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Report of the Bureau on the Study Group on Governance

Contents

	<i>Page</i>
I. Introduction.....	2
II. Consideration of issues.....	2
A. Election of Registrar.....	2
B. Performance indicators.....	5
C. Procedure for amending Rules of Procedure and Evidence.....	7
D. Management of transitions in the judiciary	9
III. The way forward	10
IV. Recommendations.....	11

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 to eighteenth sessions, the dialogue between the organs of the Court and States Parties was continued from 2012 to 2020.

3. The eighteenth session of the Assembly took note of the report of the Bureau on the Study Group² and the recommendations contained therein, and extended the mandate of the Study Group for a further year³

4. On 24 January 2020, the Bureau appointed Ambassador María Teresa Infante Caffi (Chile) as Chairperson of the Study Group and Mr. Jan Christoph Nemitz (Germany), Ms. Edith Ngungu (Kenya) and Ms. Laura Victoria Sanchez (Colombia) as the co-focal points. On 25 February 2020, the Bureau appointed Ambassador Heinz Walker-Nederkoorn (Switzerland) as Co-Chairperson of the Study Group. On 24 September 2020, the Study Group took note that Ambassador Infante Caffi would complete her term as Co-Chairperson by the end of September 2020.

5. The Study Group held four regular meetings, on 5 March, 14 May, 10 July and on 24 September 2020, as well as informal meetings between the co-Chairs and co-focal points, States Parties, representatives of the organs of the Court and representatives of the Independent Experts appointed to Cluster 1 (Governance)⁴.

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. Consideration of issues

7. The program of work for the Study Group focused on four main areas: (a) opening of a discussion about the framework and key elements of the election of the Registrar; (b) continuation of the discussion on performance indicators and, to the extent possible, an update on the development of qualitative and quantitative indicators; (c) consideration of the procedure for amending Rules of Procedure and Evidence; and (d) introduction of the report on management of transitions in the judiciary.

A. Election of Registrar

8. At the meeting of the SGG on 24 September 2020, the Co-Chairs recalled that the election of the Registrar was conducted according to article 43 of the Rome Statute and rule 12 of the Rules of Procedure and Evidence. They noted that the “Matrix over strengthening the Court and the Rome Statute system” (Matrix),⁵ dated 27 November 2019, referred to the “Election of Registrar” as one of the areas for consideration of the judiciary, the Bureau and

¹ ICC-ASP/9/Res.2.

² ICC-ASP/18/27.

³ ICC-ASP/18/Res.6, para.88.

⁴ ICC-ASP/18/Res.7, annex II.

⁵ https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-review-Matrix-v2-27Nov19-1740.pdf

the SGG under the heading “Governance, management and leadership”. Also, resolution ICC-ASP/18/Res.7⁶ in the “List of legal and technical issues to be covered in each cluster” referred to this issue,⁷ and the omnibus resolution gave a mandate to the Study Group on this issue.⁸

1. Briefing by the Secretariat

9. The Secretariat of the Assembly, presented an overview of the evolution of the recommendations on the election of the Registrar that the Assembly had made to the judges for the second, third and fourth elections of the Registrar. The Study Group had before it an informal note prepared by the Secretariat titled “Election of the Registrar of the International Criminal Court” which presented a historical overview of the practice of States Parties in that regard.

10. The representative of the Secretariat informed that the recommendations tended to replicate the provisions of the Rome Statute and the Rules of Procedure and Evidence and included, for example, a recommendation on the language proficiency of candidates and their ability to liaise effectively and regularly with the Assembly, its subsidiary bodies, other organs of the Court and relevant stakeholders; it had also been suggested that the judges focus on candidates of States Parties. In addition, there had been a change regarding the preparation of the vacancy announcement, i.e. in 2012, it was drafted with the input of States Parties, while in 2017 it was prepared by the Presidency of the Court. The number of candidates selected by the Presidency for the short list had increased over the years.

11. Further, as regards the geographical representation of candidates on the shortlists, the desired representation of all regions had not been reflected; in the course of 13 years some regions had never had a single candidate on the short list, and other regions had a few occasional candidates. Dual nationality per se was not a major concern but could be relevant where the second or third nationality was that of a non-State Party, a situation which had arisen with some short-listed candidates.

