



Legal memorandum on the IOM mandate

19 November 2010

Introduction

1. This memorandum is submitted by the Office of the Prosecutor (“Office” or OTP) to the Bureau of the Assembly of States Parties (ASP) in order to clarify its position on the proposed mandate of the Independent Oversight Mechanism (IOM) and to dispel any notion that the Office is seeking to avoid the scrutiny of the ASP or the IOM.
2. The memorandum focuses on the OTP’s legal analysis of one aspect of the proposed mandate: the ability of the IOM to initiate investigations for misconduct against OTP staff members¹ without the prior authorisation of the Prosecutor. The Office has no objection to the other aspects of the IOM’s investigative mandate, including the initiation of investigations against the Prosecutor or the Deputy Prosecutor without prior consent or the *proprio motu* powers of the IOM.
3. The Office considers that the above is a constitutional issue that goes to the very heart of the Rome Statute system: for the first time the Assembly will discuss the proper balance between the independence of the OTP as established and guaranteed by article 42(1) and (2), and the oversight role of the ASP under article 112(2) and (4) “to enhance its [the Court’s] efficiency and economy”.

Executive summary

4. The proposed mandate for the IOM to investigate OTP staff without requesting the authorization of the Prosecutor extends beyond the oversight role envisaged by article 112 (4) to increase “efficiency and economy”. It introduces an unacceptable risk of undue interference by a subsidiary body of the ASP, with the independence of the Office of the Prosecutor guaranteed by the Rome

¹ Staff includes contractors working on behalf of the OTP

Statute (Article 42(1) and (2)) and the Prosecutor's "full authority" as envisaged in Article 42(2):

- a) If the current mandate of the IOM is adopted, the ASP, through its subsidiary body the IOM, creates the risk that its oversight capacity encroaches into the realm of day to day Office management. It will transform article 112 oversight into the replacement of managerial decisions that properly belong with the Prosecutor.
 - b) The IOM's proposed mandate also extends beyond areas that are purely administrative by encroaching on OTP activities that are independent and part of the judicial process.
 - c) The ASP is diminishing the "full authority" of the Prosecutor over the staff of the Office established by article 42(2), thereby infringing upon the Prosecutor's authority and the independence of the Office.
5. As a consequence, the proposed mandate overlooks a constitutional aspect of the Rome Statute and potentially exposes the staff of the Office to frivolous complaints and politicized investigations.
 6. The proposed safeguards in the IOM mandate to respect the independent judicial activities of the OTP can not be used as an argument to justify circumventing the Rome Statute. The Office of the Prosecutor considers that the safeguards for the independence of the OTP are included in the Statute in article 42(1) and (2), and any change to this regime will therefore require an amendment to the Statute.
 7. This exceptional system that departs from some national jurisdictions and the *ad hoc* International Tribunals is intended to protect the members of the Office of the Prosecutor against false allegations made by powerful individuals or states with an interest in subverting investigations. National and international experiences show that such attacks are not uncommon.
 8. Finally, and most importantly: for the first time the Assembly will discuss the proper balance between the independence of the OTP as established and guaranteed by article 42(1) and (2), and the oversight role of the ASP under articles 112(2) and (4) "to enhance its [the Court's] efficiency and economy". An ASP Resolution based on an erroneous interpretation of articles 42 and 112 could set a dangerous precedent for future decisions on oversight that may further affect the integrity of the Statute.

I. Background

9. 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.²
10. In terms of the said resolution the independent professional investigative capacity would be implemented immediately. It provides that the IOM will develop all its functions, regulations, rules, protocols and procedures and submit them to the Assembly for approval.³ 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)⁴ and sets up the basis on which the amendments should be made.⁵ 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 independent oversight mechanism.⁶
11. After the adoption of the Resolution, the Bureau decided that the issue of the IOM should be further discussed by The Hague Working Group (“the Working Group” or HWG) in 2010.⁷
12. In accordance with the resolution, 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”).⁸ At its eighth meeting, held on 12 April 2010, the Bureau appointed Ms. Beverly Ida Mulley as the Temporary Head of the IOM for a period of one year.

² *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* (International Criminal Court publication, ICC-ASP/8/20), vol. I, part II, resolution ICC-ASP/8/Res.1, para. 1.

³ *Ibid.*, annex, para.3.

⁴ *Ibid.*, para. 4.

⁵ *Ibid.*, paras. 7-12.

⁶ *Ibid.*, para. 6 (e).

⁷ Draft report of the Hague Working Group on the Independent Oversight Mechanism, dated 5 November 2010, as adopted by HWG for consideration by the Bureau, para 2.

⁸ *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* (International Criminal Court publication, ICC-ASP/8/20), vol. I, part II, resolution ICC-ASP/8/Res.1,, annex, para.3.

13. 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 working group decided to receive the Temporary Head's views in closed session on 10 September 2010. According to the report of that session:

"The Working Group considered a request by the Prosecutor to participate in the discussions on the IOM which, in his view, could impinge upon the independence of his office and that even an appearance to that effect should be avoided.

There was broad consensus among the delegations that at this stage it was preferable for them to hear from the Temporary Head of the IOM without the presence of any Court organ or NGO.

