

COALITION FOR THE  
INTERNATIONAL CRIMINAL COURT



**BACKGROUND PAPER**

IN PREPARATION FOR

**THE TENTH SESSION OF THE ICC ASSEMBLY OF STATES PARTIES**

12 DECEMBER - 21 DECEMBER 2011 – NEW YORK

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## I. INTRODUCTION

The Coalition for the International Criminal Court (CICC) has prepared this Background Paper in preparation for the tenth session of the Assembly of States Parties (ASP) to the Rome Statute of the International Criminal Court. The paper covers issues which will be discussed as specific agenda items at the tenth session, and also provides information on those issues which have been the subject of discussions in the Bureau of the ASP and Working Groups of the Bureau (in The Hague and New York) in preparation for the tenth session.

The Assembly will meet in New York, from 12 – 21 December 2011. Some 200 non-governmental organisation (NGO) representatives will attend the session. Hundreds of government delegates, representatives of the International Criminal Court (ICC) and other international organisations are also expected to participate.

### Relevant Documents

The Provisional Agenda for the Tenth Session of the ASP is available at:  
[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-1-ENG.pdf)

The Journal for the Tenth Session of the ASP is available at:  
[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ASP10-Journal-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ASP10-Journal-ENG.pdf)

## II. OPENING PLENARY

On the first day of the session, the Assembly will organise its work and hear reports from the Court, the Trust Fund for Victims, the Bureau of the Assembly, and the Oversight Committee on the Permanent Premises respectively. The UN Secretary-General, Mr. Ban Ki-Moon and the President of Botswana, H.E. Seretse Khama Ian Khama, are also scheduled to address the Assembly. The opening plenary session will also see the election of Ms. Tiina Intelmann (Estonia) as the new President of the ASP for the next triennium, the election of two ASP Vice-Presidents, 18 members of the ASP Bureau and six members of the Committee on Budget and Finance (see below).

### Relevant Documents

The note by the ASP Secretariat on the election of members of the Committee on Budget and Finance is available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-21-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-21-ENG.pdf)

## III. GENERAL DEBATE

During the General Debate, states and non-states parties (and groupings of states) are given the opportunity to address issues of particular concern in relation to the Assembly's work and the Rome Statute as a whole. At the end of the debate, NGOs are given 45 minutes to address the Assembly.

#### IV. PROSECUTOR AND JUDICIAL ELECTIONS

At its tenth session, the ASP will elect six new judges and a new Prosecutor. The elections are scheduled to take place on the first and second day of the tenth session (12 and 13 December). It is also very likely that the ASP will establish an advisory committee on nominations, in order to ensure that the highest qualified candidates are appointed as judges of the ICC.

##### PROSECUTOR ELECTIONS

The election of a new ICC chief Prosecutor will take place on the first day, in the afternoon plenary session. The term of the current Prosecutor - Mr. Luis Moreno-Ocampo (Argentina) - ends in June 2012. ICC Prosecutors cannot be re-elected. The new Prosecutor will be elected for a non-renewable term of 9 years, unless the Assembly decides otherwise at the time of the election, and will take responsibility for all ongoing and future investigations. This includes the cases currently before the ICC in relation to situations in Central African Republic, Cote d'Ivoire, Darfur, Democratic Republic of Congo, Kenya, Libya and Uganda, as well as the numerous preliminary examinations undertaken in Asia, Africa, Europe, Latin America, and the Middle East.

In 2010, the ASP Bureau established a Search Committee for the Prosecutor of the ICC. The Search Committee was given a mandate to recommend a minimum of three suitable candidates to the Bureau for consideration. On 25 October 2011, the Search Committee issued a report outlining its efforts to identify suitable candidates. The report identifies the following four individuals as candidates for the position:

**Ms. Fatou B. Bensouda (The Gambia):** currently the Deputy Prosecutor (Prosecutions) of the ICC.

**Mr. Andrew T. Cayley (United Kingdom):** currently the International Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia (ECCC).

**Mr. Mohamed Chande Othman (Tanzania):** currently Chief Justice of Tanzania.

**Mr. Robert Petit (Canada):** currently Counsel to the Crimes against Humanity and War Crimes Sections of the Department of Justice, Canada.

On 1 December 2011, the President of the ASP announced that an informal agreement had been reached to nominate Ms. Fatou Bensouda as the consensus candidate for election as the next chief prosecutor of the ICC. This announcement followed informal consultations among ICC states parties to identify one candidate for formal nomination and election by consensus during the tenth ASP session.

##### JUDICIAL ELECTIONS

The ASP will elect six of the ICC's 18 judges, which will result in a significant change in the bench's composition. A judicial candidate must be a national of a state party to the Rome Statute and the candidate can be nominated by any state party but is not required to be nominated by the state of which the candidate is a national.

