

# The “Lessons Learnt” process at the International Criminal Court – a suitable vehicle for procedural improvements?

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## I. Introduction

Trials in international criminal courts and tribunals for international crimes are inherently slow compared to national proceedings for ordinary crimes. The dimensions of international trials, often including multiple crime sites, a high number of distinct charges, amounts of witnesses per case easily reaching counts beyond 50 and thousands of pages of documentation submitted as evidence, are vast and require significant time and resources.<sup>1</sup> This is exacerbated by the high legal complexity of these proceedings, with perpetrators often far detached from the actual crimes on the ground, and a procedural framework of its own, comprising elements of the inquisitorial and the adversarial procedural systems alike.<sup>2</sup> These factors have led to trial phases in international criminal tribunals that lasted for many years, even in single-accused cases.<sup>3</sup> The same applies to the International Criminal Court (“ICC” or “Court”). In light of its novel statute and rules of procedure compared to already existing international courts and tribunals, the need to amend the procedural framework in order to optimize the Court’s output and efficiency is quite obvious. In the following, the different options for improving the procedural framework shall be analyzed. This analysis will also zoom in and critically examine various initiatives from in and around the ICC over the past years. This will be followed by a brief conclusion, as far as one can do so in assessing a progressing and highly diverse process.

### 1. The ICC “Lessons Learnt” initiative

States Parties to the Rome Statute have become increasingly aware of the Court’s need to adapt and respond to procedural challenges in a dynamic and efficient fashion. The need to test the system for possible efficiency improvements became ever more tangible towards the end of the first decade of the ICC’s operations, both through the many precedents at the UN ad hoc tribunals, and also in light of the evolving trial

<sup>1</sup> See only, as an example the trial before the ICTY against Radovan Karadžić, Case No. IT-95-5/18, and the trial before the ICC against Dominique Ongwen, Case No. ICC-02/04-01/15; trial hearings are scheduled to commence on 6.12.2016.

<sup>2</sup> See Ambos, Treatise on International Criminal Law, Vol. 3, 2016, Chapter I, p. 2, 28 f.; Broomhall, in: Triffterer/Ambos, The Rome Statute of the International Criminal Court, 3<sup>rd</sup> ed. 2015, art. 51, para. 9 f.; Cryer/Friman/Robinson/Wilmshurst, An Introduction to International Criminal Law and Procedure, 3<sup>rd</sup> ed. 2015, Chapters 8.3, 17.

<sup>3</sup> There are many examples at both ICTR and ICTY of trial phases that lasted years and generated relevant litigation (see only ICTR, Decision of 9.10.2012 – ICTR-00-61-A [Jean-Baptiste Gatete v. The Prosecutor], para. 45; ICTY, Decision of 29.9.2011 – IT-03-67-T [Prosecutor v. Vojislav Šešelj], with Separate Individual Opinion of the Presiding Judge Jean-Claude Antonetti).

practice emerging from the first cases at the ICC.<sup>4</sup> At the yearly meetings of the Assembly of States Parties, as well as in working groups of States Parties’ delegates in the intersessional periods, the question gained traction on how the processes and proceedings at the ICC could be reviewed and, where appropriate, improved. In 2010, a concrete dialogue started between the Court and States Parties in light of the perceived need to take stock of the institutional framework of the Rome Statute system, focusing on the efficiency and effectiveness of the Court in its operations.<sup>5</sup>

As an immediate result of this, in 2011 the “Lessons Learnt” initiative was established by the Court to assess the functioning of the ICC’s procedural framework and look into possible improvements.<sup>6</sup> This article will attempt to shed some light on this initiative, the progress so far and the challenges ahead.

### 2. Hard-letter law tools to streamline the procedural framework

The idea of streamlining the procedural framework is not a novelty: at the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the Rules of Procedure and Evidence date in their original version of 11 February 1994.<sup>7</sup> The first revision ensued only three months after the first issuance<sup>8</sup> and ICTY Rules have gone through altogether 50 rounds of revisions since then; the latest on 10 July 2015.<sup>9</sup> Similarly, the Rules of Procedure and Evidence at the International Criminal Tribunal for Rwanda (“ICTR”) were changed altogether

<sup>4</sup> Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06; The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07; The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12; and Situation in Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08.

<sup>5</sup> ICC-ASP/9/Res.2, 10.12.2010; the Assembly emphasized that enhancing the efficiency and effectiveness of the Court is of a “common interest both for the Assembly [...] and the Court”.

<sup>6</sup> Study Group on Governance: Lessons learnt: First report of the Court to the Assembly of States Parties, ICC-ASP/11/31/Add.1, 23.10.2012, para. 13.

<sup>7</sup> See at:

<http://www.icty.org/en/documents/rules-procedure-evidence> (1.12.2016) “ICTY Rules”; the ICTY Rules are in force since 14.3.1994, see Rule 1.

<sup>8</sup> ICTY, Decision of 5.5.1994 – IT/32 Rev.1.

<sup>9</sup> See IT/282, Amendments to the Rules of Procedure and Evidence, 10.7.2015, at:

<http://www.icty.org/en/documents/rules-procedure-evidence> (1.12.2016).

23 times since 1995;<sup>10</sup> the Rules of Procedure and Evidence of the Special Court for Sierra Leone (SCSL) saw 14 amendments until the end of that court’s mandate;<sup>11</sup> the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) have been amended nine times since its entry into force on 12 June 2007.<sup>12</sup> Finally, the Rules of Procedure and Evidence of the Special Tribunal for Lebanon (“STL”) have been amended nine times to date since their adoption on 20 March 2009.<sup>13</sup>

The vehicle and prescribed process of these revisions for all aforementioned courts and tribunals is a rather simple, judiciary-driven, one: to take one example, article 15 of the ICTY Statute (and article 14 of the insofar identical article 14 of the ICTR Statute) provides:

“The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.”<sup>14</sup>

The Statutes of the Special Tribunal for Lebanon and the Special Court for Sierra Leone contain similar provisions.<sup>15</sup> Rule 6(A) of the ICTY and the – in this respect identical – ICTR Rules specify that:

<sup>10</sup> The latest version is of 13.5.2015 (“ICTR Rules”), available at:

<http://unictr.unmict.org/en/documents/rules-procedure-and-evidence> (1.12.2016).

<sup>11</sup> Since 2013, the Rules of Procedure and Evidence of the Residual Special Court for Sierra Leone have been amended twice (2013 and 2015). See at:

<http://www.rscsl.org/RSCSL-Documents.html> (1.12.2016).

<sup>12</sup> The last revision of the ECCC Internal Rules (Rev.9) dates of 16.1.2015; see at:

<https://www.eccc.gov.kh/en/document/legal/internal-rules-rev9> (1.12.2016).

<sup>13</sup> See the Rules of Procedure and Evidence of the STL at:

[http://www.stl-tsl.org/images/RPE/STL-BD-2009-01-Rev8\\_RPE\\_EN.pdf](http://www.stl-tsl.org/images/RPE/STL-BD-2009-01-Rev8_RPE_EN.pdf) (1.12.2016).

<sup>14</sup> The only Statute not providing for a similar provision is the ECCC Statute, which merely refers to “existing procedures in force” under Cambodian law and, in case of a lacuna, “guidance [from] procedural rules established at the international level”, see articles 20, 23, 33 of the “Law on the Establishment of the Extraordinary Chambers as amended” of 27.10.2004, at:

<https://www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended> (1.12.2016).

See also article 12 (1) of the “Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea” of 6.6.2003, at:

[https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement\\_between\\_UN\\_and\\_RGC.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf)

(1.12.2016).

<sup>15</sup> See article 28 (1) of the STL Statute, S/RES/1757 (2007); article 14 SCSL Statute.

“Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted if agreed to by the majority of the permanent Judges composing the Tribunal, at a plenary meeting of the Tribunal convened with notice of the proposal addressed to all Judges.”<sup>16</sup>

Importantly, pursuant to ICTY Rule 6 (D), an amendment shall enter into force only seven days after the date of issue of an official ICTY document containing the amendment. As a safeguard against retroactivity to the detriment of the accused, the ICTY Rule also stipulates that any amendment “shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case.”<sup>17</sup> ICTR Rule 6 (C) and STL Rule 5 (H) contain similar provisions.<sup>18</sup> A Practice Direction issued by the President<sup>19</sup> of the ICTY stipulates further details on how potential rule amendments are being discussed and consulted internally.<sup>20</sup> A “Rules

<sup>16</sup> Interestingly, Rule 6 of the SCSL Rules broadens the group of potential moving parties for a Rule amendment to “the Principal Defender and by the Sierra Leone Bar Association or any other entity invited by the President to make proposals for amendments”; amendments are to be adopted by the plenary of judges (Rule 6 [B], [C]), at:

<http://www.rscsl.org/Documents/RPE.pdf> (1.12.2016).

<sup>17</sup> See for relevant jurisprudence on this matter ICTY, The Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-T, Trial Chamber III, Redacted version of the “Decision on the Prosecution’s Consolidated Motion Pursuant to Rules 89(F), 92<sup>bis</sup>, 92<sup>ter</sup>, and 92<sup>quater</sup> of the Rules of Procedure and Evidence” filed confidentially on 7.1.2008, 21.2.2008; and *ibid.*, Decision on Continuation of Proceedings, 13.12.2013; ICC, The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Judgment on the appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V (A) of 19.8.2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, ICC-01/09-01/11-2024, 12.2.2016.