Prior to the session being closed, the Prosecutor was provided the opportunity to present his views. For his part, the Prosecutor recalled that the independence of his office arose from the Statute, not from the Assembly of States Parties. The Prosecutor stated that he had requested the Temporary Head of the IOM to seek an appropriate balance between the *proprio motu* powers of the IOM and the independence of the OTP. Furthermore, he had asked her to discuss with him the draft operational mandate she was preparing before it was discussed with the Working Group, which she had not done. He stressed that as he was responsible to the Assembly for the management of his office; his approval/authorization should constitute a prerequisite before any member of his staff was the subject of a proposed investigation, so that he could decide if the investigation should proceed.

The Prosecutor stated that he was challenging the idea that, through the IOM, the Assembly could proceed with the inspection of his staff without his consent since that would be illegal.⁹

The facilitator, Mr. Vladimir Cvetkovic (Serbia), indicated that he had requested a closed segment in order to allow the Temporary Head of

⁹ Draft report of the Hague Working Group on the Independent Oversight Mechanism, dated 5 November 2010, as adopted by HWG for consideration by the Bureau, para. 40.

the IOM to introduce the draft operational mandate, dated 31 August 2010, prior to its dissemination to the Court, a view with which the Temporary Head concurred, and that the agenda for the meeting did not foresee any decision on the matter, since the Working Group had to discuss other matters, such as the recruitment process for the Permanent Head of the IOM, as well as how to proceed with the study on the inspection and evaluation functions of the IOM.

The Coordinator recalled that, as a subsidiary body of the Assembly, the Working Group had the right to hold closed meetings whenever it deemed it appropriate in order to allow States Parties to discuss issues solely among themselves, which was sometimes necessary. Any decision of the Working Group to hold a closed meeting did not preclude a subsequent decision to hold an open meeting, and vice-versa. He indicated that a closed meeting did not prevent States Parties from keeping open the dialogue with the Court.

The Working Group then held a closed segment of the meeting on the Independent Oversight Mechanism, open to States only. In response to the Prosecutor's introductory comments Ms. Mulley briefly explained her reasons for not discussing further issues of the operational mandate of the IOM with the Prosecutor before discussing the matter with the Working Group.¹⁰

14. The draft mandate prepared by the Temporary Head of the IOM was circulated to the Court and on 30 September 2010, the Court submitted its comments on it to the HWG. The document contained Court-wide comments and OTP specific comments. The Temporary Head of the IOM accepted most of the Court-wide comments and amendment suggestions.¹¹
15. The Working Group discussed the comments of the OTP at the informal consultations held on 5 and 19 October. 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

¹⁰ Report of the HWG meeting of 10 September 2010, dated 8 October 2010, pp. 2-3.

¹¹ Draft report of the Hague Working Group on the Independent Oversight Mechanism, dated 5 November 2010, as adopted by HWG for consideration by the Bureau, para. 42.

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.¹²

16. On 22 October 2010, the OTP submitted “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’ contained a number of drafting amendments to the draft IOM Operational Mandate as proposed by the Temporary Head of the IOM.”¹³

II. The IOM Provisional Mandate Adopted

17. In the last version of the draft IOM Operational Mandate, dated 25 October, only minor amendments from the OTP were included. The one important issue raised by the OTP however was not taken into account and the mandate includes the capacity of the IOM to start investigations against OTP staff without requesting the authorization of the Prosecutor.¹⁴ (See Annex A)
18. According to para 2 of the Operational Mandate: “The independent oversight mechanism may receive and investigate reports of misconduct¹⁵ 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”)” and 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”)¹⁶.

¹² *Ibid.*, para. 52.

¹³ *Ibid.*, para. 55.

¹⁴ *Ibid.*, para. 57.

¹⁵ 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.

¹⁶ 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.

19. Paragraphs 11- 17 of the IOM mandate define the mode of operation. Some of the key aspects are:

- a) The IOM operates under the authority of the President of the Assembly of States Parties;
- b) The authority of the IOM to act does not require any prior consent;
- c) The IOM has the discretion to notify the Prosecutor, of the receipt of a report of misconduct or unlawful acts by staff and contractors acting under the Prosecutor's authority.¹⁷

20. "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, be submitted to the Assembly for consideration and adoption at its ninth session."

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21. The 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 is considered necessary in order to begin work on the IOM Manual of Procedures.

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III. Independence and Oversight under the Rome Statute

(i) *The Rome Statute and prosecutorial independence*

22. The independence of the Court as a whole and of the OTP in particular, is the cornerstone of the system of justice established by the Rome Statute. The OTP is responsible for "receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court".²⁰

¹⁷ 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.. However there is lack of clarity: Notification in terms of para. 17 of the IOM mandate is discretionary however notification in terms of the procedural safeguards mentioned in para. 19 is obligatory

¹⁸ *Ibid.*, para. 63.

¹⁹ *Ibid.*, para. 40.

²⁰ Article 42(1), ICC Statute.