12. The Secretariat further informed the SGG about the possibility of an incumbent Registrar running for re-election or of a staff member occupying a senior position who could apply for the position, which raised possible concerns about the use of the exposure given by the position and the resources of the Court to advance the individual’s (re-)election objectives.

13. As regards the timelines, States Parties usually began their consideration of the issue in the second semester of the year. The Secretariat suggested that in future, States Parties might wish to consider specific recommendations and views on each individual candidate (strengths/weaknesses etc.). The forum for such consideration would need to be decided. In this connection, the Secretariat recalled a proposal that the Advisory Committee on Nominations of Judges could be asked to assess the candidates for election as the Registrar, which would require an expansion of the Committee’s mandate.

14. Furthermore, the Secretariat noted that there was very limited information regarding how the judges dealt with the recommendations of the Assembly and how they actually proceeded with the election of the Registrar. This was in sharp contrast to the election of judges by the Assembly, where a detailed breakdown of the outcome of each round of balloting was posted online. The representative of the Secretariat posited that if, there was that level of clarity for the election of judges, the Court could consider something similar for the election of the Registrar.

15. In connection with the lacuna on norms for the election to be applied by the judges, reference was made, for example, to a 2017 discussion as to whether the six newly-elected

⁶ Review of the International Criminal Court and the Rome Statute system.

⁷ Ibid., annex I, appendix I, para. 5: “The experts shall be aware that the States Parties are intending to address, where appropriate through dialogue with the Court, and in accordance with the mandates of the relevant facilitations and working groups, issues relating to the election of Judges (1.1.), Prosecutor (1.2.), and Registrar (1.4.)...”

⁸ ICC-ASP/18/Res.6, annex I, para. 9 (f): “invites the Study Group to consider the following issues listed in the Matrix, mindful of work of the Group of Independent Experts, and to report thereon to the nineteenth session of the Assembly:

1. 1.4 Election of Registrar; (...)”

judges should participate in the election of the Registrar in the first trimester of 2018. There was no normative clarity on this point and States Parties may wish to consider addressing that.

2. The ICC Presidency's experience of the election of the Registrar

16. The Chef de Cabinet of the Presidency described the process for the election of the Registrar from the perspective of the Presidency. The Presidency begins considering the issue in the year prior to the election and aims to send the list of names to the Assembly more than two months before the Assembly session. The Registrar is elected by secret ballot and is eligible for re-election once.⁹ He noted that lack of diversity in the geographical representation of candidates was a challenge and expressed the view that State Parties and the Court need to consider better ways of disseminating the vacancy announcement.

17. In commenting, some States Parties noted the importance of taking into account recommendations to be made by the Independent Experts on this topic.

18. In response to a query on the possibility of outsourcing the entire process to a recruitment agency, the Chef de Cabinet indicated that any discussion on outsourcing would need to be viewed against the backdrop of the Statute, which mandates the judges to elect the Registrar.

19. Regarding a suggestion that it might be useful to look into how the election of the Registrar was handled in other international organizations, he indicated that, in the ad hoc tribunals, the United Nations Secretary General appoints the Registrar in consultation with the tribunals' President, whereas at the ICC, the judges elect the Registrar. The processes are thus not comparable.

20. The Co-Chairs proposed that this item be kept on the agenda of the Study Group. Further discussions will include consideration of the final "Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System"¹⁰, dated 30 September 2020, which contains the following recommendations on the Election of the Registrar:

- a) "R76. The process of electing the Registrar should be more thorough. The ASP, in accordance with its responsibilities under the Three-Layered Governance Model, should carry out a selection process with the assistance of an expert committee that would vet candidates, perform background checks, carry out interviews, and present a shortlist to the States Parties. The ASP would then vote to confirm a shortlist of candidates before it is transmitted to the Judges for their decision. The same procedure would be followed in the case of a Deputy Registrar, if one is to be elected.
- b) R77. The Experts recommend making use of the possibility of instating a Deputy Registrar, to enable the Registrar to focus on administration of the ICC/IO (Layer 3). The role would coincide with the Chief of Judicial Services (D-2) position, which would make the decision practically cost-neutral. The Deputy Registrar should be elected in the same manner recommended for the Registrar, and if possible simultaneously. The ASP could consider having candidates apply jointly, as a pair, for the positions of Registrar and Deputy Registrar, and electing them as such, to promote gender and geographic diversity. A similar approach should be considered by the ASP for the joint election of the Prosecutor and Deputy Prosecutor.
- c) R78. In the long-term, States Parties are recommended to consider amending the provisions referring to the Registrar's term to limit it to a 7 – 9 years non-renewable mandate."