<sup>18</sup> Interestingly, the ECCC Internal Rules and the SCSL Rules do not contain any such explicit reference in the relevant provisions. Yet, the general nulla poena principle which is part of every legal regime of the aforementioned courts and tribunals would prevent any detrimental application even of a procedural rule (while traditionally more geared towards issues of substance than to those of procedure) if it materially negatively affects an accused’s overall position in trial; *Broomhall* (fn. 2), art. 51, para. 32; see also ICC, The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Judgment on the appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V (A) of 19.8.2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, ICC-01/09-01/11-2024, 12.2.2016, para. 78.

<sup>19</sup> See, on this competence, Rule 19 (B) of the ICTY Rules of Procedure and Evidence, “addressing detailed aspects of the conduct of proceedings before the Tribunal”.

<sup>20</sup> Procedure for the Proposal, Consideration of and Publication of Amendments to the Rules of Procedure and Evidence

Committee” channels proposals and relevant communication/comments to the judges in preparation of the plenary session. The Committee itself consists of a minimum of three permanent judges of the ICTY and a non-voting representative, each from the Registry, Office of the Prosecutor and the Defense. Chambers legal support staff provide secretarial support.<sup>21</sup> The Plenary considers proposals for amendment to the ICTY Rules at least once per year.<sup>22</sup>

The procedure involving the Rules Committee can also be circumvented, provided the amendment is unanimously approved by the permanent judges.<sup>23</sup> This power illustrates that the legislator intended to confer the ultimate authority to change the UN Tribunals’ procedural rules with the judges alone. Similarly, at the ECCC, changes to the “Internal Rules” outlining the applicable procedural regime,<sup>24</sup> are decided upon by the plenary of the judges.<sup>25</sup> Again, the STL and SCSL contain similar provisions.<sup>26</sup>

Conversely, the ICTY Statute was amended altogether nine times, with the last amended version of 2009 presently in force.<sup>27</sup> Similarly, the ICTR Statute has seen more than 10 amendments and even the MICT Statute has been amended

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of the International Tribunal, Rev. 2, 24.1.2002, IT/143/Rev.2, 24.1.2002 (in the following: “Procedure”), at:  
[http://www.icty.org/x/file/Legal%20Library/Practice%20Directions/it143\\_amendmentstорules\\_procedure\\_rev2\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Practice%20Directions/it143_amendmentstорules_procedure_rev2_en.pdf)  
(1.12.2016).

<sup>21</sup> Section 2 of the Procedure provides that “[t]he Committee Secretariat shall consist of, at a minimum, a Senior Legal Officer and Associate Legal Officer of the Chambers Legal Support Section of the International Tribunal”.

<sup>22</sup> Procedure, Section 3.

<sup>23</sup> Rule 6 (B) of the ICTY Rules; Procedure, Section 7. Similarly, see Rule 6 (C) of the SCSL Rules. Rule 6 (B) of the ICTR Rules requires approval “by at least two-thirds of all Judges by any appropriate means either done in writing or confirmed in writing”.

<sup>24</sup> The ECCC’s Internal Rules serve “to consolidate applicable Cambodian procedure for proceedings before the ECCC and, pursuant to articles 20 new, 23 new, and 33 new of the ECCC Law and Article 12 (1) of the Agreement, to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards”, ECCC Internal Rules (Rev.9), 16.1.2015, Preamble, at: [https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal\\_Rules\\_Rev\\_9\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf) (1.12.2016).

<sup>25</sup> See ECCC Internal Rules (Rev.9), 16.1.2015, Rule 3 (3).

<sup>26</sup> See ECCC Internal Rule 3 (2); SCSL Rule 6 (B).

<sup>27</sup> The original Statute was adopted on 25.5.1993 by UNSC Resolution 827; it was then amended in 1998 by UNSC Resolution 1166; in 2000 by UNSC Resolution 1329; in 2002 by UNSC Resolution 1411; in 2003 by UNSC Resolution 1481; in 2005 by UNSC Resolution 1597; in 2006 by UNSC Resolution 1666; in 2008 by UNSC Resolution 1837 and most recently on 7.7.2009 by UNSC Resolution 1877. The latest Updated Statute is of September 2009.

recently.<sup>28</sup> These amendments, however, required separate resolutions of the UN Security Council and did not, for the most part, impact on the procedural outlines of those institutions.<sup>29</sup>

At the ICC, any amendments to its Rules of Procedure and Evidence (“ICC Rules” or “Rules”) are more difficult to achieve than is the case for any of the abovementioned institutions. Article 51 (2) of the Rome Statute<sup>30</sup> stipulates that:

Amendments to the Rules of Procedure and Evidence may be proposed by:

- Any State Party;
- The judges acting by an absolute majority; or
- The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

In other words, the power to amend the procedural framework in terms of the most relevant tool, the Rules (which are incidentally much more detailed than those of the ad hoc Tribunals or any other international court), lies not with the judges of the ICC but with its legislator, the Assembly of States Parties (“Assembly”).<sup>31</sup> Furthermore, mindful of past and present practice, for a rule amendment to pass, not the statutorily required two-thirds majority but indeed consensus amongst States Parties will usually be required – a product of States’ reticence to display irreconcilable disagreement on items that are finally put to a vote.<sup>32</sup> Statutory requirements for changes to the Statute, governed by articles 121 and 122 of the Rome Statute, are even more restrictive: the default provision for Statute amendments, article 121, requires the ratification or acceptance by seven-eighths of all

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<sup>28</sup> See UN SC Resolution 2306 (2016).

<sup>29</sup> In fact most statute changes of the UN ad hoc tribunals related to the amount of judges (including the addition of ad litem judges) and the composition of the Appeals Chamber, arts. 11-12<sup>quater</sup> ICTR Statute and 12-13<sup>quater</sup> ICTY Statute.

<sup>30</sup> A/CONF.183/9 of 17.7.1998 and corrected by process-verbaux of 10.11.1998, 12.7.1999, 30.11.1999, 8.5.2000, 17.1.2001 and 16.1.2002. The Statute entered into force on 1.7.2002; see at:

[https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) (1.12.2016).

<sup>31</sup> For the Assembly of States Parties (Assembly), see article 112 of the Rome Statute and, for a general overview, *Rama Rao/Ambach*, in: Triffterer/Ambos (fn. 2), art. 112, para. 8 f.

<sup>32</sup> States’ preference for consensus in international voting fora is not a bad thing, in particular at the example of the – still fragile – Rome Statute system of the ICC; the more unity is displayed by States Parties, the stronger the system is portrayed externally, enhancing the ICC’s deterrent effect and thus making it more attractive for non-States Parties to accede to the Rome Statute system and benefit from its protective legal regime.

States Parties for an amendment to enter into force.<sup>33</sup> Only amendments of a limited (and enumerated) set of provisions of an institutional nature – and thus of no direct procedural relevance – require a mere two-thirds majority.<sup>34</sup>

Regarding the ICC Rules, one exceptional amendment power is conferred with the judges of the ICC; article 51 (3) of the Rome Statute provides that:

“[a]fter the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.”

However, this power is what it is: exceptional. Its use is restricted by two cumulative requirements: (a) urgency; and (b) a lacuna in the law for the “specific situation” at hand.

Against this backdrop, it is obvious that the ICC is clearly lacking its brother and sister tribunals’ flexibility in terms of changing its procedural rules. It may be argued that this is indeed intended by the legislators to create a rigorous Rome Statute system that remains unaffected by temporary (and potentially politically motivated) initiatives and attacks against the ICC’s normative framework.<sup>35</sup> At the same time, it effectively prevents the ICC from exercising a similar amount of flexibility in adapting its procedural rules to court-room realities to what the ad hoc Tribunals and other international(ized) courts could/can.

In the following, the different procedural alleyways will be assessed on how rule – as well as practice – changes have been achieved to date at the ICC, followed by an outlook of what may be to come.

## II. Establishment of the Road map

Initial discussions between the Court and States Parties regarding the necessity of strengthening of the institutional framework of the Rome Statute and enhancing the efficiency and effectiveness of the Court were held throughout the year 2010 in the so-called “Hague Working Group”, one of the two main platforms of interaction between States Parties and the Court in between the yearly Assembly sessions (the other platform being the New York Working Group).<sup>36</sup> During the

<sup>33</sup> Article 121 (4) of the Rome Statute. For any amendments to the crimes themselves the regime is even more restrictive, see article 121 (5) of the Rome Statute.

<sup>34</sup> Article 122 of the Rome Statute. The set of articles which can be amended through this procedure is defined in article 122 (1) of the Rome Statute. See also *Clark*, in: Triffterer/Ambos (fn. 2), art. 122, para. 3.

<sup>35</sup> See *Clark* (fn. 34), art. 121, para. 1 f.; see also, in the context of the statutory amendment procedure in article 121 of the Rome Statute *Ambach*, in: Bergsmo/Wui Ling/Ping (eds.), *Historical Origins of International Criminal Law*, Vol. 3, 2015, p. 422 f.