23. Such unprecedented functions and accompanying guarantees of independence of the Prosecutor allow the Court to act without an additional trigger from States or the UN Security Council, and without political interference. This was a conscious decision adopted in Rome.
24. Accordingly, article 40 of the Statute establishes the independence of the judges, while article 42 stipulates that the entire Office of the Prosecutor shall act independently as a separate organ of the Court and its members shall not be subject to instruction from external sources.
25. As expressed in the context of the negotiations, “given the complementary nature of the Court’s jurisdiction, the view emerged in many delegations to the Preparatory Committee and the Diplomatic Conference that the Court’s efficacy would largely depend on the powers and independence of its Prosecutor.”²¹
26. The drafting history shows that the specific powers and safeguards conferred on the Prosecutor in the Rome Statute were derived directly as a consequence of the OTP’s mandate to determine which situations should be investigated.²² As mentioned, because the work of the Office during the preliminary examination, investigation and prosecution stages is carried out by the members of the Office under the authority of the Prosecutor, the principle of independence extends to each member of the Office. Accordingly article 42(1) establishes that “[a] member of the Office shall not seek or act on instructions from any external source”, while article 42(2) specifies that “[t]he Office shall be headed by the Prosecutor” and, to ensure substantial independence, that “[t]he Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof.”
27. Article 42(2) recognises that true substantive independence is only possible if there is administrative or managerial independence as well. As commentary on the drafting history notes, “[i]n many ways the credibility of the Court depends on whether the Prosecutor is able to act independently and in an atmosphere which does not create perceptions of bias or partiality Consequently, the Office of the Prosecutor is also given operational independence.”²³

²¹ Morten Bergsmo/ Frederik Harhoff, ‘Article 42’, in Otto Triffterer ed., *Commentary on the Rome Statute of the International Criminal Court* (2008), p.972.

²² Compare early proposal in art 12 of the 1994 ILC Statute which were based on a presumption that the Prosecutor would act at the request of States and the Security Council; John Jones, ‘The Office of the Prosecutor’, in Antonio Cassese et al eds., *The Rome Statute of the International Criminal Court: A Commentary* (2002), p. 270.

²³ Medard Rwelamira, ‘Composition and Administration of the Court’, in Roy Lee (1999), p. 167-8.

28. The ICC model, as a consequence, also departs in a number of other significant ways from the administrative structure of the UN and other international organizations including the *ad hoc* Tribunals. Taking advantage of the lessons learned from the experience of the ICTY and ICTR, where the authority of the Registry on the administration of the Prosecutor's Office had been assessed as causing undue interference in the exercise of the OTP's independence,²⁴ the Rome Statute specifically created a dual system of administration: the Prosecutor has full authority over the management and administration of the Office.
29. This dual system is confirmed by article 38 which establishes that the Presidency is charged with the "proper administration of the Court, with the exception of the Office of the Prosecutor",²⁵ while article 43 states that the Registrar is responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42".²⁶
30. The "Report of the Court on measures to increase clarity on the responsibilities of the different organs" establishes that "there is a clear separation of functions and of authority between the OTP and the other organs (...) deliberately established by the States Parties as a fundamental aspect of the Rome Statute system. This independence is central to the integrity of investigations and of judicial proceedings. Any dispute in relation to judicial functions shall be resolved by the relevant judges. Administrative issues arising between the OTP and the other organs must be solved through coordination with full respect for this independence." It also states that "the administration of the Court must take into account the institution's particular judicial nature."²⁷

(ii) *ASP Oversight*

31. Article 112(2)(b) provides for management oversight of the different organs of the Court including the Prosecutor by the ASP regarding the administration of the Court, while article 112(4) enables the establishment of "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."

²⁴ *Report of the Secretary General on the Activities of the Office of Internal Oversight Services, Financing of the ICTR ('Paschke Report')*, A/51/789 (6 February 1997)

²⁵ Article 38(3)(a), ICC Statute.

²⁶ Article 43(1), ICC Statute.

²⁷ ICC-ASP/9/CBF.1/12 of 18 March 2010.

32. Effective oversight is crucial to help the Court accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve “the efficiency and economy” of the Court. It should assist the Assembly and the different organs of the Court in the effective discharge of their responsibilities.
33. The investigative role of oversight, in particular, will help to ensure that instances of misconduct do not undermine the Court and its activities. This is crucial for the legitimacy of the Court. Consequently, the Office recognizes the importance of effective oversight and appreciates that the creation of an independent mechanism to provide such oversight is expressly provided for in the Statute.
34. The negotiation of article 112 (4) indicates an express intention to provide the required management oversight while taking into consideration the independence of the Court, by ensuring that it focuses on non-judicial activities only. As the former chair of the Ad Hoc and Preparatory Committees on the Establishment of the ICC, Adriaan Bos, has stated, “[t]he essential question with regard to this paragraph is the delimitation between the judicial and the administrative part of management. Management oversight covers only the non-judicial activities of the Court”.²⁸ Similarly, S. Rama Rao, coordinator at the Rome Conference of the Working Group on Financing of the Court, Assembly of States Parties and the Preparatory Commission, has stated “[t]he power of the Assembly to exercise management oversight of the Court was maintained, but the controversial area of the scope of such activity (judicial administration or operations of the Court) was deleted”.²⁹
35. All the Office activities are linked to its judicial activities, including the identification of situations for investigation; the assessment on the gravity of the alleged crimes and the existence of national proceedings; the direction of ongoing or future investigations; the formulation of case hypotheses; the

²⁸ Adriaan Bos, ‘Assembly of States Parties’, in Cassese et al eds., *The Rome Statute of the International Criminal Court: A Commentary* (2002), pp. 305, 310, in relation to both articles 112(2)(b) and 112(4).