In December 2010, the CICC established the Independent Panel on Judicial Elections (“Panel”), an independent committee of international law and judicial experts, which reviewed the nominations received by the ASP Secretariat for the judicial elections. The views of the Panel and its assessments of judicial candidates were strictly its own and did not reflect those of the Coalition. The Panel undertook an independent assessment of whether each judicial candidate fulfilled the qualifications prescribed by article 36 of the Rome Statute. With a view to raising awareness of the qualifications for ICC judicial candidates and encouraging states parties to nominate only the most highly-qualified candidates for these crucial ICC elections, the Panel issued a report containing an assessment of each judicial candidate as “Qualified” or “Not Qualified”. The report explained any assessment of “Not Qualified”. However, the Panel neither endorsed nor opposed any individual candidate in the elections.

ICC judicial elections are subject to minimum voting requirements (MVRs) in the areas of legal competence and expertise (which is divided between established competence in criminal law and procedure and relevant experience (“List A”); and established competence in international law such as international humanitarian law and the law of human rights and relevant experience (“List B”)), regional representation and gender.<sup>1</sup> The MVRs require states parties to vote a minimum number of times, as determined by an established formula, for candidates from areas that are underrepresented based on the anticipated composition of the Court. This is to ensure that the composition of the judicial bench is adequately representative in the three MVR areas. The following minimum voting requirements must be met:

- Regional: Asian States: 1, Latin American and Caribbean States: 2, Eastern European States: 1
- Gender: Male: 2
- List A: 3

The following candidates have been nominated:

- BANKOLE THOMPSON, Rosolu John (Sierra Leone), List A, African States, Male
- BEL HAJ HAMOUDA, Ajmi (Tunisia), List A, African States, Male
- BOOLELL, Vinod (Mauritius), List A, African States, Male
- BRIA, Modeste-Martineau (Central African Republic), List A, African States, Male
- CARMONA, Anthony Thomas Aquinas (Trinidad and Tobago), List A, Latin American and Caribbean States, Male
- CATHALA, Bruno (France), List A, Western European and Other States, Male
- CIFUENTES MUÑOZ, Eduardo (Colombia), List A, Latin American and Caribbean States, Male
- CZAPLINSKI, Wladyslaw (Poland), List B, Eastern European States, Male
- DEFENSOR-SANTIAGO, Miriam (Philippines), List B, Asian Pacific States, Female
- EBOE-OSUJI, Chile (Nigeria), List A, African States, Male
- FREMR, Robert (Czech Republic), List A, Eastern European States, Male
- HERRERA CARBUCCIA, Olga Venecia (Dominican Republic), List A, Latin American and Caribbean States, Female
- KAM, Gberdao Gustave (Burkina Faso), List A, African States, Male

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<sup>1</sup> See article 36(3)(b)(i) and 36(8) of the Rome Statute.

- LAYNEZ POTISEK, Javier (Mexico), List A, Latin American and Caribbean States, Male
- MINDUA, Antoine Kesia-Mbe (Democratic Republic of the Congo), List A, African States, Male
- MORRISON, Howard (United Kingdom), List A, Western European and Other States, Male
- NOUHOU, Hamani Mounkaila (Niger), List A, African States, Male
- SERGHIDES, George A. (Cyprus), List A, Asian Pacific States, Male
- URBINA ORTEGA, Jorge Antonio (Costa Rica), List B, Latin American and Caribbean States, Male

### **Advisory Committee on the Appointment of Judges of the ICC**

At the ninth session of the ASP in 2010, the ASP requested the Bureau to prepare a report to the Assembly for the tenth session on the potential implementation of article 36(4)(c) RS. This article states that the ASP may decide to establish an Advisory Committee on [judicial] Nominations. The committee would be mandated to facilitate that the highest qualified individuals are appointed as judges of the ICC, guided by the applicable provisions of article 36 of the Rome Statute.

In light of the report which will be presented to the tenth ASP session, it is very likely that the ASP will - in a stand alone resolution - decide to establish an advisory committee on nominations.

### **Relevant Documents**

Note Verbale on the Nomination and Election of the Prosecutor - ICC-ASP/10/S/06, available at:  
[http://www.icc-cpi.int/iccdocs/asp\\_docs/Elections/EP2011/NV-Election-Prosecutor-2011-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Elections/EP2011/NV-Election-Prosecutor-2011-ENG.pdf)

Note Verbale on the Nomination and election of judges - ICC-ASP/10/S/04, available at:  
[http://www.icc-cpi.int/iccdocs/asp\\_docs/Elections/EJ2011/NV-Election-Judges-2011-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2011/NV-Election-Judges-2011-ENG.pdf)

