International Criminal Court
ICC-ASP/10/32

Assembly of States Parties

Distr.: General
9 December 2011

Original: English

Tenth session
New York, 12-21 December 2011

Report on the Working Group on Amendments

Contents

Page

I. Introduction 2

II. Consideration of amendment proposals 2

A. General comments 2

B. Consideration of the proposals submitted by Belgium 3

C. Consideration of the proposal submitted by Mexico 3

D. Consideration of the proposal submitted by the Netherlands 4

E. Consideration of the proposal submitted by Trinidad and Tobago and Belize 4

F. Consideration of amendments to rule 4 of the Rules of Procedure and Evidence 5

III. Consideration of procedural rules or guidelines 6

A. General comments 6

B. Comments on the draft procedural guidelines 7

IV. Way forward 8

Annex I: Belgium 9

Annex II: Mexico: Amendment to article 8 of the Rome Statute of the International Criminal Court regarding the use of nuclear weapons 13

Annex III: Netherlands: Proposal for the inclusion of the crime of terrorism in the Rome Statute ... 17

Annex IV: Trinidad and Tobago and Belize 19

Annex V: African Union States Parties to the Rome Statute 21

Annex VI: Proposal for amendments to rule 4 of the Rules of Procedure and Evidence 22

Annex VII: Chair's draft procedural guidelines 24

Annex VIII: Draft text for the omnibus resolution 25

I. Introduction

1. The Working Group on Amendments ("the Working Group") was established by the Assembly at its eighth session pursuant to 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 at its eighth session, 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 of States Parties."

2. During its ninth session, the Assembly in resolution ICC-ASP/9/Res.3 requested the Bureau "to prepare a report for the consideration of the Assembly, at its tenth session, on procedural rules or guidelines for the Working Group on Amendments." The report contained in ICC-ASP/9/20, annex II, of the ninth session of the Assembly further states that informal consultations be held in New York and that the "goal of these consultations would be to achieve greater clarity on both the substantive views on the amendment proposals and the procedure to be followed in dealing with amendment proposals."

3. Accordingly, the Working Group met intersessionally. Informal consultations were held on 19 May, 28 September and 2 December 2011, on the basis of three papers introduced by the Chair of the Working Group, H.E. Ambassador Paul Seger (Switzerland): A note for discussion, dated 1 May, draft procedural guidelines, dated 12 September, and excerpts from the report of the Bureau on the Study Group on Governance, dated 23 November.

II. Consideration of amendment proposals

A. General comments

4. The Working Group received and discussed general, cross-cutting comments on the amendment proposals before it. Some delegations raised the question as to the precise source of the criminalization of the conduct referred to in the proposed amendments and whether breaching such rules would entail a universal sanction. This would have an impact on the Statute in a more general sense: does the Statute merely give the Court jurisdiction over existing international crimes, or does the Statute criminalize certain conduct? In this connection, the point was made that some of the proposals encompassed conduct which was not penalized under customary international law. However, other delegations expressed the view that primary norms were often not accompanied by secondary norms, and recalled that there were doubts at the 1998 Rome Conference regarding whether certain war crimes were already prohibited by customary international law. In that regard, doubt was expressed as to adopting as a principle consideration of new crimes only if they are already penalized under customary international law.

5. As regards the question of timing, it was recalled that the 1998 Rome Statute text had sought to attain universal support. By seeking to expand the Court's jurisdiction, the quest for universality might be affected. Furthermore, it would be unwise to divide States Parties at a time when the Court was dealing with a number of politically sensitive issues. Bearing in mind the considerable resources had been invested by the Assembly in the consideration of the crime of aggression, caution was suggested before embarking upon discussions over new amendment proposals.

6. It was also proposed to await the completion of a full judicial cycle so that the Assembly could be better informed by Court practice before moving on to consider new amendments. It was also posited that even with the existing provisions of the Rome Statute, additional efforts were called for in relation to providing the requisite support for and cooperation with the Court, as difficulties in that connection had arisen vis-à-vis some States Parties; this cast some doubts as to whether the timing was appropriate to discuss new amendment proposals. Others stated that awaiting the completion of a full judicial cycle might not be necessary, as it was important to take into account progress in the field of international law.

7. Two proposed criteria for further consideration were whether an amendment proposal related to a crime which was of international concern, and whether the proposal could attract consensus. The importance of not overburdening the Court or upsetting the balance embodied in the Rome Statute was raised, as was the importance concentrating on first implementing the existing body of law.

B. Consideration of the proposals submitted by Belgium

8. During the reporting period, Belgium recalled that it had submitted three amendment proposals. The first, which was adopted in Kampala in 2010, had aimed at extending the jurisdiction of the Court over three crimes in non-international armed conflict, over which it already had jurisdiction in situations of international armed conflicts. The remaining two proposals had been cosponsored by 13 States Parties but not forwarded to the Review Conference. The first proposal would extend the list of war crimes to the use of weapons defined and prohibited by the Chemical Weapons Convention, the Biological Weapons Convention and by the Landmine-Ban Treaty. The second proposal would do the same for the weapons covered in the Convention on Certain Conventional Weapons, especially those contained in its Protocols 1 and 4. The language had been updated compared with older versions (annex I), for example by replacing “using” by “employing”, so as to be more consistent with language used in the Statute. Furthermore, the argument against considering the convention on cluster bombs could be revisited as the convention had entered into force in the latter part of 2010. Belgium indicated that it might produce a non-paper containing additional proposals for consideration aimed at harmonizing war crimes in non-international and international conflicts.

9. Some delegations signalled openness and initial support for the Belgian proposals. According to other views, there was a need to verify if the proposed crimes were penalized under existing international law and, if so, whether such conduct would result in individual criminal responsibility under international law, as well as to consider the existing status of the proposed banned weapons. States also raised a concern in creating obligations under the Rome Statute for States that had not ratified the conventions on which the new crimes envisaged by Belgium were based.

C. Consideration of the proposal submitted by Mexico

10. Mexico introduced a revised version if its proposal that no longer refers to the threat of the use of nuclear weapons (annex II). Only the use of nuclear weapons would be criminalized. In doing so, it clarified that if adopted the amendment would only take effect for the States that would accept the amendment. The amendment sought to fill an omission in the Rome Statute.

