

**Eleventh session**

The Hague, 14-22 November 2012

**Report of the Working Group on Amendments****I. Introduction**

1. The present report is submitted pursuant to the mandate given to the Working Group on Amendments (“the Working Group”).
2. The Working Group was established by the Assembly of States Parties (“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.”<sup>1</sup>
3. 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.” Accordingly, the Working Group submitted a report (ICC-ASP/10/32), containing a summary of its discussions on the substantive amendment proposals and on its draft procedural rules or guidelines to the Assembly at its tenth session.
4. At its tenth session, the Assembly “*invite[d]* the Working Group to continue its consideration of amendment proposals and of its own procedural rules or guidelines, and *request[ed]* the Bureau to submit a report for the consideration of the Assembly at its eleventh session”. The Working Group thus continued to meet intersessionally. Informal consultations were held on 8 February, 26 June and 7 November 2012, on the basis of two draft procedural guidelines, dated 31 January and 19 June 2012, introduced by the Chair of the Working Group, H.E. Ambassador Paul Seger (Switzerland). A final document, entitled “Chair’s fourth draft terms of reference” was subsequently circulated and approved by silence procedure on 20 July 2012.

<sup>1</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, eighth session, The Hague, 18-26 November 2011* (ICC-ASP/8/20), Vol. I., part II, ICC-ASP/8/Res.6.

## II. Consideration of amendment proposals

### A. Consideration of proposals to amend the Rome Statute

5. The Working Group continued to have before it those amendment proposals previously referred to it by the Assembly at its eighth session.<sup>2</sup> Delegations were given the opportunity, at the beginning of each of its meetings, to comment on these proposals. However, no delegation requested a discussion. Equally, none of the delegations with an amendment proposal updated their submissions in the reporting period.

### B. Consideration of amendments the Rules of Procedure and Evidence

6. At its meeting on 7 November 2012, the Working Group considered a proposal, agreed pursuant to article 51, paragraph 2 (b) of the Rome Statute by an absolute majority of judges of the Court to amend the Rules of Procedure and Evidence to include a new Rule 132 *bis* (see annex I to this report).<sup>3</sup> The proposed new Rule would specify that the functions of the Trial Chamber, in respect of trial preparation, may be exercised by a single judge or single judges in order to expedite proceedings and to ensure cost efficiency.

7. In that regard, the Working Group took note of the Report of the Study Group on Governance on rule 132 *bis* of the Rules of Procedure and Evidence of 1 November 2012.<sup>4</sup> The report contained proposed three alternative recommendations the Working Group might make to the Assembly: to adopt the proposed rule 132 *bis* as proposed; to adopt the proposed rule 132 *bis* but subject it to changes; or not to support the proposed rule 132 *bis* due to concerns on its legal basis.

8. The Working Group heard briefings by the focal point of the Study Group on Governance on cluster 2 (expediting judicial proceedings), Mr Kanbar Hossein Bor (United Kingdom) and the Principal Legal Adviser to the Presidency of the Court, Mr Hiram Abtahi, who participated in the meeting via video link. The Working Group was informed of the proposal's genesis inside the Court, where it had been vetted by the Advisory Committee on Legal Texts (ACLT), a committee containing representatives of the three divisions of the Court, the Office of the Prosecutor, victims counsel and defence counsel, with the participation of the Registry.

9. All delegations expressed support for the proposal or declared themselves attracted to its idea. Several noted in that regard that for some time now, States Parties had asked the Court to find ways of becoming more efficient in its proceedings, and that it was now the responsibility of States Parties to assist the Court in effecting the changes proposed. While the view was widely shared that the initiative of the Court and the thrust of the proposal were to be welcomed, some delegations raised concerns regarding the compatibility of the proposal with the Statute, given that the Statute had regulated the composition of the Trial Chamber in its article 39, paragraph 2. The opinion was expressed that in order to have a single judge exercise certain functions of the Chamber, it would be necessary to amend this article. However, most delegations felt that the article 64, paragraph 3(a) provided a sufficient legal basis, particularly if read in conjunction with paragraph 8 of the same article. The amendment had been intensively discussed among judges of all chambers and within the ACLT, which also comprised representatives from the Office of the Prosecutor, Counsel for defendants and victims, and was considered to be compatible with the Rome Statute. It was also noted that the judges could have adopted the proposed amendment provisionally under article 51 (3) of the Statute, but preferred to present it to the ASP for reasons of transparency and to engage in a dialogue with the States parties.