Terms of Reference of the Independent Panel on ICC Judicial Elections available at:  
<http://www.iccindependentpanel.org/sites/default/files/Independent%20Panel%20on%20ICC%20Judicial%20Elections%20-%20Terms%20of%20Reference%2012%20May%202011%20-%20final.pdf>

Report of the Independent Panel on ICC Judicial Nominations 2011, available at:  
<http://www.iccindependentpanel.org/sites/default/files/Independent%20Panel%20on%20ICC%20Judicial%20Elections%20-%20Report%2026%20October%202011.pdf>

## **V. BUDGET AND FINANCE**

The Working Group on the Budget has met both informally and formally to consider the Proposed ICC Budget for 2012 and in preparation for further discussion when the Assembly meets at its tenth session. The main discussions will focus on the report of the Committee on Budget and Finance (CBF) and its recommendations. The CBF is an expert subsidiary mechanism of the ASP, responsible for addressing the Court's financial resources and in doing so considered the Court's proposed 2012 Budget on 22 – 31 August 2011.

The proposed budget for 2012 is **€117.73 million** (which could eventually rise to €130 million euros). The proposed budget represents an increase of €14.12 million or 13.63 per cent over the approved

2011 budget of €103.61 million. The CBF has recommended an adjustment to the proposed 2012 budget by approximately minus €5.5 million, giving a 2012 budget of **€112.2 million** which is an increase on the approved budget for 2011 of about €8.6 million or 8.3%. The CBF explained to states parties that they had pushed the Court to its limit in coming to this adjustment, and any more cuts would have impacted on the ICC program. The principal cost drivers in the 2012 proposed budget are the increased costs of legal aid (approximately €5 million) and the costs of the Libya situation (approximately €7 million). The breakdown of costs for the principle organs of the Court are; Judiciary – approximately €9.99 million; Office of the Prosecutor – approximately €29.8 million; Registry<sup>2</sup> – approximately €67.06 million; with approximately €5.15 million divided up amongst the other programs.<sup>3</sup>

Over the last few years, discussions on the budget have taken place in the context of a global financial crisis. This has resulted in some states parties seeking to adopt a ‘zero nominal growth’ approach to the Court’s budget – adopting the same exact budget as the previous year without accounting for inflation. Although to date, such an approach has yet to be adopted in any finally approved budget by the ASP.

### **CBF Elections**

On the first day of the session, the Assembly will elect six members of the Committee on Budget and Finance. The new members of the CBF will serve three-year terms from 21 April 2012 to 20 April 2015. The nominees must fulfil regional criteria: one nominee must be from the African States group, one nominee from the Eastern European States group, one nominee from the Latin and Caribbean States group, two nominees from Asian States and one nominee from the Western European and other States group. Seven nominations have been made<sup>4</sup>, of which 4 nominees are incumbent. The only contested seat is for the African region<sup>5</sup>.

### **Relevant Documents**

Proposed Programme Budget for 2012 of the International Criminal Court, available at:

[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-10-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf)

Report of the Committee on Budget and Finance on the work of its seventeenth session, available at:

[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-15-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-15-ENG.pdf)

Resolution Establishing the Programme Budget of the Court for 2011 (ASP 9), available at:

[http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-9-Res.4-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.4-ENG.pdf)

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<sup>2</sup> The budget for the Registry includes budgetary allocations for amongst other the Public Information and Documentation Section; the Office of the Public Counsel for Victims; the Office of the Public Counsel for Defence; and field operations.

<sup>3</sup> This includes amongst other things the ASP Secretariat; the Trust Fund for Victims and the Independent Oversight Mechanism.

<sup>4</sup> Nominees: Elena SOPKOVA (Eastern European States) – *incumbent*; Hugh ADSETT (Western European States and Other States); Rosette NYRINKINDI (African States) – *incumbent*; Samuel P.O. ITAM (African States); Masatoshi SUGIURA (Asia-Pacific States) – *incumbent*; Fawzi Gharaibei (Asia-Pacific States) – *incumbent*; Mónica SÁNCHEZ IZQUIERDO (Latin American and Caribbean States).

<sup>5</sup> The 2 nominees for the 1 African Region seat are; Rosette NYRINKINDI (Uganda) – *incumbent*; Samuel P.O. ITAM (Sierra Leone).

Note by the ASP Secretariat on the Election of members of the Committee on Budget and Finance, available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-21-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-21-ENG.pdf)

## VI. COOPERATION

During 2011, the Hague Working Group, under the facilitation of Ambassador Mary Whelan (Ireland) discussed via informal consultations, various issues of particular importance including; interim release, sentence enforcement; and implementing legislation. The Hague Working Group also discussed the Court's Report on Cooperation which detailed *inter alia*; cooperation between states parties and the Court in support of preliminary examinations, investigations and prosecutions; cooperation between states parties and the Court in support of judicial proceedings and; Court initiatives to support cooperation with states parties. The outcome of the discussions held in 2011 is a standalone resolution on cooperation, which welcomes the Court's Report and stresses the importance of effective and comprehensive cooperation and assistance by States Parties, other States, and international and regional organisations, in order for the Court to completely fulfill its functions, at every level, as mandated in the Rome Statute system.