11. Some delegations raised concerns with regard to the impact that this proposed amendment could have on the universality of the Court, in particular with regard to States adhering to a policy of nuclear deterrence. It was also stated that there is no definitive agreement that nuclear weapons are illegal under all circumstances, as the International Court of Justice in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* had declined to opine on their legality in cases of extreme self-defence and in this connection reference was made to bearing in mind the full breadth of the reasoning of the advisory opinion.

12. Other States expressed grave doubts regarding the possible legality of the use of nuclear weapons. In that regard, the question was raised whether their use would not already be covered by some of the crimes currently contained in the Statute, such as the crime of aggression and others, given the knowledge of the accompanying, excessive effects. The question was raised whether the provisions of article 31, paragraph 1(c), of the Rome Statute establishing grounds of exclusion of criminal responsibility on the grounds of self-defence would also apply. States welcomed the removal of the criminalization of the threat of use of nuclear weapons in the revised proposal, as well as the indication that the proposal would only be applicable to States Parties that accept the amendment, but raised the question as to the added value of criminalizing the use of nuclear weapons.

13. As regards the point about the use of nuclear weapons possibly being covered by existing provisions of the Statute or other international instruments, Mexico was of the view that such provisions would not be sufficient to establish individual criminal responsibility for such conduct and that its proposal had the added value of clearly penalizing such conduct and thus bringing individuals to justice. Mexico circulated a revised position paper, dated 8 July 2011, with more detailed responses to the questions raised.

D. Consideration of the proposal submitted by the Netherlands

14. The Netherlands reintroduced its proposal on the crime of terrorism (annex III). It indicated that although it was aware of the arguments raised concerning the lack of a universally agreed definition of terrorism, it was nonetheless possible to move forward and to begin to prepare for the incorporation of the crime of terrorism in the Rome Statute. The proposed amendment would add a paragraph e) to article 5, the crime of terrorism as well as a paragraph 3, which would state that Court could only exercise jurisdiction once another amendment containing a definition and elements of the crime had been agreed to.

15. Delegations pointed to the on-going negotiations on the Comprehensive Convention on International Terrorism taking place at the United Nations, and questioned the value of adding a new paragraph (e) into article 5 of the Statute. The use of the “placeholder approach” was not necessarily deemed to constitute the best way forward as, unlike the crime of aggression, which had been included in article 5, paragraph 2, at the 1998 Rome Diplomatic Conference on the basis of an agreement among States, there was no such agreement on the proposed inclusion of terrorism. Furthermore, two rounds of ratifications would be needed before the provisions would be activated, one to penalize the conduct in a general sense and then once more at a subsequent phase when a definition had been agreed to. In this connection, doubts were expressed about the appropriateness of inclusion of the crime of terrorism in the Rome Statute even once a definition had been agreed to in the context of the negotiations on the Comprehensive Convention.

16. The need to focus efforts on consolidating the Court and the possible impact upon universality was also raised. As regards the last sentence of paragraph 3 of the proposal, which stated that the provision shall be consistent with the relevant provisions of the United Nations Charter, the question was raised as to which specific provisions were referred to and whether this reference was necessary. Finally, while the threat posed by terrorism was acknowledged, it was also stated that the international community had already undertaken a considerable amount of action in this regard. The value of embroiling the Court in these efforts was thus questioned.

17. The Netherlands stated that it understood the comments which sought to avoid altering the delicate balance achieved in the Statute and agreed with them up to a point. However, the Statute should be considered from a holistic perspective. Furthermore, terrorism had been included in Resolution E of the 1998 Rome Conference Final Act for future consideration. With regard to the “placeholder approach”, the Netherlands indicated that it would give careful consideration to the points raised.

E. Consideration of the proposal submitted by Trinidad and Tobago and Belize

18. Trinidad and Tobago recalled that the proposal on drug trafficking (annex IV) dated from 1998 and noted that although proposed by Trinidad and Tobago and Belize, the amendment was a CARICOM initiative. Furthermore, as the issue of the crime of aggression had been resolved in Kampala, the time had come to discuss new amendments based on their merits. International criminal responsibility for drug trafficking is not what it should be at the present, with many perpetrators remaining at large. Bilateral cooperation alone did not seem to solve the problem. It is for this reason that an amendment was sought to the Rome Statute. Trinidad and Tobago stressed that the problem of drug trafficking was a living reality for many and that thus while the Caribbean States had, out of solidarity and a respect for the rule of law, agreed to the inclusion of genocide and crimes against humanity in the Statute, the time had come for the international community to consider the

region's problems, with the goal being not to confuse or overburden the Court, but to eradicate drug trafficking.

19. Delegations emphasized the important role played by Trinidad and Tobago in the creation of the Court. Reference was made to the link with international peace and security, in so far as the financing of certain crimes could be undertaken via drug trafficking activities. Several delegations, however, while acknowledging the gravity of international drug trafficking, questioned the utility of its inclusion in the Rome Statute, as the conduct has traditionally been considered to constitute a national issue.

20. The view was also expressed that although the proposal could be supported, there was nonetheless a need to refine the proposed definition to clearly distinguish between international drug trafficking and domestic drug crimes. In the same vein, the point was made about the difficulties in defining the criminal conduct with the requisite precision for its inclusion in the Rome Statute.

21. The question of the chapeau in paragraph 2 was raised, specifically as to the precise threshold that would be required. What would the threshold be and who would make that determination? What constituted a "threat to the peace, order and security in the region"? Reference was made to the proposed text in paragraph b) penalizing an "attack upon a person", which would not seem to meet the Rome Statute threshold. Having the views of the United Nations Office on Drugs and Crime on the proposal was also mentioned as meriting consideration.

22. Reference was also made to the fact that customary international law did not incriminate drug trafficking and therefore the issue of double-incrimination could arise, which would thus require a modification of the relevant provisions of the Statute.

23. The question was also raised whether drug trafficking was a problem of law enforcement or of trial capacity, and to what extent it could be alleviated by capacity-building. Another point raised was how paragraph 2 of the proposal would relate to article 25, paragraph 3(a), of the Rome Statute. Furthermore, given the lack of enforcement capacity of the Court, the question of what practical contribution could be made by adding drug trafficking to the Statute's crimes was also raised. Reference was also made on the clarification as to whether the proposed text sought to refer to the 1961 Single Convention on Narcotic Drugs, as amended.

24. At one of the meetings, Trinidad and Tobago stated that the comments would be taken into account in producing a revised proposal to be submitted to the Working Group.

