

**Twelfth session**

The Hague, 20-28 November 2013

Report of the Working Group on Amendments**I. Introduction**

1. The present report is submitted pursuant to the mandate given to the Working Group on Amendments (“the working group”).

2. The working group was established by the Assembly of States Parties (“the Assembly”) at its eighth session pursuant to resolution ICC-ASP/8/Res.6, “for the purpose of considering [...] amendments to the Rome Statute proposed in accordance with article 121, paragraph 1, of the Statute at its eighth session, as well as any other possible amendments to the Rome Statute and to the Rules of Procedure and Evidence, with a view to identifying amendments to be adopted in accordance with the Rome Statute and the Rules of Procedure of the Assembly of States Parties.”¹

3. At its eleventh session, the Assembly “invite[d] the working group to continue its consideration of amendment proposals, *decide[d]* to adopt the terms of reference of the Working Group on Amendments annexed to the present resolution, and *request[ed]* the Bureau to submit a report for the consideration of the Assembly.” The working group thus continued to meet intersessionally. Informal consultations were held on 5 June and 11 October 2013, on the basis of two proposals for amendments to the Rules of Procedure and Evidence prepared by the Court’s Working Group on Lessons Learnt (WGLL) and the Study Group on Governance (SGG).

II. Consideration of amendment proposals**A. Consideration of proposals to amend the Rome Statute**

4. The working group continued to have before it those amendment proposals previously referred to it by the Assembly at its eighth session.² Delegations were given the opportunity, at the beginning of each of its meetings, to comment on these proposals. At the meeting of 5 June, the Netherlands announced that it was no longer pursuing its proposal to amend article 5 of the Rome Statute to expand jurisdiction of the Court to the crime of terrorism. Its amendment proposal was therefore to be considered withdrawn from the roster of proposals. None of the other delegations with an amendment proposal had updates to share on their submissions in the reporting period, nor did any delegation request a discussion.

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, eighth session, The Hague, 18-26 November 2011* (ICC-ASP/8/20), Vol. I., part II, ICC-ASP/8/Res.6.

² See resolution ICC-ASP/8/Res.6, footnote 3. These amendment proposals are also contained in annexes I-VI of the previous report of the Working Group on Amendments, ICC-ASP/10/32.

B. Consideration of amendments of the Rules of Procedure and Evidence

5. At its meeting on 5 June 2012, the working group considered the WGLL proposal to amend Rule 100 of the Rules of Procedure and Evidence. The WGA had before it the report of the Working Group on Lessons Learnt of 27 March and an updated interim report of the Study Group on Governance (SGG) on rule 100, dated 31 May 2013. Rule 100 concerns the decision-making for the Court to sit outside The Hague in accordance with Article 3(3) of Rome Statute. The amendment provides for a more unambiguous and expeditious process for designating an alternate seat by giving the Trial Chamber the authority to decide the issue to the Court's President, on the basis of an assessment prepared by the Registry of the Court and an absolute majority recommendation of the judges of the relevant Chamber.

6. After a comprehensive briefing by The Hague Working Group's SGG (Cluster I) co-focal point Thomas Henquet (Netherlands), the WGA decided without further discussion to recommend the amendment proposal for adoption in its current form to the upcoming 12th session of the Assembly of States Parties, subject to the formal submission of the proposal by the judges of the Court according to article 51(2) of the Rome Statute.

7. During a plenary session held on 11 July 2013, the judges of the International Criminal Court agreed, in accordance with article 51(2)(b) of the Rome Statute, to propose to the Assembly of States Parties the amendment to rule 100, as endorsed by the Working Group on Amendments in New York on 5 June 2013. This decision was communicated to the President of the Assembly by way of a letter dated 4 September 2013. During its meeting on 11 October, the WGA took note of the letter and reaffirmed its recommendation to the Assembly to adopt the amendment to Rule 100 as submitted.

8. At its meeting of 11 October, the working group discussed the second amendment emanating from the Court in the reporting period. The proposed new Rule 68 of the Rules of Procedure and Evidence would allow the judges of the Court to reduce the length of Court proceedings and streamline evidence presentation by increasing the instances in which prior recorded testimony could be introduced instead of hearing the witness in person, while paying due regard to the principles of fairness and the rights of the accused.

9. The WGA had before it the WGLL's report (rev. 1) on rule 68, dated 27 September 2013, and the finalized draft report of the Study Group on Governance (SGG), also dated 27 September 2013, which included in annex 2 a draft resolution for joint adoption of the amendments to rules 100 and 68. The meeting again benefited from a comprehensive presentation by Thomas Henquet (Netherlands), this time through video link.

10. In the following discussion, many delegates expressed their support for the proposed amendments to Rule 68. Some delegations who originally had concerns expressed appreciation that those concerns had been addressed and that these amendments appeared to help expedite the workings of the Court in addition to providing safeguards for the rights of the accused and without prejudice to Article 68(3) of the Rome Statute. It was likewise acknowledged that the proposed amendments had been through a comprehensive review, including by all relevant organs of the Court. Against this background, in order to provide a comprehensive record of the revised text, several delegations suggested that the elements and discussions surrounding the proposed text should be understood as part of the *travaux préparatoires* of Rule 68. This was acknowledged by the WGA, and full reference is hereby made to the above mentioned reports of the WGLL and the SGG that informed the WGA's treatment of Rule 68.

