



Seventeenth session

The Hague, 5-12 December 2018

Report of the Bureau on the Study Group on Governance

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I. Introduction

1. The Study Group on Governance (the “Study Group” or “SGG”) was established via a resolution¹ of the Assembly of the States Parties (the “Assembly”) in December 2010 “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 “to facilitate this dialogue with a view to identifying issues where further action is required, in consultation with the Court, and formulating recommendations to the Assembly through the Bureau”. It was further decided that “the issues to be dealt with by the Study Group include, but are not limited to, matters pertaining to the strengthening of the institutional framework both within the Court and between the Court and the Assembly, as well as other relevant questions related to the operations of the Court”.

2. In 2011 the Study Group dealt with the relationship between the Court and the Assembly, strengthening the institutional framework within the Court and increasing the efficiency of the criminal process. At the request of the Assembly in its tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth sessions, the dialogue between the organs of the Court and States Parties was continued from 2012 to 2018.

3. The sixteenth session of the Assembly took note of the report of the Bureau on the Study Group and the recommendations contained therein, and extended the mandate of the Study Group for a further year.²

4. On 4 March 2018, the Bureau appointed Ambassador María Teresa Infante Caffi (Chile) and Ambassador Hiroshi Inomata (Japan) as co-Chairs of the Study Group. The Bureau also appointed Ms. Erica Lucero (Argentina) and Mr. Philip Dixon (United Kingdom) as focal points for Cluster I (Increasing the efficiency of the criminal process), and Mr. Reinhard Hassenpflug (Germany) and Mr. Alfredo Álvarez Cárdenas (Mexico) as focal points for Cluster II (Governance).

5. The Study Group held seven regular meetings between April and October 2018, as well as informal meetings between the co-Chairs and co-focal points, the States Parties and the organs of the Court.

6. This report on the Study Group describes the activities of the Study Group in the past year and contains recommendations regarding the continuation of its work.

II. Cluster I: Increasing the efficiency of the criminal process

7. The programme of work for Cluster I in 2018 focused on two areas: (a) victim participation in ICC proceedings; and (b) an amendment to rule 26 of the Rules of Procedure and Evidence.

A. Victim Participation

8. On 6 February the co-focal points held a half-day seminar on Victim Participation at the International Criminal Court at the British Official Residence. Then President Silvia Fernandez de Gurmendi delivered opening remarks, on behalf of the Court. The seminar consisted of two panels of experts from civil society, practitioners and the ICC Bar Association, moderated by the co-focal points. The first panel ‘ICC Proceedings & the Interests of Victims’ considered key issues and challenges surrounding victim participation. Panelists set out the various aspects of victim participation at different stages of the process, including the statutory framework and a review of the ICC’s jurisprudence to date; and the organization of victims’ legal representation before the ICC, including a study of the application of rule 90 of the Rules of Procedure and Evidence.

¹ ICC-ASP/9/Res.2.

² ICC-ASP/16/Res.6, para. 80.

9. The second panel ‘Legal Representation for Victims at the ICC – what does it look like in practice?’ provided practitioner perspectives from the courtroom and the field. Panelists shared their experiences and insights from working with, and representing, victims at different stages of ICC proceedings, and outlined some of the practical challenges encountered.

10. Participants agreed that it was crucial at the 20th anniversary of the Rome Statute to look back at the *raison d’être* of victim participation. It was noted that the Rome Statute provides for various opportunities for victims to participate, but the detail and practicalities were left to be developed by the Rules of Procedure and Evidence and jurisprudence of the Court.

11. Speakers noted that there was a need for effective and meaningful participation, rather than merely symbolic involvement of victims. It was submitted that there were logistical and administrative hurdles for victims, alongside more substantive difficulties.

12. Recommendations included:

(a) The provision of information to victims in a clear, timely (early) and effective manner;

(b) The need for clear processes – the Court’s revised and simplified victim application form was widely praised;

(c) The provision of essential training for intermediaries and representatives; and development of professional and ethics standards;

(d) A clear Court-wide strategy for outreach and engagement with victims;

(e) Consolidation of best and common practice to ensure some consistency and predictability (to assist with managing expectations), while also recognizing the need to maintain some flexibility to allow adaption of approaches to take account of specific circumstances in specific cases;

(f) Development of common practice on the practical elements of victim participating in proceedings, e.g. would it involve provision of evidence, questioning of witnesses, etc.?

