


Fifteenth session

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Report of the Working Group on Amendments

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* Reissued for technical reasons.

I. Introduction

1. The present report is submitted pursuant to the mandate given by the Assembly of State Parties (“the Assembly”) to the Working Group on Amendments (“the Working Group”). The Working Group was established by Assembly resolution ICC-ASP/8/Res.6 for the purpose of considering amendments to the Rome Statute proposed in accordance with article 121, paragraph 1, of the Statute as well as any other possible amendments to the Rome Statute and to the Rules of Procedure and Evidence, with a view to identifying amendments to be adopted in accordance with the Rome Statute and the Rules of Procedure of the Assembly.

2. The Working Group’s consideration of amendment proposals to the Rome Statute and to the Rules of Procedure and Evidence is governed by the Terms of Reference set out in Assembly resolution ICC-ASP/11/Res.8, annex II. The amendment procedure for the Rules of Procedure and Evidence is also governed by the “Roadmap on reviewing the criminal procedures of the International Criminal Court”, the main purpose of which is to facilitate a structured dialogue between key stakeholders on proposed amendments to the Rules of Procedure and Evidence.¹ In endorsing the Roadmap by resolutions ICC-ASP/11/Res.8 and ICC-ASP/12/Res.8, the Assembly has reaffirmed the role of the Working Group in receiving and considering recommendations to the Assembly on proposals of amendments to the Rules of Procedure and Evidence.

3. At its fourteenth session, the Assembly invited the Working Group to continue its consideration of all amendment proposals in accordance with the Terms of Reference of the Working Group, and requested the Bureau to submit a report for the consideration of the Assembly at its fifteenth session.²

4. On 10 March 2016, the Bureau reappointed via silence procedure Ambassador May-Elin Stener (Norway) as Chairperson of the Working Group.³

5. The Working Group met on 10 February 2016 to commence its work. Cognizant of the importance of holding regular meetings, the Working Group agreed to meet approximately every six weeks. It held 8 intersessional meetings, on 10 February, 21 March, 3 May, 27 June, 28 September and 10, 21 and 28 October 2016.

II. Consideration of proposals to amend the Rome Statute

6. The Working Group continued to have before it those amendment proposals previously referred to it by the Assembly at its eighth session, as well as those transmitted by the Depositary of the Rome Statute on 14 March 2014.⁴

7. As in the past, proponents were given the opportunity, at each meeting of the Working Group, to provide updates on their proposals. All delegations were invited to comment on the different proposals before the Working Group.

A. Belgium

8. At the third meeting, on 3 May, Belgium introduced a non-paper containing new provisions complementing proposed amendments 2 and 3 relating to article 8 of the Rome Statute proposed by Belgium and co-sponsored by 13 delegations. Belgium also submitted

¹ The Roadmap is contained in the Report of the Bureau on the Study Group on Governance to the eleventh session of the Assembly (ICC/ASP/11/31), annex I. The Revised Roadmap is contained in the Report of the Bureau on the Study Group on Governance to the twelfth session of the Assembly (ICC-ASP/12/37, annex I).

² *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourteenth session, The Hague, 18 - 26 November 2015* (ICC-ASP/14/20), vol. I, part III, ICC-ASP/14/Res.4, annex I, paras. 16(a) and (b).

³ Bureau of the Assembly of States Parties, 1st meeting, 1 April 2016, Agenda and decisions, annex I.

⁴ These amendment proposals are contained in the report of the Working Group on Amendments to the thirteenth session of the Assembly (ICC-ASP/13/31). They are available on the website of the Assembly https://asp.icc-cpi.int/en_menus/asp/WGA/Pages/default.aspx and, having been notified to the Depositary, are also available at the United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en.

a Frequently Asked Questions non-paper regarding the proposed amendments.⁵ The non-papers were further considered at the fourth and fifth meetings, on 27 June and 28 September.

9. Belgium indicated that the proposal consisted of two parts: amendments to article 8 aimed at the inclusion of provisions bringing the use of four particular types of weapons in both international and non-international armed conflicts within the jurisdiction of the Court; and proposed elements of crimes relating to said provisions. The proposal aimed at strengthening the international legal framework regarding war crimes. The hope was expressed that it would develop into a rolling text to reflect the state of the discussions in the Working Group, with the aim of making a recommendation to the Assembly in due course.

