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Report of the Bureau on the Study Group on Governance

Contents

I. Introduction

1. The Study Group on Governance (the "Study Group") was established via a resolution[1] of the Assembly of the States Parties (the "Assembly") in December 2010 "to conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence…."; and "to facilitate this dialogue with a view to identifying issues where further action is required, in consultation with the Court, and formulating recommendations to the Assembly through the Bureau". It was further decided that "the issues to be dealt with by the Study Group include, but are not limited to, matters pertaining to the strengthening of the institutional framework both within the Court and between the Court and the Assembly, as well as other relevant questions related to the operations of the Court".

2. In 2011, the Study Group dealt with the relationship between the Court and the Assembly, strengthening the institutional framework within the Court and increasing the efficiency of the criminal process. At the request of the Assembly at its tenth to nineteenth sessions, the dialogue between the organs of the Court and States Parties was continued from 2012 to 2021.

3. The nineteenth session of the Assembly took note of the report of the Bureau on the Study Group on Governance[2] and the recommendations contained therein, and extended the mandate of the Study Group for a further year[3], requesting the Study Group to consider and report on the following issues[4]: (i) 1.4 Election of Registrar; (ii) 1.8 Performance indicators; (iii) 1.13 Procedure for amending Rules of Procedure and Evidence; and (iv) 2.9 Management of transitions in the judiciary

4. In response to the final report of the Independent Expert Review[5], dated 30 September 2020, ("IER report"), the nineteenth session of the Assembly further requested that [6]:

"[…] relevant Assembly Mandates designated as responsible for assessing and taking possible further action as appropriate on relevant recommendations to commence implementation in 2021 and to submit to the Bureau the outcome of its consideration, including on action already taken and proposals for next steps, by 1 November 2021."

5. The Comprehensive Action Plan[7] adopted by the Bureau on 28 July 2021, allocated a number of recommendations to the Study Group and set timelines for their assessment. In addition, the Comprehensive action plan identified the Study Group as a platform for discussion to facilitate a dialogue on clusters of recommendations allocated to the Court.

6. On 6 April 2021, the Bureau appointed Ambassador Heinz Walker-Nederkoorn (Switzerland) and Ambassador Laura Dupuy (Uruguay) as Co-Chairs of the Study Group on Governance, and also appointed Mr. Jan Christoph Nemitz (Germany), Ms. Edith K. Ngungu (Kenya) and Ms. Francis Chávez (Peru) as co-focal points.

7. The Study Group held seven meetings, on 17 June, 14 July, 14 September, 27 September, 12 October, 20 October and on 25 October 2021. The co-Chairs and co-focal points held informal meetings with the President of the Assembly, the Chairperson of the Hague Working Group, States Parties, the Review Mechanism, the then Chair of the Working Group on Amendments, Ambassador Juan Sandoval Mendiolea (Mexico), the Court focal points[8] and other representatives of the Court.

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

[1] ICC-ASP/9/Res.2.
[2] ICC-ASP/19/21.
[3] ICC-ASP/18/Res.6, para.91.
[4] Ibid., annex I, para 9.
[5] ICC-ASP/19/16
[6] ICC-ASP/19/Res.7, para.7.
[7] https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/RM-Comprehensive%20Action%20Plan-ENG.pdf
[8] Mr. James Stewart, Deputy Prosecutor, Mr. Hirad Abtahi, Chef de Cabinet of the Presidency, and Mr. Osvaldo Zavala Giler, Senior Special Assistant to the Registrar.

II. Consideration of issues

9. Informed by its mandate and the Comprehensive action plan, the program of work for the Study Group focused on the following issues: (a) Continuation of the discussions on the election of Registrar, including the assessment of R76-R78 of the IER Report; (b) Continuation of the discussion on performance indicators, including the assessment of R146 and R148; (c) Continuation of the discussion on the procedure for amending the Rules of Procedure and Evidence, including the assessment of R381-R384; (d) Continuation of the discussion on the management of transitions in the judiciary, including the assessment of R214 and R206; (e) Assessment of other IER recommendations allocated to the Study Group with the deadline of the second half of 2021 (R55, R120); and (f) Facilitation of a Platform for Discussion of clustered IER recommendations assigned to the Court.

A. Election of Registrar

10. At the first plenary meeting of the Study Group on 14 July 2021, the Co-Chairs and co-focal points of the Study Group presented a discussion paper titled "The way ahead in relation to the election of the Registrar". The paper recalled that the Registrar is elected by an absolute majority of judges taking into account any recommendation of the Assembly of States Parties according to article 43 (4) of the Rome Statute and rule 12 (1) of the Rules of Procedure and Evidence.

11. The paper took note of the findings and recommendations 76-78 of the Independent Experts Review of the International Criminal Court and the Rome Statute system- Final Report (IER report) and considered that the implementation of the recommendations would require an amendment to rule 12 (1) of the Rules of Procedure and Evidence and article 43 (5) of the Rome Statute. Considering that the process of the election of the Registrar would start in the first quarter of 2022, it was further noted that there was not sufficient time to assess and implement recommendation 76 ~~of the IER~~ report beforehand.

12. The Co-Chairs and co-focal points suggested that States Parties should, in the short term, seek to strengthen the role of the Assembly in the upcoming election of the Registrar and in the long term, assess the possible implementation of recommendations 76-78, and presented options on the strengthening of the role of States Parties within the current legal framework.

