

Annex II

Report of the Working Group on the Review Conference

A. Introduction

1. The Working Group on the Review Conference was established by the Assembly at the first meeting of its eighth session. Upon the recommendation of the Bureau, the Assembly appointed Mr. Marcelo Böhlke (Brazil) and Ms. Stella Orina (Kenya) as coordinators of the Working Group.
2. The Working Group held seven meetings, on 20, 21, 23, 24 and 25 November 2009 and two informal meetings on the stocktaking exercise, on 23 and 24 November 2009 respectively.
3. The Working Group had before it the Report of the Bureau on the Review Conference,¹ the Report of the Special Working Group on the Crime of Aggression² and the Informal inter-sessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 to 10 June 2009.³
4. At its first meeting, on 20 November 2009, the facilitator for the crime of aggression, H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein (Jordan) briefed the meeting on the work that had been conducted at the informal inter-sessional meeting on the crime of aggression, which had considered the draft elements of crime.

B. Consideration of amendments

1. Article 124

5. The co-facilitators recalled that the issue had been considered by the New York Working Group on the basis of a “Non-paper by the facilitators on the mandatory review of article 124 of the Rome Statute”, which was re-circulated on 21 November 2009. The options on the topic were thus: retention, reformulation or deletion of the article. It was also noted that deletion or reformulation would amount to an amendment that would need to follow the procedure established in article 121 of the Statute. In this regard, the amendment would affect potential future article 124 declarations made by new States Parties prior to the entry into force of the amendment, and which would not yet have expired at that time.
6. It was noted that although two States Parties had made a declaration under article 124, one had withdrawn its declaration, while in the case of the second one, the seven-year period had ended on 31 October 2009.
7. Some delegations expressed their preference for retaining article 124. It was argued that the clause facilitated the adherence of other States to the Rome Statute and thus contributed to its universality. Its deletion would create a discriminatory situation between the current State Parties and future ones. The low number of States that had made declarations under article 124 did not necessarily mean that the clause would not assist others to adhere. Furthermore, the clause had been important for the adherence of two States Parties and, hence, should be kept in order to facilitate further ratifications. These last arguments in favor of the retention were supported by one non-State

¹ ICC-ASP/8/43 and Add.1.

² *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19–23 January and 9–13 February 2009* (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, annex II.

³ ICC-ASP/8/INF.2.

Party which also argued that if two States Parties had made declarations under article 124 its usefulness had been proven; moreover, its “transitional” nature did not mean that it should also last for a short period of time.

8. A suggestion was also made that if the clause was to be retained, the first sentence of article 124 should be deleted or should be reformulated as a “sunset” clause, with a timeframe after which it would automatically expire.

9. Other delegations supported the deletion of article 124. The grounds presented for deletion varied as follows: a) categorization of article 124 as a “transitional provision” with a historical temporary nature; b) the low number of States Parties that had made declarations under article 124 was evidence of its lack of usefulness; c) article 124 amounted to a partial “exclusion” of the Court’s jurisdiction running counter to article 120, which prohibits reservations to the Statute, thus appearing contrary to the integrity of the Statute; d) article 124 had been adopted to a specific historical moment in order to facilitate the adoption of the Statute, but those specific objectives were no longer present; e) its retention could give rise to impunity in a given State in which a war crime was perpetrated.

10. Some of these delegations nevertheless stated that they did not hold strong views on this matter and would follow any consensus reached. These delegations pointed out that not too much time should be devoted to this matter since there was a clear mandate to consider it at the Review Conference.

11. Regarding the point made that the deletion would imply discriminatory treatment against future States joining the Statute, it was observed that new States were bound to suffer a certain degree of differential treatment, for example with regard to elections of judges that had already taken place.

12. Some delegations favoured the deletion of article 124 due to its transitional nature, without having recourse to the amendment provision contained in article 121 of the Statute. The deletion would enter into force automatically upon a decision by the Review Conference. However, other delegations supporting deletion argued that the amendment procedure would have to be undertaken in any case.

13. A summary of Saturday’s meeting was presented together with a draft proposal circulated by the co-facilitators, dated 23 November 2009, at 2.00 pm. It was stressed that no consensus had been reached so far and that the matter, therefore, should be deferred to the Review Conference.

