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Study Group on Governance

Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties

I. Introduction

1. The present report is submitted by the Working Group on Lessons Learnt ("WGLL") pursuant to the Roadmap on Reviewing the Criminal Procedures of the International Criminal Court ("Roadmap"), endorsed by the Assembly of States Parties ("ASP") in November 2012.[1] The WGLL was established in accordance with the Roadmap to consider recommendations on proposals to amend the Rules of Procedure and Evidence ("Rules"). The Roadmap provides that the WGLL is to submit recommendations on proposals to amend the Rules that receive the support of at least five judges both to the Study Group on Governance ("the Study Group")[2] and to the Advisory Committee on Legal Texts ("ACLT").[3]

2. The Court submitted its First report on lessons learnt ("First Report") to the Study Group in October 2012. The First Report outlined the scope of the work of the WGLL, as determined by the judges of the Court following consultations in August 2012 with the Office of the Prosecutor, the Registry, and counsel.[4] The annex to the First Report lists and briefly describes nine clusters and 24 sub-clusters that the Court identified as requiring discussion, with a view to expediting proceedings and enhancing their quality. The nine clusters identified were: Pre-trial; Pre-trial and trial relationship and common issues; Trial; Victims participation and reparations; Appeals; Interim release; Seat of the Court; Language Issues; and Organizational Matters. The identified clusters were designed to address multiple aspects of the Court's procedures.

3. After the ASP endorsed the Roadmap in November 2012, the WGLL met to review the nine clusters. The WGLL decided, on the basis of the judicial experience of the Court at that stage, to place its main focus on three of the identified clusters, namely "Pre-trial", "Pre-trial and trial relationship and common issues" and "Seat of the Court".

4. This report will focus on the objectives that the WGLL has achieved during its first cycle of activities as well as looking forward to the WGLL's future work programme. The report

[1] *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Eleventh session, The Hague, 14-22 November 2012* (ICC-ASP/11/20), vol. I, part III, ICC-ASP/11/Res.8. The Roadmap was annexed to the Report of the Bureau on the Study Group on Governance, (ICC/ASP/11/31).
[2] Established via a resolution of the ASP in December 2010 (ICC-ASP/9/Res.2). In March 2012 it was decided to organize the work of the Study Group into two Clusters. These are Cluster I: Expediting the Criminal Process, and Cluster II: Enhancing the transparency and predictability of the budgetary process. (ICC/ASP/11/31), para. 5.
[3] Regulations of the Court, regulation 4.
[4] ICC-ASP/11/31/Add.1, annex.

covers the twelve-month period from the endorsement of the Roadmap in November 2012 to October 2013. In this period the WGLL has both worked to develop efficient working practices, and proposed to States Parties two consolidated recommendations on proposals to amend the Rules. As will be discussed below, work is also on-going under the "Pre-trial", "Pre-trial and trial relationship and common issues" and "Language Issues" clusters.

II. Development of working practices

5. In the first year of its work under the Roadmap, the WGLL has worked to establish consistent and coherent processes for the proposal of recommendations. In order to expedite the WGLL's working process, the judges of the WGLL decided, before submitting recommendations to the Study Group, to consult with major stakeholders to the Court proceedings with a view to submitting consolidated proposals to the Study Group. The ACLT was identified as the body gathering all the stakeholders to the Court proceedings, as it is comprised of three judges, elected from each division of the Court from amongst the members of that division, as well as one representative from the Office of the Prosecutor, one representative from the Registry, and one representative of counsel included in the list of counsel, in accordance with regulation 4 of the Regulations of the Court. As a result of this flexible approach, the WGLL is in a position to provide States with refined proposals that are the outcome of a series of inclusive consultations with the members of the ACLT. This process will facilitate the later consideration of these proposals by the Study Group and the ASP. The WGLL is of the view that this approach will be useful under the Roadmap in the long-term and could be considered in a future review of the Roadmap, as the Roadmap currently foresees that consultations of the ACLT and the Study Group will occur simultaneously.[5] It will be recalled that under the Roadmap, it is anticipated that amendments to the implementation of the Roadmap may be considered for any review process post 2013.[6]

6. Additionally, States Parties have invited the WGLL to propose recommendations at any time during its first year of operation, while the Roadmap foresees deadlines for the proposal of recommendations. This invitation has enabled the WGLL to expedite its work by proposing recommendations to States on a proactive basis, outside the official timeline of the Roadmap. In the twelve-month period under review, the proposed amendment to rule 68 was submitted to States on this basis.

7. These two flexible approaches, borne out in practice, have enabled the WGLL to reduce the time period between the endorsement of the Roadmap and the proposal of recommendations, and will ultimately facilitate the work of States. The WGLL is motivated to propose further recommendations in line with these two flexible practices. In particular, the WGLL would be open to an extension of the invitation to propose recommendations at any time. If this approach were in place during the second year of the WGLL's operations, it could promote an expedited consideration of recommendations by the Study Group and the ASP.

III. Recommendation on a proposal to amend rule 100 of the Rules of Procedure and Evidence (Place of the Proceedings)

8. In accordance with the Roadmap, the WGLL submitted a report to the Study Group on 27 March 2013, which provided a status update on the work of the WGLL and a recommendation on a proposal to amend rule 100 of the Rules under the "Seat of the Court" cluster. It will be recalled that this cluster addressed the need to simplify the procedure for designating an alternative seat for the proceedings of the Court. The recommendation was therefore proposed as a means to promote a fair and expeditious process for the designation of an alternate seat. It is anticipated that the greater efficiency of the recommended procedure would also entail some budgetary benefits.

[5] ICC-ASP/11/31, annex I, para. 6.
[6] *Ibid*., para. 17.

9. In April and May 2013, the Study Group held several meetings and exchanges with the Court. On the basis of these meetings and exchanges, the Court prepared a revised recommendation on 13 May 2013, which contained a revised version of the proposed amendment to rule 100. This report is included as **annex I.A**.[7]

10. Under the Roadmap, the Study Group was to consider the WGLL recommendations and transmit views or other recommendations to WGLL by the end of May 2013. However as a result of the earlier involvement of the ACLT in the preparation of the recommendations, as well as the subsequent exchanges between the Study Group and the Court in April and May 2013, the process was expedited. The Study Group endorsed the revised proposal regarding rule 100 on 30 May 2013, and a revised report was circulated on 31 May 2013. This report is included in **annex I.B**. The Court was informed of this development in a letter from the Chair of the Study Group, Ambassador Håkan Emsgård, which is included as **annex I.C** of this Report. On 5 June 2013 the revised proposal on rule 100 was endorsed by the Working Group on Amendments ("WGA") in New York. **annex I.D** of this Report provides an exchange of emails between Ambassador Paul Seger, the Chair of the WGA, and Vice-President Monageng, noting these developments. Subsequently, on 11 July 2013, the plenary of judges agreed, in accordance with article 51(2)(b) of the Statute, to propose to the 12th session of the Assembly of States Parties the amendment to rule 100. A letter from Vice-President Monageng informing Ambassador Emsgård of this development, dated 23 July 2013, is included as **annex I.E.** On 4 September 2013, President Song wrote to President Intelmann to request that the proposal to rule 100 of the Rules be placed on the agenda of the twelfth session of the Assembly of States Parties. This letter is included as **annex I.F.** As a result, the work of the WGLL on the cluster "Seat of the Court" has been completed.

IV. Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony)

11. On 1 August 2013, the WGLL submitted to the Study Group a recommendation on a proposal to amend rule 68 of the Rules under the "Pre-trial and trial relations and common issues" cluster. This recommendation was submitted in accordance with States Parties' invitation to the WGLL to propose recommendations at any time during its first year of operation. It will be recalled that the annex to the First Report identified the need for discussion on the possibility of giving the Trial Chamber more discretion to introduce transcripts or previously recorded reliable testimony in certain circumstances, in order to expedite proceedings. The proposed amendment to rule 68 accordingly proposed three additional instances in which prior recorded testimony may be introduced in the absence of the witness. The amendment was intended to reduce the length of Court proceedings and streamline evidence presentation, while also having due regard to the principles of fairness and the rights of the accused.

12. Discussions on a proposed amendment to rule 68 took place on a preliminary basis in May 2013. The WGLL's recommendation of 1 August 2013 formed the basis of discussions between the Study Group and the Court in September 2013. On the basis of fruitful discussions between the WGLL and the Study Group and further consultations with the ACLT, the Court prepared a revised proposal regarding rule 68, and a revised report was circulated on 27 September 2013. A copy of the revised report is included as **annex II.A**.

13. The Study Group endorsed the revised proposal on rule 68 on 27 September 2013. The Court was informed of this development by Ambassador Emsgård, in a letter dated 3 October 2013. This letter is included as **annex II.B**. Vice President Monageng responded to Ambassador Emsgård by letter on 4 October 2013, commending the collaborative approach between States Parties and the Court. This letter is included as **annex II.C**. On 11 October 2013, The WGA endorsed the revised proposal. The Court was informed of this development

[7] The WGLL notes that this report was dated 27 March 2013 by oversight, although it was circulated on 13 May 2013.

by Ambassador Seger in a letter dated 14 October 2013, which is included as **annex II.D.** On 18 October 2013, the judges agreed, in accordance with article 51(2)(b) of the Statute, to propose the rule 68 amendment to the 12th session of the Assembly of States Parties. A letter from Vice-President Monageng informing Ambassador Seger and Ambassador Emsgård of this development, dated 18 October 2013, is included as **annex II.E.** On 21 October 2013, President Song wrote to President Intelmann to request that the proposal to amend rule 68 be placed on the agenda of the twelfth session of the Assembly of States Parties. This letter is included as **annex II.F.** As a result, the Court's work under the sub-cluster "Recorded testimony" in the "Pre-trial and trial relationship and common issues" cluster has been completed.

V. Ongoing work of the Court

14. The WGLL has intensified efforts to further analyse and identify key issues under the "Pre-trial" cluster and the "Pre-trial and trial relationship and common issues" cluster. The WGLL is focusing in particular on issues of disclosure, additional evidence for trial, presentation of evidence, record of proceedings, and recorded testimony under the "Pre-trial and trial relationship and common issues" cluster.

15. As the WGLL continues its work under the "Pre-trial" and "Pre-trial and trial relationship and common issues" clusters, it emphasizes that these two clusters are particularly complex, and, as such, they will require further reflection in order to frame the most effective amendments possible. The WGLL notes in particular that the structure of the Court is derived from the various legal systems of the world, and that it will approach the amendment of the rules in this integrated system with the greatest of care.