10. Presenting the revised proposal in more detail, Belgium pointed out that the text had been streamlined: rather than referring to relevant international conventions dealing with specific types of weapons, each proposed provision regarding the employment of such weapons defined the crimes directly, based on the provisions of said conventions.⁶ In addition to being more in line with the pattern of other crimes under article 8, this would provide the Court with a degree of discretion, including in taking into account future technological developments. Emphasis was placed on the fact that the treaties in question had been widely ratified and continued to garner new parties. It was observed that the proposal was also of significance to States not parties to such conventions, as it was dealing with the specific issue of individual criminal responsibility related to the use of certain weapons and not with other elements that were addressed in these instruments.

11. It was stressed that the revised proposal made it more apparent that the prohibition of the use of the weapons in question applied in both international and non-international armed conflicts. Belgium also noted that the revised proposal did not contain any reference to the use of chemical weapons since the Kampala amendments to article 8 already brought such acts within the jurisdiction of the Court. In this respect, dwelling over any slight difference in scope between the original Belgian proposal and the current text of the Statute would be counterproductive; it was important not to preempt the Court from possibly addressing such crimes given that chemical weapons had been used in ongoing conflicts.

12. As regards the proposed elements of crimes, Belgium pointed out that paragraph 1 under each article was based on the relevant provisions of the international conventions relating to the respective categories of weapons. This was also the case for paragraph 2 of the elements of crimes relating to biological weapons and blinding laser weapons, which provided additional clarifications as to the circumstances in which their use constituted a crime. The last two paragraphs under each proposed provision for the elements of crimes were identical to those found in the current text of the Elements of Crimes concerning war crimes under the Statute, in the respective cases of international or non-international armed conflict.

13. Regarding the procedure for the activation of the Court's jurisdiction over the proposed crimes, Belgium referred to the provisions of article 121, paragraph 5, of the Rome Statute, stressing that the Court would not exercise such jurisdiction when a crime was committed by the nationals or on the territory of a State Party that had not ratified the amendments.

14. Most delegations stressed the fact that they were parties to the relevant conventions. While the proposal was well received, several delegations felt the need for further examination before reaching a final position. In this regard, some questions were addressed to Belgium, which the sponsor addressed at subsequent meetings of the Working Group. Following this exchange, a number of delegations expressed support for the proposal.

⁵ Both non-papers by Belgium (with the minor revisions introduced at subsequent meetings) are included in annex III of the present report.

⁶ Respectively the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction; the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; Protocol I on Non-Detectable Fragments and Protocol IV on Blinding Laser Weapons to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.

15. The question was thus raised whether the crimes in question could be considered as crimes under customary international law. In reply, Belgium made reference to the ICRC Study on customary international humanitarian law in support of an affirmative answer, while acknowledging that States could have a different position on the matter. It further expressed the view that there was no requirement that all crimes in article 8 be crimes under customary international law, as was demonstrated by the inclusion in the Statute of the crimes of recruitment of children and of attacks against peacekeepers. Some delegations wondered why it was felt necessary to include the proposed crimes in article 8 itself rather than in an annex to the Statute as envisaged in article 8, paragraph 2 (b) (xx). The view was also expressed that that the proposed crimes could be subsumed into the current text of article 8. The point was further made that it was preferable to make a reference to relevant instruments, as these were often subject to amendments. Belgium reiterated in this connection that direct definitions were more in line with the text of article 8 and would allow the Court to take into account technological developments. Responding to a query on the status of the proposed elements of crimes, Belgium referred to article 9 of the Statute. It further clarified that it had not consulted the judges on the proposal, as it did not consider this to be appropriate at the current stage.

16. The Working Group agreed to consider the proposal in depth at its future meetings on the basis of the non-paper, which would develop into a rolling text reflecting the state of the discussions, with the aim of submitting a recommendation to the Assembly at its sixteenth session.