13. In commenting, States Parties noted that recommendations 76 -77 were premised on the proposed Three-Layered Governance Model whose assessment was still pending and that there was a need to delink the discussions on the governance model from the election of the Registrar and Deputy Registrar. Support was expressed for the proposals for the establishment of a due diligence process and organization of public hearings for candidates for the position of Registrar. It was noted that the proposed way forward was based on the premise that greater involvement of the Assembly was required for the election of the Registrar which was not necessarily the case.

14. Regarding recommendation 77 on the election of the Deputy Registrar, the representative of the Court informed that the mode of election proposed by the Independent Experts was not in line with the provisions of rule 12 (4) of the Rules of Procedure and Evidence and that the Registrar and Deputy Registrar could not be elected in tandem under the current legal framework, since the need for the election of a Deputy has to be assessed by the Registrar.

15. A number of States Parties expressed support for the proposals. A point was made that the legal framework did not prevent State Parties from establishing an expert committee to carry out the selection process for the Registrar as recommended by the Independent Experts. In response, it was recalled that according to rule 12 (1) of the Rules of Procedure and Evidence, it was the Presidency that was responsible for transmitting the list of candidates who satisfy the criteria of the Rome Statute to the Assembly of States Parties. To give that role to an expert committee without amending the Rules would amount to a duplication of roles.

16. Regarding whether the Study Group would discuss the issue of the appointment of a Deputy Registrar, it was noted that the recommendation on the appointment of the Deputy

Registrar was tied to the recommendations on the Three-Layered Governance Model and could be discussed by the Study Group or in a meeting of the Review Mechanism in the context of the wider discussion on unified governance.

17. As regards whether the current Registrar could make a recommendation on a Deputy Registrar, the Court representatives expressed their support for the idea of having a Deputy Registrar and reiterated that under rule 12 (4) of the Rules of Procedure and Evidence it is the Registrar who assesses the need for a Deputy Registrar and makes a recommendation to the President of the Court, and that the decision on whether to elect a Deputy Registrar is made at a plenary session of the Court.

18. A request was made for a tabulation of the costs of having a Deputy Registrar. The representative of the Court indicated that the Court would be in a position to provide the information once a decision had been reached to elect a Deputy Registrar.

19. Several States Parties noted the need for further discussion on the modalities on the election of the Registrar, the importance of learning from the current process on the election of Deputy Prosecutors, and queried whether the role of States Parties should be strengthened considering that the lessons learnt exercise on the election of the Prosecutor had not been concluded by the Bureau of the Assembly.

20. As regards the nature of recommendations that the Assembly of States Parties had made to the Presidency for previous elections, States Parties were informed that the Secretariat would circulate an information note prepared by the Secretariat in 2020 titled "Election of the Registrar of the International Criminal Court" which presented a historical overview of the practice of States Parties.

21. At the third plenary meeting of the Study Group on 27 September 2021, the Co-Chairs and co-focal points presented a paper titled "Draft decision on election of Registrar". Several States Parties observed that the draft was a good basis for further discussion and a reflection of previous discussions. A proposal was made for the inclusion of the words "after consultation with States Parties and civil society organizations" in operative paragraph 6. The Co-Chairs requested States Parties to convey their comments on the draft.

22. At its fourth meeting, on 12 October 2021, the Study Group considered the amended draft decision which incorporated the views submitted. It was noted that in previous elections the recommendations on the list of candidates for Registrar had been discussed by The Hague Working Group. The draft decision had therefore been amended to include the words "through The Hague Working Group" in operative paragraph 5 and operative paragraph 6 was amended to include "through The Hague Working Group to discuss the list of candidates for Registrar…"

23. A point was made that the Court should take measures to encourage a wider diversity of eligible candidates who satisfy the criteria of article 43 (3) of the Rome Statute and that this should be reflected in operative paragraph 3. A clarification was sought on the proposal for public roundtable discussions with candidates for the position of Registrar. It was also emphasized that discussions on the recommendations on the list of candidates should be inclusive.

24. At the fifth meeting, on 20 October 2021, the Study Group considered an updated draft decision on the election of the Registrar. Operative paragraph 3 had been amended by including the wording of article 43(3) of the Rome Statute. Operative paragraph 5 had been amended to include the words "as an option" and operative paragraph 6 was amended to include the words "in an inclusive manner", to look for transparency and engagement of all delegations.

25. Support was received for the proposed amendments to operative paragraphs 3 and 6. However, several States Parties expressed support for public roundtable discussions with the candidates and proposed the deletion of the words "as an option" in operative paragraph 5. As regards whether the Study Group had, in principle agreed to recommend that the Bureau facilitate the holding of public roundtable discussions, it was noted that several other options on engagement with the candidates had been proposed and that States Parties would continue the discussions in 2022, though this option received broad support.

26. At the conclusion of discussions, the Co-Chairs and co-focal points proposed that the Study Group continue to consider recommendations 77-78 and to report thereon to the twenty-first session of the Assembly.

27. The final draft decision on the election of Registrar was conveyed to States Parties on 20 October 2021 for approval under a silence procedure until 22 October 2021. As no comments were received, the draft decision was formally approved by the Study Group and has been included in the current report of the Study Group to the Bureau.[9]

B. Performance indicators

28. At the meeting of the Study Group on 17 June 2021, the Co-Chairs recalled that at the 24 September 2020 meeting, the Study Group had received presentations by representatives of the Registry and the Office of the Prosecutor on the development of the performance indicators of the Court.

29. The Co-Chairs recalled the mandate given to the Study Group by the Assembly at its nineteenth session,[10] requesting the Study Group to consider performance indicators, mindful of the recommendations made by the Group of Independent Experts.