16. The WGLL is firmly committed to making further concrete proposals to States Parties under these clusters, based on this rigorous analysis. The Court is committed to elaborating more efficient procedures and intends to work expeditiously towards this goal. In view of this determination, the WGLL has also expanded its focus to begin an examination of translation issues under the "Language Issues" cluster. This work stems from an understanding that translation of witness statements and other important documents has proved extremely time-consuming at all stages of proceedings and poses a significant challenge to the Court's resources. Recognizing the complexity of the "Pre-trial" cluster and the "Pre-trial and trial relationship and common issues" cluster, it was considered that commencing work on the discrete issue in the "Language Issues" cluster would be beneficial. Under this approach, the WGLL will be able to undertake and to finalize work on this discrete issue while simultaneously addressing the larger and more complex issues that arise in the "Pre-trial" and "Pre-trial and trial relationship and common issues" clusters.

Annex I.A

Study Group on Governance
Cluster I: Expediting the Criminal Process

Working Group on Lessons Learnt

Recommendation on a proposal to amend rule 100 of the Rules of Procedure and Evidence (Place of the Proceedings)

I. Introduction

1. The present report is submitted by the Working Group on Lessons Learnt ("WGLL"), which was established pursuant to the Roadmap on Reviewing the Criminal Procedures of the International Criminal Court ("Roadmap"), as endorsed by the Assembly of States Parties ("ASP") in its omnibus resolution (ICC-ASP/11/Res.8).[1] Pursuant to the Roadmap, recommendations on proposals to amend the Rules of Procedure and Evidence ("Rules") that receive the support of five judges are to be submitted by the WGLL to both the Study Group on Governance – Cluster I ("SGG-I") and the Advisory Committee on Legal Texts ("ACLT") by 31 March 2013.

2. The scope of the work of the WGLL, as determined by the judges of the Court following consultations in August 2012 with the Office of the Prosecutor, the Registry, and counsel, may be found in the annex to the document entitled "the Study Group on Governance: Lessons Learnt: First Report of the Court to the Assembly of States Parties" (ICC-ASP/11/31/Add.1). The annex lists and briefly describes nine Clusters and a total of 24 Sub-Clusters. Following the endorsement of the Roadmap by the ASP[2] in November 2012, the WGLL met, with Judge Monageng, the First Vice-President of the Court, acting as focal-point for SGG-I. Having reviewed all nine Clusters, the WGLL decided, on the basis of the judicial experience of the Court at this stage, to place its main focus on three of the Clusters, namely the "Pre-Trial" Cluster, the "Pre-Trial and Trial relationship and common issues" Cluster, and "the seat of the Court" Cluster.

3. At this point in time, the other Clusters are the subject of substantial reflection papers that require further discussions. These discussions may result in recommendations on proposals to amend the Rules, practice changes, or some combination thereof. The outcome of such discussions will be communicated promptly to the SGG.

4. At this point, the WGLL is pleased to make a recommendation on a proposal to amend rule 100 of the Rules.

II. Recommendation on a proposal to amend rule 100 of the Rules of Procedure and Evidence (Place of the Proceedings)

A. Background

5. According to article 3(3) ("Seat of the Court") of the Rome Statute ("Statute"), "The Court may sit elsewhere [in a place other than The Hague], whenever it considers it desirable, as provided in this Statute". This exception to the rule is addressed by two other provisions in the Statute. Article 4(2) ("Legal status and powers of the Court") provides that "the Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State". The only other provision in the Statute to address explicitly this issue is article 62 ("Place of trial"), which is concerned with trial proceedings. The Rules' Section IV ("Miscellaneous provisions") of Chapter 4 ("Provisions relating to the various stages of the proceedings"), provides for the broader application of article 3(3), beyond the trial phase, through rule 100, by specifying that the change of the place of the proceedings can take place "any time after

[1] The Roadmap was annexed to the Report of the Bureau on the Study Group on Governance ("SGG") (ICC-ASP/11/31).
[2] ICC-ASP/11/Res.8.

the initiation of an investigation".[3] Rule 100 thus attempts to provide a defined decision making process requiring articulation as a result of Article 3(3).

6. In practice, since the start of the proceedings before the ICC, several attempts, in separate cases, have been made to change the place of the proceedings. This has concerned the pre-trial phase, where, in 2011, Pre-Trial Chamber II sought to hold the confirmation of charges hearings in both Kenya cases away from the seat of the Court. At the trial level, in 2008 Trial Chamber I and in 2012 Trial Chamber III considered changing the place of the proceedings in the Lubanga and Bemba cases, respectively – particularly with a view to facilitating the testimony of witnesses, while also bringing the proceedings closer to the affected communities.[4] Most recently, in 2012 and 2013, the defence in both Kenya cases have requested Trial Chamber V to change the place of the trial proceedings. These requests aimed essentially at enabling the defendants – who are not subject to a warrant of arrest – to conduct their public and private life with minimum disruption; facilitating prosecution and defence investigations; minimising disruption to the normal life routine (e.g. family, work) of the witnesses (who cannot be compelled to testify under the Statute legal framework); as well as bringing justice closer to those concerned.[5] Subject to the outcome of the Kenya cases' rule 100 discussions, which are ongoing, all previous attempts encountered such complex procedural challenges, linked to the current formulation of rule 100, that the process could not be pursued further. For example, in the Lubanga case, in considering the change of the place of the proceedings under rule 100, Trial Chamber I referred the textual difficulties inherent to the interpretation of the rule to the plenary of the judges, which could not reach a conclusion on the matter. Eventually, Trial Chamber I decided not to pursue the question of change of the place of the proceedings. The varying interpretations of the rule, in and of themselves, slowed down the decision making process which the rule was designed to clarify. These challenges and obstacles – see section C below – were such that it was decided to suggest that the ASP amend the provision.

B. The provision

7. Rule 100 reads:

> Rule 100
>
> Place of the 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.
>
> 2. An application or recommendation changing the place where the Court sits may be filed at any time after the initiation of an investigation, either by the Prosecutor, the defence or by a majority of the judges of the Court. Such an application or recommendation shall be addressed to the Presidency. It shall be made in writing and specify in which State the Court would sit. The Presidency shall satisfy itself of the views of the relevant Chamber.
>
> 3. The Presidency shall consult the State where the Court intends to sit. If that State agrees that the Court can sit in that State, then the decision to sit in a State other than the host State shall be taken by the judges, in plenary session, by a two-thirds majority.

8. The main problems in considering changing the place of the proceedings lie in the complicated and, at times, illogical text of rule 100. To this end, the WGLL has, in consultation with the major stakeholders to the proceedings, prepared a draft amended rule 100, as elaborated upon below.

[3] It should be noted that the only exception that articles 3(3) and 62, as well as rule 100, are concerned with is the place of proceedings. Other provisions and principles enshrined in the Statute and the Rules, such as those concerning fair and public proceedings, presumption of innocence, rights of the accused, protection and participation of victims/witnesses remain applicable – regardless of the location of the hearing.

[4] For the Lubanga case, see ICC-01/04-01/06-1311-Anx2, paras. 68-70 and 105. For the Bemba case, see ICC-01/05-01/08-2225-AnxA-Red; ICC-01/05-01/08-2242-Red, paras. 27-30; status conference of 2 October 2012 (T-252, pages 5, line 1 to page 6, line 2); ICC-01/05-01/08-2448, paras. 1-2.

[5] See e.g. ICC-01/09-02/11-551; ICC-01/09-02/11-581; ICC-01/09-01/11-567; ICC-01/09-01/11-568.

C. The issues

1. Rule 100(1)

9. As a preliminary matter, rule 100(1) lacks clarity with regard to which phases of the case may have their place of proceedings changed. It is therefore important to make clear that sitting in an alternative venue need not be for the hearing of the entire case; nor does it necessarily entail the relocation of all those involved in the proceedings. In other words, the consideration to change the place of the proceedings will always be conducted on a case-by-case basis, adapted to the needs of the case at hand, based – as drafted and inserted by States under the current rule 100 – on "the interests of justice". Therefore, rule 100(1) could be amended so as to clearly comprehend that it is also possible to hear only part of the case away from the seat of the Court. Rule 100(1) would thus read as follows:

> 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, <u>for such period or periods as may be required, to hear the case in whole or in part.</u>

2. Rule 100(2)

10. Next, according to rule 100(2), an application by the parties or a recommendation by a majority of the judges of the Court to change the place of the proceedings shall be addressed to the Presidency, which shall satisfy itself of the views of the relevant Chamber. This text is problematic for two key reasons.

11. First, if the phrase "the majority of the judges of the Court" is understood to mean the majority of all judges of the Court, then an issue arises. This is that, whilst the parties to the proceedings, and the judges hearing the case are best acquainted with the details and intricacies of the case, such as witness protection issues, victim participation, and a variety of confidential, *ex parte* and under seal matters, all of which must be known and taken into account for the purpose of initiating the change of the place of the proceedings, this cannot be the case for all other judges of the Court. Accordingly, it would seem highly unlikely that the majority of all judges of the Court would initiate, *proprio motu*, the process to change the place of proceedings in a case that is not managed by and not known to them in an exhaustive and intimate manner.

12. Secondly, if the proceedings are initiated by the parties, it would seem illogical that the request be addressed to the Presidency. It would indeed be more appropriate that it be addressed to the Chamber, for the reasons articulated in the paragraph above.

13. The unclear text has resulted in this twin problem, which is confusing to the parties, and is subject to inconclusive interpretations by the judges, every time the procedure on the change of the place of the proceedings has been initiated. It has also resulted in delays and at times inconclusive outcomes.