B. Mexico

17. At the second meeting, on 21 March, Mexico indicated that it would present an update on its proposal in due course.

C. Trinidad and Tobago

18. No further updates were provided by Trinidad and Tobago concerning its proposal during the intersessional period.

D. South Africa

19. No further updates were provided by South Africa concerning its proposal during the intersessional period.

E. Kenya

20. No further updates were provided by Kenya concerning its proposal during the intersessional period.

III. Consideration of proposals to amend the Rules of Procedure and Evidence

A. Proposed amendments to rule 76 (3), rule 101 and rule 144 (2) (b) (“language cluster”)

21. The Working Group had before it proposed amendments to rule 76(3), rule 101 and rule 144(2)(b) of the Rules of Procedure and Evidence - the so-called “language cluster” – which had been referred to it by the Study Group on Governance in 2014.⁷ At the sixth meeting of 2015, the Chair of the Working Group had noted that, while there was strong support in favor of recommending to the Assembly the adoption of the language cluster amendments, a few delegations continued to have concerns. The Working Group had thus refrained from making a recommendation to the fourteenth session of the Assembly, but

⁷ Report of the Bureau on the Study Group on Governance (ICC-ASP/13/28), annex I, appendix III.

had agreed that the matter remained a priority on its agenda and that it would continue to deliberate the issue with a view to responding to the questions raised by those delegations with outstanding concerns, including by seeking further advice from the Court, if necessary.⁸

22. At its second meeting, on 21 March 2016, the Working Group thus continued its consideration of the language cluster amendments. Many delegations expressed strong support for the proposed amendments, observing, in particular, that these would result in considerable savings in terms of cost and time. Reference was made to the arguments put forward by the Court in support of the proposals, including the absence of a written form of some languages and the considerable time required to train translators in the *Lubanga* case. It was also emphasized that the judges were mindful of the need to balance expeditiousness with fair trial standards.

23. A few delegations indicated that previous discussions had not alleviated their concerns regarding rule 76(3), including the possible negative impact on due process and on the rights of the accused, the shifting of the budgetary burden of translations to the defence and the fact that appeals on the grounds of the amendment in question could outweigh efficiency and effectiveness gains, rendering the amendment counterproductive. The Court was invited to provide a more detailed analysis of such purported benefits.

24. At the same meeting, the Working Group decided to continue the discussion on both the process for dealing with the proposed amendments and the substantive issues involved within an open-ended small group of interested delegations, coordinated by Mr. Andreas Motzfeldt Kravik (Norway). The coordinator reported regularly to the Working Group on these consultations.

25. Further to a request by some delegations that the Court indicate whether the rationale behind the proposal remained valid at the present time, the Chair invited Mr. Hiram Abtahi, Principal Legal Adviser to the Presidency of the Court, to the fourth meeting of the Working Group, held on 27 June. Mr. Abtahi recalled that the proposed amendments had been adopted by the Advisory Committee on Legal Texts, a widely representative body. He noted that they were based on the relevant practice of regional human rights courts and other international or regional organizations and bodies and that they were fully consistent, in the view of the Court, with the requirements of article 67 of the Rome Statute. Mr. Abtahi made reference to cases where full translations of witness statements had resulted in considerable delays in the proceedings, even amounting to three years. He also stressed the importance of avoiding legal uncertainty as to whether partial translations of judicial decisions were authorized. He called on States Parties to put their trust in the Court's judges and to allow them to make case-by-case determinations, taking into account considerations of fairness and expeditiousness. In this connection, he observed that undue delays had a negative impact on the fairness of proceedings.

26. In the ensuing discussion, there was strong support for the speedy adoption of the proposed amendments, which were considered to safeguard the rights of the accused. A few outstanding concerns regarding the proposal on rule 76(3) were reiterated.

27. The Chair observed that the proposed amendments to rules 101 and 144(2)(b) had garnered broad support in the Working Group. As regards the proposed amendment to rule 76(3), while there was strong support for its adoption, a few delegations continued to voice concerns and were therefore not ready to recommend such action.

28. At its seventh meeting, on 21 October, the Working Group considered the text of a draft resolution on the adoption by the Assembly of the proposed amendments to rule 101 and rule 144(2)(b) of the Rules of Procedure and Evidence. At the same meeting, it decided to refrain from making a recommendation to the Assembly at its forthcoming session regarding the proposed amendment to rule 76(3), but agreed that the issue would remain on its agenda.