<sup>36</sup> See on the different working groups and their mandates Report of the Bureau: Evaluation and rationalization of the working methods of the subsidiary bodies of the Bureau,

Assembly meeting in December 2010, the Assembly acknowledged “the need to take stock of the institutional framework of the Rome Statute system”, and “that enhancing the efficiency and effectiveness of the Court is of a common interest both for the [Assembly] and the Court”.<sup>37</sup> Stressing that any such dialogue on the Court’s efficiency needs to be carried out in full respect for its judicial independence,<sup>38</sup> the Assembly created a designated platform for such interaction in establishing a study group on governance issues (hereinafter “Study Group”)<sup>39</sup> within its Hague Working Group. The group’s task is to identify “issues where further action is required” in consultation with the Court, and formulate recommendations to the Assembly through its Bureau.<sup>40</sup> The Study Group is open to representatives of all States Parties;<sup>41</sup> representatives of the organs of the Court are regularly invited. Other stakeholders such as representatives of the defense and victims and the NGO-community may also take part as appropriate. Discussions in the Study Group on the Court’s institutional framework led to a first rule amendment (rule 4) and the addition of rule 4<sup>bis</sup> to the Rules, transferring the decision on the assignment of judges to the judicial divisions from the plenary of judges to the Presidency.<sup>42</sup> This amendment followed the process of article 51 (2) of the Rome Statute, and was adopted by consensus.<sup>43</sup>

Simultaneous to the discussions on powers and competences of the Presidency of the Court in relation to the Judiciary (which had led to the amendment of rule 4 and the addition of rule 4<sup>bis</sup> to the Rules), the Study Group had also engaged, throughout the year 2011, on the issue of expediting the criminal process.<sup>44</sup> Following relevant discussions, the

ICC-ASP/12/59, 20.11.2013, para. 8; *Rama Rao/Ambach* (fn. 31), art. 112, para. 15.

<sup>37</sup> ICC-ASP/9/Res.2, Establishment of a study group on governance, 10.12.2010.

<sup>38</sup> ICC-ASP/9/Res.2, para. 1.

<sup>39</sup> The Assembly initially gave a mandate to the Study Group for a period of one year. It took up its work in 2011, deriving its mandate from ICC-ASP/9/Res.2; its mandate has been continuously extended ever since.

<sup>40</sup> ICC-ASP/9/Res.2, para. 2; see also para. 3, outlining the operational mandate as including matters pertaining to the institutional framework and “relevant questions related to the operation of the Court”.

<sup>41</sup> ICC-ASP/9/Res.2, para. 5.

<sup>42</sup> Report of the Bureau on the Study Group on Governance, ICC-ASP/10/30, 22.11.2011, para. 21.

<sup>43</sup> ICC-ASP/10/Res.1, Amendments to rule 4 of the Rules of Procedure and Evidence, 20.12.2011. Pursuant to article 51 (2), amendments to the Rules may be proposed by any State Party, the Prosecutor, or the judges acting by an absolute majority. These amendment proposals enter into force upon adoption by a two-thirds majority of the members of the Assembly.

<sup>44</sup> Report of the Bureau on the Study Group on Governance, ICC-ASP/10/30, para. 23. Discussions also included consultations on principles relating to reparations pursuant to article 75 of the Rome Statute.

Presidency of the Court established an internal working group at the recommendation of States Parties, with the intention to conduct a thorough “lessons learnt” exercise during 2012 in light of the experience of the first trials, with a view to identifying potential improvements in its procedures. This initiative was endorsed by States and then subsequently by the Assembly.<sup>45</sup> As a relevant channel between the Court and States Parties, the Advisory Committee of Legal Texts (“ACLT”)<sup>46</sup> was selected; it comprises representatives of the Judiciary, the Office of the Prosecutor and Counsel before the Court,<sup>47</sup> and therefore represents an inclusive forum for all actors before the ICC to produce well contemplated and consulted proposals for rule amendments.

In the course of 2012, the Court engaged in an internal exercise to identify items that need to be addressed with a view to expediting the judicial proceedings and enhancing their efficiency, including through amendments to the legal framework. In an exercise spearheaded by the Presidency of the Court, the judges identified issues and recommended solutions, either by suggesting the standardization of best practices or in proposing amendments to the legal framework. In consultation with States Parties it was agreed to focus on necessary changes to the Rules of Procedure and Evidence and not (also) the Statute.<sup>48</sup> A list of issues identified by the judges was circulated to the Office of the Prosecutor, the Registry and a representative of Counsel. Further items were thus included in the list. A number of other operational suggestions not requiring a rule change but a mere practice adjustment were likewise noted for future consideration.<sup>49</sup> As a

result of these efforts, a non-exhaustive list was established and shared with States Parties of issues that need(ed) discussion with the view to expediting proceedings and enhancing their quality.<sup>50</sup> The list outlines nine clusters and 24 sub-clusters of distinct issues. The nine clusters identified are briefly outlined below:

## 1. Pre-trial

- Format and content of the confirmation of charges decision;
- Extent of the legal interpretation made by the Pre-Trial Chamber;
- Necessary degree of precision of the legal characterization of facts and modes of liability; and
- Presentation of *viva voce* witnesses during the confirmation hearing.

## 2. Pre-trial and trial relationship and common issues

- Establishment of a standard system of disclosure, unified e-Court protocol and a more simplified system for applying/lifting redactions;
- Possibility of achieving greater uniformity between Pre-Trial and Trial Chambers regarding the assessment of the relevance and admissibility of evidence;
- Extent of the evidence that needs to be presented before the court, including its format and procedure of presentation, and the scope of the Chamber’s power guiding the parties in that respect;
- Possibility of having a unified record of the case (as opposed to a pre-trial and a trial record at present) throughout all stages of the proceedings;
- Trial Chamber’s possibility to introduce previously recorded reliable testimony;<sup>51</sup>
- Options to avoid repetitive litigation of issues in pre-trial and trial; options to increase parties’ agreement on facts where possible;
- Relationship between Chambers, the Office of the Prosecutor (OTP) and the Victims and Witnesses Unit (now: Section) in relation to witness protection; and
- Question of a need to impose strict authentication requirements of documentary evidence.

<sup>45</sup> Report of the Bureau on the Study Group on Governance, ICC-ASP/11/31, 23.10.2012, para. 10; ICC-ASP/10/Res.5, Strengthening the International Criminal Court and the Assembly of States Parties, 21.12.2011, para. 35 ff.

<sup>46</sup> The ACLT was established pursuant to regulation 4 of Regulations of the Court (ICC-BD/01-01-04).

<sup>47</sup> The Assembly has since repeatedly extended the Study Group’s temporal mandate to accommodate for relevant discussions, see Resolution ICC-ASP/10/Res.5, para. 36 ff.; ICC-ASP/12/Res.8, 27.11.2013, Annex I, para. 7 (extending the mandate from year to year ever since).

<sup>48</sup> States noted that “amendments to the Statute would take considerable [sic] more time to enter into force” and, more importantly, “that amendments to the Statute did not constitute a feasible means, at this stage, to provide timely redress to any problems relating to the criminal procedures”. Finally, it was noted that any discussion on proposals to amend the Statute would need to be undertaken within the remit of the New York-based Working Group on Amendments, and could thus not be discussed within The Hague Working Group mandate. Report of the Bureau on the Study Group on Governance, ICC-ASP/11/31, 23.10.2012, para. 11.

<sup>49</sup> These items were decided to be addressed through the adoption of best practices or amendments to the Regulations of the Court, where necessary. A product of this is the present Chambers Practice Manual (version February 2016), available at:

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[https://www.icc-cpi.int/iccdocs/other/Chambers\\_practice\\_manual--FEBRUARY\\_2016.pdf](https://www.icc-cpi.int/iccdocs/other/Chambers_practice_manual--FEBRUARY_2016.pdf) (1.12.2016).

<sup>50</sup> Study Group on Governance: Lessons learnt: First report of the Court to the Assembly of States Parties, ICC-ASP/11/31/Add.1, 23.10.2012, Annex. The Court made it clear that the list is “by no means intended as exhaustive and it does not preclude the addition of other issues that may arise during future discussions. It only constitutes a first step of a process to be continued”, para. 11.

<sup>51</sup> This item has since been disposed of: see amended Rule 68 of the Rules, as amended by resolution ICC-ASP/12/Res.7.

3. Trial

- Introducing the possibility to have a Single Judge handle the preparatory stages of the trial up to the beginning of hearings.<sup>52</sup>

4. Victim participation and reparations

- Possibility of improving the management of the application system for victims to participate in the proceedings;
- Possibility of a collective system of victims’ application;
- Streamlining the participation of victims in all phases of the proceedings, including their representation; and
- Discussion on scope of reparations (individual or collective); whether principles on reparations should be addressed in a court-wide document or should be further developed on a case-by-case basis; and whether reparation proceedings may be dealt with by a Single Judge.

5. Appeals

- Discussion on the current certification procedure for interlocutory appeals requiring such certification;
- Options to expedite proceedings in interlocutory appeals.

6. Interim release

- Alternative options to the requirement to consult relevant States before granting interim release to an accused.

7. Seat of the Court

- Possibility of simplifying the procedure for designating an alternative place of the proceedings.<sup>53</sup>

8. Language issues

- Clarification of the extent to which witness statements and other documents need to be translated;
- Possible simplification of transcription system in rules 111, 112 of the Rules;
- Possibility to streamline the review of transcripts.