⁹ Article 43 (4) and (5).

¹⁰ https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf

B. Performance indicators

21. At the meeting of the SGG on 24 September 2020, the Co-Chairs recalled that on the 6 July 2019 meeting the Study Group had received presentations by representatives of the Presidency, the Office of the Prosecutor and the Registry on the development of the performance indicators for the respective organs of the Court.

22. The Co-Chairs recalled the mandate given to the Study Group by the Assembly at its eighteenth session¹¹, inviting the Study Group to consider performance indicators as listed in the Matrix, mindful of work of the Group of Independent Experts.

1. Report on performance indicators, presented by the Registry

23. A representative of the Registry briefed the Study Group on the report on performance indicators of the Registry. He indicated that the Registry spoke also on behalf of the Presidency regarding key performance indicators (KPIs) since the latter had delegated the coordination function to the Registry.

24. He recalled that for the first time, the Court had three Strategic Plans, those of the Court, of the Office of the Prosecutor and of the Registry, that were aligned with each other and that covered the same period (2019-2021). In the current Court Strategic Plan, the ten strategic goals had been grouped into three themes: judicial and prosecutorial performance; cooperation and complementarity; and organizational performance. The key performance indicators had been regrouped and linked to the new goals.

25. The Court's 2020 report on the strategic plan would address cooperation and complementarity, which had not been included in previous reports, as well as issues such as the timelines for judicial proceedings discussed by the judges in their October 2019 retreat. Further, the Court expected that the report of the Group of Independent Experts would contain recommendations on KPIs and, if endorsed by the Assembly, the Court would incorporate them into future reports, but not in the 2020 report as it would be premature to do so without the endorsement of the Assembly. In addition, the Court would address in greater detail the experience of their clients. While many KPIs were quantitative, the Court was also interested in feedback from stakeholders on qualitative indicators. As regards qualitative KPIs on outreach to victims, he noted that no further progress on those had been possible in 2020 due to the COVID-19 pandemic, but this area would continue to be included in the Registry's Strategic Plan. The KPIs would continue to include the evaluation of gender and geographical balance in the recruitment of staff and the report would include details of how the Court was addressing those indicators.

2. Update on performance indicators by the Office of the Prosecutor

26. A representative of the Office of the Prosecutor presented an update on the performance indicators of the Office of the Prosecutor. He showed a power point presentation titled "OTP Performance Indicators - Status & Way Forward"¹² which dealt with how the Office had been implementing its commitments regarding performance indicators PIs; how the PIs had been used by the OTP; and how the Office planned to move forward.

27. While the Court's report on KPIs had set a path for the indicators at the Court-wide level, the OTP Strategic Plan had formulated the roadmap for PIs at the OTP-level. The roadmap had as a goal continuous improvement, since the Office needed to adapt and improve as circumstances evolved. For most goals, the OTP had developed a number of indicators capturing key elements of the goals.

28. As regards reporting to its stakeholders, he noted that the report on the implementation of the previous 2016-2018 Strategic Plan was presented while the OTP was also implementing the current plan. Ideally, the report on the evaluation of the previous cycle should be completed before the new one is started to provide more information on the factors that affected the strategic choices of the new plan. However, there was no time gap between the end of the previous cycle and the start of the new plan, and the processes ran in parallel.

¹¹ ICC-ASP/18/Res.6.

¹² Circulated to States Parties and all stakeholders.

The key lessons learned are incorporated in the new plan before the evaluation report is released. In that context, he suggested the streamlining of requests for reports.

29. The OTP planned to further explore the results captured via the PIs to assess how the Office had made progress towards the goals, either yearly or end-cycle. The qualitative KPIs still required some work in order to have a meaningful and solid result.

30. Some States welcomed the more integrated approach to the Strategic Plans, as well as the Court's interest in including more qualitative indicators. They noted that qualitative indicators were important for creating the link to resources.

31. It was suggested that despite the fact that the success rate of many PIs depended on external factors, this should not discourage their assessment, and the Court should look at what could be done to mitigate those external factors.