²⁹ S. Rama Rao ‘Financing of the Court, Assembly of States Parties and the Preparatory Commission’, in Roy Lee ed., *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (1999), p. 412. See also Rao, ‘Article 112’, in Otto Triffterer (2008), p.1691: “there was some degree of controversy in the preparatory process of the Rome Conference as to whether the term ‘administration’ covers judicial administration in addition to the operations of the Court. Some delegations strongly opposed it on the grounds that the doctrine of judicial independence would not permit any intrusive oversight into its judicial administration. In fact, the Draft Statute referred by the Preparatory Committee to the Rome Conference in a corresponding article 102 employed two alternative terms ‘non-judicial administration’ and ‘operations of the Court’. The compromise at Rome reflected in the Statute is on the term ‘administration’. In the light of the negotiating history of this article, the term ‘administration’ will not lend itself to a wider interpretation so as to include judicial activities of the Court.”

analysis of the evidence to identify who are those most responsible; the identification of confidential insiders, intermediaries or potential witnesses and their families; the securing of assistance from information providers including States, intergovernmental and non-governmental organisations and other sources; the analysis of information provided under conditions of confidentiality or subject to national security protection; as well as the compliance by staff with instructions from senior management and with Office stipulated modalities and internal operational manual procedures. The Office has a small services section to support the operational functions and the purely administrative functions are delegated to the Registry, acting as a service provider for the OTP.

36. There are four consequences of the legal system established by the Rome Statute:

- a) There is a dual system of administration, one specific for the OTP;
- b) The Prosecutor has full authority over the management of the staff of the OTP;
- c) Article 112 concerns oversight over how the Prosecutor exercises his/her authority and is not intended to replace the Prosecutor's authority;
- d) Article 112 only covers the non-judicial activities.

IV. The IOM mandate as envisaged in the Rome Statute

37. The Office considers that the solution for the modalities of interaction between the independence enjoyed separately by the OTP and the IOM is to be found within the Statute itself. Articles 42 and 112(4) must be read in a way than will enable the object and purpose of the Statute to be realised, rather than frustrate their mutual compatibility. Articles 42 and 46 establish a specific regime for the management and administration of the Office whereby the staff of the Office is accountable to the Prosecutor while the Prosecutor is accountable to the ASP. As a consequence, there are two distinct aspects of the IOM mandate:

- a) As a subsidiary body of the ASP, the IOM can independently initiate and conduct investigations against the Prosecutor without his/her consent as established by para 2, 11 and 12 of the draft Operational Mandate;
- b) on the basis of the Prosecutor's request or *proprio motu* following the Prosecutor authorization the IOM can carry out independent investigations of alleged misconduct by OTP staff in accordance with para 13 of the draft Operational Mandate.

38. Accordingly, the IOM can, while respecting the Rome Statute, fulfil two roles: it may provide oversight to the ASP of the Prosecutor including his or her management of internal investigations, and it can provide independent investigative services to the Prosecutor without circumventing or overriding the “full authority” of the Prosecutor in such matters. This will respect article 42 and strengthen the Prosecutor’s ability to impartially investigate allegations of OTP’s staff misconduct.
39. Additionally, in order to enhance the OTP’s efficiency and economy,³⁰ as established by article 112 the IOM can, as a subsidiary body of the ASP, provide oversight over how the Prosecutor conducts his or her management functions and exercises his/her authority, and not usurp any aspect of the Prosecutor’s authority or management functions.
40. As mentioned above, ASP “oversight” under article 112 does not include the judicial or operational work of the Office. Such activities fall under the full authority of the Prosecutor .³¹
41. Since OTP staff core functions are part of the judicial process, the ASP or its subsidiary body the IOM should not be involved in matters affecting the conduct of OTP staff without the Prosecutor’s authorization. Notably, the HWG is in agreement that the ASP should not intrude on the substantive decisions of the Prosecutor with respect to his/her staff (see para 51) and the IOM has removed “intermediaries” from the scope of its mandate, recognizing the risk that investigations against intermediaries could pose to the OTP activities.
42. As a matter of law, the possibility of the IOM proceeding with an investigation without seeking the authorization from the Prosecutor as currently proposed, would be in conflict with the plain text of article 42(2) and a proper interpretation of article 112.
43. The legal basis proposed for such an authority of IOM is unclear and was never properly analyzed. The plain text of the ASP resolution does not establish such

³¹ One illustrative example of this is the Prosecution’s role under the Statute and the Rules vis-à-vis the offences described in Art. 70 of the Statute: Rule 163 (1) makes clear that the Statute and the Rules apply *mutatis mutandis* to the investigation of these offences; under the Statute, the Prosecution is the sole organ authorized to investigate the commission of crimes. Rule 165 (1), in turn, states that the Prosecutor may initiate and conduct investigations pertaining to Art. 70 offences on his or her own initiative or on the basis of information communicated by a chamber or any reliable source. No other body is given this authority. Thus, it should be also beyond dispute that under this regime the IOM should request the authorization of the Prosecutor.

a power,³² and there was no analysis permitting the adoption of such an approach.