14. In the light of the discussions, the coordinators included draft language on the resolution conveying the matter.

2. Crime of Aggression

15. The facilitator for the crime of aggression, H.R.H. Prince Zeid Ra’ad Zeid Al-Hussein (Jordan), recalled that the provisions on the crime of aggression for consideration by the Review Conference had been officially submitted to the United Nations Secretary-General, in his capacity as depositary of the Rome Statute, in accordance with article 121 of the Statute.

16. He noted that it was important to take account of the views of non-States parties and, in this regard, recalled that the venue of the inter-sessional meeting (New York) had facilitated the participation of all States.

17. He indicated that the outcome of the inter-sessional meeting on the draft elements of the crime⁴ of aggression complemented the previous work on the crime of aggression and stressed that the draft elements could not change the definition contained in article 8 (bis) but, rather, clarified the requisite elements of intent and knowledge. Furthermore, he recalled that annex III to the report of the inter-sessional meeting contained a Chairman's non-paper on jurisdiction, listing a series of questions related to the entry into force procedure, pursuant to paragraphs 4 and 5 of article 121.

18. The facilitator recommended that the Working Group take note of the report of the inter-sessional meeting and, given the strong convergence of views on the elements of crime at that meeting, agree to transmit to the Review Conference the outcome of the inter-sessional meeting, which would thus complement the text produced by the Special Working Group on the Crime of Aggression in February 2009.

19. As regards the future process, he noted that interest had been expressed in continuing the discussions on the crime of aggression, so as to bridge the gap on outstanding issues, especially the question of the exercise of jurisdiction.

3. Other amendments

a) General comments

20. Some delegations expressed the view that the Review Conference had a very specific mandate regarding the consideration, for inclusion in the Statute, of the crime of aggression, and the review of article 124. In addition, the Assembly of States Parties was mandated to decide which proposed amendments should be forwarded for consideration by the Review Conference.

21. The point was made that, in any event, the integrity of the Statute should be preserved, in particular the delicate balance achieved in Rome in 1998, including the Statute's "constructive ambiguity" so as to give the Court time to consolidate.

22. While several delegations expressed their belief that the exercise of considering amendments was a constructive one, and indeed a continuation of the work achieved in Rome, they expressed the belief that only those amendments which attained consensus or would carry very broad support should be forwarded for consideration by the Review Conference. Those amendments not examined in Kampala might be the object of a follow-up by States and be considered at subsequent sessions of the Assembly, as foreseen in article 121 of the Rome Statute.

23. In this regard, it was added that there was still room for interpretation of the provisions of the Statute and for further practice to take place before any actual engagement in amendment of the Statute. It was recalled that there would be other opportunities for further amendments of the Statute as Kampala would just be the first Review Conference.

24. The view was expressed that in order not to overburden the work of the Review Conference, proposed amendments would have to be thoroughly examined possibly by convening a resumed session of the Assembly prior to the Review Conference while, according to another view, the Assembly would need to think of innovative ways to deal with amendments in the future in the event that consensus would be difficult to reach.

25. Some delegations considered that all proposed amendments should be given a fair and equal treatment, while at the same time, taking into account the need to avoid overburdening the agenda of the Review Conference.

⁴ Ibid.

26. The co-coordinator recalled that it had already been decided at the New York Working Group that only those amendments carrying very broad support would be forwarded to the Review Conference. He also concurred with those delegations that had pointed out that the Conference would not be the last opportunity to amend the Statute since any future session of the Assembly would be entitled to take up the issue, according to article 121 of the Rome Statute. The proponents were given an opportunity to provide an update on their amendments.

b) Belgium

27. The three proposals of the Belgian amendment on war crimes were introduced by Belgium. Belgium explained that it had announced its amendment more than a year and a half earlier, had introduced it a year earlier, and then had presented at the Assembly only those proposals that had found broad support.

28. Belgium acknowledged that of its three proposals, amendment 1 had received very broad support while support for amendments 2 and 3 had not been so significant. Belgium proposed to dissociate both groups of proposals during the discussion, and informed the meeting that it would not insist in submitting to the Review Conference those amendments which would not attract overwhelming support.

