

INTERNATIONAL CRIMINAL COURT

**INITIAL RECOMMENDATIONS
ON THE REVIEW CONFERENCE**

**AMNESTY
INTERNATIONAL**



Amnesty International Publications

**First published in November 2009 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org**

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**Index: IOR 40/013/2009
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom**

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INITIAL RECOMMENDATIONS ON THE REVIEW CONFERENCE

INTRODUCTION

The eighth session of the Assembly of States Parties (Assembly) which takes place in The Hague, The Netherlands, from 18 to 26 November is an important opportunity for states parties to the Rome Statute to advance preparations for the first Review Conference of the Rome Statute of the International Criminal Court (Review Conference) that is scheduled to take place in Kampala, Uganda, from 31 May to 11 June 2010.¹

Article 123 (1) of the Rome Statute of the International Criminal Court (Rome Statute) provides that:

"Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions."

There are four items which the Review Conference must consider or which it has been recommended to consider:

- First, transitional Article 124 expressly requires that "[t]he provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1."
- Second, the Review Conference will have before it proposals concerning the crime of aggression, including its definition and the circumstances under which the Court will exercise its jurisdiction over this crime, and a report on the subject prepared pursuant to paragraph 7 of Resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Final Act).
- Third and fourth, Resolution E of the Final Act recommends that a Review Conference "consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court". Proposals on both of these crimes have been submitted by the Netherlands (on terrorism) and Trinidad and Tobago (on international drug trafficking).

In addition to these issues, the Review Conference can consider amendments to other aspects of

¹ This paper supplements an earlier paper which addresses other issues arising at the eighth session of the Assembly: *International Criminal Court: Concerns at the eighth session of the Assembly of States Parties*, AI Index: IOR 40/011/2009, 21 October 2009.

the Rome Statute. The following additional proposals have been submitted:

- Belgium and Mexico have issued separate proposals to expand the weapons prohibited in article 8 (war crimes); and
- Norway has proposed an amendment to Article 123 to recognize that some states parties may require assistance in bringing their prison facilities in line with international standards so that they can enforce sentences of the Court.

Furthermore, members of the African Union in the report of its experts meeting on 5 to 7 November recommended that a proposal should be submitted to amend Article 16 to enable the General Assembly to act in deferring a situation when the Security Council fails to act. No such proposal has been made, although it is still possible that a state party to the Rome Statute could do so before the end of January 2010, pursuant to the deadline in Article 121 (1) of the Rome Statute.

The Review Conference is also expected to conduct a detailed stocktaking process of the Court's work to date and efforts to ensure international justice in every corner of the globe.

In this paper, Amnesty International sets out its initial recommendations on these issues, recognizing that at this early stage in the consideration of these issues the organization will likely update its position to respond to developments in the lead-up to the Review Conference. As a general point, however, Amnesty International notes that a super-majority is required for the adoption of amendments. The current political environment would suggest that proponents of changes in the Rome Statute should agree to push for adoption of amendments at the first Review Conference only if there is overwhelming support for them in all regions around the world.

Amnesty International will have a delegation present throughout the eighth session of the Assembly. Members of the delegation are available to discuss any of these issues with government delegations.

1. PREPARING FOR AN EFFECTIVE STOCKTAKING PROCESS

In a letter to governments dated 7 August 2009, United Nation's Secretary-General Ban Ki-moon stated that the Review Conference "is a timely opportunity for States to take stock of what has been achieved" since the entry into force of the Rome Statute on 1 July 2002 and "to reflect on the Court's future course".² Amnesty International considers that the stocktaking process at the Review Conference is an essential component of the Conference - equally as important as the consideration of the amendments. It is an opportunity to review not only the work of the Court but also – and no less important - the contribution that states parties can make to the achievement of the mandate in the Rome Statute, in particular, their own contribution to put an end to impunity for perpetrators of the most serious crimes, in compliance with the complementarity principle.

The stocktaking process will permit states parties to express their views on a number of topics. To

² Letter from Ban Ki-moon, dated 7 August 2009. This letter was circulated by the President of the Assembly to all states parties on 15 September 2009 (<http://www.icc-cpi.int/NR/rdonlyres/7D67278B-C8C2-4777-BBEE-28DoD7007341/0/ICCASPReviewConference2010InvitationENG.pdf>).

that end, adequate time must be allocated during the Conference for these discussions, as well as preparatory meetings that should be held well in advance. All meetings regarding the stocktaking process should be public and open to participation from non-governmental organizations. Below, Amnesty International sets out a number of key issues that should be given detailed consideration during the stocktaking process and the preparatory discussions.

REACHING FULL CAPACITY AS SOON AS POSSIBLE

Although significant progress has been made since 2002 to establish the Court and commence its work, much more needs to be done before the work of the Court reaches full capacity. With three courtrooms in the new permanent premises and the possibility of *in situ* trials and hearings in the countries where the crimes were committed, there is clearly room to expand the Court's judicial work significantly in the next ten years. Given the scale of impunity in situations under the Court's jurisdiction, it would be unthinkable for the Court's judicial work not to expand to achieve its full capacity as soon as possible. This will ensure that the institution functions efficiently and achieves as much as possible within its practical boundaries. The Review Conference is therefore an important opportunity for each state party to consider its vision for expansion of the Court's work in the next ten years and beyond to give the Court truly global reach and to guide the Court, on how it can achieve full capacity. In particular, the Review Conference should consider:

- The Prosecution's current strategy in relation to preliminary examinations. Noting that many crimes under the jurisdiction of the Rome Statute have been in preliminary analysis for a number of years, in some cases without any possibility of genuine national prosecutions.
- Expanding the number of investigations to cover all situations under the jurisdiction of the Court no matter where they occur when national authorities are unable or unwilling genuinely to investigate and, where there is sufficient admissible evidence, to prosecute crimes;
- Expanding the scope of investigations to investigate and prosecute cases that fully represent the crimes committed in each situation;
- Conducting *in situ* hearings and trials in or close to the countries where the crimes were committed, while ensuring the safety of victims, witnesses and all others associated with the proceedings.