⁸ Report of the Working Group on Amendments, ICC-ASP/14/34, para. 30.

B. Provisional amendments to rule 165

29. At its fifth meeting, on 28 September 2016, the Working Group began its consideration of the provisional amendments to rule 165 adopted by the Court on 10 February 2016, which were referred to it by the Study Group on Governance.⁹ The provisional amendments were further discussed at the sixth and seventh meetings, on 10 and 21 October.

30. The Study Group on Governance had considered the amendments in a series of informal consultations on 3 and 19 May and on 21 June without reaching a final view on the matter. While the majority of States Parties supported the adoption of the amended rule by the Assembly, one State had a significant objection to the amendments and one State had concerns that were still under consideration. The Study Group on Governance had therefore not been in a position to make a concrete recommendation to the Working Group and decided to refer to it the provisional amendments, together with the views expressed and the responses from the representative of the Presidency of the Court who had attended the consultations.¹⁰

31. The Chair of the Working Group invited the Principal Legal Adviser to the Presidency of the Court, Mr. Hiram Abtahi, to participate via video link in the sixth meeting, on 10 October, to provide further information and respond to issues raised by delegations. Mr. Abtahi observed that article 70 proceedings had proven to be very lengthy and to require the commitment of substantial judicial resources at a time when the Court was addressing a number of situations and dealing with a multitude of cases at various stages, including procedures that were confidential or under seal. Given the fact that the Court's primary function was to deal with crimes under article 5, while article 70 offences were ancillary in nature, the judges felt the need to address the disproportionate resource drain of the latter. Hence the elaboration of a proposal to amend the Rules of Procedure and Evidence, which had been discussed and adopted by the Advisory Committee on Legal Texts, an organ where all stakeholders to Court proceedings were represented. The judges had then decided to resort to the procedure under article 51, paragraph 3, since they had interpreted the term "urgent" as applying not only to a situation requiring an immediate response, but also to one that is anticipated in light of current circumstances and has to be addressed in advance.

32. Regarding the legality of the provisional amendments, Mr. Abtahi pointed out that the drafters of the Statute had clearly intended the regime applying to offences against the administration of justice to be different from that applying to the core crimes: as indicated in article 70, paragraph 2, the principles and procedures governing the Court's exercise of jurisdiction over these ancillary crimes were not included in the Statute itself; in accordance with article 70, paragraph 3, sanctions included fines and were limited to a 5-year term of imprisonment; and the Court had the power to request a State Party to submit the case to its authorities for prosecution under article 70, paragraph 4 (b). The Rules of Procedure and Evidence also established a separate regime for article 70 offences. As regards the composition of the three types of chambers in such cases, the provisional amendments were based on international practice and conformed to relevant human rights standards.

33. In response to a question about the provisional amendments' stipulation that article 76, paragraph 2, did not apply to offences against the administration of justice, Mr. Abtahi noted that it was based on the fact that the sanctions for article 70 offences were different from those for core crimes and observed that a chamber could always decide *proprio motu* to hold a sentencing hearing. Replying to a similar query regarding article 82, paragraph 1(d), of the Statute, he indicated that the aim was to expedite proceedings and that the Court, as many other judicial bodies, could deal with interlocutory appeals at the end of the process. As to the question of the legal status of the amendments in case the Assembly did not take a decision, Mr. Abtahi pointed out that the judges would be called upon to pronounce themselves on the matter if it arose.

⁹ Report of the Study Group on Governance Cluster I in relation to the provisional amendments to the Rules of Procedure and Evidence (ICC-ASP/15/7), para. 18. The text of the provisional amendments is reproduced in annex IV of the present report.

¹⁰ *Ibid.*, paras. 17-18.