14. This problem can be addressed by substituting the word "Chamber" for the phrase "the majority of the judges of the Court". Under this proposal, a party submits its request to change the place of the proceedings not to the Presidency but to the Chamber hearing the case, which would seek the views of the other party in order to decide whether or not to make a recommendation to the Presidency to change the seat of the Court. Equally, as in the current rule 100(2), the Chamber would retain the ability to initiate, *proprio motu*, the process to change the place of the proceedings; here too the Chamber would have to seek the views of the parties. Additionally, in accordance with past practice, the Chamber would seek the views of the victims. Under either option, the Chamber would take into account the assessment, including on security and budget, prepared by the Registry. This would be consistent with the systematic practice of the Court to date, whereby the Registry have prepared and provided detailed reports on feasibility and budgetary items, security and safety of all concerned by the proceedings, as well as any other relevant matters, such as privileges and immunities. In this regard, it should be emphasised that the decision to sit away from the seat of the Court may be taken by majority and binds all members of the Chamber concerned. Furthermore,

given the fact that the matter will first have been addressed by the Chamber, once the latter has addressed its recommendation to the Presidency, there would be no need for the Presidency to satisfy itself of the views of the Chamber. This would result in an expedited process and a streamlined procedure, with significant savings in both time and money. Rule 100(2) would thus read as follows:

> 2. ~~An application or recommendation changing the place where the Court sits may be filed~~ The Chamber, at any time after the initiation of an investigation, may proprio motu or at the request of ~~either by~~ the Prosecutor or the defence~~or by a majority of the judges of the Court~~, 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 ~~an application or~~ 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 ~~Court~~ Chamber would sit. The assessment prepared by the Registry shall be annexed to the recommendation. ~~The Presidency shall satisfy itself of the views of the relevant Chamber.~~

15. By shifting the authority to the Chamber for decisions regarding the change of place of proceedings – a matter that will frequently involve important considerations of fairness and efficiency of the proceedings – the mechanisms foreseen in the Statute, Rules and Regulations of the Court to protect the parties' rights necessarily apply. In particular, the parties' right to seek leave for appellate review of a decision either to recommend or not to recommend to the Presidency a change of the place of proceedings under article 82(1)(d) of the Statute should not be called into question. Of course, this right to seek leave for appellate review would not apply if and when the Chamber involved in the determination is the Appeals Chamber in the context of appellate proceedings.

3. Rule 100(3)

16. Once the Presidency has received a recommendation from the Chamber, it would, as foreseen in the current rule 100(3), consult the relevant State. Subsequently, the final decision will be taken by the Presidency, in consultation with the Chamber, taking into account any relevant factor, such as the Registry assessment. This means a decision making process involving the Chamber – the sole body with an exhaustive knowledge of the case record – and the Presidency, elected by the judges and constituting a distinct organ which is recognised under article 38(3)(a) of the Statute as being responsible for the proper administration of the Court, and to which the ASP provides management oversight regarding the administration of the Court pursuant to article 112(2)(b) of the Statute. Under the proposed approach, the plenary of the judges would no longer intervene, thus expediting the rule 100 procedure, as well as enabling all other judges to focus on their caseload. Accordingly, rule 100(3) would read as follows:

> 3. The Presidency shall consult the State where the ~~Court~~ Chamber intends to sit. If that State agrees that the ~~Court~~ 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 ~~judges, in plenary session, by a two thirds majority~~. Thereafter, the Chamber or any designated judge shall sit at the location decided upon.

D. The proposed provision

17. The full amended text reads as follows:

> Rule 100
>
> Place of the 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. ~~An application or recommendation changing the place where the Court sits may be filed~~ The Chamber, at any time after the initiation of an investigation, may proprio motu or at the request of ~~either by~~ the Prosecutor or the defence~~or by a majority of the judges of the Court~~, 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 ~~an application or~~ 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 ~~Court~~ Chamber would sit. The assessment prepared by the Registry shall be annexed to the recommendation. ~~The Presidency shall satisfy itself of the views of the relevant Chamber.~~

3. The Presidency shall consult the State where the ~~Court~~ Chamber intends to sit. If that State agrees that the ~~Court~~ 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 ~~judges, in plenary session, by a two-thirds majority~~. Thereafter, the Chamber or any designated judge shall sit at the location decided upon.

Current rule 100	*Proposed rule 100*
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. 2. An application or recommendation changing the place where the Court sits may be filed at any time after the initiation of an investigation, either by the Prosecutor, the defence or by a majority of the judges of the Court. Such an application or recommendation shall be addressed to the Presidency. It shall be made in writing and specify in which State the Court would sit. The Presidency shall satisfy itself of the views of the relevant Chamber. 3. The Presidency shall consult the State where the Court intends to sit. If that State agrees that the Court can sit in that State, then the decision to sit in a State other than the host State shall be taken by the judges, in plenary session, by a two-thirds majority.	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.

E. Conclusion

18. If adopted, the above discussed amendment would expedite the proceedings by:

- Clarifying, improving and streamlining the process required for a decision on a change to the place of proceedings;

- Ensuring that those most adequately placed, with regard to knowledge of the specifics of a case and with the requisite responsibility for the proper administration of the Court, are part of the recommendation and decision-making process; and

- Enabling those judges who are not required to take part in the process to focus on their caseload.

Annex I.B

Study Group on Governance
Interim report of the Study Group on Governance – Cluster I

I. Introduction

1. The Study Group on Governance ("Study Group") was established by the Assembly of the States Parties ("Assembly") in December 2010[1] "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". Since the Study Group's inception, the issue of expediting and improving the criminal process has served as a standing agenda item.

2. Since 2011, the Assembly has recognised that sufficient courtroom practice has developed for there to be a substantive review of the Court's criminal procedures, especially in the areas of Pre-Trial and Trial. It was agreed that the primary focus of review should be the Rules of Procedure and Evidence ("the Rules") of the Court and that the review should be undertaken in the spirit of collaboration between the Court and States. Given the Court's day-to-day and practical expertise with the use of the Rules it was agreed, in 2011, that the Court should conduct an internal "lessons learnt" review.[2]

3. In August 2012, the Court completed this initial review, identifying nine clusters and twenty four sub-clusters which were to be the subject of further in-depth consideration.[3] The report also contained a draft 'Roadmap', which was further refined and endorsed by the Assembly.[4] The Roadmap recognises that, given the current legal framework, there is a need to facilitate a structured dialogue between key stakeholders on proposed amendments to the Rules, without prejudice to article 51 of the Statute.[5] It was agreed, however, to encourage participants to engage, via the Roadmap, so as to avoid a disparate and unstructured approach to any proposals on amending the Rules.

4. Finally, the Assembly agreed that any process of review should not be driven only by budgetary considerations; instead the driving factor would be to ensure that proceedings were being conducted fairly and expeditiously.[6] In summary, the Assembly in 2012 agreed upon a Roadmap which provided for a process whereby the Court, using the "lessons learnt" report as a basis and guided by its day-to-day expertise with the Rules, would put forward proposals to amend the Rules. Any recommendation(s) endorsed by the Study Group will be transmitted to the Working Group on Amendments for consideration prior to the twelfth session of the Assembly. It was understood, furthermore, that this process was long-term in outlook and that the Roadmap itself should be amended, if necessary, for use in future years.

II. Organisation in 2013

5. On 12 February 2013, the Bureau appointed Ambassador Håkan Emsgård (Sweden) as Chair of the Study Group. The Bureau agreed also to appoint two focal points for Cluster I (expediting the judicial process): Mr. Cary Scott-Kemmis (Australia) and Mr. Thomas Henquet (Netherlands).

6. Under the Roadmap endorsed by the Assembly there are a number of key milestones. First, the Working Group on Lessons Learnt ("WGLL") will transmit recommendations on proposals to amend the Rules to the Study Group by the end of March 2013. Second, by the end

[1] ICC-ASP/9/Res.2.
[2] ICC-ASP/11/31 and ICC-ASP/11/20.
[3] ICC-ASP/11/31/Add.1.
[4] ICC-ASP/11/20, paragraph 41.
[5] ICC-ASP/11/31, annex I.
[6] ICC-ASP/11/31.

of May the Study Group will finalise views or other recommendations and transmit these to the WGLL. Third, in August the WGLL will report back to the Study Group. Fourth, the Study Group must transmit to the Working Group on Amendments, at latest sixty days before the twelfth Assembly, final recommendations on proposals to amend the Rules.

III. Progress on the nine clusters and a proposal to amend rule 100

7. On 27 March, in accordance with the Roadmap, the Study Group received the first version of a written report from the WGLL containing an update on the progress of the review of the nine clusters. The Study Group learned that the WGLL was focusing on three clusters – namely "Pre-Trial", "Pre-Trial and Trial relationship and common issues" and "the seat of the Court". The Study Group learnt that the Court's review of the clusters was aimed at identifying ways to expedite and improve processes, either through changes to practice or to the Rules or Regulations of the Court. The Study Group learned that the outcome of ongoing WGLL discussions will be promptly communicated to States. The Study Group indicated it would welcome receipt in 2013 of the additional anticipated outcomes of ongoing WGLL discussions, even if receipt was outside of the specific timeframes in the Roadmap.

8. The 27 March report also contained a concrete recommendation to amend rule 100, identified under Cluster 'G' ('Seat of the Court') in the Court's August 2012 report.[7] Rule 100 establishes the decision making procedure, as envisaged by article 3(3) of the Statute, for designating an alternate seat for (Pre-Trial, Trial or Appeal) proceedings of the Court.

IV. Recommendation to amend rule 100 - views of the Study Group

9. The Study Group held several meetings in March, April and May. During these meetings the Study Group discussed with the Court its past experience with attempts to utilise the process outlined under the current rule 100 in a number of cases in separate situations, at both Pre-Trial and Trial level. The Study Group heard that past attempts to move the place of proceedings were triggered primarily by desires to facilitate the hearing of evidence.

10. The Study Group recognised that the process articulated under the current rule 100 suffers from a lack of clarity and does not make the most efficient and logical use of limited resources. The proposal to amend rule 100 would change the decision making process so that, rather than involving the plenary of the judges at both stages, the relevant Chamber is initially seized of the matter, making a recommendation to the Presidency - which will then make a final decision on whether or not to move the place of proceedings. In so far as the decision making process is concerned, the proceedings would be expedited and the decision making competency would be vested in those best placed.

11. In several exchanges with the Court the Study Group expressed, in detail, its views on the original recommendation to amend rule 100. Following these exchanges, the Court revised both its recommendation and accompanying report.[8] On the basis of this revised recommendation,[9] the Study Group endorses the proposed new rule 100; as outlined below.

12. The proposed new rule 100, as endorsed by the Study Group, is as follows:

> *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*

[7] ICC Working Group on Lessons Learnt report, 27 March 2013.
[8] In addition to the 27 March WGLL report, revised reports were issued on 19 April and 13 May. The report of 13 May 2013 included revisions to the proposed amendment to rule 100, stemming from recommendations made by the Study Group.
[9] See the WGLL report, dated 13 May 2013.

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.

13. A summary of the views expressed by the Study Group and taken into account by the WGLL in revising its recommendation included, in particular, the following.