9. Organizational matters

- Discussion on the options to facilitate the movement of judges between all three divisions within the remit of article 39 of the Rome Statute;
- Potential for Chambers to sit temporarily with only two judges for a limited period of time (e.g. in the case of illness or temporary unavailability);
- Interpretation of article 36 (10) of the Rome Statute as well as the possibility for judges under a mandate

extension to perform other duties, be replaced or perform as part-time judges.<sup>54</sup>

Since the Court’s statutory and regulatory framework did not provide an appropriate platform for the Court and States Parties to have a structured dialogue on possible recommendations to amend the Rules,<sup>55</sup> the Court drew up a roadmap (“Roadmap”) of steps to be taken to ensure timely discussions and actions to bring any such proposal to the attention of States Parties for a possible adoption at the Assembly at year-end. The Roadmap established a “Working Group on Lessons Learnt” (“WGLL”), open to all interested judges of the Court, in order to work on the issues identified in the list and to determine whether amendments to the Rules of Procedure and Evidence are required.<sup>56</sup> If a need to amend an ICC Rule is identified, the WGLL drafts necessary proposals for amendments, including an explanatory note, and transmits it to the ACLT for further consultation.<sup>57</sup> If accepted by the ACLT, the proposal is transmitted to States in the Study Group and from there eventually to the New York-based Working Group on Amendments<sup>58</sup> for consideration at the Assembly.<sup>59</sup>

In December 2012, the Assembly endorsed the Roadmap and encouraged States Parties “to engage via the Roadmap, so as to avoid a disparate and unstructured approach to any proposals on amending the Rules.”<sup>60</sup> It was understood that the Roadmap covered a long-term project and that if the need arose over time the Roadmap could be amended.<sup>61</sup> Consequently, the Roadmap and its implementation remained under review throughout 2013; by the end of that year, an amended, more flexible Roadmap was adopted by the Assembly.<sup>62</sup>

<sup>54</sup> Annex to ICC-ASP/11/31/Add.1.

<sup>55</sup> As acknowledged by States Parties in Report of the Bureau on the Study Group on Governance, ICC-ASP/11/31, 23.10.2012, para. 14.

<sup>56</sup> ICC-ASP/11/31, para. 13.

<sup>57</sup> ICC-ASP/11/31, para. 13.

<sup>58</sup> The Working Group on Amendments is mandated to consider Statute and Rule amendments and make proposals to the Assembly, see ICC-ASP/8/Res.6.

<sup>59</sup> Should the Study Group decide to endorse any proposals they are transmitted to the Assembly’s Working Group on Amendments for consideration at least 60 days prior to commencement of the next Assembly meeting at year end. See ICC-ASP/11/31, Annex I, “Draft Roadmap on reviewing the criminal procedures of the International Criminal Court”.

<sup>60</sup> In its Report of the Bureau on the Study Group on Governance (ICC-ASP/11/31, 23.10.2012), the Assembly however pointed out that States, Judges or the Prosecutor could still put forward proposals outside the auspices of the Roadmap if they so desired. para. 15.

<sup>61</sup> Report of the Bureau on the Study Group on Governance, ICC-ASP/11/31, 23.10.2012, para. 15, 17; Report of the Bureau on Study Group on Governance, ICC-ASP/12/37, 15.10.2013, para. 10.

<sup>62</sup> Resolution ICC-ASP/12/Res.8, “Strengthening the International Criminal Court and the Assembly of States Parties”,

<sup>52</sup> This item has since been disposed of: see Rule 132<sup>bis</sup> of the Rules, as amended by resolution ICC/ASP/11/Res.2.

<sup>53</sup> This item has since been disposed of: see amended Rule 100 of the Rules, as amended by resolution ICC-ASP/12/Res.7.

States Parties also indicated that they expected to receive a minimum number of detailed amendment proposals to the ICC Rules following the freshly established new process.<sup>63</sup> As a start, the Court submitted in 2012 a proposed new rule to the Assembly, under the procedural vehicle of article 51 (2) (b) of the Rome Statute, following approval by an absolute majority of the judges of the Court. The “rule amendment” actually consisted of an insertion of a new rule 132<sup>bis</sup> into the Rules of Procedure and Evidence. Pursuant to rule 132<sup>bis</sup>, the functions of the Trial Chamber in respect of trial preparation may be exercised by a single judge. This new rule, inspired by some of the functions of the Pre-Trial Judge at the ICTY<sup>64</sup> and adopted by the Assembly in 2012,<sup>65</sup> served not only to expedite proceedings, but also ensured cost efficiency.

### III. The Roadmap – rules that were passed at the 12<sup>th</sup> Assembly meeting

During discussions in 2012, general agreement had been reached amongst both States and the Court that sufficient courtroom practice had developed allowing for a substantive review of the Court’s criminal procedures in the areas of pre-trial and trial, with a view to expediting the criminal procedures.<sup>66</sup> In the beginning of 2013, the WGLL therefore put its focus on three of the clusters identified in the list: pre-trial; pre-trial and trial relationship; and the seat of the Court, the latter being a matter of relevance particularly at the earlier stages of trial (e.g. opening statements).<sup>67</sup>

As a direct result of this prioritization,<sup>68</sup> the following rules were proposed by the judges of the Court pursuant to article 51 (2) (b) of the Statute and adopted by the Assembly at the 12<sup>th</sup> Assembly meeting (in 2013):<sup>69</sup>

- Rule 68 – prior recorded testimony: allowing for the introduction of previously recorded audio/video testimony;<sup>70</sup> and
- Rule 100 – place of proceedings: possibility for a chamber 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, if in the interests of justice.

Up until the 12<sup>th</sup> Assembly, the Roadmap seemed effective, as evidenced by the adoption of rules 68 and 100. In addition, the Court had informed States Parties of ongoing intensified work under the “Pre-trial” and “Pre-trial and trial relationship and common issues” clusters, as well as an examination of translation issues under the “Language Issues” cluster of the list.<sup>71</sup> In conclusion, States Parties and the Court managed to establish a lengthy yet solid and, importantly, consultative and inclusive system for rule changes proposed by the judges pursuant to article 51 (2) (b) of the Rome Statute. The different steps of in-depth research and careful crafting of any proposed amendment or even new provision by those who are supposed to apply the rule in court at a later stage is particularly important as it safeguards the practical significance and legality of any such provision. In this sense, the Roadmap approach is supported by the rule amendment mechanisms of other international courts and tribunals, leaving the authority and responsibility for the legal assessment, research and drafting of amendments to the first-row appliers, i.e. the judges<sup>72</sup> – while the power to adopt the rule remains with the legislator, i.e. the States Parties.

However, rules 68 and 100 were not the only rules adopted at the 12<sup>th</sup> Assembly session; three further rules were inserted into the Court’s legal texts *outside* of the Roadmap and pursuant to article 51 (2) (a) of the Statute, namely rule 134<sup>bis</sup> (presence through the use of video technology), rule 134<sup>ter</sup> (excusal from presence at trial) and rule 134<sup>quater</sup> (excusal from presence at trial due to extraordinary public duties).<sup>73</sup> This will be addressed in more detail further below.

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27.11.2013, para. 39. The amendments contained two proposals of the ICC regarding a more flexible exchange of views between the Court and the Study Group on amendment proposals, including more flexible timelines. Report of the Bureau on the Study Group on Governance, ICC-ASP/12/37, 15.10.2013, Annex I.

<sup>63</sup> ICC-ASP/11/31/Add.1, para. 6, 12.

<sup>64</sup> See ICTY Rule 65<sup>ter</sup>.

<sup>65</sup> ICC-ASP/11/Res.2, Amendment of the Rules of Procedure and Evidence, 21.11.2012.

<sup>66</sup> Report of the Bureau on the Study Group on Governance, ICC-ASP/11/31, 23.10.2012, para. 10.

<sup>67</sup> Study Group on Governance – Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, ICC-ASP/12/37/Add.1, 31.10.2013 (“Second Report”), para. 3. On 27.3.2013, the Study Group received the first version of a written report from the WGLL, indicating this prioritization notice (ICC-ASP/12/37, para.12).

<sup>68</sup> See Second Report, para. 8 ff., Annex I.A, Annex II.A.

<sup>69</sup> See Resolution ICC-ASP/12/Res.7, “Amendments to the Rules of Procedure and Evidence”, 27.11.2013.

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<sup>70</sup> The rule is inspired, *inter alia*, by Rules 92<sup>bis-quinquies</sup> of the ICTY Rules, which demonstrates the very real potential of international criminal courts and tribunals to cross-fertilize and inspire each other also in terms of procedural law despite many obvious differences between the ICC and the ad hoc Tribunals’ procedural regime. See, on the latter, *Ambos* (fn. 2), Section IV, p. 334 f. On subsequent litigation regarding the retroactive application of the Rule see only ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Appeals Chamber, Judgment on the appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V (A) of 19.8.2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, Case No. ICC-01/09-01/11-2024*, 12.2.2016.

<sup>71</sup> Para. 16.

<sup>72</sup> It needs to be added that the degree of involvement of the parties to the proceedings or other stakeholders varies though.

<sup>73</sup> ICC-ASP/12/Res.7, “Amendments to the Rules of Procedure and Evidence”, 27.11.2013.

#### IV. Roadmap failures – leading to an impasse?

##### *1. Relevant developments in 2014*

In 2014, the WGLL followed a dual track of activities; on a first level, it concentrated on one obvious cluster that had been subject to continuous discussion at the Court and academic debate more generally: the pre-trial and trial relationship. At the same time, the WGLL began to focus on issues common to all phases of the criminal process, including initial work on the issue of victim participation (notably the application process on the one hand, and participation/representation modalities on the other). On a second level, the WGLL sought to deliver on the State-driven quota of rule amendment proposals per year,<sup>74</sup> and produced a number of proposals for amendments to the Rules of Procedure and Evidence and submitted these to the States Parties’ Study Group on Governance.