32. Some States stressed the importance of the proper evaluation of staff performance, as well as of geographical and gender representation, and it was suggested that States Parties and the Court should continue to discuss these benchmarks.

33. In response to a question regarding management decisions on the allocation of resources, the representative of the OTP stated that for some PIs it was possible to look at specific situations, e.g. evidence reviews, investigation plan reviews, source assessment. These were not done on an OTP-wide basis but as part of team evaluations.

34. On the way forward, the OTP would finalize the development of indicators for all strategic goals in focus areas of the Strategic Plan and have a link to the specific PIs. The overall goal was to make a more complete connection between the OTP's Strategic Plan and to the Court-wide Strategic Plan, so that the justification of resources could be clearly linked to the Strategic Goals. In addition, the Court intended to consider recommendations to be made by the Independent Experts prior to elaborating the KPIs for the future.

35. The Co-Chairs proposed that this item be kept on the agenda of the Study Group. Further discussions will include considerations of the final "Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System", which contains the following recommendations on performance indicators:

- a) "R144. All Major Programmes should develop concrete and measurable KPIs, in relation to the strategic goals identified in the Court's or relevant organ's specific Strategic Plans, following the Registry model.
- b) R145. The Court should implement the External Auditor's recommendation as to means of employing KPIs in budget proposals and budget performance reports.
- c) R146. To assess the Court's efficiency, a report presenting raw data based on quantitative indicators should be compiled. The data should be presented in a coherent, consistent and reader-friendly manner. The document should be available to the oversight bodies and the States Parties. Data collection and presentation should be standardised, to enable comparison across several years. Review of KPIs based on lessons learnt should take into account this need for stability in data.
- d) R147. To enable comparison with other international organisations, including other international courts and tribunals, the Registrar should engage in dialogue with various such institutions and agree on the type of indicators that can be tracked and shared (e.g. with other international courts - number of days of Courtroom use; with other international organisations - staff engagement, sick leave).
- e) R148. Assessing the Court's impact should be delegated to external partners (civil society organisations, academia, international/regional organisations), and encompass quantitative and qualitative indicators. Such efforts could be funded through voluntary contributions."

C. Procedure for amending the Rules of Procedure and Evidence

36. At its 5 March 2020 meeting, the Co-Chairs noted that the issue of amendments to the Rules of Procedure and Evidence (“the Rules”) was a procedural question, but was also related to the assessment of the efficiency of the work of the Court. They recalled that the procedure for amendments to the Rules proposed by the Judges is set out in the “Roadmap on reviewing the criminal procedures of the International Criminal Court”.¹³

37. The Roadmap established how the Study Group coordinated its work with the Working Group on Amendments (WGA), and the SGG wished to continue this collaboration.

38. At the meeting, the Chef de Cabinet to the President presented the process of preparation and consideration of proposals for amendments to the Rules by the Court. He gave a historical overview and informed about the status of the proposed amendment to rule 140bis.

39. The Co-Chairs noted that the current system discouraged the Court from making amendment proposals. The Study Group therefore decided to focus on two areas: 1) the process of the Roadmap within the Court, the action States Parties took on the outcome of that process, and the coordination of the Study Group with the WGA; and 2) the principle of consensus. In commenting, some States agreed that this was an area where States Parties had not fulfilled their duties to ensure that the Rules remained up to date.

40. Some support was expressed for the Co-Chairs' suggestion of a pilot case for the amendment of a rule as a practical way to test the system. The Co-Chairs recognized the necessity to identify where the problems lay and to assess where States Parties stood regarding possible solutions. Some delegations noted the importance of the issue and agreed that it was necessary for the Assembly to act quickly in order to improve the efficiency and effectiveness of the Court.

41. As a result, on 9 April 2020, the Co-Chairs circulated a concept paper titled “How to Improve the Procedure for Amending the Rules of Procedure and Evidence” together with a questionnaire, to which 19 States responded.

42. The Co-Chairs had also reached out to SGG partners, and met with the President and the Registrar of the Court, as well as the Coordinator of the Hague Working Group, Ambassador Jens-Otto Horslund (Denmark), Coordinator of the New York Working Group, Ambassador Michal Mlynár (Slovakia), and the Chair of the Working Group on Amendments, Ambassador Juan Sandoval Meniolea (Mexico). They had also met with State representatives and representatives of the Group of Independent Experts.