29. Numerous delegations supported amendment 1. Some delegations reiterated that, in their view, only the crime of aggression and article 124 should be considered by the Review Conference but they would accept that amendment 1 be conveyed to the Conference because of the large level of support it had obtained. Some delegations, although supporting that the amendment be discussed in Kampala, reserved their position on the substance.

30. As regards amendments 2 and 3, there was a general view that they were not mature enough to be sent to the Review Conference. In this connection, the need to differentiate between the prohibition of certain weapons and criminalization of their use was raised. Other delegations made reference to the ongoing discussions in the context of other legal instruments and the need to keep a lean agenda for the Review Conference. Some delegations suggested that amendments 2 and 3 be deferred for consideration at the Assembly in 2010 or other subsequent sessions. In one particular case, objections were raised in regard to certain of the weapons listed under amendments 2 and 3, not all.

31. In any case, several other delegations stated that they did not have strong views and would go along with the consensus.

32. As regards non-State Parties, the point was made that adoption of amendments 2 and 3 would not contribute to the universality of the Rome Statute since consensus had not been reached on these issues in other international fora.

33. In light of the discussion, Belgium circulated a non-paper, dated 21 November 2009, which contained technical adjustments to amendments 2 and 3. On 23 November, Belgium communicated that it was withdrawing amendments 2 and 3 from the proposed consideration of the Review Conference, on the understanding that they would be discussed at the ninth session of the Assembly of States Parties.

c) Mexico

34. Mexico introduced its proposal by stating that it was conscious that proposed amendments should enjoy consensus or broad support in order to be conveyed to the Review Conference. Nevertheless, Mexico requested that every proposal be examined thoroughly, that discussions be reflected in the respective reports, and that equal treatment be given to all proposals. Though conscious of the need not to overburden the Review Conference, Mexico stressed that it expected a

discussion on the merits of its proposal, and not only the expression of support as to whether the proposal should be considered by the Review Conference.

35. Mexico explained that its proposal was based on the belief that the threat or use of nuclear weapons was forbidden under general international law.

36. Some delegations welcomed the proposal and expressed their wish to continue its discussion in the future. These delegations pointed out that, although they were in agreement on the substance of the proposal, much more work needed to be undertaken before conveying this issue to the Review Conference.

37. The 8 July 1996 Advisory Opinion by the International Court of Justice was recalled and, in this connection, it was argued that the use of nuclear weapons in an extreme circumstance of self-defence could be in accordance with international law in the context of Article 51 of the United Nations Charter. Inclusion of this amendment, it was added, might have a negative impact upon the universality of the Rome Statute. It was also recalled that the issue of nuclear weapons was a very difficult one which had already been discussed during the negotiations leading to the Rome Statute with no success.

38. Some non-State Parties were not in favour of consideration of the proposal on the basis that no consensus had been achieved during the negotiations of the Rome Statute, that current negotiations on the same matter were being conducted in other fora, such as the disarmament negotiations, and that discussions on this issue would overshadow the consideration of the crime of aggression at the Review Conference.

39. Regarding comments by delegations, Mexico replied that there was no link between its proposal and the ongoing negotiations on disarmament. As to the use of the phrase “threat or use of nuclear weapons” in the proposal, Mexico clarified that it was taken from the 8 July 1996 Advisory Opinion by the International Court of Justice, and, in that regard, Mexico expressed its willingness to elaborate on that question at a later stage. Finally, Mexico explained that it was precisely because no consensus had been reached in Rome on nuclear weapons that Mexico felt the matter should be considered again.

d) Netherlands

40. The Netherlands introduced its proposal by recalling that the Rome Statute had jurisdiction over the most serious crimes of international concern; the crime of terrorism was encompassed in such crimes and had been thus included in resolution E of the Final Act of the Rome Conference.

41. The Netherlands viewed terrorism as one of the most serious threats to international peace and security and had taken steps to address the problem at the national level; there was a need to hold those responsible for terrorism to account internationally, where the State with jurisdiction was unable or unwilling to prosecute them. The proposed inclusion of the crime of terrorism in the Rome Statute sought to strengthen the arsenal of counter-terrorism measures. The fact that there was no universally agreed definition of terrorism should not be grounds for the lack of jurisdiction of the Court over the crime.