44. Unless States Parties wish to amend the Statute itself to expressly condition the OTP's independence, neither a modification to the Staff Regulations, the Regulations of the Court, a resolution of the ASP, nor an amendment of the Rules of Procedure and Evidence can be made in a manner that is inconsistent with the Statute.
45. The concrete ways in which this can affect prosecutorial independence are clear: The experience of the Office shows that alleged perpetrators, their lawyers, or officers of States with an interest in discrediting staff members in order to obstruct or prevent preliminary examination, investigations or prosecutions, can orchestrate false allegations against OTP staff in order to disrupt or frustrate OTP activities and threaten OTP staff. Even disagreements between staff members of the Office can unnecessarily escalate to the IOM. In all these situations, the OTP staff member concerned will be exposed to the decision of the IOM's Head whether an investigation is initiated, while in accordance with the statutory scheme only the Prosecutor is entrusted with the authority necessary to decide upon such matters.
46. Moreover, the IOM is envisaged to enjoy broad powers (including direct and prompt access to all OTP staff, access to all electronic and other Court records, files, documents, books or other materials, assets and premises, and to receive full cooperation). The highly sensitive and confidential nature of OTP operations means that such information cannot be shared without the express consent of the Prosecutor. If the IOM can act without the authorization of the Prosecutor, staff may be placed in a position of conflict between their obligations towards the OTP and the IOM.³³
47. There are ways to overcome these issues. Accordingly, the IOM mandate could include the possibility to on its own initiative (*proprio motu*) request

³² ICC-ASP/8/Res.1, para. 6, by conferring *proprio motu* powers on the IOM, provides the possibility for the mechanism to trigger its oversight functions without awaiting a request from one of the organs of the Court: it does not provide the powers to proceed without authorisation. *See also ibid*, para. 7.

³³ Recognizing the problem of confidentiality paragraph 16 of the IOM Operational Mandate – Final Draft 25 October 2010 establishes, “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.”

authorisation from the Prosecutor to start investigations with respect to OTP staff.³⁴ Should the Prosecutor unreasonably deny or condition the scope of such investigations by the IOM, the Prosecutor's own accountability would come into question and the matter could be put before the ASP under the provisions regulating misconduct or breach of duties.

48. As an alternative procedure, the Prosecutor could be required to conduct an investigation subject to the IOM's oversight and to submit a report to it. Should the IOM not be satisfied with the investigation or its outcome, it could seek consultations with or clarifications from the Prosecutor. Should the matter not be resolved to the IOM's satisfaction, it could apply its oversight powers in order to investigate the Prosecutor for failing to properly address its specific concerns and bring the issue, as appropriate, to the attention of the ASP.
49. The above oversight scheme should dispel any perception that the Office is seeking to avoid the scrutiny of the ASP or the IOM: the question is not whether the IOM should exercise independent oversight, but how such oversight should be practically exercised in the light of the unique statutory functions of the OTP and the legal parameters of the Assembly's oversight role. Under the above proposals, the Office of the Prosecutor will be fully accountable and subject to the disciplinary scrutiny of the Assembly in matters affecting not only the Prosecutor's own conduct, but also the management and discipline of all OTP staff. This is the way to ensure the effectiveness and integrity of day-to-day OTP operations without rendering the Prosecutor's independence and that of the Office staff subject to the separate independence of the IOM. This approach would protect and respect statutory independence of the OTP and also ensure that the IOM would be able to function efficiently as an oversight body of the ASP.
50. The Office believes that a proper legal analysis should be conducted, and the OTP's proposals fully considered before the adoption of the IOM mandate. As noted above, for the Office, the issue is of constitutional importance. An erroneous interpretation of articles 42 and 112 could set a dangerous precedent for future decisions on oversight that may further affect the integrity of the Statute.

³⁴ The OTP has drawn the attention of the HWG to the similarity of this approach to that outlined in article 15 of the Statute, whereby the *proprio moto* powers of the Prosecutor to initiate investigations is subject to prior authorization by the Pre-Trial Chamber. Just as only the PTC can confer the powers and duties on the OTP to conduct investigations *proprio moto*, so the Prosecutor can thereby authorize the IOM to proceed with its investigations in the light of the express requirement of full cooperation from the staff member(s) concerned.

51. The Office is concerned that the serious issues raised by the OTP could be dismissed without a proper legal discussion taking place. For example, the draft *Report on the Independent Oversight Mechanism* of the HWG records the view that the interpretation of the Rome Statute is primarily the task for the States, since it was the States who adopted the Rome Statute.³⁵ The OTP respectfully suggests that there has to be room for proper discussions on the merits of this constitutional matter.
52. The Office notes that the discussions at the HWG recognized that the IOM's proposed mandate could lead to politicized investigations or frivolous complaints, and sought to propose safeguards, in the IOM mandate to counter them. In the OTP view, article 42 is the statutory safeguard of its independence. The IOM mandate as currently envisaged, because it does not fully take article 42 into consideration, introduces a concrete risk of undue interference, by a subsidiary body of the ASP, with the independence of the Office, a risk that article 42 was meant to prevent.