10. On the details of the proposal, one delegation expressed a preference to have paragraphs 4 to 6 of the report deleted because these were believed to be of an exemplary nature and hence superfluous (unnecessary.) This delegation was however ready to go

<sup>2</sup> See resolution ICC-ASP/8/Res.6, footnote 3. These amendment proposals are also contained in annexes I-VI of the previous report of the Working Group on Amendments, ICC-ASP/10/32.

<sup>3</sup> As contained in a letter by the President of the Court, addressed to the President of the Assembly, dated 12 October, reproduced in annex III to ICC-ASP/11/41 (see also annex I).

<sup>4</sup> ICC-ASP/11/41.

along with this text in case it received consensual support from other delegations. Should they be retained, it was felt that the word “substantive” in paragraph 6 should be deleted in order to avoid an inappropriate distinction between “substantive” and “not substantive” rights of victims.

11. Given that there was no immediate consensus to recommend the adoption of the proposed amendment to the Rules of Procedure of Evidence to the Assembly, and in order to give delegations more time to reflect on the matter, the Working Group decided to further consider this issue at a meeting to be convened during the eleventh session of the Assembly.

### **III. Consideration of procedural rules or guidelines**

12. The Working Group considered the question of establishing procedural rules or guidelines on the basis of the Chair’s second (and annotated) draft procedural guidelines, dated 8 February 2012 and, subsequently, the Chair’s third draft procedural guidelines. Following discussions in the Working Group on 19 June 2012, the Chair introduced a fourth draft, entitled “Chair’s fourth draft terms of reference”, dated 2 July 2012, which the Working Group adopted by silence procedure (see annex II to this report).

#### **A. General comments**

13. In the discussions on the basis of the second, annotated draft dated 2 February 2012, the Chair noted that the draft recognized the role of the Working Group as a subsidiary body of the Assembly, and thus could not adopt its own Rules of Procedure. As a consequence, binding language such as “shall” had been set aside.

14. Regarding the binding nature or otherwise of the document, disagreement persisted. It was also noted that the word “understandings” used in the chapeaux of the 2 February and 2 June 2012 drafts may have implications in this regard. The suggestion was made to use “terms of reference” instead – both in the title and the chapeau – to indicate a status more substantive than guidelines but not as binding as rules. This was approved by the Working Group. A common understanding was reached that the Working Group would consider itself bound by its own terms of reference. In order to express this agreement the terms of reference should be adopted by the Assembly, and could only be amended by a decision of the same.<sup>5</sup>

15. The Chair also noted that the attempt for introducing substantive criteria had been dropped from the draft dated 2 February 2012, and all subsequent drafts. The only remnants were the notes that the Working Group considers with special attention amendment proposals that aim to improve the effective functioning of the Court, and the reference that the Working Group particularly considers whether a proposed new crime can be characterized as one of the most serious crimes of concern to the international community as a whole and whether the crime is based on an existing prohibition under international law.<sup>6</sup>

#### **B. Comments on specific provisions of the draft terms of reference**

16. Regarding the revision that the Working Group may establish sub-groups in order to discuss amendment proposals simultaneously or in more detail,<sup>7</sup> a proposal was made to mention explicitly that such sub-groups might meet either in New York or The Hague, as it might be desirable for a sub-group to have the possibility of interacting with Court officials available at the seat of the Court in The Hague. Any decision of a sub-group would still have to be discussed in the Working Group proper and at the Assembly. Support was also expressed for the original text proposed by the Chair, as it did not preclude the formation of a sub-group in The Hague without implicitly encouraging it. Paragraph 4 of the draft terms of reference remained unchanged, but in the clear understanding that it would be for the

<sup>5</sup> See paragraph 12 of annex II.