(g) The need to balance the rights of the accused and victims.

13. The event was very well attended at all levels of the Court, States Parties, observers, civil society and other stakeholders.

B. Amendment to rule 26

14. In October 2017, the then Head of the Independent Oversight Mechanism, Mr. Ian Fuller, informally suggested possible amendments be made to rule 26 of the Rules of Procedure and Evidence, to make rule 26 and the IOM mandate compatible.³ The Assembly⁴ requested the Study Group to consider the suggested amendments, in consultation with the Court, and to convey its recommendations to the Working Group on Amendments to enable the latter to make a recommendation thereon to the seventeenth session of the Assembly.

15. The SGG met in Cluster I on five occasions for informal consultations to consider whether States Parties should amend rule 26. The consultations took place on 19 April, 9 May, 14 June, 5 July and 18 July. At these consultations States Parties had the opportunity to express their views on the proposed amendment. States Parties were also invited to provide written comments to the co-focal points. The Acting Chef de Cabinet of the Presidency, Mr. Hiram Abtahi, was invited to attend the consultations to provide the legal background and to answer questions from States. Likewise, the Acting Head of the IOM, Ms. Judit Jankovic, was also invited to participate in the discussions. Observer States and other observers were also invited to the informal consultations.

³ See Annual report of the Head of the Independent Oversight Mechanism, (ICC-ASP/16/8), annex I.

⁴ ICC-ASP/16/Res.6, annex, para. 9(b).

16. At the conclusion of the consultations, a draft amendment to rule 26 was agreed by consensus. In accordance with its mandate on this matter, the co-focal points conveyed the draft amendment to the Working Group on Amendments in the report dated 2 August, which was adopted by Cluster I (see annex). The report recommended that the WGA consider the proposed amendment with a view to making a recommendation for adoption of the amendment to the seventeenth session of the Assembly of States Parties. It also recommended that the WGA avoid reopening the agreed language unless it was absolutely necessary, noting the extensive and inclusive negotiations in The Hague and the consensus reached.

17. On 2 October, the co-focal points briefed a meeting of the WGA (via video-link) on the work conducted by Cluster I on the rule 26 amendment.

C. Judicial retreat

18. At a meeting on 26 October the group received an update from the Presidency of the Court on the work of the judges on expediting the criminal process, including the judicial retreat held on 27-28 September in The Hague.

19. The Presidency Legal Adviser and Acting Chef de Cabinet to the Presidency, Mr Hiram Abtahi, explained that the 2018 judges' retreat focused on the importance of cultivating a collegial judicial culture, as well as on various aspects of judicial proceedings. The retreat provided an opportunity for private exchanges amongst judges, with a view to enhancing the conduct of judicial proceedings and the overall functioning of the judiciary. The topics discussed over the two days of the retreat were judicial collegiality and ethics, various aspects of the reparations phase of proceedings, the modalities of victim participation in proceedings and current legal developments at the Court.

D. Future work

20. The Study Group aims to continue its ongoing dialogue with the Court, with a view to enhancing the efficiency and effectiveness of the Court, and ensuring the best use of the Court's resources; while, at the same time, fully preserving the ICC's judicial independence and the quality of its work, as well as safeguarding the rights of the accused and victims.

21. To this end, Cluster I will host a plenary discussion segment at the seventeenth session of the Assembly on 'Achievements and Challenges regarding Victim Participation and Legal Representation after 20 years of the adoption of Rome Statute'.

III. Cluster II: Governance issues

22. The mandate of Cluster II for 2018 derives from the omnibus resolution adopted at the sixteenth session of the Assembly. In that resolution the Assembly welcomed the continued work of the Court on the topic of performance indicators and expressed its wish to continue the dialogue with the Court on that topic, bearing in mind that the Court needed to implement its intended approach in order to produce results which could form the basis of further dialogue. Furthermore, the Assembly requested the Study Group to "follow up and, where appropriate, continue the dialogue on the evolution of indicators", and invited the Court to "continue to share with the Study Group any update on the development of qualitative and quantitative indicators".