11. In this understanding, the WGA decided to recommend the amendment proposal for adoption in its current form to the upcoming 12th session of the Assembly of States Parties, subject to the formal submission of the proposal by the judges of the Court according to article 51(2)(b) of the Rome Statute. Upon recommendation by the Chair, the WGA further decided that the draft resolution for joint adoption of the amendments to rules 100 and 68, as contained in annex 2 of the finalized draft report of the Study Group on Governance (SGG), dated 27 September 2013, be integrated into the report of the WGA for submission to the Assembly.

III. Exchange of information on the status of ratification of the Kampala amendments to the Rome Statute

12. On its 5 June 2013 meeting, the working group was informed of the recent ratification by Botswana and Germany of both set of amendments adopted in Kampala, and on its 11 October 2013 meeting, of additional ratifications of Andorra, Uruguay, Cyprus and Slovenia, also for both set of amendments. At the time of reporting, 11 countries had thus ratified the crime of aggression and 14 the amendment regarding article 8 of the Rome Statute.

IV. Recommendations

13. The working group recommends that the Assembly adopt the amendment proposals for Rules 68 and 100 of the Rules of Procedure and Evidence on the basis of the draft resolution in annex I.

14. The working group recommends that the Assembly include in the omnibus resolution an updated paragraph on its work as contained in annex II.

Annex I

Draft resolution: Amendment to Rule 68 and Rule 100 of the Rules of Procedure and Evidence

The Assembly of States Parties,

Recalling the need to conduct a 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 *inviting* the organs of the Court to continue engaging in such a dialogue with States Parties,

Recognizing that enhancing the efficiency and effectiveness of the Court is of common interest both for the Assembly of States Parties and the Court,

Commending, in this regard, the judges of the Court, acting pursuant to article 51, paragraph 2 (b), of the Rome Statute,

Noting the report of the Study Group on Governance to the Bureau of the Assembly of States Parties,¹

1. *Decides* that the following shall replace rule 100 of the Rules of Procedure and Evidence:²

“Rule 100

Place of proceedings

1. In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part.

2. The Chamber, at any time after the initiation of an investigation, may proprio motu or at the request of the Prosecutor or the defence, decide to make a recommendation changing the place where the Chamber sits. The judges of the Chamber shall attempt to achieve unanimity in their recommendation, failing which the recommendation shall be made by a majority of the judges. Such a recommendation shall take account of the views of the parties, of the victims and an assessment prepared by the Registry and shall be addressed to the Presidency. It shall be made in writing and specify in which State the Chamber would sit. The assessment prepared by the Registry shall be annexed to the recommendation.

3. The Presidency shall consult the State where the Chamber intends to sit. If that State agrees that the Chamber can sit in that State, then the decision to sit in a State other than the host State shall be taken by the Presidency in consultation with the Chamber. Thereafter, the Chamber or any designated Judge shall sit at the location decided upon.”

2. *Further decides* that the following shall replace rule 68 of the Rules of Procedure and Evidence,³ and *noting* that the rule as amended is without prejudice to article 68(3) of the Rome Statute:

“Rule 68

Prior recorded testimony

1. When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraphs 2 and 4, and after hearing the parties, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent

¹ Report of the Bureau on the Study Group on Governance (ICC-ASP/12/37).

² *Official Records ... First session ... 2002* (ICC-ASP/1/3 and Corr.1), part II.A.

³ *Ibid.*

with the rights of the accused and that the requirements of one or more of the following sub-rules are met.

2. If the witness who gave the previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony in any one of the following instances:

(a) Both the Prosecutor and the defence had the opportunity to examine the witness during the recording.

(b) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused. In such a case:

(i) In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, *inter alia*, whether the prior recorded testimony in question:

- relates to issues that are not materially in dispute;
- is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;
- relates to background information;
- is such that the interests of justice are best served by its introduction; and
- has sufficient indicia of reliability.

(ii) Prior recorded testimony falling under sub-rule (b) may only be introduced if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief. Accompanying declarations may not contain any new information and must be made reasonably close in time to when the prior recorded testimony is being submitted.

(iii) Accompanying declarations must be witnessed by a person authorised to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State. The person witnessing the declaration must verify in writing the date and place of the declaration, and that the person making the declaration:

- is the person identified in the prior recorded testimony;
- assures that he or she is making the declaration voluntarily and without undue influence;
- states that the contents of the prior recorded testimony are, to the best of that person's knowledge and belief, true and correct; and
- was informed that if the contents of the prior recorded testimony are not true then he or she may be subject to proceedings for having given false testimony.

(c) The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. In such a case:

(i) Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability.

(ii) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.

(d) The prior recorded testimony comes from a person who has been subjected to interference. In such a case:

(i) Prior recorded testimony falling under sub-rule (d) may only be introduced if the Chamber is satisfied that:

- the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony;

- the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, or coercion;

- reasonable efforts have been made to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness;

- the interests of justice are best served by the prior recorded testimony being introduced; and

- the prior recorded testimony has sufficient indicia of reliability.

(ii) For the purposes of sub-rule (d)(i), an improper interference may relate, *inter alia*, to the physical, psychological, economic or other interests of the person.

(iii) When prior recorded testimony submitted under sub-rule (d)(i) relates to completed proceedings for offences defined in article 70, the Chamber may consider adjudicated facts from these proceedings in its assessment.

(iv) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.

3. If the witness who gave the previously recorded testimony is present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony if he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.”

Annex II

Draft text for the omnibus resolution

Paragraph 80 of the 2013 omnibus resolution (ICC-ASP/11/Res.8) is replaced by the following:

“Welcomes the report of the Bureau on the Working Group on Amendments, invites the working group to continue its consideration of amendment proposals, and requests the Bureau to submit a report for the consideration of the Assembly at its thirteenth session.”