1. Presentation of the 2020 report on performance indicators

30. At the meeting of the Study Group on 17 June 2021, representatives of the Registry and of the Office of the Prosecutor briefed the Study Group on behalf of the Court on the Court's 2020 report on key performance indicators ("KPI" or "KPIs").

31. A representative of the Registry recalled the adoption, on 17 July 2019, of the new Strategic Plans (2019-2021) of the Court, the Office of the Prosecutor, and the Registry and that the Registry collected Court-level performance data in relation to the goals set out in the Court's strategic plan, comprising judicial and prosecutorial performance goals, cooperation and complementary goals; and organizational performance goals.

32. He pointed out that, for the first time, the report, covering the period up to 30 September 2020, included data regarding timelines for the issuance of certain decisions adopted by the judiciary at the retreat held in October 2019 and subsequently included in the Chamber's Practice Manual, as well as data on cooperation and complementary goals, which were not part of the previous reports.

33. He further noted that the vast majority of data collected referred to judicial and prosecutorial proceedings and was being used as a management tool, for example with regard to the estimation of workload. While the data collected was useful, he expressed a need to look at how better use could be made of it.

34. A representative of the Office of the Prosecutor welcomed that the new reporting structure allowed a more detailed breakdown of the data analysis and emphasized the challenge in developing meaningful indicators to measure the Court's performance with regard to its cooperation and complementary goals. By definition, both depended partly on external circumstances and did require interaction with and action from external actors and stakeholders.

35. On the next steps, the Court representatives took note of the recommendations on KPIs in the IER report and provided an overview of the Court's initial response to recommendations R144-R148.

36. The Co-Chairs proposed to assess recommendations R146 and R148, both allocated by the Comprehensive action plan to the Study Group for assessment in 2021, in a separate meeting.

[9] Section IV. C.
[10] ICC-ASP/19/Res.6, annex I, para.9.

2. Assessment of recommendations R146 and R148

37. At the meeting of the Study Group on 20 October 2021, a representative of the Registry presented the Court's assessment and status of implementation of recommendations R146 and R148.

38. He recalled the Court's initial response, welcoming recommendations R146 and R148 and expressing the will to continue to develop its KPIs in accordance with the recommendations and to fully commit to further fine-tuning the use of KPIs.

39. With regard to R146, the Court had already identified a number of measures, some of which could be implemented in 2022, in order to standardize the collection of data, enable comparison across several years, make the presentation of data more coherent, consistent and reader-friendly and consequently provide more meaningful insight of the achievement of strategic goals.

40. In future, each KPI shall be linked to a specific ICC strategic goal (as opposed to one of the three groups of strategic coals), thus more closely aligning organ-specific KPIs with the new Court Strategic Goals. The presentation of low-leverage indicators shall be eliminated and high-leverage indicators shall be more often included, in order to streamline the report and reduce data reporting fatigue. The report shall further include more data visualization and clear definitions and descriptions. To enable better comparison with and inclusion in budget documents, the reporting timeline should be adjusted to January-December.

41. In response to a query on how KPIs were defined, communicated to staff and evaluated, as the exercise was also considered important for establishing a common mission and vision for staff, the representative of the Registry indicated that the KPIs had been developed at the retreat in Glion, Switzerland, in 2016. They were subsequently adjusted when the strategic plans were developed, in an effort to align them more with the budget process and to bring them closer to the Sections. While some KPIs may be more visible to staff than others, all Sections reported regularly on their KPIs. KPIs that had been consistently met were either deleted or redefined more ambitiously.

42. With regard to R148, the representative of the Registry noted that the Court had in the past collaborated with external parties to assess the impact of the Court on affected local communities and victims and would continue to provide full support and cooperation to reputable external parties undertaking independent studies.

43. He further expressed the Court's view that, should the Assembly decide to take recommendation 148 forward for implementation, a number of key issues should be taken into account for consideration. Firstly, one should start with a stock-taking of existing studies to see what opportunities they offer, including lessons learned in terms of methodology and limitations. Secondly, the "impact" to be measured should be adequately defined and put in the context of the Court's available resources and spheres of influence. Thirdly, the question of how "impact" can actually be measured should be considered, taking into account that impact might take long time to be measured. Fourth, quantitative and qualitative indicators, while being assessed by external parties, should be agreed upon in consultation with the Court. The Internal Oversight Mechanism ("IOM") may also need to be consulted in the context of paragraph 22 of its revised mandate.[11] Fifth, indicators (quantitative & qualitative) across different situation countries should be carefully designed to identify the variables beyond the Court's work that impact its performance. Sixth, voluntary contributions should be sought after and secured by the relevant external partners undertaking a particular study, as the Court will not have the means to fund such an exercise out of the normal budget.

44. The Co-Chairs subsequently invited Mr. Klaus Rackwitz, Director of the Nuremberg Academy and Mr. Sam Mueller, founding Director of The Hague Institute for Innovation of Law, to give a presentation on the Nuremberg benchmark's project, a feasibility study to determine whether benchmarks for international criminal justice can be established.

45. Mr. Rackwitz and Mr. Mueller explained that their study aimed at assessing whether there could be a measuring system, helping States to identify what type of intervention (i.e.

[11] ICC-ASP/19/Res.6, annex II.

a Court or a demilitarization project) would be most effective for what type of situation. They concluded that it would be possible to develop a system to measure the effectiveness of an intervention response in terms of deterrence, accountability or restoration effects, but that political support would be needed. The process of creating a measuring system would take several years and cost approximately €6 million, with an additional €1.5 – 2 million per year to keep it running. Therefore, an organizational owner would be needed to take the study further. They emphasized that despite the costs, the issue would be too important to let go. Their final report would be published in early 2022 and would produce a blue print.