23. In addition, the Assembly invited the Court to "monitor the use of intermediaries through its Working Group on Intermediaries with a view to safeguarding the integrity of the judicial process and the rights of the accused", and requested the Court to "inform States Parties, when appropriate, about important developments pertaining to the use of intermediaries, which might require the Court to amend the Guidelines".

24. The programme of work for Cluster II was disseminated on 28 March 2018. The programme of work was focused on the topic of performance indicators and, in particular, on strengthening the dialogue between States Parties and the Court by providing a forum for the Court to share progress in this area. To fulfil the mandate, the co-focal points proposed that they would maintain contact with the key stakeholders in the Court on the topics of performance indicators and intermediaries, and when there were developments in these areas the co-focal points would convene meetings to receive and discuss those developments.

A. Performance indicators

25. A meeting of Cluster II was held on 19 July 2018, with a focus on the fourth key goal identified by the Court in relation to performance indicators: “Victims have access to the Court”. The Study Group received a presentation from the Chief of the Victims Participation and Reparation Section (VPRS) of the Registry, Mr. Philipp Ambach. The purpose of the presentation was to assist States in better understanding the performance statistics which the Court generated in relation to the fourth goal. The presentation focused on the goal from the perspective of the VPRS, but it was noted that other parts of the system also had a vital role to play, including the Field Offices, the Legal Representative of Victims (LRV), the Office of the Public Counsel for the Victims (OPCV), the Trust Fund for Victims (TFV) and the Public Information and Outreach Section (PIOS).

26. The Chief of the VPRS recalled some key points from the three reports of the Court on the development of performance indicators. He provided updated figures on various quantitative indicators, including the number of documents received by the VPRS, the kinds of applications received, and the gender breakdown of applicants. Overall there was a significant increase in activity, as well as a high level of volatility in the figures. He noted that qualitative indicators relating to the Court’s impact on victims and affected communities were inherently difficult to measure. There were also resource and capacity constraints which made it difficult to measure the impact in the field. The particular aspects of each situation or case would necessarily affect the indicators, as would case-specific innovations and approaches. It was noted that, in order to have a clear idea of the overall impact, there was a need for an integrated approach and collaboration with relevant external actors.

27. States expressed their appreciation for the useful and informative presentation, and their support for the work of the Court on performance indicators. The point was also made that it was important to continue to consider whether the current indicators were serving their purpose.

B. Future work

28. The Study Group aims to continue its consideration of the topic of performance indicators, bearing in mind that the Court needs time and space to implement its intended approach in order to produce results which can form the basis of meaningful further dialogue.

29. The Study Group will therefore continue to follow developments on performance indicators, and on the use of intermediaries, and to receive relevant updates from the Court. The Study Group will provide the forum for ongoing dialogue between States Parties and the Court, as appropriate.

IV. Recommendations

30. The Study Group through the Bureau submits the following recommendations for the consideration of the Assembly:

A. For inclusion in the omnibus resolution:

The Assembly of States Parties,

1. *Welcomes* the 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;
2. *Takes note* of the Bureau's report on the Study Group on Governance;⁵
3. *Extends* for another year the mandate of the Study Group, established in resolution ICC-ASP/9/Res.2 and extended in resolutions ICC-ASP/10/Res.5, ICC-ASP/11/Res.8, ICC-ASP/12/Res.8, ICC-ASP/13/Res.5, ICC-ASP/14/Res.4, ICC-ASP/15/Res.5 and ICC-ASP/16/Res.6;
4. *Encourages* the Court to continue its work in 2019 on developing common practice, in particular on victim participation;
5. *Also welcomes* the dialogue between States Parties, the Court, members of civil society and practitioners at the plenary discussion on victim participation held during the seventeenth session of the Assembly, which focused on achievements and challenges regarding victim participation and representation twenty years after the adoption of the Rome Statute;
6. *Calls upon* States Parties to continue considering amendment proposals by the Working Group on Lessons Learnt;
7. *Welcomes* the continued work of the Court on the topic of performance indicators as an important tool to fulfill its functions;
8. *Expresses* the Assembly's wish to continue an active dialogue with the Court on that topic, bearing in mind that the Court needs to implement its intended approach in order to produce results which can form the basis of further dialogue;