The first set of amendment proposals pertained to the “language cluster” of the list of issues previously identified in 2012:

- Rule 76 (3) – Allowing the chamber to authorize partial translations of prosecution witness statements where such partial translations would not infringe the rights of the accused;
- Rule 101 (3) – Allowing for the delay of the commencement of deadlines/time limits triggered by certain decisions until their translations are notified; and
- Rule 144 (2) (b) – Allowing for the partial translation of certain decisions, where such partial translations would not infringe the rights of the accused.<sup>75</sup>

The Study Group debated whether the proposed amendments prejudiced the rights of the accused as set out in article 67 of the Rome Statute, and whether the proposals, inspired by practice at the ad hoc Tribunals,<sup>76</sup> did indeed tip the balance too far towards focusing on an expeditious trial at the expense of the right of the accused to a fair trial.<sup>77</sup>

The second proposed rule amendment pertained to the “organizational matters cluster” of the list:

<sup>74</sup> ICC-ASP/11/31/Add.1, para. 6: States Parties “expected to receive a minimum number of detailed amendment proposals to the Rules”.

<sup>75</sup> Report of the Bureau on Study Group on Governance, ICC-ASP/13/28, 28.11.2014, Annex I, Appendix III.

<sup>76</sup> See for a comprehensive ICTY jurisprudence overview ICC-ASP/13/28, Appendix I, Paper from the chair of the Study Group on Governance – Amendments to rule 76 (3), rule 101 (3) and rule 144 (2) (b) – Relevant International Legal Standards, para. 4 ff.

<sup>77</sup> Report of the Study Group on Governance Cluster I in relation to amendment proposals to the Rules of Procedure and Evidence put forward by the Court, ICC-ASP/13/28, Annex I, para. 8 f.

- Rule 140<sup>bis</sup><sup>78</sup> – temporary absence of a judge – where a Trial Chamber judge is absent for illness or other unforeseen and urgent reasons, the remaining judges of the Chamber may continue hearing the case to complete a specific matter, provided that such continuation is in the interests of justice and the parties consent.<sup>79</sup>

Discussions around this amendment, which follows the practice at the ad hoc Tribunals,<sup>80</sup> focused on the question of consistency with articles 39 (2) (b) (ii) and 74 (1) of the Rome Statute.<sup>81</sup>

All proposed amendments were subsequently forwarded, in accordance with the Roadmap, to the States Parties’ Working Group on Amendments, where discussions continued, including with the Court. However, in its 2014 report, the Working Group held that “discussions showed that the working group was not yet in a position to make recommendations on these two sets of proposals as several delegations had still some concerns and/or needed further clarification.”<sup>82</sup> For the draft rule 140<sup>bis</sup>, States Parties noted that a Trial Chamber of the ICC had previously dealt with the matter absent any specific rule,<sup>83</sup> accepted the approach taken at that time and “invite[d] the Court to bring to its attention any information that could further inform the discussion of the working group on this issue”.<sup>84</sup> There may have been some doubt as to the necessity of a rule change/amendment in light of the fact that the Court had already addressed the issue in its jurisprudence. The comprehensive discussions on the matter between States Parties<sup>85</sup> and the fact that the Court’s practice on the matter is not uniform<sup>86</sup> would, however, seem to suggest that regulating the matter more explicitly may be beneficial. The report

<sup>78</sup> See the exact text, both as proposed by the Court and suggested amendments of the Court proposal through the Study Group, in: Report of the Working Group on Amendments, ICC-ASP/11/31, Annex II.

<sup>79</sup> ICC-ASP/13/28, Appendix II.

<sup>80</sup> See, e.g. Rule 15<sup>bis</sup> of the – insofar identical – ICTY and ICTR Rules; Rule 19 MICT Rules.

<sup>81</sup> ICC-ASP/13/28, Annex I, para. 15.

<sup>82</sup> Report of the Working Group on Amendments, ICC-ASP/11/31, para. 17.

<sup>83</sup> The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Transcript of Trial Hearing, 24.11.2010, ICC-01/04-01/07-T-222-Red2-FRA, p. 1 ff.

<sup>84</sup> Report of the Working Group on Amendments, ICC-ASP/13/31, para. 24.

<sup>85</sup> See Report of the Study Group on Governance Cluster I in relation to amendment proposals to the Rules of Procedure and Evidence put forward by the Court, ICC-ASP/13/28, Annex I, para. 13 ff.; Report of the Working Group on Amendments, ICC-ASP/13/31, para. 17 ff.

<sup>86</sup> Working Group on Lessons Learnt: Recommendation on a proposal to introduce a rule 140<sup>bis</sup> to the Rules of Procedure and Evidence: Temporary Absence of a Judge, ICC-ASP/13/28, Appendix II, para. 10 f., citing relevant – and seemingly diverging – ICC jurisprudence.

then concludes with a slightly ambivalent paragraph: it notes at the outset that consultations and discussions in the different fora showed ‘strong support in favor of recommending the Assembly to adopt the proposed amendments to rule 76 (3), rule 101 (3) and rule 144 (2) (b) of the Rules of Procedure and Evidence’ (nota bene: rule 140<sup>bis</sup> not mentioned!). However, the report then states the following:

“[...] some delegations expressed concerns about the proposed amendments and/or were waiting for instructions on how to proceed. One delegation expressed the fact that it was not in a position to support a recommendation to the Assembly as outlined above.”<sup>87</sup>

This conclusion would seem to go beyond the earlier statement of several delegations having remaining “concerns and/or need[ing] further clarification”<sup>88</sup> – a finding made during the discussion of the merits of the provisions in question and thus hinting at *legal* concerns of delegations pertaining to the rules themselves. In contrast, the language chosen (be that the lack of instructions or the fact that delegations were not “in a position to support a recommendation”) in the concluding quote above seems to include concerns of an institutional and/or political nature. None of these concerns should generally be considered as illegitimate; rather, they represent an indicator for the complexity of the matter when the legislator undertakes to amend the toolkit of a permanent institution like the ICC. Discussions in national parliaments and specialized working groups on amendments to criminal legal provisions display the same wide array of legal, institutional, political and other concerns.

At the end of the Assembly meeting, no rule amendments were adopted. Interestingly, neither the relevant “Omnibus” Resolution of the Assembly<sup>89</sup> nor the Assembly’s definition of mandates for the intersessional period in 2015<sup>90</sup> made specific reference to the need for further proposals for rule amendments or the Roadmap. Instead, the Assembly invited the Court “to intensify its efforts to enhance the efficiency and effectiveness of proceedings including by adopting further changes of practice”.<sup>91</sup> The Assembly encouraged the Court to continue exploring a more “informal” avenue of streamlining of processes and procedures through practice changes (including amendments to the Regulations of the Court which would not require State Party approval<sup>92</sup>). For-

tunately, this had already been on the Court’s agenda since late 2012, and the Court could thus present in 2014 a report outlining the progress in discussions of issues dealing with the relationship between pre-trial and trial proceedings (including related common issues).<sup>93</sup> While explicitly “encourag[ing] the judges to continue their work on this issue into 2015”,<sup>94</sup> the Assembly omitted any such encouraging language for the Court reports on the proposed rule amendments, or the report of the Working Group on Amendments.<sup>95</sup>

One could be led to conclude that too strong Assembly language pushing for rule amendment proposals through the Roadmap creates, in turn, pressure on States Parties to agree on often highly complex legal matters, in discussion fora which may not be completely isolated from other, external influences. The Assembly’s encouragement to continue seeking for practice adjustments short of the “article 51 threshold” means that the Court was indeed called upon to optimize its processes and procedure, following the same logic as all other international courts and tribunals, i.e. internally.

## 2. Relevant developments in 2015

In 2015, the Court continued to focus on changes to practice in relevant areas as per the list of 2012,<sup>96</sup> with a specific focus on the pre-trial and trial relationship, victims participation (particularly the application system), as well as the harmonizing of judgment and decision drafting across the chambers of the Court.<sup>97</sup> Additionally, it informed States Parties that “[n]ormative changes [i.e. changes to the Regulations of the Court, or changes to the Rules] would only be proposed if an issue could not be resolved via changes of practice.”<sup>98</sup> In September 2015, the Court issued a “Pre-trial practice manual”<sup>99</sup> which sought to codify agreed best practices for a (large) number of procedural issues at the pre-trial stage. The manual was generally welcomed by practitioners, academics and States Parties alike, as it indeed had – and continues to have – a major clarifying effect in terms of the relevant applicable procedure, thus solidifying procedural practice and

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ties retain merely a “veto” right by a(n absolute) majority of States Parties, see article 52 (3).

<sup>87</sup> Report of the Working Group on Amendments, ICC-ASP/13/31, para. 26.

<sup>88</sup> Report of the Working Group on Amendments, ICC-ASP/11/31, para. 17.

<sup>89</sup> See Resolution ICC-ASP/13/Res. 5, Strengthening the International Criminal Court and the Assembly of States Parties, 17.12.2014, para. 51 ff.

<sup>90</sup> Resolution ICC-ASP/13/Res. 5, Strengthening the International Criminal Court and the Assembly of States Parties for the intersessional period, para. 6, 7, 15.

<sup>91</sup> Resolution ICC-ASP/13/Res. 5, Annex I, para. 7 (a); see also para. 54 in the resolution text.

<sup>92</sup> Article 52 of the Rome Statute lays amendments to the Regulations of the Court into the judges’ hands; States Par-

<sup>93</sup> Report of the Working Group on Lessons Learnt to the Study Group on Governance Cluster I: Expediting the Criminal Process Progress Report on Cluster B: “Pre-Trial and Trial Relationship and Common Issues”, ICC-ASP/13/28, Annex II.