F. Consideration of amendments to rule 4 of the Rules of Procedure and Evidence

25. During its meeting of 2 December, the Working Group had before it an excerpt from the report of the Bureau on the Study Group on Governance (annex VI), containing a proposal to amend rule 4 of the Rules of Procedure and Evidence. According to article 51, paragraph 1, of the Rome Statute, such an amendment would enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties. As stated in the report, the proposal aimed at transferring the decision on the assignment of judges to divisions from the plenary of judges to the Presidency. Should the Assembly decide to adopt the amendment during its tenth session, the new provisions could already be applied to the composition of divisions that will follow the election of six new judges.

26. On this basis, delegates unanimously spoke out in favour of amending rule 4 of the Rules of Procedure and Evidence and welcomed the potential gains in efficiency in the workings of the Court that thus could be realised. The Working Group decided to recommend to the Assembly to adoption during its tenth session.

III. Consideration of procedural rules or guidelines

27. The Working Group considered the question of establishing procedural rules or guidelines on the basis of the 1 May 2011 note prepared by the Chair and also, following the first intersessional meeting, on the basis of draft procedural guidelines of 12 September, also prepared by the Chair (see annex VII).

A. General comments

28. In discussions on the basis of the 1 May 2011 Chair's note, some members of the Working Group supported the proposed guidelines as a whole. The opinion was also expressed that guidelines were not necessary, while others emphasized that if there were to be guidelines, nothing in them could contain a derivation from the Rome Statute. The opinion was also expressed that the guidelines should not be legally binding, since the Working Group as a whole was a voluntary mechanism. States retained the right to avail themselves of the mechanisms under the Rome Statute. However, preference was also expressed for binding rules. In that case, the Assembly would either need to adopt those rules or grant the Working Group the right to adopt its own rules.

29. The point was made that the Working Group was an informal forum, where a proposal could be considered without any pre-determined rules nor having it previously conveyed by the Assembly, so that if enough support for the proposal was expressed, it could then be forwarded to the Assembly, thus avoiding a lengthy process for what could be an important amendment. It was posited that the submission of a proposal to the Working Group should preferably take place before its submission to the depositary. However, the point was also made that only a State could withdraw its proposal, and furthermore that nothing in the guidelines under consideration could prohibit a State from submitting an amendment to the depositary.

30. On the question of threshold for proposals to be forwarded to the Assembly, delegations expressed the view that only proposals with the potential for consensual adoption should be forwarded, with a strong threshold for discussion of a proposal within the Working Group and even higher threshold for conveying it to the Assembly. Other delegations supported a rule of strict consensus within the Working Group, as States Parties would always have the right to bring amendment proposals to the Assembly directly. Amendments should then be adopted by the Assembly by consensus. However, it was also posited that attaining consensus within the Working Group would not necessarily constitute a pre-requisite for conveying a proposal to the Assembly, especially since requiring consensus could motivate a State to submit its proposal directly to the Assembly.

31. The view was also expressed that amendment proposals, particularly those relating to the catalogue of crimes, should only be adopted at special "constitutional" sessions of the Assembly, such as a Review Conference. Such as restrictive approach would allow the Assembly to work on consolidating the existing jurisdiction of the Court and the Kampala amendments. Furthermore, bearing in mind the economics of negotiations by investing time and resources only on those proposals with potential consensus support, the regular session of the Assembly would not be overburdened with amendment proposals, thus allowing focus to be directed to more pressing issues, such as cooperation.

32. As regards the order in which amendment proposals should be discussed, some considered that the level of support should be taken into account. In this connection, some delegations supported objective criteria in this regard, such as a minimum number of cosponsors from all regional groups. Other factors which could be borne in mind included the time of submission, the type of amendment proposed, and the repeated request by the proposing State for consideration of the amendment. Reference was made that measuring the level of support for a proposal required doing so over time and that a flexible approach would thus be required.

B. Comments on the draft procedural guidelines

33. Introducing the draft procedural guidelines of 12 September 2011, the Chair pointed out that it would be useful to understand the draft procedural guidelines as being divided into two parts. The first part, paragraphs 1 to 3, described the mandate of the Working Group and situated it within the scheme of the Rome Statute and the Rules of Procedure of the Assembly of States Parties. It clarified that the Working Group was evidently a subsidiary body of the Assembly and that all it did was subsidiary to the provisions of the Rome Statute, in particular articles 51, 121 and 122.

34. The second part of the draft guidelines, paragraphs 4 to 10, sought to clarify the core business of the Working Group: How should the Working Group process amendment proposals? The draft explained that the Working Group's primary task was preliminary discussion, prior to a formal decision of the Assembly to "take up" a proposal in the sense of article 121, paragraph 2, of the Rome Statute. The purpose of the Working Group was to advise the Assembly as to which amendments would generate enough support for an eventual adoption. Accordingly, the draft encouraged States to notify the Working Group early to start such preliminary discussion. Two central questions were then dealt with in paragraphs 6 and 9. Firstly, how should the Working Group, even if there would be no question that any proposal brought before the Working Group would be discussed, be understood to proceed when it was faced with multiple proposals and a need arose to set priorities? Secondly, what, if any, criteria should the Working Group apply to hand over a proposal to the Assembly? The draft procedural guidelines presented alternative answers to both questions.

35. On a general level, having expressed a preference for the non-binding nature of the guidelines, delegations suggested removing language that was indicative of a binding nature of the guidelines such as "shall" or "should" and replacing it with "will" or "would" throughout the draft.

36. With regard to the first part of the draft, it was suggested that there should be a limitation to proposals made by States or States Parties and the pre-existing rules applicable to the work of the Working Group should be mentioned more comprehensively. Regarding paragraph 3, the question was raised whether this article was necessary. If so, it was suggested to emphasize that nothing in the guidelines would affect the Rome Statute.

37. Regarding the second part of the draft procedural guidelines, and particularly paragraph 6, it was suggested that proposals be simply considered in the order in which they were received and that there was as such no need to give priority to proposals. It was also suggested that the goal should be to concentrate on proposals that enjoy an initial level of support, though it was difficult to adequately reflect that. Further, the opinion was expressed that paragraph 6 did not deal with the issue of how to discuss a proposal once it has been decided to be taken forward. Others noted that since all proposals would be discussed, it was merely a question of when to forward a certain proposal. The question was raised as to whether paragraph 6 was intended as a tool for deciding when to forward proposals to the Assembly or as a tool for deciding if proposals should be discussed. In that regard, the opinion was expressed that all proposals, regardless of the level of support they receive, should be discussed. It was noted that the qualifiers were rather vague and that their application only be decided in the context of a specific discussion, and that it would be very difficult to prioritise questions.