42. The proposal sought to apply for the crime of terrorism the same technique as had been agreed to by the 1998 Rome Diplomatic Conference for the crime of aggression, i.e. the inclusion of the crime in article 5 of the Rome Statute, with a deferral of the exercise of jurisdiction by the Court until the definition and the modalities for the exercise of such jurisdiction had been agreed to. The deliberations on terrorism could be carried out in a working group on terrorism, along the model of the Special Working Group on the Crime of Aggression, which would not interfere with efforts in other fora to define the crime, but would focus on issues such as the extent to which the Statute should be amended or the required threshold. Such a working group could meet during the sessions

of the Assembly or at any other time, and could submit proposals for amendment of the Statute to the Assembly or to a review conference.

43. Delegations condemned terrorism and supported their unwavering support to combat it although the view was expressed that it was premature to include the crime of terrorism in the Rome Statute without a definition and, further, that a clear definition agreed to in the United Nations was a precondition to inclusion of terrorism in the Statute. It was suggested that, even if the proposed working group addressed issues other than the definition, e.g. thresholds, it would nonetheless be difficult to proceed without a definition.

44. Some delegations recalled the on-going complex work of elaborating a definition in the forum of the United Nations. It was posited that the proposed working group would very likely also encounter the same difficulties and the query was posed as to what would constitute the basis of the work of the proposed working group, given that there was no definition of terrorism. It was suggested that the Assembly await the outcome of the work in the United Nations forum. It was stressed that an assessment of the proposal from an international criminal law perspective would be necessary.

45. Nevertheless, the view was expressed that there was, in fact, no lack of definition of terrorism, since the 13 counter-terrorism conventions defined a multitude of acts that constituted terrorism but there was no agreement on which acts could be added. In light of this, it was suggested that the Assembly should not send the wrong signal that there were problems with the 13 sectoral conventions.

46. Furthermore, it was suggested to consider the extent to which it was appropriate to put the crime of terrorism on the agenda of the Review Conference due to the risk of politicization of the issue. It was also suggested that the Assembly should strive for universality of the Court, which could be hindered by entering into negotiations on terrorism.

47. It was pointed out that terrorism could already fall under article 7, crimes against humanity, should it reach a certain threshold.

48. As regards the technique of including a placeholder in the Statute along the lines of the decision of the 1998 Rome Conference for the crime of aggression, it was noted that the analogy could not easily be drawn as a degree of consensus had already existed on the definition of the crime of aggression, in General Assembly resolution 3314(XXIX), while no such generally agreed definition of terrorism as yet existed. Furthermore, the Rome Conference had agreed to the placeholder technique only in very exceptional circumstances and because the success of the 1998 Rome Diplomatic Conference depended to some extent on this compromise.

49. In addition, it was suggested that this technique should not become the norm and it was noted that its use for terrorism would make it possible to argue for similar usage in respect of other crimes suggested for inclusion in the Statute.

50. Some delegations noted that the proposal merited greater discussion and reflection than was possible in the limited time before the Review Conference. In this connection, it was suggested that the proposal could be discussed after the Review Conference, at the ninth session of the Assembly or at a more appropriate time. The suggestion was also made that terrorism could be taken up as part of the stocktaking exercise at the Review Conference.

51. The Netherlands expressed the view that no delegation had indicated that the crime of terrorism should not fall within the jurisdiction of the Court and that its non-inclusion in the Statute could send the wrong signal that there was no agreement that terrorism was a very serious crime that should fall under the jurisdiction of the Court. Furthermore, because of the concerns about overburdening the Review Conference, the placeholder technique and the establishment of a

working group for the substantive discussions on terrorism had been suggested. The Review Conference could hold a brief discussion to note that terrorism was a serious crime that could potentially be included in the Rome Statute.

