

## SECRETARIAT OF THE ASSEMBLY OF STATES PARTIES

### Informal compilation of proposals to amend the Rome Statute

#### I. Introduction

1. According to article 121(1) of the Rome Statute, any State Party may propose amendments to the Statute after the expiry of seven years from its entry into force. The following compilation lists all amendment proposals to the Rome Statute that are under consideration by the Working Group on Amendments. This excludes those amendment proposals that have been acted upon at the Kampala Review conference in 2010,<sup>1</sup> or which in the meantime have been withdrawn proposing delegations.<sup>2</sup>

2. Although this is not a requirement for the Working Group's consideration, all proposals listed have previously been submitted to the United Nations Secretary-General in accordance with article 121(1) of the Rome Statute, and have subsequently been circulated to all States Parties in the form of depositary notifications.<sup>3</sup>

3. The compilation lists all proposals in their latest iteration with accompanying comments, reflecting any revisions by the proposing delegation(s) subsequent to the formal circulation by the Secretary-General. The proposals are enumerated in the order they were submitted and, in case submitted on the same day, in alphabetical order.

#### II. Belgium<sup>4</sup>

##### A. Proposed amendment 2

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

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<sup>5</sup>;

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

---

<sup>1</sup> See resolutions RC/Res.3, “Strengthening the enforcement of sentences” (proposed by Norway); RC/Res.5, “Amendments to article 8 of the Rome Statute” (proposed by Belgium); and RC/Res.6, “The crime of aggression” (proposed by Liechtenstein). With regard to article 124 of the Rome Statute, cf. the decision of the Assembly in resolution RC/Res.4 to review article 124 once again at the fourteenth session of the Assembly: “*Having reviewed* the provisions of article 124 at the Review Conference in accordance with the Rome Statute, 1. *Decides* to retain article 124 in its current form; 2. *Also decides* to further review the provisions of article 124 during the fourteenth session of the Assembly of States Parties to the Rome Statute.”

<sup>2</sup> The proposal of the Netherlands, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighth session, The Hague, 18-26 November 2009* (ICC-ASP/8/20), vol.I, annex II, appendix III, was withdrawn at the 5 June 2013 meeting of the Working Group on Amendments.

<sup>3</sup> All pertinent depositary notifications conveyed to States Parties by the Secretary-General are available online at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en).

<sup>4</sup> *Official Records ... Eighth session... 2009* (ICC-ASP/8/20), vol. I, annex II, appendix I; UN depositary notification [C.N.733.2009.TREATIES-8](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en) of 29 October 2009 (Proposal of amendment by Belgium to the Statute). Note that amendment proposal 1 has been acted upon at Kampala, see footnote 1, and therefore is not listed here.

<sup>5</sup> 170 States parties (3 November 2014).

Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, 13 January 1993<sup>6</sup>;

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<sup>7</sup>.”

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.”

### **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, para. 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, para. 2, e) of the Rome Statute).

## **B. Proposed amendment 3**

**Proposed by Argentina, Belgium, Bolivia, Burundi, Cambodia, Cyprus, Ireland, Latvia, Luxembourg, Mauritius, Mexico, Romania, Samoa and Slovenia, as revised<sup>8</sup>**

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<sup>9</sup> ;
- Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), Vienne, 13 October 1995<sup>10</sup>.”

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

---

<sup>6</sup> 190 States parties (3 November 2014).

<sup>7</sup> 162 States parties (3 November 2014).

<sup>8</sup> *Official Records ... Eighth session... 2009* (ICC-ASP/8/20), vol. I, annex II, appendix I.

<sup>9</sup> 113 States parties (3 November 2014).

<sup>10</sup> 103 States parties (3 November 2014).

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, para. 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, para. 2, e) of the Rome Statute).

## **C. Explanations to the revisions**

### **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, §2 b), xvii), xviii), xix) and xx)).

### **Amendment 2, §1, line 2 and §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, §1 line 2 and §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, §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.

### III. Mexico<sup>11</sup>

#### A. Proposed amendment

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

[...] **Employing nuclear weapons.**

#### B. Explanation

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.”<sup>12</sup>

(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.”<sup>13</sup>

(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”<sup>14</sup>; 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”.<sup>15</sup>

(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”<sup>16</sup>. 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<sup>17</sup>.

(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

---

<sup>11</sup> Report of the Working Group on Amendments, ICC-ASP/10/32, annex II; see also UN depositary notification C.N.725.2009.TREATIES-6 of 29 October 2009 (Proposal of amendment by Mexico to the Statute); “Proposal of Mexico: Amendment to article 8 of the Rome Statute of the International Criminal Court regarding the use of nuclear weapons-Position paper”, revised draft dated 19 May 2011.

<sup>12</sup> Resolution 1653 (XVI) of the General Assembly, November 24 1961, operative paragraph 1, subparagraph b).

<sup>13</sup> 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.

<sup>14</sup> Article 51.4(c) of Additional Protocol I to the 1949 Geneva Conventions.

<sup>15</sup> 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.