34. In the course of the discussion in the Working Group, strong support was expressed for the provisional amendments, which were considered to be in conformity with the Statute and the Rules of Procedure and Evidence, and aimed at enhancing the Court's efficiency without affecting fair trial guarantees. The point was further made that the amendments were consistent with national and international practice, including as regards the number of judges composing the various chambers, the absence of an automatic right for a separate sentencing hearing or the consideration of interlocutory appeals and the end of the process. However, a few delegations questioned the conformity of the provisional amendments, or some elements thereof, with the Statute and fair trial standards. One delegation drew attention, in this connection, to a letter addressed by its Attorney General to the President of the Assembly.¹¹

35. As to the procedure followed by the Court, there was strong support for the view that the criteria in article 51, paragraph 3, of the Statute had been met. It was observed in this connection that the provisional amendments had been adopted by a unanimous decision of the judges, who were the ultimate arbiters of the Statute's interpretation. But a few delegations expressed misgivings in this regard, irrespective of whether they supported the substance of the amendments. In this connection, reference was made to the importance of and the commitment to a structured dialogue between all stakeholders and to the Roadmap in matters related to amendments. It was suggested that the Court make efforts, whenever possible, to submit amendment proposals to States Parties before provisional adoption. One delegation stated that the legislative process had been hijacked.

36. At the seventh meeting, on 21 October, France and Germany jointly submitted a non-paper containing a proposal to amend the text of provisional rule 165. In introducing the proposal, the sponsors emphasized that they had noted the serious concerns expressed by some delegations as to whether the two criteria in article 51, paragraph 3, had been met when the provisional amendments to rule 165 were adopted. However, they felt that it was in the interest of the proper administration of justice to save human resources and to speed up proceedings under article 70 of the Statute. They therefore suggested to amend provisional rule 165 so as to allow Pre-Trial Chambers only to be composed of a single judge to carry out their functions, except as regards the confirmation of charges. The amendment proposal thus related to the title of the provisional rule and its paragraphs 2 and 4.¹²

37. At the same meeting, the Chair of the Working Group noted that, although a large majority of States Parties supported the adoption of the provisional amendments by the Assembly, there was no final view on the matter at that stage. The Working Group was therefore not in a position to make a concrete recommendation to the Assembly at that time. It agreed to reconvene during the fifteenth session of the Assembly to continue the discussion on the provisional amendments.

IV. Information on the status of ratifications of the Kampala amendments to the Rome Statute as well as on the amendment adopted at the fourteenth session of the Assembly

38. The Working Group was kept regularly informed of any ratifications of the amendments to the Rome Statute adopted at the 2010 Review Conference or at the fourteenth session of the Assembly. Since the submission of its last report, Chile, El Salvador, Finland, Lithuania, the Netherlands and the former Yugoslav Republic of Macedonia had ratified the Kampala amendment relating to article 8 of the Rome Statute; Chile, El Salvador, Finland, Iceland, Lithuania, the Netherlands, the State of Palestine and the former Yugoslav Republic of Macedonia had ratified the Kampala amendments on the crime of aggression; and Finland, Norway and Slovakia had ratified the amendment to article 124 of the Rome Statute.

¹¹ *Ibid.*, annex III.

¹² The non-paper is reproduced in annex V of the present report.

39. As of 28 October 2016, the Kampala amendment to article 8 has been ratified by 32 States Parties, the Kampala amendments on the crime of aggression have been ratified by 32 States Parties and the amendment to article 124 has been ratified by three States Parties.

V. Decisions and Recommendations

40. The Working Group recommends to the Assembly the adoption of a draft resolution on amending rule 101 and rule 144(2)(b) of the Rules of Procedure and Evidence (annex I).

41. The Working Group agrees to reconvene during the fifteenth session of the Assembly to continue the discussion on the provisional amendments to rule 165 of the Rules of Procedure and Evidence .

42. The Working Group recommends that regular meetings be held throughout 2017, including, if necessary, in expert meetings format.

43. The Working Group concludes its intersessional work by recommending to the Assembly the inclusion in the omnibus resolution of three paragraphs (annex II).