38. Regarding the alternatives presented for paragraph 6, some expressed the opinion that all alternatives in this paragraph were incompatible with article 121 of the Statute. Support was expressed for alternative 1 in paragraph 6, with some suggesting its merger with alternative 3. One such suggestion would be to refer to "proposals that have a broad initial level of support and that have a likelihood of reaching consensus". Others noted that the word "initial" might be deleted, as proposals might be under discussion in the Working Group for many years. Others expressed support for alternative 3 in paragraph 6. Further, in alternative 3 of paragraph 6, it was suggested to replace "likelihood of reaching consensus" with "broad and initial level of support among States Parties. This was based on the experiences with the crime of aggression, which many did not believe would be adopted at the Review Conference. Suggestions were also made regarding prioritization of proposals based on whether a new crime could be characterized as "one of the most serious crimes

under international law" and was rooted in existing prohibitions in international law. Others still expressed support for option 2 in paragraph 6. It was also suggested that paragraph 6 is not necessary, as deciding on priorities was a very political consideration.

39. As regards paragraph 9, some noted that the desirability of reaching consensus should be stressed. Others held the view that it was preferable to leave room for the Working Group to forward proposals to the Assembly even absent a consensus, in accordance with the provisions for subsidiary bodies enshrined in the Rules of Procedure of the Assembly of States Parties, a fact reflected in paragraph 2 of the draft guidelines. In that regard, it was noted that should there be derogation from the Rules of Procedure, the reason for this should be clearly stated. It was also suggested to amend the wording to reflect that a vote would require a two-thirds majority, in accordance with rule 63 of the Rules of Procedure. In this connection, the opinion was expressed that this provision would only be tenable if the guidelines were binding, as there may otherwise be some contestation. Others expressed a preference for simply deleting the last sentence of paragraph 9, as one should not add more requirements than those imposed by the Rome Statute.

IV. Way forward

40. The Working Group concluded that the Chair would reformulate the draft procedural guidelines on the basis of comments made by delegations during the intersessional period.

41. The Working Group concluded its intersessional work with the following recommendations to the Assembly:

(a) Adoption, at its tenth session, of the draft amendment to rule 4 of the Rules of Procedure and Evidence (annex VI); and

(b) Inclusion in the omnibus resolution of one paragraph (annex VIII).

Annex I

Belgium

A. Amendments 2 and 3

Amendment 1

[omitted as it was adopted via resolution RC/Res.5 at the Review Conference]

Amendment 2

Proposed by Argentina, Belgium, Bolivia, Burundi, Cambodia, Cyprus, Ireland, Latvia, Luxembourg, Mauritius, Mexico, Romania, Samoa and Slovenia

1. Add to article 8, paragraph 2(b), the following:

"(xxvii) Using the agents, toxins, weapons, equipment and means of delivery as defined by and in violation of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, London, Moscow and Washington, 10 April 1972;[1]

(xxviii) Using chemical weapons or engaging in any military preparations to use chemical weapons as defined by and in violation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, 13 January 1993;[2]

(xxix) Using anti-personnel mines as defined by and in violation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa 18 September 1997. "[3]

2. Add to article 8, paragraph 2 (e), the following:

"(xiii) Using the agents, toxins, weapons, equipment and means of delivery as defined by and in violation of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, London, Moscow and Washington, 10 April 1972;

(xiv) Using chemical weapons or engaging in any military preparations to use chemical weapons as defined by and in violation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, 13 January 1993;

(xv) Using anti-personnel mines as defined by and in violation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa 18 September 1997."

Justification

The draft amendment refers to the use of specific weapons forbidden by international treaties ratified or accepted by more than four fifth of the States in the world; some of them are almost universally ratified. All are considered by an extremely large number of States as international customary law.

The first paragraph incriminates this use in case of an international armed conflict (article 8, paragraph 2(b), of the Rome Statute). The second paragraph extends the jurisdiction of the Court to the employment of such weapons in case of armed conflict not of an international character (article 8, paragraph 2(e), of the Rome Statute).

[1] 165 States parties (25 November 2011).
[2] 188 States parties (25 November 2011).
[3] 157 States parties (25 November 2011).

Amendment 3

Proposed by Argentina, Belgium, Bolivia, Burundi, Cambodia, Cyprus, Ireland, Latvia, Luxembourg, Mauritius, Mexico, Romania, Samoa and Slovenia

1. Add to article 8, paragraph 2(b), the following:

> "(xxx) Using weapons as defined by and in violation of any of the following Protocols 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. Geneva, 10 October 1980:
>
> – Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention), Geneva, 10 October 1980;[4]
>
> – Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), Vienne, 13 October 1995."[5]

2. Add to article 8, paragraph 2(e), the following:

> "(xvi) Using weapons as defined by and in violation of any of the following Protocols 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. Geneva, 10 October 1980:
>
> – Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention). Geneva, 10 October 1980;
>
> – Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), Vienne, 13 October 1995."

Justification

The draft amendment refers to the use of weapons forbidden by two Protocols to the 1980 Convention which are broadly ratified or accepted. Both are considered by a large number of States as international customary law.

The first paragraph incriminates this use in case of an international armed conflict (article 8, paragraph 2(b), of the Rome Statute). The second paragraph extends the jurisdiction of the Court to the employment of such weapons in case of armed conflict not of an international character (article 8, paragraph 2(e), of the Rome Statute).

B. Revised amendments 2 and 3

Amendment 2

1. Add to article 8, paragraph 2(b), the following:

> "(xxvii) Employing the agents, toxins, weapons, equipment and means of delivery as defined by ~~and in violation of~~ the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, London, Moscow and Washington, 10 April 1972;[6]
>
> (xxviii) Employing chemical weapons ~~or engaging in any military preparations to use chemical weapons~~ as defined by ~~and in violation of~~ the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, 13 January 1993;[7]

---

[4] 112 States parties (25 November 2011).
[5] 100 States parties (25 November 2011).
[6] 165 States parties (25 November 2011).
[7] 188 States parties (25 November 2011).