Chapter IX of the Rome Statute elaborates on the different forms of cooperation that the Court can demand from a State Party for the purpose of investigating or prosecuting a crime within the jurisdiction of the Court. The obligation to cooperate with the ICC also entails an obligation to implement procedures under national law which will facilitate such cooperation. Accordingly, a State should be able to fully comply with requests regarding arrests, provisional arrests, surrender of persons, and other forms of cooperation regarding, *inter alia*, access to information, gathering of evidence, searches and seizures, witness protection, freezing of assets and any other type of cooperation not prohibited by the law of the requested State Party. Special voluntary cooperation agreements can form the basis of enhanced cooperation with states where situations are being investigated or cases prosecuted, or for the implementation of witness protection and relocation programmes, as well as sentence enforcement or interim release of accused persons.

### **Non-Cooperation**

Under the Rome Statute, states have an obligation to cooperate with the Court, and particularly, states parties may be obligated to arrest a suspect wanted by the ICC if that suspect is on their territory. If a states party does not fulfil its obligation in arresting a suspect, the relevant Chamber of the Court may make a finding of non-compliance with a Court request to cooperate against that states party and inform the Assembly and/or the UN Security Council for them to take any measures they deem appropriate.<sup>6</sup> Last year, the issue of non-cooperation came to the fore due to the travels of President Omar Al-Bashir to Kenya and Chad, and the failure of the Kenyan or Chadian authorities to arrest Al-Bashir. Since the previous ASP session in 2010, Omar Al-Bashir has reportedly travelled to Chad, Djibouti and Malawi - all states parties to the Rome Statute.

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<sup>6</sup> See article 87(5)(b) and (7) of the Rome Statute.

### **Bureau Work on Non-Cooperation Following ASP 9**

Following the 9th session of the ASP in December, the Bureau was tasked to prepare a report on the procedures that the Assembly could adopt to address instances of non cooperation in general and non-compliance in particular as per article 112(2) and articles 87(5) and (7) RS. Liechtenstein was tasked to develop suggested procedures in consultation with Bureau Members. The suggested procedures will be the subject of approval by the Assembly at its 10th session. The report seeks to deal with two instances of non-cooperation on the part of states parties (non-states parties fall outside the remit of the report), where the Court has referred a matter to the ASP under article 87(5)(b) or (7) RS; and where the Court has not referred the matter, but there are reasons to believe an incident of cooperation is about to occur. Where the matter has been triggered by a decision of the Court, the proposed procedure would involve a formal (and possibly public) response, including an emergency Bureau meeting; open letter from the ASP President to the defaulting State reminding it of its responsibilities and seeking a response; open discussion in the NYWG; Bureau report on the outcome of the dialogue leading to further discussion at the ASP; and possible ASP resolution with recommendations. Where the matter has not been referred by the Court to the ASP, an informal response is envisaged using the good offices of the ASP President and the possibility of an emergency Bureau meeting.

### **Relevant Documents**

Report of the Bureau on Cooperation, available at:

[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-28-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-28-ENG.pdf)

Report of the Court on Cooperation, available at:

[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-40-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-40-ENG.pdf)

‘Omnibus Resolution’: Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/9/Res.3, available at:

[http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-9-Res.3-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.3-ENG.pdf)

## **VII. OMNIBUS RESOLUTION**

Since 2003 the ASP has adopted an ‘omnibus resolution,’ at its sessions, which is formally titled ‘Strengthening the International Criminal Court and the Assembly of States Parties’. The ASP will adopt a similar resolution again this year following informal consultations on its draft content, chaired by the Facilitator for the omnibus resolution, Mr. Zenon Mukongo (Democratic Republic of Congo). The resolution has in previous years called for ratification of the Rome Statute and other agreements; noted developments linked to institution building and to each organ of the Court; highlighted cooperation and non-cooperation issues; and dealt with administrative issues. The omnibus resolution for this session will address several issues including:

**Cooperation:** The draft paragraphs recognise the importance of cooperation in the relationship between the Court and the host State.

**Non-Cooperation:** The draft paragraphs iterate the negative impact that the non-execution of Court requests can have on the ability of the Court to execute its mandate, and welcome the report of the Bureau on potential Assembly procedures relating to non-cooperation.

**Victims and affected communities and the Trust Fund for Victims:** The draft paragraphs will note the ongoing work of the Court in reviewing and finalising its victim's strategy, as well as the importance of victims' participation. The importance of the ongoing work of, and support for, the Trust Fund for Victims is also recalled.