Annex I

Draft resolution on amendments to rule 101 and rule 144 (2)(b) of the Rules of Procedure and Evidence

The Assembly of States Parties,

Recalling the need 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 *inviting* the organs of the Court to continue to engaging in such a dialogue with States Parties,

Recognizing that enhancing the efficiency and effectiveness of the Court is of a common interest both for the Assembly of States Parties and the Court,

Recalling operative paragraphs 1 and 2 of resolution ICC-ASP/9/Res.2 and article 51 of the Rome Statute,

Commending, in this regard, the judges of the Court, acting by absolute majority, pursuant to article 51, paragraph 2 (b), of the Rome Statute, and upon recommendation of the Advisory Committee on Legal Texts, for their initiative to amend the Rules of Procedure and Evidence,

Noting the reports of the Working Group on Amendments and the report of the Bureau on the Study Group on Governance,

Taking note with appreciation of the subsequent consultations undertaken by States Parties within the Study Group on Governance and the Working Group on Amendments,

Recognizing that each proposal to amend the Rules of Procedure and Evidence needs to be examined on its own merits, in conformity with the Rome Statute, and with appropriate time allocated to its analysis,

Recalling article 51, paragraph 5, of the Rome Statute, according to which in the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail,

Bearing in mind the need to fully respect the rights accorded to the accused and to victims in the Rome Statute at all stages of proceedings before the Court,

1. *Decides* that the following paragraph be inserted after rule 101, paragraph 2, of the Rules of Procedure and Evidence:

“3. The Court may order in relation to certain decisions, such as those referred to in rule 144, that they are considered notified on the day of their translation, or parts thereof, as are necessary to meet the requirements of fairness, and, accordingly, any time limits shall begin to run from this date.”

2. *Also decides* that the following shall replace rule 144, paragraph 2 (b), of the Rules of Procedure and Evidence:

“(b) The accused, in a language he or she fully understands or speaks, in whole or to the extent necessary to meet the requirements of fairness under article 67, paragraph 1 (f).”

Annex II

Draft text for the omnibus resolution

1. Paragraph 107 of the 2015 omnibus resolution (ICC-ASP/14/Res.4) is replaced by the following:

“Welcomes the report of the Working Group on Amendments.”

2. Paragraph 16 of annex I (mandates) of the 2015 omnibus resolution (ICC-ASP/14/Res.4) is replaced by the following:

“(a) invites the Working Group to continue its consideration of all amendment proposals, in accordance with the Terms of Reference of the Working Group, and

(b) requests the Working Group to submit a report for the consideration of the Assembly at its sixteenth session;”

Annex III (a)

Non-paper submitted by Belgium: New texts replacing and completing draft amendments 2 and 3 to the Rome Statute

1. This text replaces draft amendments 2 and 3 to the Rome Statute tabled by a number of States Parties and is completed by draft elements of the crimes.

A. Amendments to article 8 of the Rome Statute

2. To be inserted as article 8-2-b)xxvii) and article 8-2-e)xvi)
“Employing weapons, including their equipment or means of delivery, which use microbial or other biological agents, or toxins, whatever their origin or method of production,”
3. To be inserted as article 8-2-b)xxviii) and article 8-2-e)xvii)
“Employing anti-personnel mines.”
4. To be inserted as article 8-2-b)xxix) and article 8-2-e)xviii)
“Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.”
5. To be inserted as article 8-2-b)xxx) and article 8-2-e)xix)
“Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.”

B. Elements of crime

1. International armed conflicts

6. New article 8-2-b)xxvii)
“1. The perpetrator employed weapons, equipment or means of delivery designed to use microbial or other biological agents, or toxins.
2. The microbial or other biological agents, or toxins whatever their origin or method of production, were of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.”
7. New article 8-2-b)xxviii)
“1. The perpetrator employed mines¹ designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.²
2. The conduct took place in the context of and was associated with an international armed conflict.

¹ The term “mines” means “a munition designed to be placed under, on or near the ground or other surface area” and to be exploded by the presence, proximity or contact of a person or a vehicle.

² It is understood that this element does not encompass the use of mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices. Those mines are not considered anti-personnel mines as a result of being so equipped.

The terms “anti-handling devices” mean “a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine”.

3. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.”
8. New article 8-2-b)xxix) and article 8-2-e)xviii)
 - “1. The perpetrator employed weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.
 2. The conduct took place in the context of and was associated with an international armed conflict.
 3. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.”
9. New article 8-2-b)xxx) and article 8-2-e)xix)
 - “1. The perpetrator employed laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness³ to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.
 2. The blinding is not an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment.
 3. The conduct took place in the context of and was associated with an international armed conflict.
 4. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.”