(xxix) Employing anti-personnel mines as defined by ~~and in violation of~~ the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa 18 September 1997."[8]

2. Add to article 8, paragraph 2(e), the following:

"(xiii) Employing the agents, toxins, weapons, equipment and means of delivery as defined by ~~and in violation of~~ the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, London, Moscow and Washington, 10 April 1972;

(xiv) Employing chemical weapons ~~or engaging in any military preparations to use chemical weapons~~ as defined by ~~and in violation of~~ the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, 13 January 1993;

(xv) Employing anti-personnel mines as defined by ~~and in violation of~~ the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa 18 September 1997."

Amendment 3

1. Add to article 8, paragraph 2(b), the following:

"(xxx) Employing weapons as defined by ~~and in violation of~~ any of the following Protocols 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. Geneva, 10 October 1980:

- Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention), Geneva, 10 October 1980[9] ;
- Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), Vienne, 13 October 1995[10]."

2. Add to article 8, paragraph 2 (e), the following:

"(xvi) Employing weapons as defined by ~~and in violation of~~ any of the following Protocols 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. Geneva, 10 October 1980:

- Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention). Geneva, 10 October 1980;
- Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), Vienne, 13 October 1995."

Explanations:

Amendments 2 and 3: on the use of the terms "using":

It is suggested to replace, in Amendments 2 and 3, the word "using" with the word "employing". The purpose of this new draft is to establish consistency with the terms already used in article 8 of the Rome Statute concerning prohibited weapons (article 8, paragraphs 2 (b), (xvii), (xviii), (xix) and (xx)).

[8] 157 States parties (25 November 2011).
[9] 112 States parties (25 November 2011).
[10] 100 States parties (25 November 2011).

Amendment 2, paragraph 1, line 2 and paragraph 2 line 2: deletion of the terms "engaging in any military preparations to use chemical weapons":

Following comments made by States, it is suggested to delete, in Amendment 2, paragraph 1, line 2, and paragraph 2, line 2, the terms "engaging in any military preparations to use chemical weapons". The existing provisions of Rome Statute, article 8, concerning prohibited weapons, take into account only the use of certain weapons and do not encompass the preparation to use those weapons. It is consistent to use the same formula for all prohibited weapons.

Amendments 2 and 3: on the use of the terms "as defined by and in violation of":

It is suggested to replace the words "as defined by and in violation of" with the words "as defined by". The current wording of the amendments raises problem as far as the new criminalization's scope of application is concerned. The words "in violation of" imply that a State that ratifies the amendments has to be party to the Conventions to which the amendments refer in order for those amendments to take effect. If a State ratifies the proposed amendments without being party to one or more Conventions, the using of the prohibited weapons, by a State national or on the State's territory, would not be made "in violation of" that or those Convention(s). In order to avoid this illogical consequence of an ineffective ratified amendment, it is suggested to keep only the terms "as defined by". These terms imply that the prohibition set forth in Amendments 2 and 3 will apply to the nationals and on the territory of the States which will ratify this or these amendments, the question of whether it is a State Party being irrelevant. In this respect, it is recalled that the entry into force of the proposed amendments is governed by article 121, paragraph 5, of the Rome Statute. According to this article, "Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance (…)". The States that are not parties to the Conventions to which the amendments refer will acknowledge, by means of the ratification of the aforementioned amendments, the Court's jurisdiction regarding those crimes if they do not prosecute those crimes themselves.

Annex II

Mexico

Amendment to article 8 of the Rome Statute of the International Criminal Court regarding the use of nuclear weapons

Position Paper

In the framework of the Working Group on Amendments to the Rome Statute of the Assembly of States Parties, Mexico will continue reasserting its amendment proposal to article 8 of the Rome Statute to criminalize the use of nuclear weapons in the context of an international armed conflict as a war crime, as follows:

Proposed amendment

Add to article 8, paragraph 2, b), the following:

(…) Employing nuclear weapons.

This proposal is based on the following considerations:

1. The use of nuclear weapons is contrary to the principles of distinction and proportionality that underlie International Humanitarian Law (IHL):

(a) In resolution 1653 (XVI), the United Nations General Assembly decided that: “The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity.”[1]

(b) The principles of distinction and proportionality are fundamental principles of IHL:

(i) According to the principle of distinction, “Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”[2]

(ii) According to the principle of proportionality, indiscriminate attacks are prohibited, including those that employ methods or means of combat:

- The effects of which cannot be limited, which “are of a nature to strike military objectives and civilians or civilian objects without distinction”[3]; and

- Which may be expected to cause effects among civilian population (loss of life, injury, damage to civilian objects) “which would be excessive in relation to the concrete and direct military advantage anticipated”.[4]

[1] Resolution 1653 (XVI) of the General Assembly, November 24 1961, operative paragraph 1, subparagraph b).

[2] Articles 48 and 51 of Additional Protocol I to the 1949 Geneva Conventions and Norms 1, 2, 7, 11, 12 and 13 of Customary International Humanitarian Law.

[3] Article 51.4(c) of Additional Protocol I to the 1949 Geneva Conventions.

[4] Article 51.5(b) of Additional Protocol I to the 1949 Geneva Conventions and Norms 14, 15, 16, 17, 18 and 19 of Customary International Humanitarian Law.

(c) Consistent with such principles, according to conventional and customary IHL "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering"[5]. In addition, IHL includes the prohibition of the use of methods or means of warfare that are expected to cause widespread, long-term and severe damage, prejudicing the health or survival of the population[6].

(d) Without a doubt, the use of nuclear weapons in an international armed conflict would be contrary to the principles of distinction and proportionality that underlie IHL, as well as to the norms of IHL that protect the environment. Nuclear weapons are, by their own nature, indiscriminate arms that cannot be directed to a specific military objective. If used in the context of an international armed conflict, they are likely to cause loss of civilian life, unnecessary injuries and harm to civilians, as well as damage to civilian objects, and their harmful effects would escape, in space and time, the control of those who use them. Various international treaties recognize these characteristics[7].

(e) The International Court of Justice, in its Advisory Opinion dated 8th July, 1996 on The Legality of Threat or Use of Nuclear Weapons, expressly recognizes that: "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."

(f) For the reasons stated above, the use of nuclear weapons in the context of an international armed conflict complies with the characteristics of grave breaches to IHL referred to by the Geneva Conventions and their Additional Protocols[8].