**Strategic planning process of the International Criminal Court:** The draft paragraphs will discuss; the strategic nature of public information and communication (see below) as well as the relationship between the strategic planning process and the budgetary process and; the review of the Strategic Plan which will take place in 2012.

**Independent Oversight Mechanism (IOM):** The Draft paragraphs recommend the ASP to continue its discussion on the IOM and invite the IOM to continue to work on the further development of the investigative function of the Independent Oversight Mechanism, including the Manual of Procedures; the operation of the inspection and evaluation functions and amendments to existing legal instruments necessary for the full operationalisation of the investigation, inspection and evaluation functions. This is with a view to the Bureau submitting, at the eleventh session of the Assembly (2012), a comprehensive proposal that would make possible the full operationalisation of the IOM.

**Governance:** The draft resolution stresses the need for a continued structured dialogue between states parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence and requests the Bureau to extend, for a period of one year, the mandate of the Study Group on Governance, within The Hague Working Group.

**Complementarity:** The draft paragraphs call on all stakeholders to strengthen the effective domestic implementation of the Statute, and to enhance the capacity of national jurisdictions (if necessary by enacting legislation) to prosecute the perpetrators of the most serious crimes of international concern. The resolution also makes reference to the continuing work in The Hague Working Group and the SASP to facilitate complementarity endeavours.

**Public Information and Outreach:** Since 2005, the Omnibus Resolution has referred to the importance of the Court's communications activities, in particular public information and outreach. The draft paragraphs for the tenth session of the ASP recall that the issues of public information and communication about the Court and its activities are of a strategic nature and constitute a shared responsibility of the Court and States Parties, and emphasise the need to continue to improve and adapt outreach activities to affected communities. The draft paragraphs also make reference to the Day of International Criminal Justice and the upcoming 10<sup>th</sup> anniversary celebrations of the ICC. Some States Parties however, have suggested this language be omitted from the draft resolution, while others have sought to retain it. The paragraphs in question will therefore be subject to further discussion.

### Relevant Documents

'Omnibus Resolution': Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/9/Res.3, available at:

[http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-9-Res.3-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.3-ENG.pdf)

Report of the Bureau on Cooperation, available at:

[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-28-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-28-ENG.pdf)

Report of the Court on Cooperation, available at:

[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-40-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-40-ENG.pdf)

Report of the Bureau on the strategic planning process of the International Criminal Court, available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-29-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-29-ENG.pdf)

Report of the Bureau on the Independent Oversight Mechanism, available at:

[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-27-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-27-ENG.pdf)

Report of the Bureau on the Study Group on Governance, available at:

[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-30-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-30-ENG.pdf)

Report of the Bureau on complementarity, available at:

[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-24-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-24-ENG.pdf)

## VIII. STUDY GROUP ON GOVERNANCE

During its ninth session in 2010, the Assembly of States Parties established a Study Group on Governance with a one-year mandate to conduct a structured dialogue between states parties based in The Hague and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court pursuant to article 112(2) of the Rome Statute. During the tenth session of the ASP, discussions will focus on the recommended language in the omnibus resolution on which consensus has emerged amongst the Study Group. In particular, the omnibus resolution will recommend the extension of the Study Group on Governance for another year. The Study Group on Governance has also recommended the adoption of a stand alone resolution on the adoption of principles on reparations, as well as a stand alone resolution on the amendment of Rule 4 of the Rules of Procedure and Evidence.

This year, the Study Group on Governance organised its work around three clusters:

### **Cluster 1: Relationship between the Court and the Assembly**

- extension of judges terms
- elections of judges

### **Cluster 2: Strengthening the institutional framework within the Court**

- Powers and competences of the President of the Court in relation to the judiciary
- Relationship between the Presidency and the Registry with regard to the administration of the Court
- Administrative accountability of the Office of the Prosecutor and its relationship with the other organs of the Court

### **Cluster 3: Increasing the efficiency of the criminal process**

- Expediting the criminal process
- Reparations.

Cluster 1: Relationship between the Court and the Assembly The Presidency provided an overview of the relevant legal framework regarding the extension of judges' mandates and drafted a policy paper outlining how the Presidency utilised the powers at its disposal to ensure that the prospect of judges extending their term was, in so far as possible, avoided. The Study Group sought to understand better the current arrangements regarding the judicial calendar; criteria for determining the extension of the terms of judges; the duration of the extension; and the impact on new judges. On elections of judges, discussions took place on how and when the Assembly could take concrete action to help reinforce the existing elections procedures and processes. The Study Group also reflected on the institutional infrastructure of the Rome Statute System, in particular the role of states parties in governance and management.