e) Trinidad and Tobago and Belize

52. The representative of Trinidad and Tobago recalled that the inclusion of drug trafficking under the jurisdiction of the Court had received a considerable level of support at the 1998 Rome Diplomatic Conference as reflected in resolution E of the Conference. It was also recalled that the transnational and international impact of drug trafficking, were already reflected in various international conventions, i.e., the 1998 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The representative of Trinidad and Tobago also advised that notwithstanding these Conventions, the scourge of international drug trafficking has intensified because it is transboundary in character and is also of increasingly grave concern to members of the international community. It was mentioned that international drug trafficking places an inordinate burden on the judicial and law enforcement authorities of many States and therefore greater international cooperation is needed in this matter. Extradition agreements, it was added, have not adequately addressed the issue of the prosecution of major figures involved in the international drug trade and this has led to a culture of impunity. Consequently, it was proposed that international drug trafficking should be included as a crime under the Rome Statute of the International Criminal Court. To achieve this objective, it was suggested that an informal Working Group be established by the Assembly of States Parties to examine the proposal. It was noted that the proposal was of a broad nature, but that the threshold foreseen would limit the jurisdiction of the Court to those crimes “posing a threat to the peace, order and security of a State or region”.

53. Some States Parties expressed the view that there was not enough time to discuss the proposal on the way to Kampala, and, hence, the issue should be kept on the agenda of the Assembly to be discussed in the near future, after the Conference. It was further considered that the decision about a threshold by which a crime is considered one of the most serious crimes for the international community as a whole is a delicate one and should be dealt with after Kampala. It was suggested that a working group should be set up for further analysis of the issue. The view was also expressed that other crimes of similar gravity, such as organized crime, should be also considered under the same reasoning at a future session of the Assembly.

54. Other delegations, however, expressed the view that the issue could be considered at the Review Conference and indicated their flexibility regarding the establishment of a working group for future discussions.

f) Norway

55. Norway indicated that its proposal raised two questions: 1) whether it was necessary to modify the Statute; and if so, 2) whether to do so at the Review Conference. It noted that the proposal, which intended to strengthen cooperation with the Court regarding the enforcement of sentences would neither affect the jurisdiction of the Court nor create any new obligations for States Parties. The aim would be to mobilize donors and to allow States already willing to cooperate with the Court to be capable of doing so. It was stressed that an amendment to the Rules of Procedure and Evidence would be inadequate since the issue was not addressed therein.

56. Some States Parties expressed their support for the proposal to be considered in Kampala. According to another view, the Court was only halfway through its first trial, only two agreements on enforcement of sentence had been concluded and, therefore, these discussions should continue at the Review Conference, or at any other appropriate forum.

57. The point was also made that the matter would be more effectively addressed by amending the Rules of Procedure and Evidence or via a procedure different from an amendment to the Rome

Statute. The issuance of an interpretative or declaratory statement by the Assembly was suggested in this connection. This would avoid the amendment procedure and the risk that the lack of ratifications could pose to such an important proposal. It was suggested that the issue could be either addressed as an observation in the final act of the Review Conference or submitted to the Assembly of States Parties. Nonetheless, it was noted that the interpretative or declaratory statement procedure could constitute a dangerous precedent, leading to a growing number of such declarations by the Assembly and that the proper way to deal with the matter was through amendments to the Rules of Procedure and Evidence .

58. Some doubts were also raised as to whether the amendment proposed would be effective in catalyzing initiatives within bodies and institutions willing to cooperate with the enforcement of sentences. Furthermore, it was posited that the issue went beyond enforcement of sentences to embrace cooperation and implementation and should, therefore, be subject to further reflection. In line with this understanding, it was considered that other technical elements could be assembled to operate as a whole in order to have a set of measures to improve the functioning of the Court, to be discussed at the ninth Session of the Assembly of States Parties.

g) African Union States Parties to the Rome Statute

59. South Africa introduced the proposal on behalf of the States Parties to the Rome Statute that are also members of the African Union which consisted of an amendment to article 16 of the Rome Statute through the inclusion of two new paragraphs.⁵

60. Some States Parties considered that there was not enough time to assess the recently submitted proposal, and that any discussion would be premature even at the Review Conference. Concern was expressed that the proposal broadened the scope for political interference with the activity of the Court. It was also noted that it posed many complex issues to be addressed, involving the relationship between the organs of the United Nations system and its relationship with the Assembly, as well as inserting in the Statute provisions referring to the United Nations, that were deemed inappropriate. Doubts were raised as to whether the provision would be compatible with the Charter of the United Nations.