<sup>16</sup> Article 35 of Additional Protocol I to the 1949 Geneva Conventions and Norms 70 and 71 of Customary International Humanitarian Law.

<sup>17</sup> Article 55 of Additional Protocol I to the 1949 Geneva Conventions and Norms 43, 44 and 45 of Customary International Humanitarian Law.

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<sup>18</sup>.

(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<sup>19</sup>.

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".

(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

---

<sup>18</sup> 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.

<sup>19</sup> 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.

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<sup>20</sup>; 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

---

<sup>20</sup> Advisory Opinion of 8 July 1996, paragraph 105. 2 (c).

treaties and other undertakings which expressly deal with nuclear weapons”<sup>21</sup>.

(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<sup>22</sup>. 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”<sup>23</sup>.

## IV. Trinidad and Tobago and Belize<sup>24</sup>

### A. Proposed amendment

#### 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**<sup>25</sup>

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).

<sup>21</sup> Advisory Opinion of 8 July 1996, paragraph 105. 2 (d).

<sup>22</sup> 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.

<sup>23</sup> Advisory Opinion of 8 July 1996, paragraph 95.

<sup>24</sup> *Official Records... Eighth session... 2009* (ICC-ASP/8/20), vol.I, annex II, appendix IV; see also UN depositary notification [C.N.737.2009.TREATIES-9](#) of 29 October 2009 (Proposal of amendments by Trinidad and Tobago to the Statute).

<sup>25</sup> Language for the proposed amendment.

## B. Explanation

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:

## V. South Africa<sup>26</sup>

### 1. Proposed amendment

#### 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.**

---

<sup>26</sup> *Official Records... Eighth session... 2009* (ICC-ASP/8/20), vol.I, annex II, appendix VI; see also UN depositary notification [C.N.851.2009.TREATIES-10](#) of 30 November 2009 (Proposal of amendment by South Africa to the Statute).



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.**

## 2. **Explanation**

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.

## VI. **Kenya**<sup>27</sup>

### A. **Proposed amendment 1**

#### **Article 63 - Trial in the Presence of the accused**

Under the Rome Statute, article 63(2) envisages a trial in absence of the Accused in exceptional circumstances. The Rome Statute does not define the term exceptional circumstances and neither are there case laws to guide the Court on the same.

Article 63(2) further provides other caveats in granting such trials in circumstances where other reasonable alternatives have provided to be inadequate and for a strictly required duration.

From the above, it is our humble opinion that an amendment to article 63(2) may be considered along the following lines:

**“Notwithstanding article 63(1), an accused may be excused from continuous presence in the Court after the Chamber satisfies itself that exceptional circumstances exists, alternative measures have been put in place and considered, including but not limited to changes to the trial schedule or temporary adjournment or attendance through the use of communications technology or through representation of Counsel.**

**(2) Any such absence shall be considered on a case-by-case basis and be limited to that which is strictly necessary.**

**(3) The Trial Chamber shall only grant the request if it determines that such exceptional circumstances exist and if the rights of the accused are fully ensured in his**

---

<sup>27</sup> UN depositary notification [C.N.1026.2013](#).TREATIES-XVIII.10 of 14 March 2014 (Proposal of amendments by Kenya to the Statute).

or her absence, in particular through representation by counsel and that the accused has explicitly waived his right to be present at the trial.”

## **B. Proposed amendment 2**

### **Article 27 - Irrelevance of official capacity**

Article 27(1) provides that **“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a Member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of Sentence.**

**Further article 27(2) provides that Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”**

The meeting also may consider proposing an amendment to article 27 by inserting in paragraph 3 the words:

**“Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions.”**

## **C. Proposed amendment 3**

### **Article 70 - Offences against Administration of Justice**

This particular article presumes that such offences save for 70(1) (f) can be committed only against the Court. Noting the current situation in the Kenyan cases especially Trial Chamber V (b). This article should be amended to include offences by the Court Officials so that it's clear that either party to the proceedings can approach the Court when 2 such offences are committed. It is proposed that paragraph 1 be amended as follows:

**“The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally by any person:”**

## **D. Proposed amendment 4**

### **Article 112 - Implementation of IOM**

Article 112 (4) Assembly of States Parties shall establish such subsidiary bodies as may be necessary including Independent Oversight mechanism for inspection, evaluation and investigation of the Court ,in order to enhance its efficiency and economy. This includes the conduct of officers/procedure/code of ethics in the office of the prosecutor. The Office of the Prosecutor has historically opposed the scope of authority of the IOM. Under Article 42 (1) and (2) the Prosecutor has power to act independently as a separate organ of the Court with full authority *over* the management and administration of the office. There is a conflict of powers between the OTP and the IOM that is continuously present in the ASP.

It is proposed that IOM be operationalized and empowered to carry out inspection, evaluation and investigations of all the organs of the Court.

## **E. Proposed amendment 5**

### **Complementarity**

The Preamble of the Rome Statute provides “Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,” In accordance with African Union resolution, an amendment is propose to the *above* preambular provision to allow recognition of regional judicial mechanisms as follows:

**“Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions.**

\*\*\*