B. For inclusion in the mandates annexed to the omnibus resolution:

With regard to the Study Group on Governance,

- (a) *invites* the Court to further engage in a structured dialogue with States Parties 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;
- (b) *requests* the Study Group to report back to its eighteenth session;
- (c) *requests* the Study Group to follow up and, where appropriate, continue the dialogue on the evolution of indicators;
- (d) *encourages* the Court to continue to share with the Study Group any update on the development of qualitative and quantitative indicators;
- (e) *invites* the Court to monitor the use of intermediaries through its Working Group on Intermediaries with a view to safeguarding the integrity of the judicial process and the rights of the accused; and
- (f) *requests* the Court to inform States Parties, when appropriate, about important developments pertaining to the use of intermediaries, which might require the Court to amend the Guidelines;

⁵ ICC-ASP/17/36.

Annex

Report of the Study Group on Governance Cluster I in relation to the amendment to rule 26 of the Rules of Procedure and Evidence

I. Introduction

1. The specific mandate for the Study Group on Governance Cluster I in 2018 is derived from annex I of the omnibus resolution. The following paragraph is relevant for the purposes of this Report:

Para 9(b), which states, “*requests the Study Group on Governance to consider the amendments to rule 26 of the Rules of Procedure and Evidence proposed by the Head of the IOM, in consultation with the Court, and to convey its recommendations to the Working Group on Amendments to enable the latter to make a recommendation thereon to the seventeenth session of the Assembly;*”.

2. The Independent Oversight Mechanism’s (IOM) investigatory mandate was approved by the Assembly at its twelfth session.¹ In his Annual Report to the Bureau dated 17 October 2017, the former Head of the IOM, Mr. Ian Fuller, pointed out that the IOM mandate with regard to the receipt and investigation of claims of misconduct against judges, the Prosecutor, a Deputy Prosecutor, the Registrar and a Deputy Registrar (“elected officials”) did not fully accord with the procedures set out at rule 26 of the Rules of Procedure and Evidence (RPE) of the Court. He added that an interim set of procedures for the administration of such cases had been temporarily put in place by the IOM; however, it was necessary to seek a more permanent solution by aligning the RPE with the IOM’s mandate.²

II. IOM Mandate

3. As noted below, the IOM mandate allows for it to receive and investigate claims of misconduct made against elected officials, including judges. Furthermore, the IOM mandate requires that all complaints made against elected officials should be passed to the IOM for consideration, and that the IOM has discretionary authority over whether or not to pursue such claims to investigation:

“The IOM may receive and investigate reports of misconduct or serious misconduct, including possible unlawful acts by a judge, the Prosecutor, a Deputy Prosecutor, the Registrar and the Deputy Registrar (hereinafter “elected officials”),...”. (ICC-ASP/12/Res.6, annex paragraph 28).

“All reports of misconduct or serious misconduct, including possible unlawful acts, made against an elected official...shall, if received by the Court, be submitted to the IOM.” (ICC-ASP/12/Res.6, annex paragraph 33).

“The IOM shall duly consider all reported misconduct claims submitted to it, however, the Mechanism retains discretionary authority to decide which matters to investigate. Those matters which the IOM does not intend to investigate will be referred to the relevant entity for their appropriate action.” (ICC-ASP/12/Res.6, annex footnote 8).³

¹ *Official Records ... Twelfth session ... 2013* (ICC-ASP/12/20), vol. I, part III, resolution ICC-ASP/12/Res.6.

² See Annual report of the Head of the Independent Oversight Mechanism, (ICC-ASP/16/8), annex I, paragraphs 1 and 2.

³ *Idem*, paragraph 4.

III. Rule 26

4. Articles 46 and 47 of the Rome Statute concern the removal from office of a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar, as well as disciplinary measures against such persons. Rules 24 and 25 of the RPE provide a definition of serious misconduct and misconduct for the purposes of articles 46 and 47. Rule 26 of the RPE requires that all complaints made against an elected official should be passed to the Presidency, which shall be assisted by “one or more judges”. Regulations 119 and 120 of the Regulations of the Court outline the detailed procedures to be followed by the Presidency upon receipt of a complaint.⁴

5. Rule 26 currently states that:

“For the purposes of article 46...and article 47, any complaint concerning any conduct defined under rules 24 and 25 shall include the grounds on which it is based, the identity of the complainant and, if available, any relevant evidence. The complaint shall remain confidential.” (Rule 26.1, RPE).