14. The Study Group agreed with the WGLL's proposal to include explicit reference to the fact that the Court may decide to sit away from the seat of the Court for such periods as may be required, to hear the case in whole or in part. The Study Group understood that, for instance, the Court may decide during the Trial phase of a hypothetical case to sit away from the seat of the Court, for a designated period, in order to hear witness testimony.

15. The Study Group agreed that the power to initiate a recommendation to change the place of proceedings should be shifted from the plenary of the judges to the Chamber, which alone has the detailed knowledge of the intricacies of a particular case. This would also have the advantage of not increasing the workload of the other judges of the Court. The Study Group emphasised firmly the importance of the institutionalisation of the practice of the preparation, in every instance where a change of the place of proceedings is contemplated, of an exhaustive report by the Registry, to inform both the Chamber and the Presidency, on the feasibility of a potential move.

16. The Study Group emphasised that the Registry report should always include a thorough assessment of the security situation and respect for the privileges and immunities of the Court; a scrutiny of the budgetary impact of the proposed move and its efficiency; as well as other relevant considerations. The report shall be taken into account by the Chamber, when formulating a recommendation with regard to a potential move, and by the Presidency when taking a decision whether or not to sit in a State other than the host State. The Study Group also agreed that the decision of the Presidency would not be pre-empted by the decision of the Chamber.

17. The Study Group agreed that victims should be permitted, as is the developing practice, to submit their views regarding the proposed move to inform the Chamber's recommendation. The Study Group considered it important to stress that the Chamber should attempt to achieve unanimity, but that recommendations could also be made by majority. In this regard, the Study Group expressed the view that the text of article 74(3) of the Statute be inserted in sub-rule 2.

18. The Study Group took note of the importance of any recommendation made by a Chamber with regard to a potential move of the place of proceedings and the potential for such a decision to significantly affect the fair and expeditious conduct of the proceedings. The Study Group noted that under the proposed two-pronged decision making process the relevant Chamber will take a judicial decision which, as such, is subject to article 82(1) (d) of the Statute. The WGLL had initially proposed a sub-rule 3 which made explicit reference to this article. However, in light of the foregoing the Study Group considered this sub-rule superfluous, recommending removal. The WGLL 13 May revision incorporates this proposal.

19. As outlined previously, the Study Group emphasised that the Registry report shall be taken into account at each stage of the two-pronged decision making process. The Study Group recognised the benefits in shifting, to the Presidency, the decision-making authority on whether or not to change the place of the proceedings as: (a) the Presidency, under article 38(3) (a) of the Statute, is responsible for the proper administration of the Court and accountable to the Assembly; and (b) vesting the decision-making competency with the Presidency leads to efficiencies, as it does not impose an additional workload on the other judges of the Court.

Annex I.C

Letter from the Chair of the Study Group on Governance to the Vice-President of the Court, dated 5 June 2013

Dear Vice-President Monageng,

I am pleased to inform you that on 30 May 2013 the Study Group on Governance agreed, by consensus, to endorse the proposal by the Court's Working Group on Lessons Learnt to amend rule 100 of the Court's Rules of Procedure and Evidence.

As the chair of the Study Group, I have the privilege to send you a copy of the interim Report of the Study Group. As you are aware, the final text of the proposed amendment, as endorsed by the Study Group, is the product of close collaboration between the Court and the States Parties in accordance with the 'roadmap'. I trust the collaborative spirit in which we have been able to conduct our work will remain a feature of ongoing discussions this years and in the years ahead. I would also like to take the opportunity to thank the Working Group on Lessons Learnt and in particular yourself and Mr. Hirad Abtahi for your active engagement in this process.

The Study Group's recommendation on the amendment of rule 100 has also been transmitted to the New York Working Group on Amendments. This item is on the agenda of the Working Group's meeting of 5 June. I have also shared a copy of this correspondence with Ambassador Paul Seger, in his capacity as Chair of the Working Group.

The collaboration between States and the Court has been excellent and we are looking forward to receiving further proposals for amendment of the Rules of Procedure and Evidence.

Yours sincerely,

[Signature]

Ambassador Emsgård

Annex I.D

Email from the Vice-President of the Court to the Chair of the Working Group on Amendments, dated 25 July 2013

Dear Ambassador Seger,

Thank you for your email of 19 June 2013, in which you noted that on 5 June 2013 the Working Group on Amendments decided to recommend the adoption of the amendment proposal to rule 100 of the Rules of Procedure and Evidence, in its current form, to the upcoming 12th session of the Assembly of States Parties. I note that this recommendation was subject to the formal submission of the proposal by the judges of the Court according to article 51(2) of the Rome Statute of the International Criminal Court.

I am pleased to inform you that 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.

Progress on this issue has been facilitated by a set of fruitful meetings and exchanges between the Study Group on Governance and the Court from April to May 2013. This cooperative approach enabled the Working Group on Lessons Learnt to reduce the time period between the endorsement of the Roadmap and the proposal of recommendations. The Court commends this collaborative spirit, which has expedited the amendment process.

Kind regards,

Vice-President Monageng

Email from the Vice-President of the Court to the Chair of the Working Group on Amendments, dated 21 June 2013

Dear Ambassador Seger

On behalf of the WGLL and the Court in general I wish to thank you and the WGA and of course States Parties for the continued seriousness and commitment with which we are all tackling the issue of expediting criminal proceedings in the Court through the Lessons Learnt exercise in relation to the Rules of Procedure and Evidence. The WGLL and I appreciate your assistance in this very important exercise.

I look forward to our continued collaboration.

Kind regards,

Vice-President Monageng

Email from the Chair of the Working Group on Amendments to the Vice-President of the Court and the Chair of the Study Group on Governance, dated 19 June 2013

Dear Vice-President Monageng, Dear Ambassador Emsgård,

As the Chair of the Working Group on Amendments (WGA) of the Assembly of States Parties to the Rome Statute of the International Criminal Court, I am pleased to advise you on the WGA's deliberations on the proposal by the Court's Working Group on Lessons Learnt (WGLL) to amend rule 100 of the Court's Rules of Procedure and Evidence.

At its session on 5 June 2013 the WGA considered the WGLL proposal to amend rule 100. The WGA also had before it the WGLL's report, dated 27 March 2013, and the interim report of the Study Group on Governance (SGG) on rule 100, dated 31 May 2013. After a comprehensive briefing by the Hague Working Group's SGG (Cluster I) co-focal point Thomas Henquet (Netherlands), 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 scheduled for 20-28 November 2013, subject to the formal submission of the proposal by the judges of the Court according to article 51(2) of the Rome Statute.

The constructive collaboration and dialogue between States and the Court in the context of the SGG provided a solid foundation assisting the WGA's endorsement of the proposal. I would like to take the opportunity to thank the WGLL, and yourself in particular, for your commitment to active engagement on these important matters, both with States Parties and within the Court. We continue to fully support the Court's efforts, through the WGLL, to assess, review and reflect on its judicial processes and guiding legal texts, and look forward to learning about the outcomes of these deliberations, and to receiving further proposals for amendment of the Rules of Procedure and Evidence.

Yours sincerely,

Ambassador Seger

Annex I.E

Letter from the Vice-President of the Court to the Chair of the Study Group on Governance, dated 23 July 2013*

Dear Ambassador Emsgård,

Thank you for your letter of 5 June 2013, in which you noted that the Study Group on Governance had agreed by consensus to endorse the proposal by the Court's Working Group on Lessons Learnt to amend rule 100 of the Court's Rules of Procedure and Evidence.

I am pleased to inform you that at 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 of the International Criminal Court, 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.

Progress on this issue has been facilitated by a set of fruitful meetings and exchanges between the Study Group on Governance and the Court from April to May 2013. This cooperative approach enabled the Working Group on Lessons Learnt to reduce the time period between the endorsement of the Roadmap and the proposal of recommendations. The Court commends this collaborative spirit, which has expedited the amendment process.

Kind regards,

[Signature]

Vice-President Monageng

* Reference: 2013/PRES/285-2.

Annex I.F

Letter from the President of the Court to the President of the Assembly of States Parties, dated 4 September 2013*

Excellency,

I have the honour to request that you place a proposal to amend rule 100 of the Rules of Procedure and Evidence ("Rules") on the agenda of the 12th Session of the Assembly of States Parties.

On 11 July 2013, the judges of the Court agreed upon a proposal to amend rule 100 of the Rules in accordance with article 51(2)(b) of the Statute of the International Criminal Court, which provides that amendments to the Rules may be proposed by "the judges acting by an absolute majority". The amendment proposal was formulated by the Working Group on Lessons Learnt ("WGLL"), following consultations with all relevant stakeholders. It will be recalled the WGLL was established in accordance with the Roadmap on Reviewing the Criminal Procedures of the International Criminal Court to consider recommendations on proposals to amend the Rules.

I have attached for your consideration a series of documents which chart the key procedural developments regarding the amendment proposal.

- A recommendation on the proposed amendment to rule 100, circulated on 13 May 2013 after a series of meetings and exchanges between the Study Group on Governance ("Study Group") and the Court, dated 27 March 2013 (annex 1);

- A revised report on the proposal, circulated after the Study Group endorsed the proposal on 30 May 2013 (annex 2);

- A letter from the Chair of the Study Group, Ambassador Håkan Emsgård, noting Study Group's decision to endorse the proposal (annex 3);

- An exchange of emails between Vice-President Monageng and Ambassador Paul Seger, noting the endorsement of the revised proposal by the Working Group on Amendments in New York on 5 June 2013 (annex 4);

- A letter from the Presidency dated 23 July 2013, informing Ambassador Emsgård of the decision of the plenary of the judges on 11 July 2013 to propose to the 12th Session of the Assembly of States Parties the amendment of rule 100 (annex 5).

Please accept, Excellency, the assurances of my highest consideration.

[Signature]

President Song

* Reference: 2013/PRES/331.

Annex II.A

Study Group on Governance
Cluster I: Expediting the Criminal Process

Working Group on Lessons Learnt

Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony)

Executive Summary

The WGLL proposes an amendment to rule 68. Currently, rule 68 addresses two instances in which prior recorded testimony may be introduced: one in which the witness in question is absent (68 (a)), and one in which the witness is present (68(b)). The amended proposal presents three additional instances in which prior recorded testimony may be introduced in the absence of the witness. The three instances are cases in which:

- *The prior recorded testimony goes to the proof of a matter other than the acts and conduct of the accused;*
- *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; or*
- *The prior recorded testimony comes from a person who has been subjected to interference.*

The proposed amendment is intended to reduce the length of ICC proceedings and streamline evidence presentation. The new sub-rules reflect practice in international criminal tribunals and are based on three ICTY rules. As such, while this is formally a single amendment to rule 68, it in reality represents a compound proposal that contains three distinct amendments. The amendment to rule 68 was prepared in consultation with major stakeholders and received broad support. In particular, its text was adopted by the Advisory Committee on Legal Texts ("ACLT"), and thereafter discussed with the Study Group on Governance ("SGG").