46. Concern was raised that externalized studies assessing the impact of the Court could be one-sided and the Court was encouraged to make an effort to involve civil society and academia from different regions of the world.

47. A representative of the Open Society Justice Initiative encouraged the Court to continue to consider ways to make better use of data it already collected, e.g. the Court could measure the number of victims applications processed in relation to those received, or the average time lapse between the commission of crimes and the delivery of reparations. While an increased use of external partners would be welcomed, the implementation of R148 could not be accomplished solely through voluntary resources.

48. The Co-Chairs invited States Parties to reflect on this issue, stressed the need to continue the dialogue on the possibilities of measuring the Court's impact and proposed to recommend that the Study Group continue to consider R148 and to report thereon to the twenty-first session of the Assembly.

C. Procedure for amending the Rules of Procedure and Evidence

49. Prior to the 14 July 2021 meeting, the Study Group coordinated its work on the issue of amendments to the Rules of Procedure and Evidence with the Working Group on Amendments, which proved to be very beneficial for the progress on this topic. The Study Group wishes to continue this collaboration with the WGA. Similarly, the Co-Chairs had reached out to the Review Mechanism as well as the Court focal points for the IER report. In addition, during the meetings on 14 July and 14 September 2021, the Chef de Cabinet answered questions by States Parties with respect to the topic of rule amendment proposals.

50. At the 14 July 2021 meeting, the co-Chairs and co-focal points presented a paper titled "Draft resolution language on way forward for proposals for rule amendments", dated 12 July 2021. This paper took note of the relevant findings in the IER report (R381-R384) and considered that the efficiency and effectiveness of the Court required a procedure that would enable the Court as well as the States Parties to provide for rule amendments; such procedure should respect the provisions of articles 112(7) as well as 51(2) of the Statute regarding, respectively, the taking of decisions by the Assembly by consensus and, in the absence of consensus, upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

51. Some States Parties indicated that a need existed to break the deadlock with respect to rule amendment proposals. In response to a query by other States Parties as to whether the Study Group had specific proposals for rule amendments in mind, the co-focal point stated that no specific proposal would be tabled for the twentieth session of the Assembly of States Parties, and that the proposed draft resolution language would apply to any future rule amendment proposals.

52. Furthermore, regarding whether such amendment proposals would be considered in joint meetings of the Study Group and Working Group on Amendments, the co-focal point answered in the affirmative. The 14 September 2021 meeting was a joint meeting of the Study Group and the Working Group on Amendments. At that meeting, the then Chair of the Working Group on Amendments commented on the draft resolution language and the procedural way forward.

53. At that meeting, States Parties discussed an updated draft resolution text which had incorporated suggested language by States Parties. In particular, some States Parties preferred an explicit reference to the pursuit of consensus in the operative paragraphs (in line with article 112 (7)), while other States Parties were concerned that such language could be

understood as requiring consensus for a rule amendment proposal (where article 51 (2) is applicable).

54. The Co-Chairs and the co-focal points therefore suggested that operative paragraph 2 should provide that, in accordance with articles 112(7) and 51(2) of the Statute, a decision on the adoption of a Rule amendment proposal shall be taken in accordance with the procedure set out in operative paragraph 1, which refers to the Roadmap of the Study Group[12], as well as the "Terms of reference of the Working Group on Amendments".[13]

55. Following further discussions, operative paragraph 1 was further amended to read that all States Parties, "in cooperation with the Court", are called upon to rigorously and thoroughly review any rule amendment proposal, in order to emphasize the role of the Court in this important process.

56. Finally, the Co-Chairs proposed that the Assembly request the Study Group continue to consider the remainder of recommendations 381-384, and to report thereon to the twenty-first session of the Assembly.

57. The final draft resolution text, dated 23 September 2021, was conveyed to States Parties on 27 September 2021 under a silence procedure. As no comments were received, the draft resolution text had been formally approved by the Study Group and has been included in the current report of the Study Group to the Bureau.[14]

D. Management of transitions in the judiciary

58. At the fourth plenary meeting of the Study Group on 12 October 2021, the Co-Chairs and co-focal points presented a discussion paper titled "Management of transitions in the Judiciary". The paper recapitulated the current situation whereby if a judge becomes permanently unable to continue a trial, the latter must start from the beginning. This situation is generated due to the provision of article 74 (1) of Rome Statute that requires the physical presence of all judges at all stages of the trial.

59. The paper also recalls the recommendations 214 and 215 of the Independent Expert Review which favor a Rome Statute amendment to establish a "substitute judge" to enable a trial to continue where a judge becomes permanently unable to continue his functions due to illness or death. In the same line, the overall response of the Court to these recommendations also agrees that amendments to the Rome Statute would be the ideal means to address the current situation, and considers the matter as urgent.

60. In addition, the discussion paper proposes three possible solutions for the way ahead. First, the paper finds that the institution of a "substitute judge", as recommended by the IER, could be an option but its main disadvantage would be that a substitute judge would not be able to join the trial immediately because he/she would need to be elected by the Assembly of States Parties. A second option would be the introduction of a new category of judges, "judges ad hoc", who would be elected by the Assembly, together with regular judges. They would be placed in a roster list, specifically designed for that purpose and would be called to serve upon request of the President of the Court as soon as a regular judge became permanently unavailable.[15] It is important to state that this second option would need an additional amendment to article 36 of the Rome Statute.

61. Finally, a third option contemplates the possibility of introducing judges ad hoc also in case of increased workload, given that the current provision on this matter, article 36 (2) of Rome Statute, stipulates that any additional judge would serve for a term of nine years. Therefore, States Parties would have to elect a new regular judge to resolve a circumstantial necessity, with all the related financial implications.