Cluster 2: Strengthening the institutional framework within the Court The work of the Study Group has focused mainly in reviewing the potential role of the Presidency in the assignment of judges to divisions, with the Study Group considering this as a possible way to strengthen the Presidency's authority to oversee the administration of judges and minimize, to the extent possible, situations resulting in the extension of judicial mandates and/or the excusal of judges. The Study Group considered that the current mechanism to assign judges to divisions could potentially limit the proper administration of the Court – a responsibility which lies with the Presidency. The focal point submitted to the consideration of the Study Group a draft amendment to the Rules of Procedure and Evidence transferring the decision on the assignment of judges to divisions from the plenary of judges to the Presidency. The proposal received unanimous support from states. However, the Presidency informed the Study Group that a majority of judges were opposed to the draft amendment. Nonetheless, the Study Group has recommended that the Assembly adopt at this ASP session, the draft amendment to Rule 4 of the Rules of Procedure and Evidence. The proposed amendment could be applicable to the composition of divisions that will follow the election of six new judges, in the case that the amendment is adopted by the Assembly.

Cluster 3: Increasing the efficiency of the criminal process Discussions in cluster 3 have been largely devoted to the issue of reparations and states parties' concerns that a legal framework and Court-wide principles for reparations need to be established in accordance with article 75(1) of the Rome Statute, with the approach of a potential reparations phase. However, the plenary of judges has decided that principles should be developed through the jurisprudence of the Court and finally unified by the Appeals Chamber. In light of the lack of the principles and states parties' continuing resolve to ensure that reparations principles are established, states parties have decided that dialogue with the Court should be continued with a view to clarifying the legal framework and principles before a specific reparations order is made.

After consultations in the Study Group with interested states parties, an amendment to the Rules of Procedure and Evidence was proposed which would obligate the plenary session of judges to establish Court-wide coherent principles in order to clarify reparations proceedings and to avoid a fragmented approach and possible conflicts between the Court and states parties in the area of reparations. However, as an overwhelming majority of judges were strongly opposed to the draft amendment, states parties eventually accepted the withdrawal of the amendment in order to accommodate to some extent the concerns expressed by the Presidency. But, consensus was achieved amongst the states parties, in draft paragraphs in the recommended Study Group resolution, and it was generally agreed that the Court, in particular judges, should ensure the establishment of Court-wide reparations principles, based on which an individual reparation order may be issued, and the states parties should closely follow the activity of the Court in this area with a view to any further measures.

It is very likely that the mandate of the Study Group will be extended as the Study Group has indicated that one year has been insufficient to address the issues that it was mandated to. Therefore, in 2012 the Study Group is likely to continue to work on the clusters which it has focussed on in 2011. The Study Group has also indicated that the question of the budget process, or more broadly the issue of the budget policy of the Court, should per se be an issue for consideration in the framework of a separate cluster of the Study Group, as some states parties have expressed that the budget process is linked to the governance structure of the Court.

#### **Relevant Documents**

Report of the Bureau on the Study Group on Governance, available at:  
[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-30-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-30-ENG.pdf)

Resolution on Establishment of a Study Group on Governance - ICC-ASP/9/Res.2, available at:  
[http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-9-Res.2-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.2-ENG.pdf)

### **IX. INDEPENDENT OVERSIGHT MECHANISM**

At the eighth session of the ASP in November 2009, the Assembly established an independent oversight mechanism (IOM) in accordance with article 112(4) of the Rome Statute, which was mandated to provide for inspection, evaluation and investigation of the Court in order to enhance the Court's efficiency and economy. It was decided that the independent investigative function would be implemented immediately, while the inspection and evaluation functions would be brought into operation at a later stage.

At its ninth session, the Assembly adopted a resolution by which it was decided that the investigative function of the IOM shall operate in accordance with the provisions in "the Operational Mandate", and decided further that the Bureau prepare a report on the operationalisation 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 10<sup>th</sup> session of the Assembly. The resolution at the ninth session also invited the Temporary Head of the IOM 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 of the IOM on the amendments to existing legal instruments, with a view of the adoption, at the tenth session of the Assembly, of all amendments necessary for the full operationalisation of the investigative function of the IOM.

#### **Operationalisation of the Investigative Function of the IOM**

During 2011, the temporary head of 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. The 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.

The Operational Mandate provided for a “three-pronged” approach for the IOM to initiate investigations; (i) through the receipt of all reports of misconduct or serious misconduct; (ii) through Head of Organ referrals, or; (iii) 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.

In the Hague Working Group’s consultations, it became evident that state parties and the Office of the Prosecutor had differing interpretations of the meaning of the IOM initiating investigations “on its own motion” (*proprio motu*), as provided for in 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. The 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 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.

However, the IOM, the Registry, the Presidency, the Staff Union Council and a number of states parties have expressed the view that they could accept the “three-pronged” interpretation, subject to further developments in the discussions.