43. At its 14 May 2020 meeting, the Co-Chairs recalled that the 9 April Concept paper and questionnaire dealt with the amendment of the procedure applied to the study of Rule 140bis (Temporary absence of a Judge - “Proposal Rule 140bis”), which had been considered by both the SGG and the WGA at the thirteenth session of the Assembly held in 2014.

44. After a presentation by the Chef de Cabinet, some States expressed support for the efforts of the Co-Chairs and focal points to find ways to improve the procedure for amendments to the Rules, including the pilot project of rule 140bis.

45. Other States expressed reservations about this pilot project and were not ready to reopen the discussion on this proposed amendment. Although some States were open to new ideas on how to move forward and unlock the deadlock, their view was that the SGG should focus first on how to improve the procedure for amendments, rather than focusing on amending the rule itself.

46. A view was expressed that this exercise should be undertaken with caution since, if the discussion was to be revived, it should be held in the WGA as the proposal was already before it.

47. Other States shared the analysis of the Co-Chairs on the deadlock in the amendment procedure and noted that it was important to understand the reason for the deadlock. It was noted that the practice of consensus was not required; it had been interpreted as unanimity leading to the possibility of one delegation objecting where there was agreement on a

¹³ Report of the Bureau on Study Group on Governance, ICC-ASP/12/37, annex I.

proposal. Some States were open to considering improvements to the working methods. Some indicated a preference for maintaining the practice of consensus as far as possible.

48. As regards the relationship with the Independent Experts, it was posited that it was useful to interact with them to avoid any overlap before considering any amendments.

49. As regards the WGA, it was suggested that a discussion be held on whether it should be better placed in The Hague, since the discussion on amendments should remain as a whole, and not be divided according to amendments to the Rules or to the Rome Statute. If it were based in The Hague, there would be the added value of proximity to the Court. It was noted, however, that not all delegations were represented in The Hague.

50. The Chair of the WGA stated that it was necessary to consider how to break the deadlock, but that two factors were relevant: the high resource intensity regarding amendments, as well as the high threshold for adoption. It was necessary to use all possible tools to find a solution. The consensus approach was a goal but it should not be an obstacle to change. As regards the pilot project, the WGA was ready to analyze it, if asked by the SGG to do so.

51. The representative of the Coordinator of the New York Working Group noted on his behalf that the ability to update the Rules was an important matter because keeping procedures up-to-date ensured that the Court could fulfil its mandate in an effective and efficient manner. The initiative of the pilot project was therefore very timely and fit well into the review process.

52. On behalf of the Independent Experts, Lord Iain Bonomy noted that this issue was one that they felt required their attention, while the SGG should take the initiative. He noted that no Court could realistically withstand an obstruction that prevented it from expediting proceedings in the interest of victims and of fighting impunity. The Experts therefore thought that the issue carried a great degree of urgency.

53. The Co-Chairs noted that as regards the interface between the SGG and the WGA, the understanding was that SGG would focus on the procedural aspects. Ambassador Walker-Nederkoorn recalled that when the Rules were negotiated, delegates were under time pressure and their understanding was that the Rules would be amended in light of experience and practice.

54. On discussion of the substance of the amendment, it was the understanding that his was within the competence of the WGA.

55. As regards the issue of consensus, while the importance of consensus was widely known, States had agreed via article 51, paragraph 2, of the Statute that amendments would be adopted by a two-thirds majority of the Assembly. The Co-Chair noted that by their current practice, States Parties had neutralized this rule.

56. In its 10 July 2020 meeting, Ambassador Walker-Nederkoorn presented the draft interim report of the Study Group titled “A way forward to improve the procedure for amending Rules of Procedure and Evidence”, dated 24 June 2020.

57. The Co-Chairs had suggested a way to improve the procedure for amending the Rules, combining State practice regarding amendments and the procedure set out in article 51 of the Rome Statute. State Practice would include the roles of the SGG and the WGA, the finding of consensus within a reasonable time, and the adoption by a vote in the Assembly in the absence of consensus.

58. Some States Parties expressed appreciation for the draft interim report and shared the view of the overall description of the current situation described therein.