62. In their preliminary comments, States Parties agreed on the necessity of addressing this issue in an urgent matter and highlighted the importance of assessing the best practices of other criminal tribunals. Some States Parties proposed to invite an expert from the

[12] ICC-ASP/12/37 (2013), annex I.
[13] ICC-ASP/18/Res.8, annex II.
[14] Section IV.C
[15] This practice had been adopted by the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia

International Residual Mechanism for Criminal Tribunals to provide details about the practice of the tribunals with respect to judges ad hoc. The discussion paper is currently being studied by the States Parties so that the options presented could be further assessed in 2022.

63. The Study Group proposes to recommend that the Assembly request it to continue its discussions on recommendations 214 and 215 in 2022, on the basis of the paper entitled "Management of transitions in the Judiciary".

64. Regarding IER recommendation 206, the Study Group will propose a way forward on its implementation in early 2022, considering that there is already a proposal for amendment of rule 140 *bis* of the Rules of Procedure and Evidence that can be reassessed by States Parties.

E. Other IER recommendations allocated to the Study Group

65. At the meeting of the Study Group on 20 October 2021, the Co-Chairs provided an update on remaining IER recommendations R55 and R120, which had also been allocated to the Study Group to be assessed in the second half of 2021.

66. With regard to R55, the Co-chairs recalled that the Court in its overall response to the IER report had welcomed this recommendation subject to sufficient funding and that the Office of the Prosecutor in its budget proposal for 2022 had asked for the funding of one Senior Public Information Officer (P-4). The Committee on Budget and Finance had subsequently recommended the approval of this position in its report on the work of its thirty-seventh session.[16] The Co-Chairs took note that ultimately the implementation of this recommendation would depend on the outcome of the budget discussion and that therefore the assessment of R55 by the Study Group would have its limits. Nevertheless, States Parties would be welcome to share their assessment of R55, if they so wished.

67. With regard to R120, the Co-Chairs informed that this recommendation had been taken up by the IOM facilitation together with related recommendations on internal grievance procedures, and that this recommendation would therefore not be assessed in the Study Group.

68. The Co-Chairs took note that no delegation wished to share an assessment and concluded that the Study Group would not need to further assess R55 and R120.

F. Facilitation of platform for discussion

69. The Study Group recalled that, in allocating the IER recommendations in the Comprehensive action plan, the Review Mechanism had decided to work through existing Assembly structures in order to avoid burdening the Assembly with new structures. The Review Mechanism allocated the recommendations concerning governance issues to the Study Group on Governance as the platform for discussion (except for those related to Unified Governance, R1-R20, where the RM had decided to facilitate the initial discussion).[17] On 25 October 2021, the Study Group held a meeting in order to discuss the clustered IER recommendations allocated to the Court that were assigned to the Study Group as the platform for discussion. The Court gave an update of its assessment of the respective recommendations, focusing on those earmarked for 2021.

1. Update by the Registry

a) Chapter II. Human Resources (R91, R93)

70. The Director, Division of Management Services, presented an update on recommendations R91 and R93 of Chapter II of the IER report.

[16] ICC-ASP/20/15.

[17] Introductory note, Proposal for a Comprehensive Action Plan for the assessment of the recommendations of the Group of Independent Experts, including requirements for possible further action, para. 7. See: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/RM-CAP-Introductory-Note-ENG.pdf

71. Regarding R91, the Court had assessed the recommendation against the current practice and the representative confirmed that most aspects were being applied. Recruitment panels already included at least one woman, with an eye to gender balance. In addition, the Court always includes a member from underrepresented regions on each panel. The Court tried to observe the requirement for the presence of speakers of both working languages on the recruitment panels, in light of the requirement in the vacancy announcement that candidates should be fluent in one of the two working languages, and depending on the job description, the Court might look into other official languages of the Court. In addition, there was always an expert from HR who guaranteed that the process was followed.

72. Regarding R93, he noted that this was a pre-Covid-19 recommendation, and that during the pandemic, the Court had conducted all interviews via video-conference. Efforts were underway to ensure that interviews for senior positions were held physically in The Hague. This recommendation was assessed against the current practice but it also built on achievements during the pandemic period.

73. Both recommendations, together with other Human Resources-related recommendations also allocated to the Study Group, were being considered by the Court in the context of the review of Human Resources Services, which was foreseen in the Registry Strategic Plan.

74. The Court would engage with the Committee on Budget and Finance on these and other Human Resources-related matters in the spring session.

75. Mr. Taeeun Choi (Republic of Korea), facilitator for Geographical representation and gender balance in the recruitment of staff (GRGB), recalled that R91 and R93 had been assigned to the Study Group with the involvement of GRGB. Since the Study Group would be discussing R91 and R93 after the clustered presentations by the Court, the most efficient way of GRGB considering these recommendations would be through the participation of GRGB New York-based representatives in the Study Group meetings on this point. R91 and R93 would be further discussed at the next facilitation meeting in New York and the facilitator would share the findings with the Study Group.