The Staff Union Council of the ICC has 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.

In informal Working Group discussions throughout the year, it has become apparent that no consensus would be reached on the matters referred to above. In the absence of a consensus, the Hague Working Group decided that it was not advisable to submit the Manual of Procedures to the tenth session of the Assembly, and decided to invite, in the omnibus resolution, the new temporary head of the IOM 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 well as judicial and prosecutorial independence, as prescribed in the Rome Statute.

A consensus was reached that, given the increasing apparent inter-connectivity of the issues being discussed with relation to the full operationalisation 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 operationalise 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.

#### **Inspection and Evaluation Function of the IOM**

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 in order to move towards a decision on the operationalisation of the inspection and evaluation functions within the oversight

mechanism. 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 tenth session of the Assembly. Discussions on the operationalisation of the inspection and evaluation functions will be continued next year.

### Relevant Documents

Report of the Bureau on the Independent Oversight Mechanism, available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-27-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-27-ENG.pdf)

ASP 9 Resolution on the Independent Oversight Mechanism, ICC-ASP/9/Res.5, available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-9-Res.5-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.5-ENG.pdf)

Resolution on the Establishment of an independent oversight mechanism, ICC-ASP/8/Res.1, available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-8-Res.1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.1-ENG.pdf)

## X. PREMISES OF THE COURT

### Permanent Premises Project

The Permanent Premises Project (PPP) has now entered the final design phase. The costs of the project remain at €190 million and the timeline for moving into the new premises has now been extended to December 2015. The host state (the Netherlands) has begun the preparation of the site of the PPP. Discussions during 2012 have focussed on the possibility of the Court purchasing the interim premises rather than continuing with the PPP and; additional costs which will be incurred as a result of costs related to the project but not directly related to the construction ("Box 4 costs").

In relation to the option of purchasing the interim premises, the Bureau of the ASP has agreed in principle not to pursue this option, however, the final decision not to do so must be made officially in the Assembly.

Regarding the Box 4 costs, these will cost approximately €42 million euros and have been separated into non-integrated user equipment ("2gv elements") which will cost €19.7 million and integrated user equipment ("3gv elements") which will cost approximately €22 million. The 2gv elements will be financed from the regular budget, and this year will cost €447,800. However, from next year, the cost of the 2gv elements will have a much more significant impact on the Court's regular budget, with the financial impact amounting to approximately €13 million in 2015. The 3gv elements will need to be subsumed by the PPP budget of €190 million, although this will not affect the regular Court budget this year. The Chair of the Oversight committee has indicated that further savings to the box 4 costs and the €22 million budget for the 3gv elements could be attained. Some finances may come out of the PPP contingency fund and savings may also be found at the tendering phase and following discussions with the Court and future contractors. However, it is likely that in order to subsume the approximately €22 million into the PPP budget, a re-evaluation of the permanent premises final design and the functionalities of the Permanent Premises may need to be made.

During the opening plenary, the Chair of the Oversight Committee on the Permanent Premises, Mr. Roberto Bellelli (Italy), will present the report of the Oversight Committee, and will likely outline the anticipated future costs which will be incurred due to the PPP, as well as outlining possible savings related to the PPP and the 3gv elements.

### **Interim Premises**

The Court will remain in the interim premises until 2015. The Host State (the Netherlands) had agreed to provide the interim premises on a rent-free basis until July 2012; however, this has been extended until the end of 2012. Therefore, from 1 January 2013 onwards, states parties will have to pay the rent of the lease of approximately €6 million a year. However, the host state has indicated that it would be willing to broaden the scope of the subsidised loan it had given for the permanent premises, to cover the costs of the lease from 2013.

Negotiations are currently still underway with the owner of the interim premises to negotiate a favourable rental agreement. However, the Bureau of the ASP has expressed the view that the additional costs of the lease for the interim premises should not negatively affect the Court's operations and any interim premises rental costs should not be included within the zero growth budget ceiling that some states parties have mentioned in budgetary discussions.

### **Relevant Documents**

ASP 9 Resolution on Permanent premises ICC-ASP/9/Res.1, available at:  
[http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-9-Res.1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.1-ENG.pdf)

Proposed Programme Budget for 2012 of the ICC: Permanent Premises, available at:  
[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-10-Add.1-Rev.2-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-Add.1-Rev.2-ENG.pdf)

## **XI. TRUST FUND FOR VICTIMS**

The Trust Fund's Board of Directors will give a presentation summarizing the activities and projects of the Trust Fund for Victims (TFV) conducted in 2011 and informing the Assembly on the progress made. In 2011, the TFV saw its fourth full year of operations. The TFV fulfils two mandates for victims of crimes under jurisdiction of the ICC:

- **Reparations:** The TFV is preparing its mandate for the implementation of Court-ordered reparations awards against a convicted person in light of a possible first conviction by the Court in 2012.
- **General Assistance:** The TFV undertakes its general assistance mandate using voluntary contributions from donors to provide victims and their families in situations where the Court is active with physical rehabilitation, material support, and/or psychological rehabilitation.