I. Introduction

A. The current provision

1. The WGLL proposes an amendment to rule 68. The current provision reads:

> When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, 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:
>
> (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or
>
> (b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, 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.

2. Rule 68 has been understood in the jurisprudence (although this interpretation is not necessarily universally accepted) to apply not only to video or audio recordings or transcripts, but also to prior written witness statements.[1]

B. Background to the proposed amendment

3. The current rule 68 has not been used a great deal in Court proceedings to date. The WGLL considers that an amendment to rule 68 could be adopted to give the Trial Chamber more discretion to introduce transcripts or previously recorded reliable testimony in particular cases. Currently, rule 68 addresses two instances in which prior recorded testimony may be introduced: one in which the witness in question is absent (68 (a)), and one in which the witness is present (68(b)). The amended proposal presents three additional instances in which prior recorded testimony may be introduced in the absence of the witness. These sub-rules are based on three ICTY rules, namely 92 *bis*, 92 *quater* and 92 *quinquies*.[2] Annex I provides a comparative table of these three ICTY rules and the corresponding provisions of the proposed amendment to rule 68.

4. The practice of the ICTY is particularly relevant in crafting provisions of this nature, although the other *ad hoc* tribunals also present a wealth of valuable experience.[3] The ICTY, despite including a version of the principle of orality in its statutory instruments, has adopted rules that allow for past statements to be admitted under conditions far less demanding than those set out in the current rule 68. It is nonetheless important to consider the differences between the ICC and the ICTY when making amendments based on ICTY Rules. In the current

[1] Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, 15 January 2009, ICC-01/04-01/06-1603.

[2] The ICTY Rules also include a rule 92 *ter*, which is broadly similar to the current rule 68(b) of this Court's Rules. ICTY rule 92 *ter* is slightly broader than the current rule 68(b). Rule 68(b) requires the witness to not object to admitting the prior recorded testimony, whereas rule 92 *ter*(a)(iii) merely requires the witness to attest that the past statement accurately reflects the witness' declaration and what the witness would say if examined.

[3] See in particular ICTR rule 92 *bis* (empowering a Trial Chamber to admit, by way of witness statement, evidence that goes to proof of a matter other than the acts and conduct of the accused); SCSL rules 92 *bis* and 92 *quarter* (addressing the admission of evidence by way of written statement or transcript if the evidence does not go to proof of the acts and conduct of the accused, or if witness is unavailable); and STL rules 155 and 158 (addressing the admission of evidence by way of written statement or transcript if evidence does not go to proof of the acts and conduct of the accused, or if the witness is unavailable). ICTR rule 92 *bis* allows for the preservation of evidence by way of special deposition recorded in a special hearing by a single Judge. A special deposition may be admitted in lieu of oral testimony if, *inter alia*, the Chamber is satisfied that the deponent is deceased, can no longer with reasonable diligence be traced, is by reason of bodily or mental condition unable to testify orally, or in exceptional circumstances is unwilling to testify following threats or intimidation.

case, it should be borne in mind that on the one hand, the ICTY is a more adversarial based legal system than the ICC, and this may mean that specific ICTY rules do not always translate into the ICC statutory scheme. On the other hand, the ICTY's version of the principle of orality may be more permissive of exceptions than article 69(2) of the Statute.[4] As a result, aspects of ICTY rules 92 *bis*, 92 *quater* and 92 *quinquies* have been adapted in the proposed amendment and language has been amended to reflect the ICC's statutory framework. The WGLL also notes that while the ICTY Rules were drafted by the ICTY judges, in the case of the ICC the Rules were originally drafted by States. When considering proposing potential amendments to the Rules, the Court is therefore required to take the additional step of examining the rationale for the original text of each rule.

5. The current Rule 68 applies when the Pre-Trial Chamber has not taken measures under article 56 of the Statute,[5] and must be read in conjunction with article 69(2) of the Statute. Article 69(2) creates a general rule that the testimony of a witness at trial "shall be given in person", but allows for exceptions to the extent provided in article 68 of the Statute[6] or in the Rules. Thus, the principle of orality enshrined in article 69(2) is a general principle. Rule 68 is an exception to this principle, and considering possible amendments to the Rules on admitting prior recorded testimony is largely an exercise in considering other possible exceptions.

6. Rule 68, in its current form, has not been particularly effective in increasing the expeditiousness of the Court's first trials. Rule 68(a) is currently the only avenue for introducing prior recorded testimony in the absence of a witness, and has demanding requirements. In particular, it is difficult to satisfy the requirement that the non-tendering party had the opportunity to examine the absent witnesses during the recording of the testimony. The difficulty in fulfilling the conditions of rule 68(a) is evidenced by the limited jurisprudence applying the provision. Rule 68(a) has only been successfully invoked twice in the history of the Court, and even then the provision was applied under arguably unusual circumstances.[7] Rule 68(b) has been applied before the Court.[8] However, it has had only a limited impact on speeding up trials because the witness who gave the prior recorded testimony must be present in

[4] Compare for example rule 89(f) of the ICTY Rules ("A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form") with article 69(2) of the Statute ("The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence"). Although meaningful insight can be gained from the ICTY in constructing this amendment proposal, the tensions created by adding exceptions to the right of the accused to examine witnesses against him or her should be borne in mind.

[5] Article 56 covers situations in which the Prosecutor considers that an investigation presents a unique opportunity to take testimony or a statement from a witness (or to examine, collect or test evidence), which may not be available subsequently for the purposes of a trial. In such cases, the Pre-Trial Chamber may take measures necessary to ensure the efficiency and integrity of the proceedings, including *inter alia* making recommendations or orders as to procedure, or directing that a record be made of the proceedings. The admissibility of such evidence at trial is governed by article 69, while its weight is determined by the Trial Chamber.

[6] This reference in article 69(2) seems to be to article 68(2) of the Statute, which allows for the Chamber, in order to protect victims and witnesses or an accused, to "allow the presentation of evidence by electronic or special means".

[7] In particular, it was used to admit prior recorded testimony related to an abuse of process application by way of deposition during the *Lubanga* trial. Trial Chamber I arranged for two witnesses to give depositions in November-December 2010: see Order on the objections raised during the depositions of DRC-OTP-WWWW-0582 and DRC-OTP-WWWW-0598, 13 December 2010, ICC-01/04-01/06-2658-Conf, p. 3. The witnesses were heard at the seat of the Court, but the Chamber was unable to sit during these dates and the Legal Advisor to the Division supervised the depositions: see Transcript of Hearing, 12 November 2010, ICC-01/04-01/06-T-333-Red2-ENG, pp. 18-21 (reclassified as public on 8 December 2011). Part of the legal basis provided by the Chamber for conducting depositions in this way was by reference to rule 68(a) of the Rules, and, notably, the parties agreed in advance to this procedure: see Transcript of Hearing, 12 November 2010, ICC-01/04-01/06-T-333-Red2-ENG, p. 19. These two depositions were admitted into evidence on 13 December 2010: see Order on the objections raised during the depositions of DRC-OTP-WWWW-0582 and DRC-OTP-WWWW-0598, 13 December 2010, ICC-01/04-01/06-2658-Conf, paras 10, 33.

[8] Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, 15 January 2009, ICC-01/04-01/06-1603; Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts, 27 August 2010, ICC-01/04-01/07-2289-Corr-Red; Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219, 3 September 2010, ICC-01/04-01/07-2362; Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, 9 February 2012, ICC-01/05-01/08-2012-Red, paras 132-156. See also Decision on the "Prosecution Application for Leave to Submit in Writing Prior-Recorded Testimonies by CAR-OTP-WWWW-0032, CAR-OTP-WWWW-0080, and CAR-OTP-WWWW-0108", 16 September 2010, ICC-01/05-01/08-886 (rejecting a request to introduce evidence under rule 68(b) of the Rules).

court under that rule. The difficulties inherent in introducing prior recorded testimony under the current rule 68 are exacerbated by the fact that the Chamber has no power to compel a witness to appear before the Court. Rule 65 provides that once a witness appears before the Court, that witness may be compelled to provide testimony, however no general subpoena power exists in the Rules. In contrast, the ICTY Rules do allow the Chamber to issue subpoenas.[9] The difficulty in compelling a witness to appear before the Court increases the need to develop more flexible and efficient processes for the introduction of prior recorded testimony, while also having due regard to the principles of fairness and the rights of the accused.

C. The proposed amendment

7. While consideration could also be given to using the two current provisions of rule 68 more robustly, the WGLL proposes amending rule 68 to allow for the admission of prior recorded testimony in three additional instances. These three instances are those in which:

- The prior recorded testimony goes to the proof of a matter other than the acts and conduct of the accused;
- 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;
- The prior recorded testimony comes from a person who has been subjected to interference.

The rule 68 amendment proposal is outlined in Part III below.

8. The proposed amendment is intended to reduce the length of ICC proceedings and to streamline evidence presentation. This amendment reflects practice in international criminal tribunals, and has been prepared in consultation with major stakeholders. In particular, its text was adopted by the Advisory Committee on Legal Texts ("ACLT"), and thereafter discussed with the Study Group on Governance ("SGG").

II. The issues

9. This section provides commentary on the proposed amendment to rule 68. For ease of reference, discussion has been divided into sub-sections that correlate to the sub-rules of the amendment proposal.

A. Rule 68(1)

10. Rule 68(1) follows the text of the chapeau of the current rule 68 with a number of small amendments. The text of rule 68(1) reads:

> 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,[10] 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 with the rights of the accused and that the requirements of one or more of the following sub-rules are met.

11. The amendments to the original text of the chapeau to rule 68 are intended to make explicit the fair trial protections that apply to the rule. The amended text additionally clarifies that each of the new sub-rules operates independently from each of the other sub-rules. While

[9] See rule 54 of the ICTY Rules ("a Judge or a Trial Chamber may issue […] subpoenas […]").
[10] In the initial WGLL recommendation dated 1 August 2013, the term "participants" was used in place of "parties".

prior recorded testimony may fall within one or more of the categories in the sub-rules, it is sufficient to show that the requirements of any one of those sub-rules are met. As a whole, the amended rule 68(1) emphasises the Trial Chamber's overriding power to control the introduction of prior recorded testimony and to rule on questions of fairness that arise in this regard.