59. As regards consensus, some States thought that while it was ideal, it should not lead to inaction, and revamping the process could provide the impetus for consensus. Further, the procedures could be combined, with every effort to be made to reach consensus and a vote under article 51 of the Statute being the last resort.

60. The Co-Chairs noted that it was necessary to discuss the decision-making rule now because the practice of consensus had led to a complete standstill. The drafter of the Rules expected that they would be amended in light of experience and practice, as foreseen in article

51. Amendments to the Rules regularly occurred at other international criminal tribunals and at the national level.

61. In response to a query on who would decide that there was no consensus in the SGG, the Co-Chairs indicated that when the SGG Chairs had the impression that there was no possibility of support by a two-thirds majority, then they would not transmit the amendment to the WGA. The WGA would then assess the level of support and decide whether the amendments should be transmitted to the Assembly.

62. The Co-Chairs recalled that previous amendments had been proposed by the Court after lengthy internal consideration and some had not been adopted by the Assembly. Two groups, the SGG and the WGA, discussed the amendments and they note that the deadlock might be political.

63. The way forward they had proposed was procedural, i.e. finding a combination between consensus and the two-thirds majority indicated in article 51 of the Rome Statute. When they had studied all comments and remarks received, they would decide on the next steps. The SGG would aim to stay within the Roadmap as much as possible, and would revise the draft interim report in light of the comments received.

64. The Co-Chairs proposed that this item be kept on the agenda of the Study Group. Further discussions will include considerations of the final “Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System”, which contains the following recommendations on the Procedure for amending the Rules of Procedure and Evidence:

- a) “R381. Article 51(2) of the Rome Statute should be amended to provide that amendments to the RPE may be proposed by a Judge, the Prosecutor, the Defence Office or any State Party, and that any amendment will enter into force if agreed to by an absolute majority of the Judges at a plenary meeting convened with notice of the proposal. It would have immediate effect. Until such an amendment enters into force, the ASP should vote on RPE amendments by two thirds majority, rather than consensus, in line with the provisions of Article 51(2).
- b) R382. Any proposal should be intimated to the Prosecutor and the Registrar a reasonable time before the plenary meeting for their comments.
- c) R383. In adopting any proposal, the Judges should be required to ensure, and to certify to that effect, that the amendment is not inconsistent with the provisions of the Rome Statute and the right of accused persons appearing before the Court to a fair and expeditious trial.
- d) R384. On adoption the amendment should be circulated to States Parties for comment and would remain in force in the absence of objection from a majority of States Parties within six months.”

D. Management of transitions in the judiciary

65. At the meeting on 5 March 2020, the Co-Chairs recalled that topic 2.9 of the Matrix referred to discussions on management of transitions in the judiciary for consideration by the SGG and the WGA. The possible action mentioned in the Matrix was “Develop and implement clear and firm procedures for managing transitions in the judiciary, such as use of alternate judges, handover strategies etc.”

66. The Chef de Cabinet of the Presidency, introduced the ‘Report of the Judges of the Court on Managing Transitions in the Judiciary’, dated 30 January 2020. The report was the outcome of the discussions at the judges’ retreat in October 2019. He recalled that every three years the term of a third of the judges comes to an end and that in previous years the service of some of the judges had to be extended until the completion of a trial. He noted that these extensions had budgetary ramifications and implications on the use of new elected judges.

67. The Chef de Cabinet explained that three provisions affected transitions in the judiciary, i.e., (1) article 36 (10) of the Rome Statute which makes it mandatory for a judge in a hearing to continue in office till the end of the hearing of a case, (2) article 39 (4) which

prohibits a judge who has participated in the pre-trial phase of a case from sitting on the trial chamber hearing the same case and (3) article 74 (1) which requires the physical presence of all judges at all stages of the trial.

68. He informed the SGG that various Presidencies had taken measures to address the management of transitions by (1) not applying article 36(10) of the Rome Statute at the pre-trial level or extending the mandate of a judge for reparation proceedings, (2) not assigning a judge whose remaining mandate is short to a trial chamber, (3) agreement to a request by a judge who did not wish to serve on a full time basis and (4) introduction of time limits for rendering decisions and judgements in pre-trial, trial and appeal proceedings. He explained that the option of using alternate judges had not been used, since an alternate judge cannot participate in deliberations and it was not considered an efficient use of resources in a court with few judges.