<sup>6</sup> See paragraphs 8 and 9

<sup>7</sup> Paragraph 4 in all versions.

Working Group, which has its base in New York, to determine where any subgroup would be located. It was also understood that paragraph 4 did not preclude subgroups being based in The Hague or elsewhere.

17. Regret was expressed that the “objective criteria” had been reduced to those contained in paragraphs 8 and 9. It was also noted, however, that it would have been difficult to agree on or to implement any of the previous options given for objective criteria. Reacting to the suggestion that the words “institutional set-up” contained in paragraph 8 of the 2 February 2012 draft, replaced them with the wording “effective and efficient functioning of the Court” in his 11 June 2012 draft.

18. Though the opinion had been expressed that the Working Group should work on the basis of consensus, the view was also expressed that the Working Group should retain the possibility of reaching agreement by a vote if no consensus could be found. Agreement was reached that as a subsidiary body of the Assembly, its decision-making rules applied by virtue of rule 84 of its Rules of Procedure. This understanding is reflected in the final version of paragraph 5.

19. Regarding the report of the Working Group and its recommendation to the Assembly, it was discussed whether the Working Group should be given the mandate to issue a recommendation to the Assembly not to take up a certain amendment proposal. The view was expressed that the Working Group should work towards a positive recommendation.

#### **IV. Exchange of information on the status of ratification of the Kampala amendments to the Rome Statute**

20. At the 8 February 2012 meeting of the Working Group, the delegation of Belgium informed that its government had prepared a draft law for the ratification of the amendments for the consideration of the parliament. The delegation of Mexico informed that the amendments had been sent to parliament. The delegation of the Netherlands noted that the government had almost completed its preparatory work in order to send both amendments to parliament.

21. On 8 May 2012, Liechtenstein became the first State Party to ratify the amendments on the crime of aggression, and the second to ratify the amendments to article 8 of the Rome Statute. At the 26 June 2012 meeting of the Working Group, the delegation of Liechtenstein informed that it had conducted a workshop on the implementation and ratification of the amendments on the crime of aggression and will be organizing further such workshops, including at the eleventh session of the Assembly. At the first workshop, 17 States had informed that they were actively working on ratification of the amendments on the crime of aggression while a further four were in the early stages. Additionally, three States Parties had already implemented the amendments in their domestic legislation.

#### **V. Way forward**

22. The Working Group adopted the draft terms of reference by silence procedure on 20 July 2012, and agreed to forward them for adoption by the Assembly.

23. The Working Group concluded its intersessional work by recommending to the Assembly the inclusion in the omnibus resolution of one paragraph (annex III).

24. The Working Group agreed to reconvene during the upcoming Assembly to continue and potentially conclude the discussion of the proposal to amend the Rules of Procedure and Evidence by a new Rule 132 *bis*.