2. Armed conflict not of an international character

10. New article 8-2-e)xvi)
 - “1. The perpetrator employed weapons, equipment or means of delivery designed to use microbial or other biological agents, or toxins.
 2. The microbial or other biological agents, or toxins whatever their origin or method of production, were of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes.
 3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
 4. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.”
11. New article 8-2-e)xvii)
 - “1. The perpetrator employed mines⁴ designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.⁵
 2. The conduct took place in the context of and was associated with an armed conflict not of an international character.
 3. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.”

³ The terms “permanent blindness” mean “irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery”.

⁴ The term “mines” means “a munition designed to be placed under, on or near the ground or other surface area” and to be exploded by the presence, proximity or contact of a person or a vehicle.

⁵ It is understood that this element does not encompass the use of mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices. Those mines are not considered anti-personnel mines as a result of being so equipped.

The terms “anti-handling devices” mean “a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine”.

12. New article 8-2-e)xviii)
 - “1. The perpetrator employed weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.
 2. The conduct took place in the context of and was associated with an armed conflict not of an international character.
 3. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.”
13. New article 8-2-e)xix)
 - “1. The perpetrator employed laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness⁶ to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.
 2. The blinding is not an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment.
 3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
 4. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.”

⁶ The terms “permanent blindness” mean “irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery”.

Annex III (b)

Non-paper submitted by Belgium: New texts replacing and completing draft amendments 2 and 3 to the Rome Statute – FAQ

A. General drafting comments

1. The new text replacing the draft amendments 2 and 3 to the Rome Statute tabled by a number of States Parties is drafted on the basis of existing Rome Statute article 8 war crimes. The original text proposed to add crimes to the Court jurisdiction by a merely referencing to existing treaties. The new text defines the crimes explicitly, based on existing rules of international law.

B. Why precisely these crimes?

2. The war crimes to be included within the Court jurisdiction are those enjoying a broad recognition based on existing rules of international law.

C. Where do the definitions come from?

3. The definition of:

(a) The war crime of employing bacteriological weapons (new article 8-2-b)xxvii) and article 8-2-e)xvi)) comes from the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxins Weapons and on their Destruction (10 April 1972).¹

(b) The war crime of employing anti-personnel landmines (new article 8-2-b)xxviii) and article 8-2-e)xvii)) comes from the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (18 September 1997).²

(c) The war crime of employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays (new article 8-2-b)xxix) and article 8-2-e)xviii)) comes from the Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980).³

(d) The war crime of employing laser weapons (new article 8-2-b)xxx) and article 8-2-e)xix)) comes from the Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 13 October 1995).⁴

4. The definitions of the elements of the crimes come from the same texts.

¹ 173 States Parties, 6th of April 2016.

² 162 States Parties, 6th of April 2016.

³ 116 States Parties, 6th of April 2016.

⁴ 106 States Parties, 6th of April 2016.

D. Why does the new text not refer to chemical weapons anymore?

5. Chemical weapons are already covered by the ICC jurisdiction.
6. They were included in the original text of the Rome Statute in case of international armed conflict (article 8-2-b)xvii) and b)xviii), and since the entry into force of the 1st Amendment to the Rome Statute (the so-called “Belgian amendment”), they also fall within the ICC jurisdiction in case of armed conflict not of an international character (article 8-2-e)xiii) and e)xiv)).

E. Do the revised amendments apply to both international armed conflicts and armed conflicts not of an international character?

7. The first two crimes find their origin in treaties which cover all armed conflicts, regardless whether they present an international character or not.
8. The last two crimes find their origin in treaties which also cover the scope of armed conflicts not of an international character.⁵

Annex IV**Provisional amendments to rule 165 of the Rules of Procedure and Evidence**