69. He noted that the Rome Statute system does not have similar measures to address challenges in the management of transitions as provided in the International Criminal Tribunal for the former Yugoslavia (ICTY) such as appointment of *ad litem* judges (article 13 *ter* (2) of the ICTY Statute) and appointment of substitute judges (rule 15*bis* (C) and (D) of the ICTY Rules of Procedure and Evidence).

70. In commenting, some States expressed the view that the legal framework binds State Parties and the Court and the report had set out some potential starting points for addressing the question of judges' tenure, which could be further discussed in the Study Group. Some States agreed that the issue should be dealt with from the procedural and the substantive perspectives, and that States should look at all options including amending the Rome Statute, if necessary, to improve the efficiency of the Court. It was posited that States should continue exploring options regarding transitions of the judiciary, as this was linked to the topic of the efficiency of the judiciary.

71. The Co-Chairs noted the relevance of the Review process and that the SGG's work should proceed with this in mind. While the report on this subject was not conclusive, it provided important elements for discussion and collaboration. On the way forward, the SGG should try to explore all avenues, looking at subject in a way that would be conducive to a positive outcome and to recommendations that would have the political support of States Parties.

72. The Co-Chairs proposed that this item be kept on the agenda of the Study Group. Further discussions will include considerations of the final "Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System", which contains the following recommendations on the management of transitions in the judiciary:

- a) "R214. The Rome Statute should be amended to provide for the assignment of a substitute Judge to enable a trial to continue following the substitute Judge certifying that they have familiarized themselves with the record of the proceedings.
- b) R215. When the workload of the Court develops to the point where it no longer allows for a substitute Judge to be assigned from the 18 regularly elected, the ASP should consider applying Article 36(2) and electing one or more Judges for such purpose."

III. The way forward

73. As regards the way forward for the Study Group, the Chairperson and co-focal points noted that the final report of the Independent Expert Review contained recommendations, relating to the work of the Study Group and covering a broad range of issues including unified governance, election of the Registrar and Deputy Registrar, performance indicators, efficiency of the judicial process, management of transitions in the judiciary and development of the Rules of Procedure and Evidence.

74. The Chairperson and co-focal points noted that the establishment of a facilitation mechanism and its subsequent careful examination and implementation of these recommendations will likely take up a considerable amount of time, during which the Study

Group should be enabled to continue its work, further building up on the progress already made.

75. Therefore, the Chairperson and co-focal points propose that the Study Group continue to consider the issues presented in this report, mindful of the recommendations made by the Independent Experts and in close cooperation with the Court and other subsidiary bodies and facilitations established by the Assembly in order to avoid duplication.

IV. Recommendations

76. 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 Governance¹⁴ covering the considerations of the following issues: Election of the Registrar; Performance Indicators; Procedure for amending the Rules of Procedure and Evidence; and Management of transitions in the judiciary.
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, ICC-ASP/16/Res.6, ICC-ASP/17/Res.5 and ICC-ASP/18/Res.6;
4. *Welcomes* the continued work of the Court on the topic of performance indicators as an important tool to fulfil its functions;
5. *Encourages* the Court to continue its work in 2021 on developing common practice, in particular on performance indicators;
6. *Takes note* of the "Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report", dated 30 September 2020, prepared by the Independent Experts, and *notes* that the Study Group on Governance will consider Recommendations falling within its ambit, including with respect to the procedure of amending the Rules of Procedure and Evidence; performance indicators; management of transitions in the judiciary and election of the Registrar.

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) *encourages* the Court to continue to share with the Study Group any update on the development of qualitative and quantitative indicators;
- (c) *Acknowledges* that the importance of avoiding duplication and *invites* the Study Group to closely cooperate with the Court, subsidiary bodies and other facilitations established by the Assembly on the examination and implementation of the Independent Expert's recommendations that address governance issues;

¹⁴ ICC-ASP/19/21.

(d) *requests* the Study Group on Governance to consider the following issues listed in the Matrix, mindful of the relevant recommendations made by the Independent Experts, and to report thereon to the twentieth session of the Assembly:

- i) 1.4 Election of Registrar;
 - ii) 1.8. Performance indicators;
 - iii) 1.13. Procedure for amending Rules of Procedure and Evidence; and
 - iv) 2.9. Management of transitions in the judiciary
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