12. Four key amendments to the original text have been made. First, while the current rule 68 refers only to article 69(2), it was considered helpful to also include a reference to article 69(4) in this context. Article 69(4) notes that the Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules. It was thought that a reference to this provision would be relevant in light of the procedural requirements for introducing evidence under the proposed sub-rules. Second, a requirement was added that the Trial Chamber may only exercise its powers under rule 68 "after hearing the parties". After discussions with the SGG, the word "parties" was inserted in place of "participants" which had appeared in the original proposal. Accordingly, under the revised proposal, both parties have an opportunity to be heard before any prior recorded testimony is introduced under this provision. The legal representative(s) for victims may also be consulted in accordance with article 68(3) of the Statute, which states that "[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". Third, an explicit reference to the rights of the accused was added, to draw attention expressly to this fundamental protection in the context of exceptions to the principle of orality. Fourth, it was decided to present the current chapeau of rule 68 as rule 68(1), in order to reduce the levels of indentation required in the sub-rules and their sub clauses.

13. Two points of terminology should also be noted. First, the WGLL notes that the term "introduction" is used in the chapeau of the current rule 68 and in the text of article 69(2) of the Statute.[11] However, the terms "submit" or "submitted" are used in articles 69(3) and 74(2) of the Statute. The WGLL has decided to retain the word "introduction" in the rule 68 amendment proposal in all cases in which the Chamber itself is admitting evidence. The WGLL understands that the term "introduction" refers to the general admission of evidence in this context.[12] When the amendment proposal refers to submission of evidence by a party, the terms "submission" or "submitted" are adopted. Second, "prior recorded testimony" in this context is understood to include video or audio recorded records, transcripts and written witness statements. This is the view in the prevailing jurisprudence to date, and it was considered unduly restrictive to understand "prior recorded testimony" in a narrower manner. Rule 68 may therefore apply to written statements taken by the parties or (inter)national authorities, provided that the requirements under one or more of the sub-rules are met.

B. Rule 68(2)

14. Rule 68(2) of the proposed amendment addresses instances in which prior recorded testimony may be admitted if the witness who gave the prior recorded testimony is not present during the subsequent proceedings. This sub-rule encompasses four discrete instances in which such testimony may be introduced. As indicated in rule 68(1), these four instances are

[11] Article 69(2) notes that the Court "may … permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence."

[12] William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute (Oxford Commentaries on International Law, OUP, 2010), p. 841. In a Decision on the status of evidence heard by the Pre-Trial Chamber, Trial Chamber I considered the manner of "introduction" of evidence generally, noting that the sole issue of consequence is "whether or not the particular piece of evidence surmounts the applicable admissibility and relevance threshold". See Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 7.

independent of each other and do not constitute cumulative requirements. The original text of rule 68(a) has been divided in order to form the chapeau of rule 68(2), as well as in the body of rule 68(2)(a). Rules 68(2)(b)-(d) contain the three additional instances proposed.

15. The chapeau of rule 68(2) follows the text of the first part of the current rule 68(a), namely "If the witness who gave the previously recorded testimony is not present before the Trial Chamber". Given that there are now four proposed instances in which evidence may be introduced in the absence of the witness, additional text has been added to the effect that the Chamber may allow the introduction of evidence "in any one of the following instances". It is noted that the Chamber retains its discretion in determining whether or not to introduce prior recorded testimony under the chapeau. The chapeau of rule 68(2) therefore reads:

> ~~(a)~~ 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:

1. Rule 68(2)(a)

16. Rule 68(2)(a) reflects the second half of the current rule 68(a). No changes to the substance of the rule have been made. Rule 68(2)(a) reads:

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

2. Rule 68(2)(b)

17. Rule 68(2)(b) adds a new instance in which prior recorded testimony may be introduced in the absence of the witness, namely when that testimony "goes to the proof of a matter other than the acts and conduct of the accused".[13] Rule 68(2)(b) reads:

> (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;[14] 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

[13] This provision corresponds to ICTY rule 92 *bis*.
[14] In the initial WGLL recommendation dated 1 August 2013, the phrase "does not have an overriding public interest in being presented orally" was used in place of "is such that the interests of justice are best served by its introduction".

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.

18. At present, prior recorded testimony that goes to the proof of a matter other than the acts and conduct of the accused cannot be introduced in the absence of the witness, unless both the Prosecutor and the defence had the opportunity to examine that witness during the initial recording. The addition of this provision is primarily intended to expedite proceedings by allowing the introduction of a limited class of evidence without the need to arrange for a witness to travel in order to appear in Court. Allowing such testimony to be admitted in the witness' absence, provided that certain procedural steps are met, would expedite proceedings and have additional budgetary benefits. The application of the sub-rule is strictly limited to testimony that does not go to the proof of the acts or conduct of the accused.[15]

19. The WGLL emphasises that the Chamber retains its discretion on whether to introduce evidence under this provision, taking into account the rights of the accused and need to ensure that fair trial protections are upheld. The Chamber may therefore determine that it is more appropriate for a witness to appear before the Court for the purposes of cross-examination. In such instances, the provisions of rule 68(3) would apply to the prior recorded testimony of the witness. Alternatively, the Court may determine that the interests of justice demand that the witness give the entirety of their testimony orally.

20. As presented above, rule 68(2)(b) has a chapeau and three sub-sections. Sub-section (i) presents a list of factors for consideration. Subsection (ii) creates a requirement that such prior recorded testimony must be accompanied by a declaration made by the witness. Sub-section (iii) stipulates that such declarations must be witnessed by an authorised person.

21. The chapeau of rule 68(2)(b) clarifies that the sub-rule relates to prior recorded testimony which "goes to the proof of a matter other than the acts and conduct of the accused". Rule 68(2)(b) applies to the acts and conduct of the accused as confirmed in accordance with article 61 of the Statute, which addresses the confirmation of charges before the trial. In the text of the corresponding ICTY Rule 92*bis,* an additional statement is included which reads "as charged in the indictment". It was decided not to include this additional statement, as the concept of an "indictment" does not appear in the Court's statutory instruments, and it is sufficiently clear that rule 68(2)(b) has no application beyond the charges confirmed in accordance with article 61 of the Statute.

22. The list of factors under rule 68(2)(b)(i) is not exhaustive and was developed to guide the Trial Chamber's exercise of its discretion under rule 68(2)(b). The list covers factors both for and against introducing the prior recorded testimony. Given that the ICC is a permanent institution, and that future cases and situations will raise a wide range of fact patterns and

[15] In rule 68(2)(c) and rule 68(2)(d), the introduction of prior recorded testimony that goes to the proof of the acts or conduct of the accused is discouraged, although it is not prohibited. This distinction is justified by the fact that it is not possible to call a witness to provide testimony regarding acts and conduct of the accused under rules 68(2)(c) and 68(2)(d), given that those sub-rules apply to unavailable and intimidated witnesses respectively. In contrast, a rule 68(2)(b) witness could potentially be called to the seat of the Court.

issues, it was decided to adopt a concise and general list of factors.[16] In particular, after discussions with the SGG, it was decided not to include a factor relating to whether there is an "overriding public interest in the evidence in question being presented orally", which appears in ICTY Rule 92 *bis* (A)(ii). It was noted in particular that the notion of "public interest" does not appear in the Statute or in the Rules. Instead, a factor was added regarding whether the prior recorded testimony is such that "the interests of justice are best served by its introduction". A similar factor appears in proposed rule 68(2)(d)(i). The fifth factor, which calls for consideration of whether the prior recorded testimony "has sufficient indicia of reliability", is without prejudice to the fact that judges of the Court have discretion to determine the probative value of evidence in accordance with article 69(4) of the Statute. It is anticipated that the Chamber may develop the factors in rule 68(2)(b)(i) through its jurisprudence. The sub-rule uses dash points as a matter of drafting technique.[17]

23. Rule 68(2)(b)(ii) requires that prior recorded testimony introduced pursuant to rule 68(2)(b) be accompanied by a declaration made 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.[18] This formal requirement appears only under rule 68(2)(b) and does not apply to the other proposed sub-rules. The rationale for this higher bar is two-fold. First, rule 68(2)(b) applies to situations in which the requirements of rule 68(2)(a) have not been met, i.e., the Prosecutor and the defence have not had the opportunity to examine the witness during the recording. If these requirements had been met, the evidence could be directly introduced under rule 68(2)(a). Secondly, rule 68(2)(b) applies to cases where a witness could appear before the Chamber, but the party considers it preferable not to call the witness.[19] Finally, it is reiterated that if the Chamber does decide to call the witness, for instance for questioning by the opposing party, rule 68(3) would then apply.[20]

24. Rule 68(2)(b)(ii) declarations must be made reasonably close in time to when the prior recorded testimony is being admitted.[21] This additional requirement concerns only the accompanying declaration, and not the prior recorded testimony itself. The time limitation on the accompanying declarations was included in order to provide the Trial Chamber with a relatively recent assurance that the witness still stands by the remarks made in his/her prior recorded testimony. A specific time limit was rejected in favour of a "reasonably close in time" requirement in order to give the Trial Chamber flexibility when deciding whether accompanying declarations are sufficient.

25. Rule 68(2)(b)(iii) states that an accompanying declaration must be witnessed and that certain verifications shall be made.[22] Witnesses must be authorised by the relevant Chamber, or in accordance with the law and procedure of a State. The inclusion of national authorities as approving bodies is intended to cover situations where a Chamber was not yet involved in the case or where logistical concerns demanded that rule 68 declarations be authorised on an expedited basis. It is understood that, if the Chamber is dissatisfied with the authorisation

[16] In this approach, the list of factors differs from the list of factors in favour and against the admission of evidence in ICTY rule 92 *bis*(A)(i)-(ii). It was considered that these factors were tailor-made for the specific issues facing the ICTY, while a general list was more suited to the needs of a permanent institution.

[17] No other provision in the statutory framework has required dash points to date. However, adding another layer of sub-headings in this provision significantly improves its readability.

[18] This requirement also appears in ICTY rule 92 *bis*.