## Annex I

### Proposal to amend the Rule of Procedure and Evidence\*

#### Rule 132 bis

##### Designation of a judge for the preparation of the trial

1. In exercising its authority under article 64, paragraph 3 (a), a Trial Chamber may designate one or more of its members for the purposes of ensuring the preparation of the trial.
2. The judge shall take all necessary preparatory measures in order to facilitate the fair and expeditious conduct of the trial proceedings, in consultation with the Trial Chamber.
3. The judge may at any time, *proprio motu* or, if appropriate, at the request of a party, refer specific issues to the Trial Chamber for its decision. A majority of the Trial Chamber may also decide *proprio motu* or, if appropriate, at the request of a party, to deal with issues that could otherwise be dealt with by the judge.
4. In order to fulfil his or her responsibilities for the preparation of the trial, the judge may hold status conferences and render orders and decisions. The judge may also establish a work plan indicating the obligations the parties are required to meet pursuant to this rule and the dates by which these obligations must be fulfilled.
5. The functions of the judge may be performed in relation to preparatory issues, whether or not they arise before or after the commencement of the trial. These issues may include:
  - (a) Ensuring proper disclosure between the parties;
  - (b) Ordering protective measures where necessary;
  - (c) Dealing with applications by victims for participation in the trial, as referred to in article 68, paragraph 3;
  - (d) Conferring with the parties regarding issues referred to in regulation 54 of the Regulations of the Court, decisions thereon being taken by the Trial Chamber;
  - (e) Scheduling matters, with the exception of setting the date of the trial, as referred to in rule 132, sub-rule 1;
  - (f) Dealing with the conditions of detention and related matters; and
  - (g) Dealing with any other preparatory matters that must be resolved which do not otherwise fall within the exclusive competence of the Trial Chamber.
6. The judge shall not render decisions which significantly affect the rights of the accused or which touch upon the central legal and factual issues in the case, nor shall he or she, subject to sub-rule 5, make decisions that affect the substantive rights of victims.

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\* Dated 25 September 2012.

## Annex II

### Draft terms of reference<sup>8</sup>

The following **terms of reference** govern the work of the Working Group on Amendments (WGA):

#### Mandate

1. The WGA considers amendments to the Rome Statute and to the Rules of Procedure and Evidence, with a view to identifying amendments to be forwarded to the Assembly of States Parties (“the Assembly”) for consideration.

#### Procedural framework

2. Articles 51, 121 and 122 of the Rome Statute determine the procedure to be followed for amendments to the Rome Statute or the Rules of Procedure and Evidence. Nothing in the present terms of reference can take precedence over these or other provisions of the Rome Statute.

3. The WGA is a subsidiary body of the Assembly according to article 112(4) of the Rome Statute. The WGA is governed by the same rules applicable to other subsidiary bodies of the Assembly, as provided for in rule 84 of the Rules of Procedure of the Assembly of States Parties.

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

5. The WGA makes every effort to reach decisions by consensus, in accordance with the Rules of Procedure of the Assembly of States Parties.

#### Consideration of amendment proposals

6. The WGA undertakes a preliminary examination of amendment proposals to inform the decision of the Assembly as to whether to take up a proposal according to article 121(2) of the Rome Statute or as to whether to adopt the proposed amendments according to articles 51(2), 121(3) and 122(2) of the Rome Statute.

7. States Parties are encouraged, on a voluntary basis, to bring the text of a proposed amendment to the attention of the WGA before formally submitting it for circulation to all States Parties.

8. The WGA considers with special attention amendment proposals that aim to improve the effective and efficient functioning of the Court.

9. In the case of a proposal for a new crime, the WGA particularly considers whether the crime can be characterized as one of the most serious crimes of concern to the international community as a whole and whether the crime is based on an existing prohibition under international law.

#### Report and recommendation to the Assembly

10. Once the WGA determines that it has completed its consideration of a proposal, it formulates a recommendation to the Assembly as to whether to take up a proposal according to article 121(2) of the Rome Statute or as to whether to adopt the proposed amendments according to articles 51(2), 121(3) and 122(2) of the Rome Statute.

11. The WGA reports to the Assembly on the progress of its discussions.

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<sup>8</sup> Originally disseminated as “Chair’s fourth draft terms of reference”, dated 2 July 2012.

**Amendments to the terms of reference**

12. Amendments to the present terms of reference are subject to a decision by the Assembly.

## Annex III

### Draft text for the omnibus resolution

Paragraph 71 of the 2011 omnibus resolution (ICC-ASP/10/20) 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, *decides* to adopt the terms of reference of the Working Group on Amendments annexed to the present resolution, and *requests* the Bureau to submit a report for the consideration of the Assembly at its twelfth session.”

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