V. HWG Arguments

53. The Office has identified two main legal arguments and one policy argument from HWG discussions to support the proposal that the IOM should have the power to initiate investigations for misconduct against the OTP staff without requesting the authorisation of the Prosecutor:
- a) OTP independence applies vis-a-vis the other organs of the Court, not the ASP;³⁶
 - b) The OTP should not deprive the IOM of its independence and make the IOM subservient to the OTP;³⁷ and
 - c) A dual regime, creating one system for OTP staff and another for other Court staff, should be avoided.³⁸

(a) *OTP independence applies vis-a-vis organs of the Court, not the ASP*

54. As set out in the HWG Report "it was argued that Article 42 provides for the independence of the Prosecutor and his office with respect to the other organs

³⁵ Bureau of the Assembly of States Parties The Hague Working Group, *Report on the Independent Oversight Mechanism*, Draft report of the Hague Working Group on the Independent Oversight Mechanism, dated 5 November 2010, as adopted by HWG for consideration by the Bureau, para 53.

³⁶ See *infra* paras. 49-52.

³⁷ See *infra* paras. 53-57.

³⁸ See *infra* paras. 58-61.

of the Court, but not for the independence of the OTP with respect to the Assembly, especially not in administrative matters.”³⁹

55. This interpretation finds no support in the plain text of the Rome Statute or in the preparatory works. There is nothing in the drafting history or the terms of the Statute to indicate that the independence of the OTP is only with respect to the other organs of the Court, and not the States Parties, the ASP or its subsidiary bodies.
56. To the contrary, as the discussions cited above indicate, central to the discussions of the ASP’s oversight powers was the notion of the independence of the Office, both from individual States and (specifically) from the Assembly. The drafting history, moreover, shows that the wording of article 42 was closely related to the conferral on the Prosecutor of *proprio motu* powers.
57. The Office believes that the absence of a legal report by the HWG on the issue has contributed to the differing and at times apparently contradictory argumentation from States within the working group. By way of further example, in the same report the HWG mentioned that the ASP should not be involved in matters affecting the investigations of OTP staff: “[i]t 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”.⁴⁰ The report accepted that such ASP oversight would infringe on the OTP independence, without clarifying why permitting the IOM, a subsidiary body of the ASP, to do so would not cause a similar infringement.

(b) The OTP should not deprive the IOM of its independence

58. The HWG report refers to “the independence of the IOM” and that “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 cannot 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.”⁴¹

³⁹ *Ibid*, para 53

⁴⁰ *Ibid*, para 60.

⁴¹ *Ibid*, para 61.

59. The HWG has also noted that the IOM would be “a body independent from the Assembly”.⁴² However, the Office observes that the IOM in fact, is a subsidiary organ of the ASP. The IOM functions under the authority of the President of the Assembly. It exercises its functions on behalf of the ASP. The IOM mandate, moreover, can be amended at any time by a resolution of the ASP.
60. The IOM independence from the ASP is hardly the reality, since practice will follow design. As early practice demonstrates and as noted above, the Temporary Head of the IOM decided not discussing further issues of the operational mandate of the IOM with the Prosecutor before discussing the matter with the Working Group.⁴³ And the Coordinator recalled that, “as a subsidiary body of the Assembly, the Working Group had the right to hold closed meetings whenever it deemed it appropriate in order to allow States Parties to discuss issues solely among themselves, which was sometimes necessary. “
61. As currently proposed, it appears that there is more concern by States with asserting the independence of the IOM rather than with the statutory-based independence of the OTP. The OTP welcomes the operational independence of the IOM to carry out investigations. Its proposal does not mean that the Prosecutor would enjoy a ‘veto’ with respect to the IOM independent mandate. To the contrary, the issue is whether the IOM, a subsidiary ASP body, should have the authority to veto the Prosecutor’s statutory management prerogatives and responsibilities. The issue thus concerns who has the authority to decide on conducting an investigation for OTP staff misconduct: the Prosecutor or the IOM. It is contrary to the Statute to vest authority with the IOM in a manner that bypasses or transgresses the authority of the Prosecutor.
62. In accordance to the Working Group report the independence of the IOM and the ASP is most important and safeguards must be built in to minimise, (as this cannot be guaranteed) the risk of the independence of the OTP being impinged upon. The approach ought to be - the independence of the OTP is the most important. It is necessary to respect this and build in safeguards to ensure that the IOM can operate with the requisite degree of independence and oversight.

⁴² *Ibid*, para 60.

⁴³ Report of the HWG meeting of 10 September 2010, dated 8 October 2010, pp. 2-3.