2. As it is a grave breach to IHL, the use of nuclear weapons must be criminalized as a war crime in the Rome Statute:

(a) Article 8 of the Rome Statute recognizes as war crimes the "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law", and enlists each of the acts that would represent such a violation.

(b) As evidenced in the previous section, the use of nuclear weapons in the context of an international armed conflict is a grave breach to IHL, which justifies the inclusion of this conduct in the Rome Statute among those acts enlisted as war crimes by article 8.2(b).

(c) Criminalizing the use of nuclear weapons is not a new issue for States Parties to the Rome Statute. Deliberations over this topic were not concluded during the 1998 Rome Conference, reason for which it is necessary for the international community to mend this gap.

3. Criminalizing the use of nuclear weapons as a war crime in article 8.2(b) of the Rome Statute is necessary and complementary to other subparagraphs of that article.

(a) Article 8.2(b) of the Rome Statute states, in subparagraph (iv), as a war crime, the act of "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".

---

[5] Article 35 of Additional Protocol I to the 1949 Geneva Conventions and Norms 70 and 71 of Customary International Humanitarian Law.

[6] Article 55 of Additional Protocol I to the 1949 Geneva Conventions and Norms 43, 44 and 45 of Customary International Humanitarian Law.

[7] E.g., Comprehensive Nuclear-Test-Ban Treaty; Treaty for the prohibition of nuclear weapons in Latin America (the Treaty of Tlatelolco); Treaty on the Non-Proliferation of nuclear weapons; Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water; Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof.

[8] As per the list of grave breaches contained in article 85.3(b) of Additional Protocol I to the 1949 Geneva Conventions, and in articles 50, 51, 130 and 147 of 1949 Geneva Conventions I, II, III and IV, respectively.

(b) In addition to this general criminalization, subparagraphs (xvii), (xviii) and (xix) of article 8.2(b) of the Rome Statute criminalize specifically as war crimes the acts of employing:

(i) Poison or poisoned weapons;

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

(c) In light of the above, it is unjustified that article 8.2(b), while criminalizing specifically the use of the above-mentioned arms, does not specifically criminalize the use of other arms that have an indiscriminate destructive effect that is considerably greater than the effect of the arms already criminalized, as is the case of nuclear weapons.

(d) Subparagraph (xx) of article 8.2(b) criminalizes as a war crime the act of "employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict". Nevertheless, it subjects this conduct to a condition: "provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123". Due to the fact that, to date, the annex referred to in this subparagraph has not been adopted, the condition to which it is subject has not been complied with and, therefore, fraction (xx) of article 8.2(b) is, in practice, inoperative.

(e) In view of the above, it is necessary and justified to include an express criminalization of the use of nuclear weapons in the context of an international armed conflict as a war crime in article 8.2(b) of the Rome Statute, which would complement the other subparagraphs currently contained in this article.

4. Criminalizing the use of nuclear weapons as a war crime is different to the issue of the legality of the possession of this type of arms

The criminalization of the use of nuclear weapons should NOT be confused with the efforts of the international community to reach a treaty on general and complete disarmament under article VI of the Treaty of the Non-Proliferation of nuclear weapons. The seriousness of the use of nuclear weapons justifies their criminalization as a war crime independently of the course taken by nuclear disarmament negotiations.

5. The amendment would enter into force only for those States Parties which have accepted it

Being an amendment to article 8 of the Statute, its entry into force will be only for those States Parties which have accepted it, which will allow such States Parties to decide on their acceptance of the amendment.

6. Establishing as a war crime the use of nuclear weapons would be compatible with the grounds for excluding criminal responsibility provided in the Rome Statute

(a) Article 31.1 (c) of the Rome Statute provides among the grounds for excluding criminal responsibility, that a person shall not be criminally responsible if, at the time of that person's conduct: "[t]he person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected."

(b) The International Court of Justice in its Advisory Opinion of 8 July 1996, despite recognizing that in general the threat or use of these weapons would be contrary to the International Law, also mentioned that "the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". It recognized, however, that in any case, the use of nuclear weapons must:

(i) Be consistent with paragraph 4 of Article 2 of the Charter of the United Nations, and comply with the requirements of necessity and proportionality in article 51 of the Charter[9]; and

(ii) Be compatible with "the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons"[10].

(c) The proposed amendment would be consistent with article 31.1 (c) of the Rome Statute considering the provisions of the aforementioned Advisory Opinion. In order for those grounds to exclude criminal responsibility of a person that uses nuclear weapons, this could only occur in the remote case that such weapons are used in extreme circumstances of self-defence in which the very survival of the State would be at stake, when such use complies with the above mentioned[11]. However, it should be emphasized that the Court itself has recognized that, regarding the principles and norms of international humanitarian law, "[i]n view of the unique characteristics of nuclear weapons […], the use of such weapons in fact seems scarcely reconcilable with respect for such requirements"[12].

[9] Advisory Opinion of 8 July 1996, paragraph 105. 2 (c).
[10] Advisory Opinion of 8 July 1996, paragraph 105. 2 (d).
[11] It should be recalled that established principles of international law of armed conflicts are applicable law for the International Criminal Court, as per article 21 (b) of the Rome Statute.
[12] Advisory Opinion of 8 July 1996, paragraph 95.

Annex III

Netherlands

Proposal for the inclusion of the crime of terrorism in the Rome Statute

To further advance the cause of justice and the rule of law on a global scale, the Netherlands is of the view that the time has come to consider the inclusion of the crime of terrorism in the list of crimes for which the Court has jurisdiction.

Terrorism is one of the biggest and most challenging threats the world is facing in the twenty-first century. The international community stands united in its strong condemnation of terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security (see for instance A/Res/60/288 - The United Nations Global Counter-Terrorism Strategy). Indeed, terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community. We have all committed ourselves to cooperate fully in the fight against terrorism, in accordance with our obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe havens. Yet, at the same time, there is all too often impunity for acts of terrorism in cases where states appear unwilling or unable to investigate and prosecute such crimes.

Impunity for such serious crimes calls for a role for the International Criminal Court. After all, the Court has been established to prosecute the most serious crimes of concern to the international community. In 1998, the Rome Conference adopted Resolution E, which specifically qualifies terrorist acts as such. In Resolution E, regret is expressed that no generally acceptable definition of the crime of terrorism could be agreed upon for the inclusion within the jurisdiction of the Court. Unfortunately, this is still the case today. While we must therefore further increase our efforts to overcome this lack of agreement, we should at the same time start moving towards preparing the provisional inclusion of the crime of terrorism in the jurisdiction of the Court. Resolution E recommends that a Review Conference considers, *inter alia*, the crime of terrorism, with a view to arriving at an acceptable definition and its inclusion in the list of crimes within the jurisdiction of the Court.