<sup>94</sup> Resolution ICC-ASP/13/Res. 5, para. 54.

<sup>95</sup> Resolution ICC-ASP/13/Res. 5, para. 92, simply “[w]elcom[ing] the report of the Bureau on the Working Group on Amendments” (ICC-ASP/13/31).

<sup>96</sup> ICC-ASP/11/31/Add.1.

<sup>97</sup> See ICC-ASP/14/30, Annex II, Report of the Working Group on Lessons Learnt to the Study Group on Governance: Cluster I: Expediting the Criminal Process: Progress Report on Clusters A, B, C and E.

<sup>98</sup> Report of the Bureau on the Study Group on Governance, ICC-ASP/14/30, 16.11.2015, para. 14.

<sup>99</sup> ICC-ASP/14/30, Appendix II, Pre-trial practice manual, September 2015.

creating certainty on the application of the law. In addition, the Court submitted a comprehensive report on cluster “4” (“Victim participation and reparations”) of the list of 2012, addressing the issue of applications for victim participation.<sup>100</sup> The WGLL also informed States Parties that in 2015 it went beyond the list of issues contained in the current Roadmap, guided by the “imperative of pursuing enhancements which could have a real impact on proceedings as a whole” and focusing on practice-based solutions not requiring amendments to the legal framework.<sup>101</sup> This is to be applauded since only a dynamic approach to the challenges in legal proceedings before the Court will vest the institution with the necessary tools to master these challenges and improve its efficiency as it moves along.

In turn, the Court informed States Parties that in 2015 no new rule amendment proposals were being prepared for the Assembly at year’s end.<sup>102</sup> Rather, during informal discussions between the Court and States Parties, concerns were expressed with the experience of the Roadmap process in 2014, and more concretely the failure to produce tangible results. It was recalled that the Roadmap was the product of States Parties’ pressure for the Court to improve the efficiency of its criminal process. Mindful of this, the Bureau noted in its 2015 report to the Assembly that “when the Court submits its proposals for amendments to the Rules States Parties should fully consider the Court’s proposals and should strive to expeditiously reach a final view on the proposals.”<sup>103</sup> This language provided appropriate guidance, considering the protracted discussions in 2014, first in the Study Group in The Hague and then in the Working Group on Amendments in New York, with an exchange of similar arguments in both fora and no concrete outcome in any of the two.<sup>104</sup>

Following this line, the 2015 Bureau report also outlined discussions on a possible review of the Roadmap methodology with a view to potentially reducing the forum for discussions on rule amendments to the Study Group in order to counter a potential overlap between the latter and the Working Group on Amendments.<sup>105</sup> However, in the end, no clear consensus emerged on the way forward and no proposals

were made for streamlining the Roadmap in 2015.<sup>106</sup> The Bureau recommended, in its 2015 report, that the Study Group “should continue to keep under review the effectiveness of the Roadmap in 2016”, mindful of ongoing reform work regarding the working methods of the Assembly, including the relationship between The Hague and New York Working Groups.<sup>107</sup> However, neither the Omnibus Resolution<sup>108</sup> nor the Assembly mandates for the intersessional period<sup>109</sup> picked up this point explicitly.

As for the proposed rule amendments from 2014, discussions continued within the Working Group on Amendments in 2015, focusing on the “language cluster”, i.e. the proposed amendments to rules 76 (3), 101 (3) and 144 (2) (b) as outlined above.<sup>110</sup> From the documentation publicly available it would appear that the major issues brought forward for and against the proposals remained the same, as did the positions of States Parties: “very strong support in favor of the language cluster amendments” by many, yet a few delegations “still voiced concerns”<sup>111</sup> and thus no recommendation was issued to the Assembly since no consensus could be reached. Incidentally, the terms of reference of the Working Group on Amendments, while stating that the Group “makes every effort to reach decisions by consensus”, do not require that a recommendation to the Assembly be based on consensus.<sup>112</sup>

In sum, the Roadmap, while redundant in practice for the year 2015 as no rule amendment proposals were even tabled at the Assembly, was maintained in principle and supported as a vehicle for rule changes. The relevant Assembly resolution called upon States Parties, as in 2014, to continue considering amendment proposals by the WGLL<sup>113</sup> and reiterated this in the definition of the intersessional mandates for 2016, inviting the Working Group on Amendments “to continue its

<sup>106</sup> Report of the Bureau on the Study Group on Governance, ICC-ASP/14/30, para. 19. It needs to be noted, though, that in the meanwhile the Court undertook a number of changes to the composition, methodology and approach of the WGLL, including its interaction with the ACLT in order to render the Court-internal lessons learnt process more efficient; see ICC-ASP/14/30, Annex II, Report of the Working Group on Lessons Learnt to the Study Group on Governance: Cluster I: Expediting the Criminal Process: Progress Report on Clusters A, B, C and E, para. 3 ff.

<sup>107</sup> Report of the Bureau on the Study Group on Governance, ICC-ASP/14/30, para. 21.

<sup>108</sup> ICC-ASP/14/Res.4, Strengthening the International Criminal Court and the Assembly of States Parties, 26.11.2015, para. 52 ff.; 107 ff.

<sup>109</sup> ICC-ASP/14/Res.4, Annex I, Mandates of the Assembly of States Parties for the intersessional period, para. 7, 16.

<sup>110</sup> Rule 140<sup>bis</sup> would not appear to have been subject to any discussions in 2015; see Report of the Working Group on Amendments, ICC-ASP/14/34, 16.11.2015, para. 21.

<sup>111</sup> Report of the Working Group on Amendments, ICC-ASP/14/34, para. 26, 30.

<sup>112</sup> See ICC-ASP/11/Res.8, 21.11.2012, Annex II, Terms of reference of the Working Group on Amendments, para. 5, 10.

<sup>113</sup> ICC-ASP/14/Res.4, para. 57.

<sup>100</sup> ICC-ASP/14/30, Annex I, Report on Cluster D (1): Applications for victim participation.

<sup>101</sup> ICC-ASP/14/30, Annex II, para. 74.

<sup>102</sup> The Court did, however, inform the Assembly of the fact that a proposal was sent to the ACLT in July 2015 concerning the amendment of rule 165 of the Rules, providing for a reduced number of judges to address article 70 offences at each of the pre-trial, trial and appeal phases; ICC-ASP/14/30, Annex II, para. 72.

<sup>103</sup> Report of the Bureau on the Study Group on Governance, ICC-ASP/14/30, 16.11.2015, para. 20.

<sup>104</sup> Compare ICC-ASP/13/28, Annex I (Study Group on Governance), para. 4 ff., with ICC-ASP/13/31 (Working Group on Amendments), para. 16 ff.

<sup>105</sup> Report of the Bureau on the Study Group on Governance, ICC-ASP/14/30, para. 15 f.

consideration of all amendment proposals” before it.<sup>114</sup> Finally, the Assembly welcomed the Court’s work on practice changes pertaining to victim participation as well as clusters A, B, C and E of the 2012 list,<sup>115</sup> including the Pre-Trial Practice Manual.<sup>116</sup>

Developments in 2015 seemingly confirmed the trend from 2014 that the Roadmap process did not provide an opportune means to achieve tangible efficiency gains in the ICC’s criminal process. This, however, provided the Court with the necessary impetus to bring forward efficiency gains through practice changes in many different respects, most importantly the codification of legal practice in its manual which, in its updated form of February 2016, is now called the “Chambers Practice Manual” and covers a number of topics relating to various stages of proceedings.<sup>117</sup>

### 3. Relevant developments in 2016

Intersessional discussions in the Working Group on Amendments in 2016 again targeted the “language cluster” rules, i.e. the proposed amendments to rules 76 (3), 101 (3) and 144 (2) (b) of the ICC Rules. As a result, at the Assembly in 2016, amendments to rule 101 and rule 144 (2)(b) of the Rules were adopted by consensus,<sup>118</sup> based on relevant recommendations of the Working Group.<sup>119</sup> As in previous years, the resolution text again encourages further relevant dialogue between the ICC and States Parties. Similarly, the Study Group’s mandate was yet again extended by one year and States Parties were

encouraged to consider rule amendment proposals through the Roadmap process.<sup>120</sup>

In addition, weeks after the Assembly meeting, on 6 December 2016 the judges of the ICC adopted amendments to seven of the Regulations of the Court during a plenary session, based on relevant preparatory work of the ACLT; all these – technical – amendments are destined to improve efficiency on a range of procedural matters without requiring any rule changes.<sup>121</sup> This progress is quite remarkable and shows that the Court is serious in its efforts in this regard.

### V. An alternative to the Roadmap: States and ad hoc rule changes

Article 51 (2) of the Rome Statute does not only foresee Court organs to be the proponents of rule changes; also “[a]ny State Party” has the right to propose a rule amendment (or a new rule to be added) to the Assembly,<sup>122</sup> an example of this being the 2011 amendment of rule 4 and insertion of rule 4<sup>bis</sup> into the Court’s Rules of Procedure and Evidence. And there is nothing wrong about that, considering the States Parties’ role as the legislator of the Court and the provider of management oversight over the organs of the Court regarding its administration.<sup>123</sup> However, it needs to be noted that there is no legal provision that would oblige, or even only recommend that in proposing any such change of an ICC Rule, States Parties should confer with the Court as the principal applier of the procedural tools first.