(c) *Avoiding a dual regime*

63. A third HWG argument at the level of principle against the OTP proposal is that it would inappropriately create a dual regime: one for OTP staff and one for other Court staff. As the HWG Report states: “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.”⁴⁴
64. The Office recalls that a two-tier system for the authorisation of IOM investigations is reflective of the distinctive scheme established by the Statute itself. As noted above, articles 38, 42 and 43 establishes a two-tier system for the administration and management of the Office, as distinguished from the other organs of the Court, bearing in mind its unique functions.
65. The Office considers that this particular argument overlooks the clear text of the Rome Statute. The very reason that the OTP has been entrusted with full authority also over its own administration was in recognition during the negotiation of the Statute that some administrative tasks are intimately related to the OTP’s operational, judicial activities. Hence those tasks that are not directly connected to the core OTP activities are delegated and performed by the Registry as a service provider for the OTP, while those that are linked to OTP operations are located within the Office itself.
66. Ambassador Zeid Ra’ad Zeid Al-Hussein of Jordan as the facilitator of the New York Working Group on oversight submitted on 4 November 2008 a non-paper in Annex to the Report, where he pointed out that the IOM should be customized to the structure, size and nature of the ICC, rather than following existing examples without the necessary adjustments.⁴⁵ Hence, there is a need to ensure that the IOM proposed framework is appropriately adjusted to address the *sui generis* features of the Rome Statute and not follow the models of other organizations.

⁴⁴ Draft report of the Hague Working Group on the Independent Oversight Mechanism, dated 5 November 2010, as adopted by HWG for consideration by the Bureau, para 59.

⁴⁵ ICC-ASP/7/28, Report of the Bureau on an independent oversight mechanism (4 November 2008), Annex *Non-paper: Oversight mechanism of the International Criminal Court*, para. 4(c).

VI. Additional Observations on HWG Arguments

67. The Office takes the opportunity below to offer its observation on a number of additional arguments that have been put forward during HWG consultations.

(i) *Proprio motu* powers

68. As is known, the expression is used, *inter alia*, in the Statute as a mechanism to trigger investigation subject to judicial oversight. Following an identical criterion, the ASP Resolution provided authority to the IOM to independently trigger an investigation against OTP staff and this can and should be subject to the approval of the Prosecutor, who has the full authority over the OTP staff.

69. The proposal that the IOM seek first the authorisation of the Prosecutor before investigating OTP staff members does not affect the independence of the IOM to investigate; no more than the authority of the Prosecutor to open investigations *proprio motu* is conditioned by the requirement to seek prior authorisation from the PTC before it is exercised. Adopting a requirement for specific authorization prior to any investigation against OTP's staff members being initiated does not in and of itself affect the independence or *proprio motu* powers of the IOM; rather, the system merely establishes a necessary condition that must be fulfilled prior to the commencement of certain investigations. This is common also in a number of national jurisdictions which contemplate constitutional obstacles to the investigation or prosecution of the conduct of certain persons (e.g. legislators, judges, high public officers) and require a specific authorization from a given organ (e.g. congress, council of the judiciary, etc) prior to any action being taken in the case.

70. It has been suggested in the HWG Report "that the analogy with Article 15 of the Rome Statute is inappropriate, since the investigations of the OTP deal with the most serious crimes known to mankind, while the investigations of the IOM deal with the administrative misconduct".⁴⁶ It is not clear, however, what relevance the gravity of the allegation bears on the issue. In both instances, an independent body is required to seek authorisation in order to take steps that would otherwise be *ultra vires* the Statute.

⁴⁶ Draft report of the Hague Working Group on the Independent Oversight Mechanism, dated 5 November 2010, as adopted by HWG for consideration by the Bureau, para 54.

(ii) Conflict of interest

71. It has been suggested that the existence in article 42(7) of provisions requiring the Prosecutor or the Deputy Prosecutor to excuse them from acting in any matter where their impartiality might be reasonably doubted, suggests recognition that conflicts of interest may also apply where the Prosecutor is required to authorise IOM investigations of the OTP staff. The argument disregards the fact that unlike a conflict of interest in a specific case, the general authority of the Prosecutor to exercise management and disciplinary powers is an intrinsic part of his or her management functions. It is not a conflict of interest for the Prosecutor to be involved in internal disciplinary matters: such functions are an integral part of management prerogatives and responsibilities.⁴⁷ This is without prejudice to the possibility that, in some very specific cases, there may be a need for the Prosecutor to consider to excuse him/herself.

(iii) Safeguards in IOM mandate

72. The efforts to address the OTP's concerns through the introduction of a number of safeguards in the IOM mandate to respect the Prosecutor's authority under the Statute, including against the risk of frivolous complaints and politicized investigations, are recognition of the problems created by the proposed mandate of the IOM.

73. The Office considers that the safeguard of its independence is established by the Statute. The need to establish safeguards in the IOM mandate is a recognition of a risk to the independence of the OTP. It is fallacious to disregard the safeguards in the Statute and replace them with new safeguards of a totally different nature since they are aspects of the IOM mandate that could be removed by an ASP resolution.

(iv) Prosecutorial independence is not absolute

74. It has been suggested during HWG discussions that no judicial system is absolutely independent, and that in the case of the ICC it is the States that are sovereign.