The Netherlands considers that the time has come to take the necessary preparatory steps, in order to be able to defeat impunity for acts of terrorism. To this end, and in the light of the absence of a generally acceptable definition of terrorism, the Netherlands proposes to use the same approach as has been accepted for the crime of aggression, i.e. the inclusion of the crime of terrorism in the list of crimes laid down in Article 5.1 of the Statute while at the same time postponing the exercise of jurisdiction over this crime until a definition and conditions for the exercise of jurisdiction have been agreed upon.

Accordingly, the Netherlands proposes to amend the Rome Statute as follows:

Proposed amendments

Article 5
Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression;

(e) **The crime of terrorism.**

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

3. **The Court shall exercise jurisdiction over the crime of terrorism once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.**

Annex IV

Trinidad and Tobago and Belize

The Review Conference 2010 in Kampala, Uganda will provide the international community with the unique opportunity to advance even further international security and justice in the global community by considering the inclusion of the Crime of International Drug Trafficking in the Rome Statute. The work in this area of prescribing international sanctions for serious international criminal conduct remains unfinished.

International drug trafficking is a major challenge to the international community as a whole because it threatens the peace, order and security of States in the international community. The growing transboundary impact of drug trafficking calls for urgent and effective international legal sanctions to combat what has become a crime of grave international concern. Otherwise**,** in the absence of an appropriate international legal framework**,** organized criminal networks and international drug traffickers will continue to spread, their corrosive tentacles beyond national borders, to subvert democratically elected governments and to threaten socio-economic development, political stability and the internal and external security of States and the physical and mental security of individuals.

The inclusion of the crime of international drug trafficking will enhance the principle of complementarity, because some member States lack the capacity and necessary facilities to combat this burgeoning problem of grave concern to the international community as a whole. Acting as a Court of last resort where national Courts are either unable or unwilling to prosecute, the International Criminal Court ("ICC") will be able to protect the international community against the perpetrators of these heinous crimes without compromising the integrity of the national Courts.

Notwithstanding the provisions of the *1961 Single Convention on Narcotic Drugs*, the *1961 Single Convention on Narcotic Drugs, as amended*, the *1971 Convention on Psychotropic Substances*, or the *1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, drug barons continue to operate with impunity within the international community. In fact, transboundary criminal activities by international drug barons in the form of murder, extortion and money laundering constitute serious crimes of concern to the international community as a whole. No member State of the international community is immune from the deleterious socio-economic effects of international drug trafficking. The security of the State and the well-being of individuals are at stake.

Trinidad and Tobago and Belize believe that it is time to take necessary and preparatory steps to combat the crime of international drug trafficking. Accordingly, Trinidad and Tobago and Belize suggest that the Review Conference establish an informal working group on the crime of international drug trafficking and that the working group consider a proposed amendment to the Rome Statute as follows:

Proposed amendments

Article 5

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression;

(e) **The Crime of International Drug Trafficking**[1]

2. For the purposes of the present Statute, crimes involving the illicit trafficking in narcotic drugs and psychotropic substances mean any of the following acts, but only when they pose a threat to the peace, order and security of a State or region:

(a) Undertaking, organizing, sponsoring, ordering, facilitating or financing the production, manufacture, extraction, preparation, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Single Convention on Narcotic Drugs; the 1961 Single Convention on Narcotic Drugs, as amended; the 1971 Convention on Psychotropic Substances, or the 1988 United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances when committed on a large scale and involving acts of a transboundary character;

(b) Murder, kidnapping or any other form of attack upon the person or liberty of civilians or security personnel in an attempt to further any of the acts referred to in subparagraph (a); and

(c) Violent attacks upon the official or private premises of persons or institutions with the intention of creating fear or insecurity within a State or States or disrupting their economic, social, political or security structures when committed in connection with any of the acts referred to in subparagraph (a).

[1] Language for the proposed amendment.

Annex V

African Union States Parties to the Rome Statute

The Permanent Mission of the Republic of South Africa to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to refer to Article 121(1) of the Rome Statute of the International Criminal Court which provides as follows:

After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General, who shall promptly circulate it to all States Parties.

The Permanent Mission of the Republic of South Africa further has the honour to inform the Secretary-General that the African States Parties to the Rome Statute held a meeting from 3-6 November 2009 in Addis Abba chaired by South Africa, at which it was decided to propose an amendment to the Rome Statute in respect of Article 16 of the Statute.

Pursuant to the decision taken by the meeting of African States Parties to the Rome Statute, the Permanent Mission hereby transmits the attached amendment in accordance with Article 121(1) of the Rome Statute and requests the Secretary-General to circulate the same in accordance with the Article 121(2) of the Rome Statute.

The Permanent Mission of the Republic of the South Africa to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.

Article 16
Deferral of Investigation or Prosecution

1. No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under the Chapter VII of the Charter of the United Nations, has requested the Court to that effect, that request may be renewed by the Council under the same conditions.

2. **A State with jurisdiction over a situation before the Court may request the UN Security Council to defer the matter before the Court as provided for in (1) above.**

3. **Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council’s responsibility under paragraph 1 consistent with Resolution 377 (v) of the UN General Assembly.**

Annex VI

Proposal for amendments to rule 4 of the Rules of Procedure and Evidence

Extract from the report of the Bureau on the Study Group on Governance[1]

Cluster II: Strengthening the institutional framework within the Court

17. Some meetings of the Study Group have focused on this cluster. In addition, the focal point conducted informal consultations with representatives of interested States Parties and organs of the Court as a way to identify areas on which the Study Group should concentrate its discussions. After consultations in respect to these issues, it was agreed to address, subject to discussions in related clusters, the following topics:

(a) Powers and competences of the Presidency of the Court in relation to the judiciary;

(b) Relationship between the Presidency and the Registry with regard to the administration of the Court; and

(c) Administrative accountability of the Office of the Prosecutor and its relationship with the other organs of the Court.