“All complaints shall be transmitted to the Presidency, which may also initiate proceedings on its own motion, and which shall, pursuant to the Regulations, set aside anonymous or manifestly unfounded complaints and transmit the other complaints to the competent organ. The Presidency shall be assisted in this task by one or more judges, appointed on the basis of automatic rotation, in accordance with the Regulations.” (Rule 26.2, RPE).

6. In order to make rule 26 and the IOM mandate compatible, the former Head of the IOM informally suggested the following amendment to the said rule:

“Proposed revised rule 26

Receipt and admissibility of complaints

1. For the purposes of article 46, paragraph 1, and article 47, any complaint concerning any conduct defined under rules 24 and 25 shall include the grounds on which it is based, the identity of the complainant and, if available, any relevant evidence. The complaint shall remain confidential.

2. All complaints shall be sent to the Independent Oversight mechanism, with a copy to the Presidency.

3. The Independent Oversight Mechanism shall set aside complaints which are anonymous or clearly vexatious. The Independent Oversight Mechanism shall investigate all complaints not so set aside. A report of each such investigation, together with all evidence located in the course thereof, shall be transmitted to the Presidency.

4. Upon receipt of an investigation report referred to in sub-rule (3), the Presidency shall, in accordance with the Regulations, appoint one or more judges, on the basis of automatic rotation, to consider the investigation report referred to in sub-rule (3) and transmit to the Presidency a recommendation as to whether the complaint should be set aside as manifestly unfounded.

5. The Presidency shall then determine whether to set aside the complaint as manifestly unfounded. All complaints not so set aside shall be transmitted by the Presidency to the competent organ, as set out in article 46, paragraphs 2 and 3 and rules 29 and 30.⁵”

IV. Informal consultations

7. The SGG met in Cluster I on five occasions for informal consultations to consider whether States Parties should amend rule 26. The consultations took place on 19 April, 9 May, 14 June, 5 July and 18 July. At these consultations States Parties had the opportunity

⁴ Idem, paragraph 5.

⁵ Idem, appendix I.

to express their views on proposed amendment. States Parties were also invited to provide written comments to the co-focal points of Cluster I. The Acting Chef de Cabinet of the Presidency, Mr. Hiram Abtahi, was invited to attend the consultations to provide the legal background and to answer questions from States. Likewise, the acting Head of the IOM, Ms. Judit Jankovic, was also invited to participate in the discussions. Observer States and other observers were also invited to the informal consultations.

8. The co-focal points noted that the amendment had been suggested for the purpose of alignment of the RPE with the IOM mandate. Previously, complaints against elected officials were transmitted to the Presidency pursuant to rule 26 of the Rules of Procedure and Evidence, whereas after the adoption of the IOM mandate at the twelfth session of the Assembly, the complaints were sent to the IOM and copied to the Presidency. In accordance with article 46 of the Rome Statute, decisions on removal from office were to be taken by the Assembly or by the judges themselves, depending on the elected official in question.

9. Mr. Hiram Abtahi, outlined the existing procedures for dealing with complaints against elected officials and the role of the Independent Oversight Mechanism (IOM) since the adoption of its Operational Mandate. He explained the development of the Regulations of the Court in relation to the rules on “Removal from office and disciplinary measures”⁶ of the Rules of Procedure and Evidence, as well as the modalities of their implementation.

10. He noted that the Rome Statute dealt with two types of misconduct, i.e. misconduct of a serious nature, which could lead to removal from office,⁷ and misconduct of a less serious nature, which could result in disciplinary measures against elected officials.⁸ Articles 46 and 47 stated that the procedure would be regulated by the Rules of Procedure and Evidence. Further, rule 26 described the procedure for receipt of complaints for the purpose of article 46, paragraph 1, and article 47, i.e. that all such complaints be transmitted to the Presidency, which shall, pursuant to the Regulations of the Court and with the assistance of one or more judges, set aside manifestly unfounded complaints and transmit the other complaints to the competent organ.