<i>Original Rule 165</i>	<i>Provisional Rule 165</i>
Rule 165 Investigation, prosecution and trial	Rule 165 Investigation, prosecution, trial and appeal
1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.	1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.
2. Articles 53 and 59, and any rules thereunder, shall not apply.	2. Articles <u>39(2)(b)</u> , 53, <u>57(2)</u> , <u>59</u> , <u>76(2)</u> and <u>82(1)(d)</u> , and any rules thereunder, shall not apply. <u>A Chamber composed of one judge from the Pre-Trial Division shall exercise the functions and powers of the Pre-Trial Chamber from the moment of receipt of an application under article 58. A Chamber composed of one judge shall exercise the functions and powers of the Trial Chamber, and a panel of three judges shall decide appeals. The procedures for constitution of Chambers and the panel of three judges shall be established in the Regulations.</u>
3. For purposes of article 61, the Pre-Trial Chamber may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.	3. For purposes of article 61, <u>the Pre-Trial Chamber, as constituted under sub-rule 2,</u> may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.
4. A Trial Chamber may, as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges under articles 5 to 8.	4. <u>The Trial Chamber seized of the case from which the article 70 proceedings originate may,</u> as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges <u>in the originating case. Where the Trial Chamber directs joinder of charges, the Trial Chamber seized of the originating case shall also be seized of the article 70 charge(s). Unless there is such a joinder, a case concerning charges under article 70 must be tried by a Trial Chamber composed of one judge.</u>

⁵ See namely Amendment 1 to the 1980 Convention (adopted in 2001) – 82 States Parties.

Annex V

Non-paper submitted by France and Germany: Proposed amendments to provisional rule 165 of the Rules of Procedure and Evidence

<i>Original Rule 165</i>	<i>Provisional Rule 165</i>	<i>Amendment to Provisional Rule 165</i>
<p>Rule 165</p> <p>Investigation, prosecution and trial</p> <p>1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.</p> <p>2. Articles 53 and 59, and any rules thereunder, shall not apply.</p> <p>3. For purposes of article 61, the Pre-Trial Chamber may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.</p> <p>4. A Trial Chamber may, as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges under articles 5 to 8.</p>	<p>Rule 165</p> <p>Investigation, prosecution, trial <u>and appeal</u></p> <p>1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.</p> <p>2. Articles <u>39(2)(b)</u>, 53, <u>57(2)</u>, <u>59</u>, <u>76(2)</u> and <u>82(1)(d)</u>, and any rules thereunder, shall not apply.</p> <p><u>A Chamber composed of one judge from the Pre-Trial Division shall exercise the functions and powers of the Pre-Trial Chamber from the moment of receipt of an application under article 58. A Chamber composed of one judge shall exercise the functions and powers of the Trial Chamber, and a panel of three judges shall decide appeals. The procedures for constitution of Chambers and the panel of three judges shall be established in the Regulations.</u></p> <p>3. For purposes of article 61, <u>the Pre-Trial Chamber, as constituted under sub-rule 2,</u> may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.</p> <p>4. <u>The Trial Chamber seized of the case from which the article 70 proceedings originate may,</u> as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges in the originating case. <u>Where the Trial Chamber directs joinder of charges, the Trial Chamber seized of the originating case shall also be seized of the article 70 charge(s). Unless there is such a joinder, a case concerning charges under article 70 must be tried by a Trial Chamber composed of one judge.</u></p>	<p>Rule 165</p> <p>Investigation, prosecution, and trial <u>and appeal</u></p> <p>1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.</p> <p>2. Articles <u>39(2)(b)</u>, 53, <u>57(2)</u>, <u>and 59, 76(2) and 82(1)(d)</u>, and any rules thereunder, shall not apply.</p> <p><u>A Chamber composed of at least one judge from the Pre-Trial Division shall exercise the functions and powers of the Pre-Trial Chamber from the moment of receipt of an application under article 58. When the Pre-Trial Chamber is seized of offences against the administration of justice under article 70, orders or rulings issued under article 61 paragraph 7 must be concurred in by a majority of judges. A Chamber composed of one judge shall exercise the functions and powers of the Trial Chamber, and a panel of three judges shall decide appeals. The procedures for constitution of Chambers and the panel of three judges shall be established in the Regulations.</u></p> <p>3. For purposes of article 61, <u>the Pre-Trial Chamber, as constituted under sub-rule 2,</u> may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.</p> <p>4. <u>The Trial Chamber seized of the case from which the article 70 proceedings originate may,</u> as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges in the originating case. <u>Where the Trial Chamber directs joinder of charges, the Trial Chamber seized of the originating case shall also be seized of the article 70 charge(s). Unless there is such a joinder, a case concerning charges under article 70 must be tried by a Trial Chamber composed of one judge.</u></p>