[19] In contrast, rule 68(2)(c) and rule 68(2)(d) apply to situations where the witness is unavailable or has been the subject of intimidation. It would be problematic to introduce a declaration requirement in these sub-rules, as the provisions apply to circumstances that could not be reasonably anticipated in the course of standard trial preparation. Given the extra hurdles to making the required showing under rule 68(2)(c) and 68(2)(d), it was considered unreasonable also to impose the requirements of formal declarations and declaration witnesses, as are contained under rule 68(2)(b)(ii)-(iii).

[20] Rule 68(3) prior recorded testimony would not have the same formal requirements as rule 68(2)(b) prior recorded testimony, but, as the requirements of rule 68(2)(b) are designed to certify the reliability of the prior recorded testimony, it would be in the parties' best interests to take rule 68(2)(b) compliant prior recorded testimony wherever possible.

[21] This temporal requirement does not appear in ICTY rule 92 *bis*.

[22] This provision, like the proposed rule 68(2)(b)(i), is drafted using dash points. No other provision in the statutory scheme has required dash points to date. However, the use of an additional sub-heading in this provision significantly improves its readability.

procedure adopted by national authorities, it retains the discretion to accord less weight to the rule 68(2)(b) testimony or to decline to introduce it entirely.

26. The WGLL notes that it has not included a provision that is analogous to ICTY rule 92 *bis* (C).[23] The WGLL considered that in the present proposal, the Trial Chamber's overriding power to determine whether or not to admit prior recorded testimony is clearly outlined in rule 68(1). In cases in which the Chamber decides not to exercise its discretion under rule 68(2)(b) to introduce evidence in the absence of the witness, the witness may appear before the Court for cross-examination in accordance with rule 68(3). As such, no additional clarifying sub-rule was required.

3. Rule 68(2)(c)

27. Rule 68(2)(c) provides an avenue to introduce prior recorded testimony from a person who has subsequently died, must be presumed dead, or, is, due to obstacles that cannot be overcome with reasonable diligence, unable to testify orally.[24] Rule 68(2)(c) reads:

> (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.[25] 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.

28. Under the current rule 68, it would not be possible to introduce such evidence unless the strict requirements of the current rule 68(a) had been met. This amendment will enable the Court to introduce prior recorded testimony that would otherwise not be possible to consider.

29. The chapeau to rule 68(2)(c) establishes the scope of the sub-rule. After discussions with the SGG, it was decided to replace the words "insurmountable obstacles" in the original proposal with the phrase "obstacles that cannot be overcome with reasonable diligence". It was considered that "insurmountable obstacles" may import too high a standard into the sub-rule. As a whole, the text of the chapeau in rule 68(2)(c) was considered preferable to the text that appears in ICTY rule 92 *quater* (namely, "has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally"), as the text in ICTY rule 92 *quater* does not cover a number of situations that may arise. In particular, ICTY rule 92 *quater* would not apply to a situation in which it was not possible to secure or to reach a witness, although that witness could, with reasonable diligence, be traced. An example of this situation would be if a witness was in detention and his or her release could not be secured. In the present amendment, the formulation "who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally" covers the examples that are explicitly raised in rule 92 *quater,* including those relating to physical or mental conditions which render a witness unavailable to testify orally, as well as other potential situations that may arise in the course of the Court's work as a permanent institution.

[23] ICTY rule 92 *bis* (C) stipulates that the ICTY Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross examination, and that if it does so decide, the provisions of ICTY rule 92 *ter* shall apply. It is recalled that ICTY rule 92 *ter* is broadly similar to the current rule 68(b).
[24] This provision corresponds to ICTY rule 92 *quarter.*
[25] In the initial WGLL recommendation dated 1 August 2013, the phrase "due to insurmountable obstacles" was used in place of "due to obstacles that cannot be overcome with reasonable diligence".

30. Under rule 68(2)(c)(ii), the fact that prior recorded testimony goes to proof of the "acts and conduct" of the accused may be a factor against its introduction, although the introduction of such evidence is not prohibited. Due to the additional burdens placed on parties in the case of unavailable witnesses—in the case of rule 68(2)(b), the parties retain the option to call an absent witness, while such an option is excluded by definition from rule 68(2)(c)—it was considered that provision should be more permissive of "acts and conduct" evidence.

4. Rule 68(2)(d)

31. Rule 68(2)(d) addresses the introduction of prior recorded testimony in cases where the person who originally made that testimony has been subjected to interference.[26] Rule 68(2)(d) reads:

> (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.

32. Under the current rule 68, it would not be possible to introduce such evidence unless the strict requirements of the current rule 68(a) had been met. As is the case for the proposed sub-rule 68(2)(c), this amendment allows the Court to introduce prior recorded testimony that it would otherwise not be possible to consider.

33. It is emphasised that the Chamber is the ultimate arbiter on whether introducing prior recorded testimony under this provision is fair, and always retains the discretion to reject testimony submitted under rule 68(2)(d) if the fairness of the trial would be compromised by its introduction. The Chamber's power is reflected in the entirety of the amended rule 68. It is recalled that rule 68(1)

[26] This provision corresponds to ICTY rule 92 *quinquies.*

states that introduction of prior recorded testimony must not be "prejudicial to or inconsistent with the rights of the accused".

34. In the context of the present rule, the WGLL considered that it would be unduly restrictive to limit the applicability of this provision only to situations where the party to the proceedings against whom the prior recorded testimony is offered, acted (or acted in concert with others), to improperly interfere with the witness.[27] Such a limitation would remove from the ambit of rule 68(2)(d) situations in which supporters of the party interfered with witnesses on their own initiative. Witness interference is a live and ongoing issue in ICC cases, and may be more of an issue at the ICC than the ICTY because of the lack of a subpoena power and the differences in the nature of criminal investigations at each institution. Witness interference is not limited to one particular party in the proceedings, and it is to be emphasised that, just as with all of the sub-rules of the amended rule 68, the Prosecution and defence alike may seek to introduce prior recorded testimony under rule 68(2)(d). Having a provision that is applicable to interference by supporters of a party (without the party's direct involvement) creates a broader disincentive for interested persons to interfere with ICC witnesses. In particular, this provision may have a deterrent effect, in that there will be no benefit to interfering with a witness if their prior recorded testimony can be admitted to the Trial Chamber as evidence.

35. Rule 68(2)(d)(i) outlines five conditions for the introduction of prior recorded testimony under rule 68(2)(d).[28] One of these conditions is that "the failure of the person to attend or to give evidence has been materially influenced by improper interference". The term "materially" was used to require a threshold level of influence on the witness which is caused by improper interference. It serves the same purpose as other threshold words like "significant" or "substantial" in the statutory scheme and jurisprudence. "Materially" is similarly used in other statutory provisions, such as article 83(2) and article 103(2)(a) of the Rome Statute. A further condition under rule 68(2)(d)(i) is that "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 WGLL considers that a submission that "reasonable efforts" have been exhausted may be subject to changed circumstances. For example, a situation may occur in which the improper interference comes to an end, and the witness is again willing to testify. It is therefore possible for there to be situations in which prior recorded testimony is introduced into evidence under rule 68(2)(d), but, due to changed circumstances, the formerly intimidated witness is now available to testify in full. If, in such a case, the prior recorded testimony was not independently admissible under any other part of rule 68, logic would dictate disregarding that testimony in evidence.

36. Rule 68(2)(d)(ii) refers to the "physical, psychological, economic or other interests of the person". The relevant interference to the witness could be direct or indirect in character.[29]

37. Rule 68(2)(d)(iii) was included to create a link to article 70 of the Statute. Article 70 grants the Court jurisdiction over offences against its administration of justice. These offences include, *inter alia*, corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence. It was seen as unduly limiting to pre-condition a finding under rule 68(2)(d) on a finding under article 70 of the Statute. In particular, it was considered that it is impractical to wait until article 70 proceedings were finalised before rule 68(2)(d) could ever be used. However, it was acknowledged that, when such findings under article 70 existed and had not been reversed on appeal, that the Chamber could use these findings in their assessment.

[27] ICTR rule 92 *quinquies* stipulates that the "interests of justice" in the context of the admission of statements and transcripts of persons subjected to interference include "the apparent rule of a party or someone acting on behalf of a party to the proceedings in the improper interference".
[28] This provision, like the proposed rule 68(2)(b)(i) and 68(2)(b)(iii) above, uses dash points to improve its readability.
[29] While ICTY rule 92 *quinquies* refers to "physical, economic, property, or other interests", the WGLL considered that the term "economic" encompassed property interests. Further, it was thought appropriate to expressly refer to the possibility of psychological interference.

38. Rule 68(2)(d)(iv) uses language which discourages the use of "acts and conduct" evidence, although the introduction of such evidence is not prohibited. Due to the additional burdens placed on parties when faced with an intimidated witness,[30] including the need to establish interference, it was seen that this provision should be more permissive of "acts and conduct" evidence when compared to rule 68(2)(b).

39. It is understood that the introduction of sub-rule 68(2)(d) would not affect the operation of protective measures under rule 87.

C. Rule 68(3)

40. Rule 68(3) contains the text of the current rule 68(b), and addresses the introduction of prior recorded testimony if the witness is present. After discussions with the SGG and further reflection, it was decided that a small stylistic amendment would improve the readability of the text of the sub-rule. No substantive changes have been made to the text of the provision. Rule 68(3) reads:

> ~~(b)~~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.[31]

41. It is recalled that rule 68(3) should be read in conjunction with rule 68(1) and the general principles and protections contained therein.

III. The proposed rule 68 amendment

42. The full amended text is provided below.

> **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 with the rights of the accused and that the requirements of one or more of the following sub-rules are met.
>
> ~~(a)~~ 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~~; or~~.
>
> (b) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused. In such a case:

[30] While in situations under rule 68(2)(b), the parties may call the witness and receive their testimony in full, this option is not available in situations contemplated in rule 68(2)(d).

[31] In the initial WGLL recommendation dated 1 August 2013, the text of this sub-rule read: "If the witness who gave the previously recorded testimony is present before the Trial Chamber, 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."

(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:

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.

(i) 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.

(ii) 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.

(iii) 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.

~~(b)~~ 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.

IV. Conclusion

43. The effect of adopting the amendment to rule 68 could lead to a reduction in the length of ICC proceedings and streamline evidence presentation. The express protections included in these provisions and the overriding power of the Chamber to control proceedings will ensure that these powers are not exercised in a manner which is prejudicial to or inconsistent with the rights of the accused. While the proposed alterations to the text of the rule are grounded in the provisions of other institutions, they can nonetheless be adopted consistently with this Court's statutory instruments and procedure.