11. Regarding any proposed amendment to rule 26, Mr. Abtahi noted that the Assembly, at its twelfth session, had given the mandate to the IOM to carry out investigations into staff as well as into elected officials, while the Rules of Procedure, adopted in 2002, prior to that session, had not foreseen a role for an IOM in the disciplinary procedures relating to allegations of misconduct by elected officials. Since the establishment of the IOM, the practice had developed whereby the Presidency, upon receipt of complaints, would send those complaints to the IOM, which reported the result of its investigation to the Presidency, which would then send that report to a panel of three judges.⁹ The former Head of the IOM had proposed an amendment that reflected the practice that had developed since the twelfth session and which was intended to fill the gap in the Rules of Procedure and Evidence.

12. The majority of States Parties who spoke during the consultations expressed their support for the need of an amendment, even though there were different views regarding the language. It was stated that complaints against elected officials had to be dealt with fairly and comprehensively, and the need for consistency between the Rules and the IOM mandate was noted. A number of delegations proposed changes to the amendments suggested by Mr. Fuller. Some delegations also noted the need to avoid any potential conflicts of interest between the roles of those who judge and those who are to be judged, and the necessity of an independent and impartial investigation.

13. In advance of the 14 June meeting, the co-focal points proposed two broad options in terms of language of the amendment considering comments made by delegations:

(i) Option 1 was based on the wording put forward by the former IOM Head, Mr Ian Fuller, but took into account of comments made by a number of delegations. This

⁶ Rules 23-32.

⁷ Article 46 (Removal from office).

⁸ Article 47 (Disciplinary measures).

⁹ Regulation 120 of the Regulations of the Court (Procedure under rule 26, sub-rule 2) states: “The Presidency shall be assisted by three judges (...) in order to determine whether a complaint is anonymous or manifestly unfounded.

option retained a role for the Presidency and judges in the investigation, but ensured that the IOM's mandate was reflected.

(ii) Option 2 removed the role for the Presidency and judges at the investigation stage and provided for the IOM alone to conduct the investigation, taking account of comments made by some delegations.

14. At the meeting on 14 June, all delegations that intervened expressed their preference for Option 2, with many noting the importance of clarity on the leadership of investigations. A point was made that the role of the Presidency originally envisaged in rule 26 was redundant now that an independent mechanism had been established. Therefore, further consultations were held focusing on a drafting exercise related to this option.

15. The issue of allowing anonymous complaints under certain circumstances was discussed at large. It was accepted that anonymous complaints should not be automatically set aside by the IOM. Some delegations pointed out that although anonymous complaints should not be the norm, there were occasions where complainants may justifiably not wish to provide their identity, for example, in cases of whistle-blowing. It was agreed that as a general rule the identity of the complainant should be included, but anonymous complaints should not be automatically dismissed, and exceptionally the IOM could investigate an anonymous complaint. Delegations reached a compromise solution on the wording of paragraph 1 of the amendment, to provide for consistency with the deletion of "anonymous" from paragraph 3, which had been a concern to some.

16. As to the criteria to be applied to setting aside complaints, some delegations could not support Mr Fuller's suggestion to allow for the setting aside of "clearly vexatious" complaints. Although the concept was well-known in common law jurisdictions, its meaning and scope was not clear to all delegations.

17. Delegations agreed on keeping "manifestly unfounded" as the main criteria to set aside complaints. Although a few delegations were concerned that it could be interpreted broadly.

18. The issue of confidentiality was discussed in detail. While accepting that the complaints themselves should remain confidential, a number of delegations noted the distinction between the complaint per se and the results of an investigation, and were keen to ensure effective reporting to the Assembly of States Parties, and other relevant organs. Some delegations highlighted that the IOM was a body of the ASP; and that reporting could be conducted in a way which retained the confidentiality of the complaint itself, but allowed the ASP to be kept informed on the IOM's work as part of its oversight and governance role.

19. A point was made to include language that obliged the IOM to produce a report in which it explains the reasons for having set aside complaints in order to provide transparency. Delegations shared the view that such a report should be sent to the ASP and the Presidency of the Court.

20. In the same vein, delegations widely supported a requirement that the IOM transmit the results of any investigation pursued, together with its recommendations, to the Assembly of States Parties and any other competent organ(s) as set out in articles 46 and 47 of the Statute, and rules 29 and 30. The express inclusion of the ASP was to ensure that the ASP was kept fully abreast of the outcomes of all investigations.