2. Update by the Judiciary

76. The Chef de Cabinet of the Presidency of the Court indicated how the judiciary was assessing the recommendations allocated to it.

a) Chapter VIII of the IER report, Election of the Presidency (*R171, R172*)

77. The Chef de Cabinet indicated that, after the judges retreat in 2020, these recommendations had already been implemented following the 19 January 2021 adoption by the plenary of judges of the Guidelines on the procedure for the election of the Presidency, as well as of the Code of judicial ethics. The Guidelines contain provisions on "Ethical obligations" (Section 6) that are reflected in the Code of judicial ethics (article 5, "Integrity"), in relation to the election of the Presidency.

b) Chapter IX Working methods: B. Full-time service of new judges (R178-R180)

78. These recommendations had already been implemented. In light of R.178, the newly elected Presidency, in March 2021, included the reasoning in its decision on assignment of judges, such as workload, profiles of the judges, and also explained the reasons on the calling of judges, including why they were called immediately and the fact that the Appeals Chamber was missing a judge.

79. Regarding R179, the Presidency had prepared a report titled "Report of the judges of the Court on Managing Transitions in the Judiciary", dated 30 January 2020 which had been introduced at the 5 March 2020 meeting of the Study Group. As part of the planning for smooth transition, the judiciary had since then taken a number of initiatives to facilitate the succession of judges. In particular, the introduction of time limits for the issuance of decisions, a narrower interpretation of article 36(10) of the Rome Statute, and the use of a judge to complete a trial (after his/her 9 years mandate) not on a full-time basis.

80. Regarding R180, prospective judges received detailed information on the terms and conditions of service prior to their election. Judicial candidates should be informed of their terms and conditions of service even before being elected. The Court's position was, that since this was a matter of elections, the Secretariat of the ASP, not the Registrar, should ideally convey that information to States Parties.

c) *Chapter X. Efficiency of the judicial process and fair trial rights (R189-R193, R204, R213)*

81. Regarding the recommendations in Chapter X and Chapter XI, the Chef de Cabinet stated that the assessment would be discussed and finalized at the judges' retreat scheduled for 19 and 20 November 2021. A press release would be issued containing the early conclusions of the judges' assessment. Further details could be shared next year. Pending the outcome of the retreat, the judiciary has done some preliminary assessments of the recommendations.

82. R189 on efficiency: The judges agree with this recommendation and believe that it should not be limited to the first appearance during pre-trial stage, as the Office of the Prosecutor (OTP) continues its investigations. For example, in the Abd Al Rahman case, the Pre-Trial Chamber requested the Prosecution to include confidential and ex parte filings on a fortnightly basis to update and explain to the Chamber on the state of affairs. This recommendation has been de facto implemented.

83. R190 on redactions: This recommendation was welcomed by the judges. However, it should be noted that much of the disclosure process is regulated in a detailed manner by the Rome Statute and the Rules of Procedure and Evidence. Thus, the implementation of this recommendation would be more complex, specifically because of the in-built high level of regulation already in place. The Judges would like to have a say in the formation of the Review Team.

84. R191 on confirmation proceedings: The judges agree with this recommendation. It is in line with the stated objectives of the confirmation process. This is also reflected in previous confirmation decisions, which emphasized that the confirmation process should not become a mini-trial process.

85. R192 on cohesion: This recommendation has already been implemented by the Chambers Practice Manual; the judges will continue to refine this Practice Manual to harmonize the work across the Chambers. However, the nature of the case also determines whether deadlines are met. A certain flexibility must be guaranteed in this respect. It is essentially a set of lessons learnt.

86. R193 on presentation of evidence for the confirmation of charges: The judges will always try to follow the Chambers Practice Manual, and will deal with novelties as they arise. Aspects of this are being discussed with a view to a possible amendment the Regulations of the Court. For more information, the retreat is awaited.

87. R204 on presentation of evidence through electronic means, during the trial stage: The judges fully agree with this recommendation. Covid-19 accelerated the implementation of this recommendation on the use of electronic means for testimonies.

88. R213 on interlocutory appeals (art. 82 of the Rome Statute): The attempt to limit the types of decisions that can be the subject to an interlocutory appeal (not final appeal) is seen as problematic. The challenge is that the Court's jurisprudence has been diverse. The judges will discuss this recommendation in the retreat in order to have more homogeneous jurisprudence; though complexity of such an undertaking should not be underestimated, especially given the diversity of ICC case law and diversity of cases which require some judicial interpretation.

d) Chapter XI. Development of processes and procedures to promote coherent and accessible jurisprudence and decision-making (R219-R225)

89. R219: The Presidency stated that it was not for them to intervene on this recommendation. This recommendation should be addressed in the context of interactions among judges on the topic of collegiality to avoid compromising the independence of the

Presidency. It should be considered with other IER Recommendations related to the collegiality of the judges.

90. R220: This recommendation had been implemented with the adoption in 2019 of the Internal Guidelines on Judgment Drafting and Guidelines on judgment structure, and will continue.

91. R221 on unanimous decisions and dissent: This recommendation was welcomed. The judges had previously discussed this issue under collegiality. However, it was noted that dissent was explicitly foreseen in article 74(5) of the Rome Statute. In addition, the legal culture of the judges was also relevant, as some systems allowed for dissenting and separate opinions while others did not. It was therefore important to strike the right balance. The judges would assess this recommendation further in their retreat.

92. R225: this recommendation on the Judgment Structure and Drafting Guidelines was being implemented.

3. Update by the Office of the Prosecutor (OTP)

93. The Deputy Prosecutor explained that the OTP had established a task force for the implementation of the recommendations assigned to the office.

a) Chapter I. Governance (R48, R55, R65, R67-R68, R71)

94. These recommendations relate to OTP governance and should be seen in the context of the transition to a new structure; he noted that the old structures would continue until the new structures had been formally established in early 2022.