61. It was also stressed that article 16 constitutes an exception within the Rome Statute system, being a unique solution designed to reflect the special role of the United Nations Security Council in promoting peace and security. It was also recalled that article 16 was the result of a carefully crafted negotiation in 1998. Accordingly, the view was expressed that an expansion of that provision would not serve the interest of the Court and could not, therefore, be supported by States Parties.

62. Two States from the African Union supported this proposal and nevertheless showed their readiness to go along with the idea that the Review Conference should focus on amendments relating to the crime of aggression and article 124, while considering that other amendments should be discussed after Kampala.

C. Stocktaking exercise

63. The co-facilitators made a brief presentation of the non-paper, dated 10 November 2009, entitled “Review Conference: Stocktaking of international criminal justice”, which contained the following items: 1. Modalities: a) format of the discussion on stocktaking (suggestion: panel presentation with discussion segment); b) the expected final outcome should: i) be action-oriented; ii) provide concrete guidance to the Court; and iii) serve as a basis for future amendments. Options: 1. Declaration or Ministerial declaration; 2. Resolution; 3. Summary of the panel discussion; 2.

⁵ African Union States Parties to the Rome Statute: Proposed amendment to the Rome Statute of the International Criminal Court (circulated on 23 November 2009).

Topics: a) universality (ratification of the Rome Statute and implementing legislation); b) cooperation; c) national efforts to investigate and prosecute international crimes; d) maximizing the impact of the Court for affected communities; e) certain topics from the contribution paper by Japan.

64. In the discussions, many delegations stressed the importance that they placed on the stocktaking segment. It was mentioned that the stocktaking exercise should be treated as an integral part of the Review Conference. It was also suggested that adequate amount of time, possibly two days or four sessions, be devoted to this matter at the Review Conference. Some delegations highlighted the need to prepare adequately for the stocktaking exercise to ensure its success. It was recognized that the proposed topics may be suited to different formats of discussion and outcomes. Some delegations expressed support to the idea contained in the co-facilitators non-paper that outcomes should be action-oriented. In addition to those set out in the co-facilitators non-paper, other suggested possible outcomes included action plans, recommendations and pledges. The involvement of civil society, victims and affected communities was also emphasized.

65. Regarding the topics and the modalities for the discussion of stocktaking at the Review Conference, the following non-papers were circulated: Canadian Proposal on Stocktaking (dated 24 November 2009), “Non-paper on Stocktaking” by the International Committee of the Red Cross (circulated on 24 November 2009), “Stocktaking exercise of the Review Conference –Impact of the Rome Statute system on victims and affected communities” by Chile and Finland (circulated on 25 November 2009).

Appendix I

Belgium

A. Amendments 1, 2 and 3

Amendment 1

Proposed by Austria, Argentina, Belgium, Bolivia, Bulgaria, Burundi, Cambodia, Cyprus, Germany, Ireland, Latvia, Lithuania, Luxembourg, Mauritius, Mexico, Romania, Samoa, Slovenia and Switzerland

1. Add to article 8, paragraph 2, e), the following: “ xvii) Employing poison or poisoned weapons;

xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

xix) Employing 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.”

Justification

The use of the weapons listed in this draft amendment is already incriminated by article 8, paragraph 2, b), xvii) to xix) of the Statute in case of an international armed conflict. This amendment extends the jurisdiction of the Court for these crimes in case of an armed conflict not of an international character (article 8, paragraph 2, e).

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 1972¹;

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 1993²;

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 1997³.”

¹ 163 States parties (2 July 2009).

² 188 States parties (2 July 2009).

³ 156 States parties (2 July 2009).

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, 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).

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 1980⁴;
- Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), Vienne, 13 October 1995⁵.”

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;

⁴ 106 States parties (2 July 2009).

⁵ 94 States parties (2 July 2009).

- 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).

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 1972⁶;

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 1993⁷;

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 1997⁸.”

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.”

⁶ 163 States parties (2 July 2009).

⁷ 188 States parties (2 July 2009).

⁸ 156 States parties (2 July 2009).

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 1980⁹ ;
- Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), Vienne, 13 October 1995¹⁰.”

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, §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

⁹ 106 States parties (2 July 2009).

¹⁰ 94 States parties (2 July 2009).

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.