21. After several rounds of negotiations, consensus was reached on the following text:

Amendment to rule 26

"Receipt and admissibility of complaints"

1. For the purposes of article 46, paragraph 1, and article 47 of the Statute, any complaint concerning any conduct defined under rules 24 and 25 shall include the grounds on which it is based and, if available, any relevant evidence, and may also include the identity of the complainant. The complaint shall remain confidential.

2. All complaints shall be transmitted to the Independent Oversight Mechanism which may also initiate investigations on its own motion. Any person submitting

such complaints may also elect to submit a copy to the Presidency of the Court for information purposes only.

3. The Independent Oversight Mechanism shall assess complaints and set aside those complaints which are manifestly unfounded. Where a complaint is set aside as manifestly unfounded, the Independent Oversight Mechanism shall provide its reasons in a report which shall be transmitted to the Assembly of States Parties and the Presidency.

4. All other complaints shall be investigated by the Independent Oversight Mechanism. The Independent Oversight Mechanism shall transmit the results of any investigation, together with its recommendations, to the Assembly of States Parties and any other competent organ(s) as set out in articles 46 and 47 of the Statute, and rules 29 and 30.”

22. In commenting on the agreed text, Mr. Abtahi indicated that the current version had no evident conflict with higher norms of the Rome Statute system, and that the amendments could go ahead as they stood without any impact on the Rome Statute. The relevant Regulations of the Court would need to be amended or deleted, but this would follow on from the amendment of the higher norm, the RPE. The Acting Head of the IOM also indicated that she was content with the approved amended text, although she noted that the IOM mandate would need to be reviewed to ‘operationalize’ the amendment.

23. The co-focal points emphasized that the purpose of rule 26 is simply to set out the procedure for the receipt and admissibility of complaints. The detail of how investigations are to be conducted and the detail of the practical application of rule 26 should be dealt with in the IOM’s mandate and the operational manual of the IOM, and in a way consistent with the over-arching rule 26.

24. If adopted the process under the proposed amendment to rule 26 could be put into operation by the IOM forthwith. Although some adjustments and modifications of the IOM’s mandate and the operational manual should be considered to provide for the practical application of the amended rule 26 (if adopted). These include

(a) Confidentiality and reporting – the need to strike a balance between transparency and confidentiality obligations; the IOM’s disclosure policy

(b) Application of the “manifestly unfounded” criterion – whether any further guidance should be provided;

(c) Handling of anonymous complaints

25. In order to work on those adjustments and modifications, the co-focal points have held consultations with the facilitation on the review of the work and the operational mandate of the IOM.

V. Conclusion

26. In accordance with its mandate on this matter, the co-focal points hereby convey the proposed amendment to rule 26¹⁰ to the Working Group on Amendments, which has been agreed by consensus by the SGG. The co-focal points recommend that the WGA consider the proposed amendment with a view to making a recommendation for adoption of the amendment to the seventeenth session of the Assembly of States Parties.

27. With the aim to improving the working methods and efficiency of the Assembly and its subsidiary bodies, and taking account of the extensive and inclusive negotiations in The Hague and the consensus reached, delegations strongly recommend that the WGA avoid reopening the agreed language unless it is absolutely necessary.

¹⁰ See appendix I to this report.

Appendix I

Rule 26 **Receipt and admissibility of complaints**

1. For the purposes of article 46, paragraph 1, and article 47 of the Statute, any complaint concerning any conduct defined under rules 24 and 25 shall include the grounds on which it is based and, if available, any relevant evidence, and may also include the identity of the complainant. The complaint shall remain confidential.
2. All complaints shall be transmitted to the Independent Oversight Mechanism which may also initiate investigations on its own motion. Any person submitting such complaints may also elect to submit a copy to the Presidency of the Court for information purposes only.
3. The Independent Oversight Mechanism shall assess complaints and set aside those complaints which are manifestly unfounded. Where a complaint is set aside as manifestly unfounded, the Independent Oversight Mechanism shall provide its reasons in a report which shall be transmitted to the Assembly of States Parties and the Presidency.
4. All other complaints shall be investigated by the Independent Oversight Mechanism. The Independent Oversight Mechanism shall transmit the results of any investigation, together with its recommendations, to the Assembly of States Parties and any other competent organ(s) as set out in articles 46 and 47 of the Statute, and rules 29 and 30.

Appendix II

See ICC-ASP/16/8, annex I.
