IOM with its own administrative staff member (a G-S level officer).

VI. Conclusions and recommendations

59. This report contains the recommendations to the tenth session of the Assembly. The recommendations have been adopted by The Hague Working Group by consensus.

Recommendation 1

It is recommended that, now with greater understanding of the inter-connectivity of the issues being discussed with relation to the full operationalization of the IOM, and the different steps and concerns that must be addressed depending upon the scope and procedures that are ultimately chosen for each function, the Assembly decide to operationalize the inspection and evaluation functions in conjunction with the investigation function as soon as possible, as envisaged in article 112, paragraph 4 of the Rome Statute, with a view to a comprehensive approach, taking into account the implications of a proposed anti-retaliation/whistleblower protection policy.

Recommendation 2

It is recommended that the IOM continue to work, in close consultation with the Court and States Parties, on the following interconnected issues:

(a) The further development of functions, regulations, rules, protocols and procedures of the investigative function of the IOM, including the Manual of Procedures;

(b) The operation of the inspection and evaluation functions; including their terms of reference, staffing issues and related financial implications, in order to come to agreement on the most efficient scope and form of operation for these functions; and

(c) Amendments to existing legal instruments necessary for the full operationalization of the investigation, inspection and evaluation functions.

with a view to submitting, at the eleventh session of the Assembly, a comprehensive proposal that would make possible the full operationalization of the IOM.

Recommendation 3

It is recommended that the IOM, working in close consultation with the organs of the Court, Staff Union Council and States Parties, to develop an anti-retaliation/whistleblower protection policy, with a view to its adoption by the Court at the earliest time possible, in recognition of the importance of an anti-retaliation policy for the Court, and as a prerequisite for the effective and just operationalization of the IOM. It is noted that the parameters and modalities of such a policy will have implications on issues surrounding the submission of complaints, including protecting the confidentiality of the complainant or whistleblower and the content of the allegation.

Recommendation 4

It is recommended that, in conjunction with the above, discussion on the investigation, inspection and evaluation functions of an oversight mechanism continue in the year 2012, with a view to reaching a comprehensive solution, so that the Bureau can prepare a report on the investigation, inspection and evaluation functions within the context of a comprehensive proposal that would make possible the full operationalization of the IOM, taking into consideration possible budgetary implications, with a view to a decision on its adoption at the eleventh session of the Assembly.

Recommendation 5

It is recommended that the Assembly delegate to the Bureau the following decisions, after taking into consideration possible budgetary implications and operational requirements, and, if necessary, consulting the Committee on Budget and Finance:

- (a) The hiring of the Head of the IOM;
- (b) If necessary, the extension of the mandate of the Temporary Head of the IOM; and
- (c) When to commence recruitment of the P-2 staff member for the IOM. It is noted that the Head of the IOM will be responsible for recruiting the P-2 staff member at such time as the Bureau decides that such recruitment is necessary.

Recommendation 6

That the draft annex attached hereto be passed in the omnibus resolution at the next session of the Assembly.

Annex

Draft paragraphs for inclusion in the omnibus resolution

The Assembly of States Parties

Recognizes the importance of a fully operational Independent Oversight Mechanism to the efficient and effective operation of the Court;

1. *Endorses* the recommendations contained in the report to the Bureau on the Independent Oversight Mechanism;

2. *Decides* to continue its discussion on the Independent Oversight Mechanism and *invites* the Independent Oversight Mechanism to continue to work, in close consultation with the Court and States Parties, on the following interconnected issues:

(a) The further development of functions, regulations, rules, protocols and procedures of the investigative function of the Independent Oversight Mechanism, including the Manual of Procedures;

(b) The operation of the inspection and evaluation functions; including their terms of reference, staffing issues and related financial implications, in order to come to agreement on the most efficient scope and form of operation for these functions; and

(c) Amendments to existing legal instruments necessary for the full operationalization of the investigation, inspection and evaluation functions.

with a view for the Bureau to submit, to the eleventh session of the Assembly, a comprehensive proposal that would make possible the full operationalization of the Independent Oversight Mechanism.

3. *Invites* the Independent Oversight Mechanism, working in close consultation with the organs of the Court, Staff Union Council and States Parties, to develop an anti-retaliation/whistleblower protection policy, with a view to its adoption by the Court at the earliest time possible, in recognition of the importance of an anti-retaliation policy for the Court, and as a prerequisite for the effective and just operationalization of the Independent Oversight Mechanism;

4. *Decides* that the Bureau shall prepare a report on the investigation, inspection and evaluation functions within the context of a comprehensive proposal that would make possible the full operationalization of the Independent Oversight Mechanism, taking into consideration possible budgetary implications, with a view to a decision on its adoption at the eleventh session of the Assembly;

5. *Decides further* to delegate to the Bureau the following decisions, after taking into consideration possible budgetary implications and operational requirements, and, if necessary, consulting the Committee on Budget and Finance:

(a) The hiring of the Head of the Independent Oversight Mechanism;

(b) If necessary, the extension of the mandate of the Temporary Head of the Independent Oversight Mechanism; and

(c) When to commence recruitment of the P-2 staff member for the Independent Oversight Mechanism.