75. The OTP fully accepts that the Prosecutor is accountable to the ASP; the issue is whether OTP staff is answerable directly to the ASP or its subsidiary body, or

⁴⁷ See Chapter X, Staff Rules of the International Criminal Court, ICC-ASP/4/3.

only through the Prosecutor. It has also been suggested by one state in HWG discussions that article 46 of the Statute indicates that the OTP is not fully independent of the Assembly.⁴⁸ It should nonetheless be noted that article 46 does not address the OTP, but its elected officials, the Prosecutor and Deputy Prosecutor. The ASP's role under the Statute does not extend to the removal or disciplining of staff members. As noted above, the *sui generis* features of the ICC Statute should be central to these discussions.

76. The IOM should, *in order to enhance the OTP's efficiency and economy*,⁴⁹ provide oversight over how the Prosecutor exercises these functions, not usurp the managerial functions of the Prosecutor.

(v) *Whistleblower protection*

77. The requirement that the IOM seek authorization from the Prosecutor to proceed *proprio motu* does not diminish protection for whistleblowers. The Office has proposed that the IOM, in the process of seeking the authorization of the Prosecutor to initiate an investigation, may take such measures as deemed necessary to protect complainants or whistleblowers as necessary. Any unauthorized disclosure of this information would constitute misconduct, for which disciplinary measures could be imposed.

78. Protecting whistleblowers requires a well-functioning system of protection against unauthorized disclosure and retaliation.⁵⁰ It does not, in and of itself, run counter to the concept of prior authorisation.

(vi) *Comparisons with the OIOS*

79. The proposed mandate for the IOM appears to be based to a large extent on the operational mandate for the United Nations OIOS, disregarding the specific features of the Rome Statute, including the specific OIOS report on the problems of the Ad hoc Tribunals. The OIOS was established under General Assembly resolution 48/218 B of 12 August 1994.⁵¹ Its role is to assist the

⁴⁸ Informal discussion during the HWG meeting of 5 October 2010.

⁴⁹ Article 112(4), ICC Statute.

⁵⁰ Similar protections already exist in ICC Administrative Instructions regarding various forms of misconduct. See e.g. section 6.5 of the *Administrative Instructions on Sexual and Other Forms of Harassment* ICC/AI/2005/005 (14 July 2005), while section 7.2 enables the submission of complaints by or through third parties in case an individual prefers not submitting the complaint directly.

⁵¹ General Assembly Resolution on Review of the efficiency of the administrative and financial functioning of the United Nations, [A/RES/48/218 B](#), 12 August 1994.

Secretary-General in fulfilling his or her internal oversight responsibilities in respect of the resources and staff of the Organization, including separately administered organs, such as the Offices of the Prosecutor of the *ad hoc* Tribunals.⁵² In these Tribunals, the staff of the entire organisation are appointed by the Secretary-General (on the recommendation of the Prosecutor or Registrar, as appropriate). As a consequence, no tension arises if the oversight mechanism reports to the Secretary-General. Furthermore, OIOS and UN staff operates under the authority of the UN Secretary-General.

80. The system developed in Rome deliberately deviates from the UN system, by making the Prosecutor accountable to the ASP (article 46), whereas the staff of the Office will be accountable to the Prosecutor only (article 42(2)).

(vii) Staff Regulations create a precedent for staff to act without approval

81. One State presented the argument that Staff Regulation 1.2(q) does indeed provide for the possibility of compelling staff members to fully respond to requests for information. However, in such case the Prosecutor would be involved and would have provided consent. The mentioned provision would be applicable in the context of procedures such as auditing and investigations of property losses. In those situations, the investigations concerned would be based on the Prosecutor's consent – either with the relevant audit program or – more generally - the Administrative Instruction on Accountability of Staff members for ICC Property (ICC/AI/2005/004 of 2 May 2005).

82. The possibility that one single Staff Regulation may be invoked as a precedent to ignore the Rome Statute highlights the importance of the decision on the IOM mandate. As mentioned before, an ASP Resolution based on an erroneous interpretation of articles 42 and 112 could set a dangerous precedent for future decisions on oversight that may further affect the integrity of the Statute, and would place the entire Rome Statute system at risk.

VII. Conclusion

83. The conclusion of the present memorandum is that the proposed mandate for the IOM extends beyond the oversight role envisaged by article 112 (4) to increase “efficiency and economy” and introduces an unacceptable risk of

⁵² Secretary-General's Bulletin on the Establishment of the Office of Internal Oversight Services, [ST/SGB/273](#), 7 September 1994, para. 1.

undue interference by a subsidiary body of the ASP, with the independence of the Office of the Prosecutor guaranteed by the Rome Statute:

- a) If the current mandate of the IOM is accepted, the ASP, through its subsidiary body the IOM, create the risk that its oversight capacity is expanded into the realm of day to day Office management, transforming article 112 oversight into the replacement of managerial decisions that properly belong to the Prosecutor;
- b) The IOM's proposed mandate also extends beyond areas that are purely administrative by encroaching on OTP activities that are independent and part of the judicial process;
- c) The ASP is diminishing the "full authority" of the Prosecutor on the staff of the Office established by article 42(2), thereby infringing upon the Prosecutor's authority and the independence of the Office.