95. R48 and R55: He indicated that R.48 had not been implemented, while favouring the structure of two Deputy Prosecutors (noting that the Committee on Budget and Finance had recommended it, as requested by the new Prosecutor; and the selection process had already taken place, pending their election at the twentieth session of the Assembly) and R55, on the appointment of a Senior Media Officer had also been included in the budget proposal. The proposed programme budget for 2022 reflected its implementation.

96. R65, R67, R68: The recommendations reflect the opinion of the OTP. Induction training already exist for staff, as well as in-house or pro bono training. In addition, staff could participate in United Nations sponsored management training programmes. Nevertheless, there were major budgetary restrictions for all those training programs (induction, follow-up, and professional development). The recommendations would be further discussed during the ongoing transition process of the new Prosecutor.

97. R71 on priorities: The dependency on the budget was also pointed out in this case. Only after the budget has been approved would the OTP be able to set more precise priorities.

*b) Chapter XV. OTP internal quality control mechanisms (R305-R319***)**

98. R305, R306, R307: These recommendations had already been implemented, namely through the recently amended Evidence Review Guidelines (R305), the amended ID Source Evaluation Guidelines (R306) and through the KPI dashboard (R307). This means that there were now regular reviews of the existing evidence.

99. R308 on peer evidence review: This detailed recommendation needed further evaluation, though some ideas were already included in the Guidelines, such as the use of simulated opposition or “red teams”. However, it appeared not to be fully implementable due to lack of financial resources which made “red-teaming” (“stress-test” of evidence by other colleagues) difficult.

100. R309 on peer review panels: The inclusion of analysts and investigators was already provided for in evidence reviews. The assessment of factual and legal aspects would be addressed under the “unified (integrated) teams” concept, with an inclusive approach.

101. R310 on testing of the trial readiness: It is being implemented through the multifaceted test of "a reasonable prospect of conviction" (not only the evidentiary strength, but also information management and witness protection).

102. R311-312 on trial monitoring: Started with lessons learned in the Ongwen case but would be more structured or regularly done to extract the best practices and continue with the professional development. This would be further discussed in the framework of the evidence review in order to assure trial readiness.

103. R313-R319: These recommendations on lessons learned were considered actionable by the OTP and would be institutionalized, including through the KPIs, and further improved, as part of the working culture.

104. R316: This recommendation must not be necessarily implemented as lessons learned reports were already being worked on.

105. R318: This recommendation was particularly welcomed by the OTP but resource availability had been a challenge to maintaining this valuable investigations jurisprudence report.

106. At the conclusion of the presentations it was enquired, whether a written document summarizing the updates presented could be provided by the Court. The Co-Chairs recalled that the comprehensive oral explanations by the representatives of the Court as a whole were an update of the overall written response, dated 14 April 2021. They further explained that asking the Court to accompany each update with a written document was thought to overburden the Court unnecessarily, since the Court was already expected to provide regular updates to the Review Mechanism and report to the Assembly ahead of its twentieth session.[18] Updates regarding the IER recommendations allocated to the Court would follow.

III. The way forward

107. As regards the way forward for the Study Group, the Co-Chairpersons and co-focal points noted that the final report of the Independent Expert Review, dated 30 September 2020, contained recommendations relating to the work of the Study Group and that the Comprehensive action plan, adopted by the Bureau on 28 July 2021, had allocated a considerable number of those recommendations to the Study Group for consideration in 2021 and 2022, and had further identified it as a platform for discussion.

108. In consequence, the Co-Chairpersons and co-focal points note that the work of the Study Group in 2022 will be threefold and include 1) the continuation and commencement of the assessment of IER recommendations allocated to the Study Group, 2) the commencement of the implementation of recommendations where the assessment has been positively concluded and 3) the continued facilitation of a dialogue with the Court on clusters of recommendations allocated to the Court.

IV. Recommendations

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

A. For inclusion in the omnibus resolution

The Assembly of States Parties,

1. *Welcomes* the continued structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence;

2. *Takes note* of the Bureau's report on the Study Group on Governance;[19]

[18] ICC-ASP/19/Res.7, para. 8.
[19] ICC-ASP/20/21.

3. *Extends* for another year the mandate of the Study Group, established in resolution ICC-ASP/9/Res.2 and extended in resolutions ICC-ASP/10/Res.5, ICC-ASP/11/Res.8, ICC-ASP/12/Res.8, ICC-ASP/13/Res.5, ICC-ASP/14/Res.4, ICC-ASP/15/Res.5, ICC-ASP/16/Res.6, ICC-ASP/17/Res.5, ICC-ASP/18/Res.6 and ICC-ASP/19/Res.6;

4. *Takes note* of the final report of the Independent Expert Review, dated 30 September 2020, and the Comprehensive Action Plan, adopted by the Bureau on 28 July 2021 and *notes* that the Study Group will consider recommendations falling within its mandate;

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

With regard to the **Study Group on Governance**,

a) *invites* the Court to further engage in a structured dialogue with States Parties with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence, and to provide State Parties with its assessment of the respective IER recommendations;

b) *invites* the Study Group to closely cooperate with the Court, subsidiary bodies and other facilitations established by the Assembly on the assessment and implementation of the Independent Experts' recommendations that address governance issues;

c) *requests* the Study Group to consider the following issues, and to report thereon to the twenty-first session of the Assembly:

i) Recommendations of the Independent Experts allocated to the Study Group in the Comprehensive Action Plan; and

ii) Facilitation of a platform for the discussion of the Independent Experts' recommendations assigned to the Court.