Appendix

Study Group on Governance
Cluster I: Expediting the Criminal Process

Working Group on Lessons Learnt

Comparative Chart of ICTY rules 92 *bis*, 92 *quater* and 92 *quinquies* and proposed sub-rules 68(2)(b)-(d)

A. Comparison of ICTY rule 92 *bis* and proposed rule 68(2)(b)

ICTY rule 92 *bis*	rule 68(2)(b)
(A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.	*[rule 68(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:]* (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) Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question: (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts; (b) relates to relevant historical, political or military background; (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates; (d) concerns the impact of crimes upon victims; (e) relates to issues of the character of the accused; or (f) relates to factors to be taken into account in determining sentence.	(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) Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether: (a) there is an overriding public interest in the evidence in question being presented orally; (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or (c) there are any other factors which make it appropriate for the witness to attend for cross-examination.	

ICTY rule 92 *bis*	rule 68(2)(b)
(B) If the Trial Chamber decides to dispense with the attendance of a witness, a written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and	(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.
(i) the declaration is witnessed by: (a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or (b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and	(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 …
(ii) the person witnessing the declaration verifies in writing: (a) that the person making the statement is the person identified in the said statement; (b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct; (c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and (d) the date and place of the declaration. The declaration shall be attached to the written statement presented to the Trial Chamber.	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 Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination; if it does so decide, the provisions of Rule 92 ter shall apply.	

B. Comparison of ICTY rule 92 *quater* and proposed rule 68(2)(c)

ICTY rule 92 *quater*	rule 68(2)(c)
(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by	(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:

Rule 92 *bis*, if the Trial Chamber:	
(i) is satisfied of the person's unavailability as set out above; and	(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, …
(ii) finds from the circumstances in which the statement was made and recorded that it is reliable.	… and that the prior recorded testimony has sufficient indicia of reliability.
(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.	(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.

C. Comparison of ICTY rule 92 *quinquies* and proposed rule 68(2)(d)

ICTY rule 92 *quinquies*	**rule 68(2)(d)**
(A) A Trial Chamber may admit the evidence of a person in the form of a written statement or a transcript of evidence given by the person in proceedings before the Tribunal, where the Trial Chamber is satisfied that:	(d) The prior recorded testimony comes from a person who has been subjected to interference. In such a case:
(i) the person has failed to attend as a witness or, having attended, has not given evidence at all or in a material respect; (ii) the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion; (iii) where appropriate, reasonable efforts have been made pursuant to Rules 54 and 75 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; and (iv) the interests of justice are best served by doing so.	(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.
(B) For the purposes of paragraph (A): (i) An improper interference may relate *inter alia* to the physical, economic,	(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.

ICTY rule 92 *quinquies*	rule 68(2)(d)
property, or other interests of the person or of another 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.
(ii) the interests of justice include: (a) the reliability of the statement or transcript, having regard to the circumstances in which it was made and recorded; (b) the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference; and (c) whether the statement or transcript goes to proof of the acts and conduct of the accused as charged in the indictment.	(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.
(iii) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.	
(C) The Trial Chamber may have regard to any relevant evidence, including written evidence, for the purpose of applying this Rule.	

Annex II.B

Letter from the Chair of the Study Group on Governance to the Vice-President of the Court, dated 3 October 2013

Dear Vice-President Monageng,

I am pleased to inform you that on 27 September 2013 the Study Group on Governance agreed, by consensus, to endorse the proposal by the Court's Working Group on Lessons Learnt to amend rule 68 of the Court's Rules of Procedure and Evidence.

As the Chair of the Study Group, I have the privilege to send you an advance copy of the report of the Study Group. As you are aware, the final text of the proposed amendment, as endorsed by the Study Group, is the product of close collaboration between the Court and the States Parties in accordance with the 'roadmap'. I trust the collaborative spirit in which we have been able to conduct our work will remain a feature of our discussions concerning other amendments. I would also like to take the opportunity to thank the Working Group on Lessons Learnt and in particular yourself and Mr. Hirad Abtahi for your active engagement in this process.

The Study Group's recommendation on the amendment of rule 68 has also been transmitted to the New York Working Group on Amendments. This item is expected to be on the agenda of the Working Group's meeting in early October. I have also shared a copy of this correspondence with Ambassador Paul Seger, in his capacity as Chair of the Working Group.

The collaboration between States and the Court has been excellent and we are looking forward to receiving further proposals for amendment of the Rules of Procedure and Evidence.

Yours sincerely,

[Signature]

Ambassador Emsgård

Annex II.C

Letter from the Vice-President of the Court to the Chair of the Study Group on Governance, dated 4 October 2013

Dear Ambassador Emsgård,

Thank you for your letter of 3 October 2013, in which you noted that the Study Group on Governance had agreed by consensus to endorse the proposal by the Court's Working Group on Lessons Learnt to amend rule 68 of the Court's Rules of Procedure and Evidence. I am also grateful to you for furnishing me with an advance copy of the report of the Study Group.

I note with appreciation the collaborative spirit with which States Parties have engaged in discussions with the Court on the text of the rule 68 amendment proposal, in accordance with the Roadmap. I am particularly indebted to your active engagement in these discussions, as well as the fine efforts of the focal points for Cluster I of the Study Group on Governance, Mr. Thomas Henquet (Netherlands) and Mr. Shehzad Charania (United Kingdom). The Court commends this collaborative approach, which has expedited the amendment process, and is confident that it will remain an indispensable element of our future joint endeavours under the Roadmap.

Kind regards,

[Signature]

Vice-President Monageng

Annex II.D

Letter from the Chair of the Working Group on Amendments to the Vice-President of the Court, dated 14 October 2013

Dear Vice-President Monageng, Dear Ambassador Emsgård,

As the Chair of the Working Group on Amendments (WGA) of the Assembly of States Parties to the Rome Statute of the International Criminal Court, I am pleased to inform you that the WGA has endorsed the proposal by the Court's Working Group on Lessons Learnt (WGLL) to amend rule 68 of the Court's Rules of Procedure and Evidence at its meeting of 11 October 2013.

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 II a draft resolution for joint adoption of the amendments to rules 100 and 68. After a comprehensive briefing by The Hague Working Group's SGG (Cluster I) co-focal point Thomas Henquet (Netherlands), the WGA decided to recommend the amendment proposal for adoption in its current form to the upcoming twelfth session of the Assembly of States Parties scheduled for 20-28 November 2013, subject to the formal submission of the proposal by the judges of the Court according to article 51(2) of the Rome Statute.

The constructive collaboration and dialogue between States and the Court in the context of the SGG provided a solid foundation assisting the WGA's endorsement of the proposal. I would like to take the opportunity to thank the WGLL, and yourself in particular, for your commitment to active engagement on these important matters, both with States Parties and within the Court. We continue to fully support the Court's efforts, through the WGLL, to assess, review and reflect on its judicial processes and guiding legal text, and look forward to learning about the outcomes of these deliberations, and to receiving further proposals for amendment of the Rules of Procedure and Evidence.

[Signature]

Ambassador Seger

Annex II.E

Letter from the Vice-President of the Court to the Chair of the Working Group on Amendments and the Chair of the Study Group on Governance, dated 18 October 2013

Dear Ambassador Seger, Dear Ambassador Emsgård,

I am grateful for Ambassador Seger's letter to Ambassador Emsgård and myself dated 14 October 2013, which notes that on 11 October 2013, the Working Group on Amendments decided to recommend the adoption of the amendment proposal to rule 68 of the Rules of Procedure and Evidence, in its current form, to the upcoming 12th session of the Assembly of States Parties. I note that this recommendation was subject to the formal submission of the proposal by the judges of the Court according to article 51(2) of the Rome Statute of the International Criminal Court.

I am pleased to inform you that on 18 October 2013, the judges of the International Criminal Court agreed by absolute majority, in accordance with article 51(2)(b) of the Rome Statute, to propose to the Assembly of States Parties the amendment to rule 68, as endorsed by the Working Group on Amendments in New York on 11 October 2013.

Progress on this issue has been facilitated by a set of fruitful meetings and exchanges between the Study Group on Governance and the Court. This cooperative approach enabled the

Working Group on Lessons Learnt to reduce the time period between the endorsement of the Roadmap and the proposal of recommendations.

The Court commends this collaborative spirit, which has expedited the amendment process.

Yours sincerely,

[Signature]

Vice-President Monageng

Annex II.F

Letter from the President of the Court to the President of the Assembly of States Parties, dated 21 October 2013*

Excellency,

I have the honour to request that you place a proposal to amend rule 68 of the Rules of Procedure and Evidence ("Rules") on the agenda of the 12th Session of the Assembly of States Parties.

On 18 October 2013, the judges of the Court agreed upon a proposal to amend rule 68 of the Rules in accordance with article 51(2)(b) of the Statute of the International Criminal Court, which provides that amendments to the Rules may be proposed by "the judges acting by an absolute majority". The amendment proposal was formulated by the Working Group on Lessons Learnt ("WGLL"), following consultations with all relevant stakeholders. It will be recalled the WGLL was established in accordance with the Roadmap on Reviewing the Criminal Procedures of the International Criminal Court to consider recommendations on proposals to amend the Rules.

I have attached for your consideration a series of documents which chart the key procedural developments regarding the amendment proposal.

- A recommendation on the proposed amendment to rule 68, drafted by the WGLL, circulated on 1 August 2013 (annex 1);

- A revised recommendation on the proposed amendment to rule 68, circulated after a series of meetings and exchanges between the Study Group on Governance ("Study Group") and the Court, dated 27 September 2013 (annex 2);

- A letter from the Chair of the Study Group, Ambassador Emsgård, noting Study Group's decision to endorse the proposal, dated 3 October 2013 (annex 3);

- A letter from the Chair of the New York Working Group on Amendments ("WGA"), Ambassador Seger, to Vice President Monageng and Ambassador Emsgård, noting the WGA's endorsement of the rule 68 proposal, dated 14 October 2013 (annex 4);

- A letter from Vice President Monageng to Ambassador Seger and Ambassador Emsgård, noting the decision of the judges acting by absolute majority to propose the rule 68 amendment to the 12th session of the ASP in accordance with article 51(2)(b) of the Rome Statute, dated 18 October 2013 (annex 5).

Please accept, Excellency, the assurances of my highest consideration.

[Signature]

President Song

* Reference: 2013/PRES/383.