20. As regards the powers and competencies of the Presidency, there was a range of general issues to be considered, in particular those related to the assignment of judges to divisions, which is a cross-cutting issue with cluster I. The focal point was also of the view that other issues for discussion could include some of the questions raised by the Committee on Budget and Finance in previous recommendations, such as the role of the Presidency in reviewing the judicial calendar.

21. The work of the Study Group in relation with this cluster focused mainly in reviewing the potential role of the Presidency in the assignment of judges to divisions, with the Study Group considering this as a possible way to strengthen the Presidency's authority to oversee the administration of judges and minimize, to the extent possible, situations resulting in the extension of judicial mandates and/or the excusal of judges. Building on the conclusions reached in cluster I related to the extension of judges, the Study Group considered that the current mechanism to assign judges to divisions could potentially limit the proper administration of the Court, responsibility which lays in the Presidency. The focal point submitted to the consideration of the Study Group a draft amendment to the Rules of Procedure and Evidence transferring the decision on the assignment of judges to divisions from the plenary of judges to the Presidency. The focal point also noted that such an amendment could already be applicable to the composition of divisions that will follow the election of six new judges, in case the amendment is adopted by the Assembly at its tenth session. The proposal received unanimous support from States. The Presidency informed the Study Group that a majority of judges was opposed to the draft amendment. **Having considered the view of the majority of judges, the Study Group nevertheless recommends the Assembly to consider and adopt at its tenth session, the draft amendment to rule 4 of the Rules of Procedure and Evidence (annex I).**

Recommendations

1. The Study Group recommends that the Assembly:

[…]

(f) Adopt at its tenth session the draft amendment to rule 4 of the Rules of Procedure and Evidence (annex I);

[1] ICC-ASP/10/30.

Annex I

Draft resolution on amendments to the rule 4 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;

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[2] and article 51 of the Rome Statute,

1. *Decides* that rule 4, paragraph 1, of the Rules of Procedure and Evidence[3] is replaced as follows:

> "Rule 4
> Plenary sessions
>
> 1. The judges shall meet in plenary session after having made their solemn undertaking, in conformity with rule 5. At that session the judges shall elect the President and Vice-Presidents."

2. *Further decides* that the following Rule 4 *bis* is inserted after Rule 4:

> "Rule 4 *bis*
> The Presidency
>
> 1. Pursuant to article 38, paragraph 3, the Presidency is established upon election by the plenary session of the judges.
>
> 2. As soon as possible following its establishment, the Presidency shall, after consultation with the judges, decide on the assignment of judges to divisions in accordance with article 39, paragraph 1."

Appendix: Rule 4, paragraph 1, of the Rules of Procedures and Evidence, with marked changes

Rule 4
Plenary sessions

1. The judges shall meet in plenary session ~~not later than two months after their election. At that first session,~~ after having made their solemn undertaking, in conformity with rule 5. At that session ~~,~~ the judges shall ~~: (a) E~~elect the President and Vice-Presidents.~~;(b) Assign judges to divisions.~~

2. The judges shall meet subsequently in plenary session at least once a year to exercise their functions under the Statute, the Rules and the Regulations and, if necessary, in special plenary sessions convened by the President on his or her own motion or at the request of one half of the judges.

3. The quorum for each plenary session shall be two-thirds of the judges.

4. Unless otherwise provided in the Statute or the Rules, the decisions of the plenary sessions shall be taken by the majority of the judges present. In the event of an equality of votes, the President, or the judge acting in the place of the President, shall have a casting vote.

5. The Regulations shall be adopted as soon as possible in plenary sessions.

---

[2] *Official Records … Ninth session … 2010* (ICC-ASP/9/20), vol. I.
[3] *Official Records … First session … 2002* (ICC-ASP/1/3 and Corr.1), part II.A.

Annex VII

Chair’s draft procedural guidelines

The following understandings shall govern the work of the Working Group (WG) on Amendments:

1. The mandate of the WG is to consider amendments to the Rome Statute proposed in accordance with article 121, paragraph 1, of the Statute at its eighth session, 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 of States Parties.

2. The WG is a subsidiary body of the Assembly of States Parties according to article 112, paragraph 4, of the Rome Statute. The general rules governing the work of subsidiary bodies of the Assembly of States Parties also govern the work of the WG.

3. Articles 51, 121 and 122 of the Rome Statute determine the procedure to be followed for any amendments to the Rome Statute or the Rules of Procedure and Evidence.

4. The WG’s primary task is one of preliminary discussion, prior to the decision of the Assembly of States Parties whether to take up a proposal according to article 121, paragraph 2, of the Rome Statute.

5. States Parties are encouraged, on a voluntary basis, to bring the text of a proposed amendment to the attention of the WG for preliminary discussion, before a potential submission to the Secretary-General of the United Nations for circulation.

6. The WG discusses proposed amendments as they are brought to its attention. If several proposed amendments are to be discussed simultaneously,

[Alternative 1:] priority shall be given to proposals that have received a broad initial level of support among States Parties.

[Alternative 2:] priority shall be given to proposals that are co-sponsored by [X] States representing each of the regional groups.

[Alternative 3:] the WG shall, in determining the order of priority of proposals, consider the likelihood of reaching consensus; the exclusively institutional nature of the amendment proposed; the importance for the Court to fulfil its existing mandate; the impact on the goal of achieving universality of the Rome Statute; the complexity of the amendment proposal; and the risk of politicising the Court.

7. The WG may establish sub-groups in order to discuss amendment proposals simultaneously or more in detail.

8. The WG reports to the Assembly of States Parties on the progress of its discussions.

9. The WG will put forward to the Assembly amendment proposals for decision according to article 121, paragraph 2, of the Rome Statute once they enjoy, or have the genuine potential of enjoying, the widest possible support among States Parties. The WG shall make every effort to reach such a decision by consensus.

[Alternative:] The WG shall make every effort to reach decisions by consensus. If consensus cannot be reached, decisions shall be taken by vote.

10. Once the Assembly of States Parties has decided to take up an amendment proposal according to article 121, paragraph 2, of the Rome Statute, it remains free to mandate the WG to continue its deliberation with a view to its final adoption.

Annex VIII

Draft text for the omnibus resolution

Paragraph 56 of the 2010 omnibus resolution is replaced by the following:

"*Welcomes* the report of the Bureau on the Working Group on Amendments, *invites* the Working Group to continue its consideration of amendment proposals and of its own procedural rules or guidelines, and *requests* the Bureau to submit a report for the consideration of the Assembly at its eleventh session."