C. For inclusion in the stand-alone resolution of the Review Mechanism

With regard to the **Study Group on Governance, on the procedure to amend the Rules of Procedure and Evidence (R381-R384)**

Recalling the findings in the Report of the Group of Independent Experts ("IER report") that "[t]here is an urgent need for the Court to consider and adopt practices enhancing the efficiency, effectiveness, considerateness, courtesy, and fairness of proceedings", and that a deadlock exists that disables the Court from "steadily introducing measures to improve the multifarious aspects of its procedures" (IER Report, para. 983),

Recalling further that the Experts found that, currently, "proposed amendments lie in limbo in the absence of consensus", while article 51(2) of the Rome Statute provides that such an amendment proposal "shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties",[20]

Recalling the "Roadmap on reviewing the criminal procedures of the International Criminal Court"; [21] ("Roadmap") which, *inter alia*, states that States Parties and the Court will keep under review the effectiveness of the Roadmap;

Considering that Recommendation 381 of the IER Report states: "Article 51(2) of the Rome Statute should be amended to provide that amendments to the RPE may be proposed by a Judge, the Prosecutor, the Defence Office or any State Party, and that any amendment will enter into force if agreed to by an absolute majority of the Judges at a plenary meeting convened with notice of the proposal. It would have immediate effect. Until such an amendment enters into force, the Assembly should vote on RPE amendments by two thirds majority, rather than consensus, in line with the provisions of Article 51(2)";

[20] IER Report, para. 980.
[21] ICC-ASP/12/37 (2013), annex 1.

Considering that the efficiency and effectiveness of the Court, a common interest for both the Assembly and the Court, require a procedure that enables the Court as well as States Parties to provide for rule amendments, and that such procedure should respect the provisions of Articles 112(7) and 51(2) of the Rome Statute regarding, respectively, the taking of decisions by the Assembly by consensus and, in the absence of consensus, upon adoption by a two-thirds majority of the members of the Assembly of States Parties;

Considering that, in accordance with the Roadmap, the Study Group on Governance engages in a dialogue with the Working Group on Lessons Learnt (WGLL) and the Advisory Committee on Legal Texts (ACLT) on recommendations for rule amendments, and that the Study Group will consider the views of the WGLL and the ACLT before it decides to endorse any such proposal and to send it to the Working Group on Amendments;

1. *Calls upon* all States Parties, in cooperation with the Court, to rigorously and thoroughly review, in accordance with the Roadmap, each Rule amendment proposal within the Study Group on Governance as well as the Working Group on Amendments in line with the "Terms of reference of the Working Group on Amendments" (ICC-ASP/11/20, Annex II);

2. *Decides* that, in accordance with Articles 112(7) and 51(2) of the Rome Statute, a decision on the adoption of a Rule amendment proposal shall be taken at the session of the Assembly of States Parties that follows the submission of this proposal to the Working Group on Amendments, in accordance with the procedure set out in paragraph 1;

3. *Requests* the Study Group on Governance to consider the remainder of recommendations 381-384, and to report thereon to the twenty-first session of the Assembly.

With regard to the **Study Group on Governance**, **on the election of the Registrar (R76-R78)**

Recalling the provisions of article 43, paragraph 4, of the Rome Statute according to which the judges shall elect the Registrar by absolute majority, taking into account any recommendation by the Assembly of States Parties,

Recalling further the provisions of rule 12, paragraph 1, of the Rules of Procedure and Evidence that it is the responsibility of the Presidency of the Court to establish a list of candidates who satisfy the criteria laid down in article 43, paragraph 3 of the Rome Statute and transmit the list to the Assembly of States Parties with a request for any recommendations,

Considering the findings of the "Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report" ("IER report") in paragraph 186 that "the process ought to be more thorough and that States Parties should play a stronger role in the process, in line with the provisions of the Rome Statute."

Noting that the full implementation of recommendation 76 of the IER report would require an amendment of the Rules of Procedure and Evidence with respect to the entity responsible for the establishment of a list of candidates to be presented to the Assembly of States Parties,

Noting further that the process of the election of the Registrar will commence in the first quarter of 2022 leaving not sufficient time to fully assess and implement recommendation 76 of the IER report beforehand,

1. *Decides* to strengthen the participation of States Parties in the upcoming election of the Registrar in 2023 within the existing legal framework and *decides further* to continue its consideration and possible implementation of recommendation 76 of the IER report for future elections;

2. *Invites* the Court to consult with States Parties on the drafting of the vacancy announcement and collaborate with States Parties on its dissemination in the first quarter of 2022;

3. *Further invites* the Court to take measures to encourage a wider diversity of eligible candidates who satisfy the Rome Statute requirements of article 43, paragraph 3, i.e., persons of high moral character, highly competent and with an excellent knowledge of and fluency in at least one of the working languages of the Court; and also with respect to representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male among the candidates;

4. *Requests* the Bureau to establish a due diligence process before September 2022 for candidates for Registrar in consultation with the Presidency of the Court and the Independent Oversight Mechanism to assist in the determination of the criterion of "high moral character" as required by article 43, paragraph 3, of the Rome Statute;

5. *Requests* the Bureau, through The Hague Working Group, to consider facilitating public roundtable discussions with the candidates in the list transmitted by the President of the Court open to States Parties and civil society and conducted in both working languages of the Court;

6. *Requests* the Bureau, through The Hague Working Group, and in an inclusive manner, to discuss the list of candidates for Registrar and submit a report and any recommendation for consideration by the Assembly of States Parties at its twenty-first session;

7. *Requests* the Study Group on Governance to consider recommendation 77 on the position of the Deputy Registrar and recommendation 78 on a proposed Rome Statute amendment to limit the Registrar's term to a 7-9 years non-renewable mandate, and to report thereon to the twenty-first session of the Assembly.