In this vein, States Parties considered and adopted the following rule amendments made pursuant to resolution ICC-ASP/12/Res.7 at the 12<sup>th</sup> Assembly meeting in November 2013:

- Rule 134<sup>bis</sup> –allowing accused to be present through use of video technology;
- Rule 134<sup>ter</sup> – excusal of the accused from presence at trial, where exceptional circumstances exist to justify such an absence;
- Rule 134<sup>quater</sup> – excusal of the accused from presence at trial due to extraordinary public duties at the highest national level.

Using the procedural vehicle of article 51 (2) (a) of the Rome Statute, States Parties adopted these rules without the involvement of the Study Group or any Court-wide consultations,<sup>124</sup> thus amending the Court’s procedural instruments

<sup>114</sup> ICC-ASP/14/20, Annex I, para. 16 (a).

<sup>115</sup> This included the harmonization of practice relating to confirmation of charges proceedings; streamlining practices related to the relationship between trial and pre-trial and common issues; streamlining practices related to trial proceedings; and practice changes related to appeals; see Report of the Working Group on Lessons Learnt to the Study Group on Governance: Cluster I: Expediting the Criminal Process: Progress Report on Clusters A, B, C and E, ICC-ASP/14/30, Annex II.

<sup>116</sup> ICC-ASP/14/Res.4, para. 55 f.

<sup>117</sup> E.g. the procedure for admission of victims to participate in the proceedings; exceptions to disclosure in the form of redaction of information; and the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant. Available at:

[https://www.icc-cpi.int/iccdocs/other/Chambers\\_practice\\_manual-FEBRUARY\\_2016.pdf](https://www.icc-cpi.int/iccdocs/other/Chambers_practice_manual-FEBRUARY_2016.pdf) (1.12.2016).

<sup>118</sup> ICC-ASP/15/Res.4, 24.11.2016, Resolution on amendments to rule 101 and rule 144 (2)(b) of the Rules of Procedure and Evidence.

<sup>119</sup> Report of the Working Group on Amendments, ICC-ASP/15/24, 8.11.2016, paras. 28, 40. Consideration of the proposed amendment to rule 76(3) will continue in 2017, see Resolution ICC ASP/15/Res.5, 24.11.2016, Strengthening the International Criminal Court and the Assembly of States Parties, Annex I (Mandates of the Assembly of States Parties for the intersessional period), para. 19 (a).

<sup>120</sup> ICC ASP/15/Res.5, paras. 67, 69.

<sup>121</sup> Pursuant to article 52(3) of the Statute, these amendments took effect upon their adoption and are circulated to States Parties for comments. See the text of the latest version of the Regulations of the Court: <https://www.icc-cpi.int/resource-library/Documents/RegulationsCourtEng.pdf> (15.12.2016).

<sup>122</sup> See article 51 (2) (a) of the Rome Statute.

<sup>123</sup> See article 112 (2), in particular subsections (b), (e), and (g) of the Rome Statute. Generally on the Assembly’s role vis-à-vis the Court see *Rama Rao/Ambach* (fn. 31), art. 112, para. 9 f.

<sup>124</sup> ICC-ASP/12/Res.7.

without any greater consultation of those that are supposed to apply them. The context to this was, however, rather special and should not remain unmentioned: the relevant amendments deviate from the general statutory requirement that the accused shall be present at trial, as provided in article 61 (3) of the Rome Statute. The proposal of the amendments, introduced by a State Party, had been triggered by relevant litigation in court in the situation in the Republic of Kenya before the ICC.<sup>125</sup> Prior to the rule amendment, a decision of the Appeals Chamber in the case against William Ruto and Joshua Arap Sang before Trial Chamber V (A) had underscored the principle that the accused’s presence was required during trials, regardless of any official status, but then provided for certain exceptions to the wording of article 63 (1) of the Rome Statute.<sup>126</sup> Rules 134<sup>bis-quater</sup> modified this ruling and created legislation, *inter alia* for what could be viewed as a rather singular, specific case scenario.<sup>127</sup>

The adoption of rules 134<sup>bis-quater</sup> is remarkable in two major respects: first, it did not follow the Roadmap and thus forewent any in-depth discussion with the Court;<sup>128</sup> this adoption procedure, perfectly legitimate as per article 51 of the Rome Statute, seems to highlight a potential ‘pitfall’ of the Roadmap: with its delicately crafted consultative procedure to amend the Rules, it may not be fast and flexible enough to adapt to emergencies of the time.<sup>129</sup> The second aspect picks up on said emergencies of the time: while jurisprudence reacts to specific circumstances of the case at hand, legislation does not; rather, the legislator is bound to craft rules of an abstract-general application. The law must be applicable to any situation, even if a particular situation has made a lacuna

<sup>125</sup> At the time, both the Kenyan President, Uhuru Kenyatta, and his Vice-President, Samuel Ruto, were accused persons in proceedings before the ICC, see the Situation in Kenya, The Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, and The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case No. ICC-01/09-01/11.

<sup>126</sup> The Appeals Chamber, The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Judgment on the appeal of the Prosecutor against the decision of the Trial Chamber V (a) of 18.6.2013 entitled “Decision on Mr. Ruto’s Request for Exculsion from Continuous Presence at Trial”, ICC-01/09-01/11-1066, 25.10.2013. The Appeals Chamber reversed the Trial Chamber V (A) decision, which allowed Mr. Ruto to be excused from trial strictly for the purposes of discharging official duties, with certain conditions, and further held that the discretion that the Trial Chamber enjoys under article 63 (1) of the Rome Statute is “limited and must be exercised with caution”, see para. 2, 51, 104 and 110.

<sup>127</sup> ICC-ASP/12/Res.7.

<sup>128</sup> Nota bene that this is meant to imply not only the judges but all parties and participants to the proceedings.

<sup>129</sup> Yet, the Assembly has persistently encouraged the use of the Roadmap in the past years. See ICC-ASP/11/31, para. 16 f.; ICC-ASP/12/37; ICC-ASP/13/28, para. 28; ICC-ASP/14/30 para. 19 f. It remains to be seen whether there will be an explicit continued endorsement of the Roadmap by the Assembly in December of 2016.

in the law apparent. Indeed, the creation of abstract-general rules for the benefit of a specific situation would risk obfuscating the clear distinction between the lawmaker and the applier of the law, not to mention the risk of creating fragmented and even incoherent law.<sup>130</sup> This is not to mean that a legislative act may not be triggered by a concrete problem occurring in the courtroom – many past rule amendments at the ad hoc Tribunals as well as national practice bear testimony to this.<sup>131</sup>

While the Bureau of the Assembly still held in 2013 – the same year that rules 134<sup>bis-quater</sup> were adopted – that the Roadmap should be followed “so as to avoid a disparate and unstructured approach to any proposals on amending the criminal procedures”,<sup>132</sup> in 2014 it did not repeat this point. It undertook, however, to retain the Study Group as a necessary discussion platform, providing for at least some Court involvement also when the Roadmap is not followed. Concretely, the Bureau acknowledged that “amendments to the Rules of Procedure and Evidence may be proposed also by any State Party”, thus recalling Rome Statute language (article 51 (2) (b)). It then went on to find that “the Study Group should also be seen as a forum to discuss amendment proposals emanating from States Parties so as to allow for a structured and fruitful dialogue between States Parties and the Court. This would, on the one hand, reinforce the role of States Parties in the amendment process, while at the same time allow the Court, including the Working Group on Lessons Learnt and the Advisory Committee on Legal Texts, the opportunity and necessary time to form its view on any such amendment proposals. It may be the case that the Roadmap would need to be amended to address such a scenario.”<sup>133</sup>

Any advances into this direction are, from the ICC’s perspective, helpful. Adding layers of consultations with Court representatives as legal experts in this particular matter of law not only has a benefit in terms of solidity and certainty of the new law created; it also provides a forum to reflect on initiatives inspired by developments in concrete (and on-going) cases, and levels them alongside other law amendment projects in a common framework of consultation.

## VI. Rule changes through Article 51 (3): A response to the Roadmap impasse?

In July 2015 the WGLL submitted a draft amendment of rule 165 of the Rules to the ACLT following the Court-internal

<sup>130</sup> Ambach, in: Stahn (ed.), *The Law and Practice of the International Criminal Court*, 2015, Chapter 50, p. 1291.

<sup>131</sup> Article 51(4) of the Rome Statute explicitly regulates the potential situation that a rule change creates an immediate effect on on-going proceedings (which may have been the trigger for said Rule change): ‘Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.’ As outlined *supra*, the ad hoc Tribunals have similar provisions in their legal framework.

<sup>132</sup> ICC-ASP/11/31, para. 15.

<sup>133</sup> ICC-ASP/13/28, para. 28.

Roadmap procedure.<sup>134</sup> Rule 165 belongs to Chapter 9 of the Rules, specifying the procedure for offences against the administration of justice under article 70 of the Rome Statute. The amended rule provides for a reduced number of judges to address article 70 offences at each of the pre-trial, trial and appeal phases. ICC Trial Chamber VII is currently seized with article 70 offences in the Bemba et al. case; the trial judgment pursuant to article 74 of the Rome Statute was issued on 19 October 2016.<sup>135</sup> A sentencing decision is imminent. There is a likelihood that appeals proceedings will follow.

Following internal consultations, on 10 February 2016 the judges of the ICC, in plenary session, provisionally amended rule 165 of the Rules, engaging the procedural vehicle of article 51 (3) of the Rome Statute. The latter reads as follows:

“After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.”