In relation to its general assistance mandate, in 2011, the TFV has extended 27 of its 28 active projects, and has increased the number of its beneficiaries by approximately 11,000 victims. In total, approximately 81,500 victim survivors have been reached by TFV rehabilitation assistance projects in the DRC and northern Uganda since the beginning of 2011. The TFV is also preparing to start activities in the Central African Republic by early 2012.

This year the TFV has raised roughly €1.5 million, although it was hoped that this may rise to €2 – €2.5 million by the end of the year. In the Trust Fund, an amount of €1 million has been reserved for reparations which equates to roughly one-third of the fund.

### Relevant Documents

Report of the Bureau on victims and affected communities and the Trust Fund for Victims, available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-31-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-31-ENG.pdf)

Trust Fund for Victims, Progress Report, summer 2011, available at: <http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Summer%202011.pdf>

Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2010 to 30 June 2011, available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-14-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-14-ENG.pdf)

Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/9/Res.3, available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-9-Res.3-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.3-ENG.pdf)

## XII. COMPLEMENTARITY

The Hague Working Group (THWG), under the facilitation of Ms. Yolande Dwarika (South Africa) and Mr. Christian Nygård Nissen (Denmark) has held informal consultations on Complementarity. Discussions with states parties have principally focused on ways in which the ASP Secretariat can undertake its positive complementarity mandate.<sup>7</sup> However, some discussions have also focused on states parties roles' in positive complementarity efforts. Reports on complementarity have been prepared by the ASP Secretariat and the Bureau for the tenth session of the ASP.

### Facilitators' Approach in consultations

The facilitators have focused on ways in which the international community can support and strengthen national jurisdictions and enable them to investigate and prosecute serious international crimes - "positive complementarity". The Hague Working Group has undertaken to:

- i. Provide guidance to the Secretariat in setting up its information sharing function;

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<sup>7</sup> Review Conference - Resolution on Complementarity:

**ASP Secretariat** - Requests the Secretariat of the ASP, within existing resources, to facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions

**Bureau of ASP** - Requests the Bureau to continue the dialogue with the Court and other stakeholders on the issue of complementarity

ICC-ASP/9/Res.3: "Requests the Bureau to continue the dialogue with the Court and other stakeholders on the issue of complementarity and the further implementation of the Review Conference resolution and invites the Court and the Secretariat to report to the next session of the Assembly on this matter, in accordance with resolution RC/Res.1."

- ii. Stimulate and reinforce the dialogue on complementarity and the strengthening of domestic jurisdictions;
- iii. Provide political support;
- iv. Provide suggestions on activities to be undertaken in relation to positive complementarity and;
- v. Provide a forum for an exchange of views and information on complementarity, such as best practices and lessons learnt.

#### **The ASP Secretariat and the ‘Complementarity Extranet’**

In order to discharge its mandate and to advance the goal of strengthening national capacity the ASP Secretariat has been mandated to work on two levels: a ‘General level’ and a ‘Case specific level’.

##### General level

As a first step, the ASP Secretariat has established a ‘Complementarity Extranet’ website which will be accessible on the ASP section of the ICC website. The extranet will:

- i. Provide an information base on events relating to complementarity;
- ii. Identify main complementarity actors and their activities;
- iii. Facilitate contacts between donor States, organizations, civil society and recipient States;
- iv. Give designated actors the ability to post relevant information on the Extranet in order to share information;
- v. Provide a ‘message board’ forum for users with passwords.

##### Case specific level

On a more gradual basis, the ASP Secretariat will be expected to take a more proactive role: sharing and exchanging information between relevant complementarity stakeholders within the international criminal law community and the donor community.

#### **Draft Complementarity Paragraphs in the Omnibus Resolution**

The draft paragraphs call on all stakeholders to strengthen the effective domestic implementation of the Statute, and to enhance the capacity of national jurisdictions (if necessary by enacting legislation) to prosecute the perpetrators of the most serious crimes of international concern. The resolution also makes reference to the continuing work in The Hague Working Group and the SASP to facilitate complementarity endeavours.

#### **Relevant Documents**

Report of the Secretariat of the ASP on complementarity, available at:  
[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-2-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-2-ENG.pdf)

Report of the Court on complementarity, available at:  
[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-23-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-23-ENG.pdf)

Report of the Bureau on complementarity, available at:  
[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-24-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-24-ENG.pdf)

Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/9/Res.3, available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-9-Res.3-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.3-ENG.pdf)