Appendix II

Mexico

In its resolution 1653 (XVI) the UN General Assembly decided: "The use of nuclear and thermonuclear 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

The Rome Statute itself sets forth that "*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*"² constitutes a war crime. According to this provision, the use of weapons of mass destruction in such circumstances could amount to a war crime. However, México deems necessary to have an explicit provision on the use of nuclear weapons in particular.

The Mexican position is based on various international treaties that prohibit the use of nuclear weapons³, as well as on the central argument of the advisory opinion of the International Court of Justice on *The Legality of Threat or Use of Nuclear Weapons* of 8 July 1996, which states 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.*"

The Review Conference of the Rome Statute to be held in June 2010 will be the opportunity to examine certain issues which remained pending after the Rome Conference, among which the list of forbidden weapons, established in article 8 of the Rome Statute, cannot be overlooked.

The Mexican delegation wishes to point out that the criminalization of the use or threat of use of nuclear arms should not be confused with the efforts of the international community to reach a treaty on general and complete disarmament under article VI of Treaty of the Non-Proliferation of nuclear weapons. The seriousness of the use and the threat of use of nuclear weapons justifies their criminalization as a war crime independently of the course taken by nuclear disarmament negotiations.

If adopted by the Review Conference, said amendment should enter into force in accordance article 121, paragraph 5, which would allow States to decide the basis of its adherence to the Rome Statute.

Proposed amendment

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

(...) Employing nuclear weapons or threatening to employ nuclear weapons.

¹ United Nations General Assembly resolution 1653 (XVI) of 24 November 1961, operative paragraph 1 b).

² Article 8, paragraph 2(b) (iv) of the Rome Statute.

³ 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.

Appendix III

Netherlands

The First Review Conference of the Rome Statute of the International Criminal Court (May-June 2010) will provide the international community with a unique opportunity to further advance the cause of justice and the rule of law on a global scale. In this regard, 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 over 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 regards 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 within the jurisdiction of the Court. In this respect, the upcoming Review Conference provides for an important momentum. Resolution E indeed 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. Therefore, 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, paragraph 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.

To this end, the Netherlands proposes to amend the Rome Statute as indicated below. For this purpose, the text of article 5 as currently in force has been used; the proposed amendments are underlined and in bold. Should the Review Conference come to an agreement on the crime of aggression and, as a result, decide to delete the present paragraph 2 of article 5, the suggested new paragraph 3 below would become a new paragraph 2 of article 5. In addition, the Netherlands proposes that the Review Conference establish an informal working group on the crime of terrorism. This informal working group should be tasked to examine the question to what extent the Statute would need any adaptations as a result of the introduction of the crime of terrorism within

the jurisdiction of the Court, as well as other questions relevant to this extension of the jurisdiction. It should not in any way interfere with the efforts to come to an agreement on a definition of terrorism as currently carried out within the context of the work on a comprehensive convention on terrorism.

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.

Appendix 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.

Appendix V

Norway

1. Background

No enforcement of sentences by the International Criminal Court has yet been carried out. The experience of international criminal tribunals has, however, shown that only a limited number of States has so far been designated to accept sentenced persons. This has to do with the fact that few States have declared their willingness to be designated. At the same time, there may be reason to believe that more States may in principle be willing to accept sentenced persons, but are excluded from coming into consideration because of the required prison standards.

There should, in our view, be scope for such States to conclude international or regional arrangements enabling them to qualify for acceptance of sentenced persons, including through receipt of voluntary financial contributions to upgrade prison facilities and other assistance or supervision. A broader group of States participating in enforcement of sentences would also have other advantages, including with regard to facilitation of family visits. To this end, we believe that it may be important to explicitly provide for added flexibility in the language contained in article 103, paragraph (1)(a), as suggested below. Technically, amendments might be called for in the Rules of Procedure and Evidence and other secondary or derived instruments.

2. Suggested language for a draft amendment

Add to the end of article 103, paragraph (1) (a):

"... for enforcement in a national prison facility or in a prison facility made available to the State by an international or regional organization, arrangement or agency, as provided in the Rules of Procedure and Evidence."

Article 103 (1) (a) would thus read (addition underlined):

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons for enforcement in a national prison facility or in a prison facility made available to the State by an international or regional organization, arrangement or agency, as provided in the Rules of Procedure and Evidence.

Appendix VI

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.