Simply put, two cumulative requirements need to be complied with: (1) there needs to be an urgent need that a certain matter be regulated authoritatively before the next regular Assembly meeting (which would otherwise be the next opportunity to have a rule amendment passed); and (2) the applicable rules do not yet regulate the specific situation at hand.

A letter from the ICC President to the President of the Assembly dated 10 February 2016<sup>136</sup> and a supplementary report<sup>137</sup> outlined the rationale and legal basis of the provisional amendment from the Court’s perspective: the provisionally amended rule 165 simplifies and expedites article 70 proceedings by allowing for the respective functions of the Pre-Trial and the Trial Chamber to be exercised by a chamber of one judge instead of a chamber of three judges. Furthermore, appeal proceedings can be conducted by a panel of three judges instead of the full bench of five judges. As to the urgency requirement, the Court noted that it disposes over a limited<sup>138</sup> pool of judges, which creates potential difficulties

<sup>134</sup> Report of the Working Group on Lessons Learnt to the Study Group on Governance: Cluster I: Expediting the Criminal Process: Progress Report on Clusters A, B, C and E, ICC-ASP/14/30, Annex II, para. 71 f.

<sup>135</sup> The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Trial Chamber VII, Judgment, ICC-01/05-01/13, 19.10.2016.

<sup>136</sup> Letter from the President of the International Criminal Court to the President of the Assembly, dated 29.2.2016, ICC-ASP/15/7, Annex I.

<sup>137</sup> Report on the adoption by the judges of provisional amendments to rule 165 of the Rules of Procedure and Evidence, dated 29.2.2016, ICC-ASP/15/7, Annex II.

<sup>138</sup> Pursuant to article 36 (1) of the Rome Statute, the default number of judges at the Court is 18. According to article 39 (4) of the Rome Statute, all five judges assigned to the Ap-

in ensuring the availability of sufficient judges to conduct the current and pending trials before the Court.<sup>139</sup> Looking at the current and expected caseload, it was held that the urgency will become apparent over time, even if not of an immediate nature.<sup>140</sup> In addition, at the time of the amendment of the provisional rule in February 2016, virtually every available judge sat in two or more Chambers while the number of trials continued to grow.<sup>141</sup>

The reduction of judges on an article 70 bench was supported by the ICC judges’ assessment that a commitment of the same amount of judicial resources to article 5 core crimes proceedings on the one hand and article 70 proceedings on the other is not commensurate to the ancillary nature of the latter – a fact expressed in the Rome Statute and not contradicted by article 70 of the Statute.<sup>142</sup> Finally, the Court also indicated the need to introduce a new regulation 66<sup>bis</sup> into the Regulations of the Court (“Constitution of Chambers and the panel of three judges”) in order to give practical effect to the amended rule 165.<sup>143</sup>

During consultations, a majority of States Parties expressed support for the provisional amendments of rule 165; confidence was expressed in the work of the judges of the Court and the ACLT regarding both the conformity of the rule with the Statute and the legality of the process.<sup>144</sup> However, some delegations challenged the “urgency” of the situation and a corresponding need for amendment. It was also argued that there was no lacuna in the law as Chapter 9 of the Rules exhaustively regulated the specific situation before the Court. Finally, concerns were raised as to potential legal problems arising if the provisional rule was to be applied prior to the Assembly considering the matter and potentially rejecting or amending the rule.<sup>145</sup> Finally, absent any consensus, the Study Group on Governance referred the provisional amendments to the Working Group on Amendments with no

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peals Division shall serve exclusively in that Division; this leaves a mere 13 judges to populate the Pre-Trial and Trial Divisions. With four simultaneous cases at trial (and the according need of twelve judges in order to be able to administer hearings in parallel), the option to reduce the amount of judges sitting on cases other than dealing with article 5 offences would appear not only reasonable but indeed urgently necessary.

<sup>139</sup> Report of the Study Group on Governance Cluster I in relation to the provisional amendments to rule 165 of the Rules of Procedure and Evidence, ICC-ASP/15/7, 21.9.2016, para. 11; ICC-ASP/15/7, Annex II, para. 19 ff.

<sup>140</sup> Report of the Study Group on Governance Cluster I in relation to the provisional amendments to rule 165 of the Rules of Procedure and Evidence, ICC-ASP/15/7, 21.9.2016, para. 10.

<sup>141</sup> ICC-ASP/15/7, Annex II, para. 20 f.

<sup>142</sup> ICC-ASP/15/7, para. 11 ff.

<sup>143</sup> ICC-ASP/15/7, Annex II, para. 15 ff.

<sup>144</sup> ICC-ASP/15/7, para. 7.

<sup>145</sup> ICC-ASP/15/7, 21.9.2016, para. 8; see also Letter from the Attorney General of Kenya to the President of the Assembly, dated 17.3.2016, ICC-ASP/15/7, Annex III.

specific recommendation, for the latter to continue discussions and make any recommendation to the Assembly as appropriate.<sup>146</sup> Discussions in the Working Group on Amendments did likewise not lead to a clear recommendation to the Assembly due to reiterated concerns by a few States Parties, despite support by a majority of States Parties.<sup>147</sup>

Article 51 (3) of the Statute differs from the other vehicles to achieve rule amendments in one essential respect: while for article 51 (2) the principle “no majority, no amendment” applies, it is exactly the opposite for article 51 (3): the provisional rule is already in force; if the Assembly does not reach the required quorum to adopt, amend or reject the provisional amendment, a plain reading of the Statute suggests that it simply remains in force and can be applied by the Court. Considering that the main reason for the lack of rule amendments through the Roadmap between 2014 and 2016 may be the Assembly’s strong preference for consensus, article 51 (3) would appear to provide another way forward – provided a rule amendment appears sufficiently urgent and serves to fill a lacuna in the law. Article 51(3) is, however, not an alternative to the Roadmap, but rather describes an exceptional situation where the urgency of the matter militates against the Roadmap process.

Also after the 15<sup>th</sup> session of the Assembly in November 2016, the judgment is still out whether the Court applied article 51 (3) of the Rome Statute appropriately in the eyes of States Parties. The Assembly discussed the matter along similar lines as in previous fora in The Hague and New York, but the relevant resolution text on rule amendments remains silent on Rule 165 of the Rules.

It is undisputed, however, that the content of the provisional amendment of Rule 165 squarely falls within the remit of the mandate to improve the efficiency and effectiveness of the judicial process. Considering the fact that also future rule amendments may invite for controversial debate, the vehicle of article 51 (3) may prove appropriate in urgent cases if there is a high likelihood that an envisaged rule change will not make it through the Roadmap to the Assembly in a year’s cycle, let alone an even shorter timeline. However, the second prong of article 51(3), the *lacuna* in the law, remains a factor just as important and indeed legally required to be assessed and justified.

### VII. Conclusion

The Lessons Learnt initiative at the ICC is an ongoing process and has proven to be increasingly effective. Since its inception in 2011 it has not only gained momentum but indeed expanded its original list of topics that were found relevant to be addressed. Also in terms of how the ICC went about addressing its challenges, it has proven both stamina and innovativeness, with the Chambers Practice Manual as

the flagship success so far in terms of improving procedural practice, alongside some early yet eminently important rule and, more recently, Regulation amendments.

However, the process has also shown some potential challenges. The necessity of State involvement in, and approval of, amendments of the procedural framework, as foreseen by article 51 of the Rome Statute, was conceived as a safeguard protecting the system against short-lived, case-specific and/or political advances; yet, the general desire for consensus has slowed down the Roadmap process designed by States Parties to encourage the Court to generate suitable rule amendment proposals. At the same time, other ways to amend the Rules, as foreseen in article 51 of the Rome Statute, have been used and specifically one, over article 51 (3), is still to be evaluated and further discussed by States Parties for the case at hand (concerning rule 165).

Still, to bury the Roadmap would be the most dangerous of paths that this juncture offers, as the progress in 2016 has shown; after all it is the most inclusive, consultative and legally solid process to bring forward well-reflected rules, crafted by those that have to test and apply it in court, and validated by the ICC’s stakeholders as foreseen by article 51 of the Rome Statute. Other options available for rule amendments should all be covered by relevant elements of the Roadmap consultation process one way or another; this goes for the Prosecutor’s or a State Party’s proposal pursuant to article 51 (2) (a) and (c), as well as provisional Rules drawn up by the judges under article 51 (3) of the Rome Statute where urgency and lacuna in the law provide.<sup>148</sup> Rule changes without consultation of all relevant stakeholders need to be avoided. The exercise is one of balance and consultation. In this vein, some fine-tuning may be in order with a view to avoiding the duplication of legal discussions in the Study Group and then again in the Working Group on Amendments a bit later in the year. To make the system work, States Parties need to stand their ground in supporting the international criminal justice system they have created and keep the powerhouse manned that provides the ICC with the necessary mandate and flexibility to adjust its procedural framework where necessary. The Roadmap process as the most inclusive and suitable vehicle for Rule amendments must be a forum of legal experts that discuss, guided by the law, and do so expeditiously.

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<sup>146</sup> ICC-ASP/15/7, para. 18; Report of the Bureau on the Study Group on Governance, ICC-ASP/15/21, 14.11.2016, para. 11.

<sup>147</sup> Report of the Working Group on Amendments, ICC-ASP/15/24, 8.11.2016, paras. 29-37.

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<sup>148</sup> In this vein, some States Parties suggested during 2016 consultations regarding the provisional rule 165, that the Court’s amendment proposals under article 51 (3) be submitted, as far as possible, to States Parties for consultation before provisional adoption; see ICC-ASP/15/7, para. 9.