UNIVERSALITY OF THE ROME STATUTE

Achieving universality of the Rome Statute should be a vital goal of the Assembly to ensure that the Court has the broadest jurisdiction and support and cooperation from the international community. Although the ratification of the Rome Statute by 110 states is very positive, the fact that the pace of ratifications has slowed significantly in recent years is concerning. The stocktaking process is therefore an opportunity for states parties to review the Assembly's Plan of Action on achieving universality and full implementation of the Rome Statute and its implementation. In particular, the Review Conference should consider what more can be done by the Court and Assembly to promote ratifications by engaging with states that lack the political will to ratify and to assist states parties that have technical obstacles to ratification. In addition, in preparing for the Review Conference, states parties should work with states that are considering ratifying to encourage them to deposit their instruments of ratification at a special event that could be organized during the Conference.

COMPLEMENTARITY

The International Criminal Court is a complementary mechanism which steps only when states parties – and sometimes non-states parties – do not comply genuinely with their obligation to

investigate and prosecute genocide, crimes against humanity and war crimes.

As part of the grand bargain at the Rome Diplomatic Conference, states established a permanent international criminal court that could only work if each state acted in good faith to define these crimes as crimes under its national law and then vigorously enforced that law through investigations and, where there was sufficient admissible evidence, prosecute them. Otherwise that court would be overwhelmed with cases. Indeed, states expressly recognized in the Preamble to the Rome Statute that they had a pre-existing duty to exercise their jurisdiction over these crimes.³ A state which failed to bring perpetrators to justice would risk being considered unable or unwilling genuinely to investigate and prosecute crimes within the International Criminal Court's jurisdiction.

A state's duty "to exercise its criminal jurisdiction" extends not only to exercise its jurisdiction under existing national legislation, which may well be inadequate to permit it to investigate and prosecute all persons suspected of such crimes, but also to exercise whatever jurisdiction it may have over such suspects under international law. Under customary and conventional international law, a state is also permitted to investigate and prosecute crimes under international law even when committed outside its territory and not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests.⁴ Almost every single state party which has drafted or enacted legislation implementing the Rome Statute has strengthened or added such universal jurisdiction provisions.⁵ It is essential for each state party to include effective universal jurisdiction provisions in its national law to ensure that it does not become a safe haven for crimes against the entire international community.

In addition, national implementing legislation must be consistent with customary and conventional international law. This principle means that, in certain circumstances, national implementing legislation should include war crimes which have been omitted in the Rome Statute and should define the crimes and principles of criminal responsibility more broadly than in the Statute and the defences more narrowly.⁶

³ In the Preamble of the Rome Statute, states parties affirm that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation", determine "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" and recall that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

⁴ For a report concerning state practice at the international and national level regarding universal jurisdiction in 125 states, see Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002 – 018/2001, September 2001. Amnesty International is updating this study in a series of papers on universal criminal and civil jurisdiction in each of the 192 UN member states. Four have been published so far: Bulgaria (<http://www.amnesty.org/en/library/info/EUR15/001/2009/en>); Germany (<http://www.amnesty.org/en/library/info/EUR23/003/2008/en>); Spain (<http://www.amnesty.org/es/library/info/EUR41/017/2008/es>) (Spanish only); and Sweden (<http://www.amnesty.org/en/library/info/EUR42/001/2009/en>). Papers in this *No safe haven* series on Solomon Islands and Venezuela are to be published in December 2009.

⁵ Amnesty International, *International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicare)*, AI Index: IOR 40/001/2009, February 2009, available at <http://www.amnesty.org/en/library/info/IO40/001/2009/en> (English) and <http://www.amnesty.org/es/library/info/IO40/001/2009/es> (Español).

⁶ Amnesty International, *International Criminal Court: Checklist for Effective Implementation*, AI Index: IOR 40/011/2000, 31 July 2000.

States parties must ensure that they review their national laws and enact or amend legislation so that they can prosecute crimes of genocide, crimes against humanity and war crimes in accordance with international law. The Court and the Assembly also have key roles to play in promoting positive complementarity and act as catalysts for justice at the national level.

To date only 44 of the 110 states parties have conducted the necessary reviews of their laws and enacted complementarity legislation. However, in most cases, such legislation falls short of the strictest requirements of international law.⁷ Many states parties are therefore incapable of fully meeting their complementarity responsibilities. The situation undermines the vision of the new system of international justice set out in the Rome Statute and threatens to overwhelm the Court with cases as states will be unable to meet their obligations.

Over seven years into the work of the Court, a comprehensive strategy on how all organs of the Court can promote complementarity has still not been adopted. Although Amnesty International notes that the Office of the Prosecutor is seeking as part of a policy of positive complementarity in some situations, including Colombia and Kenya, to encourage national police to investigate and national prosecutors to prosecute, there is clearly a need for a public court-wide strategy. In particular, more consideration needs to be given to pushing for more national prosecutions in countries where the Court is conducting investigations to end the impunity gap. Indeed, the efforts of the Office of the Prosecutor have yet to have any impact in either Colombia, where seven years after it ratified the Rome Statute almost no one of the thousands of persons suspected of crimes against humanity or war crimes has been successfully prosecuted for such crimes, or in Kenya, where none of those suspected of committing crimes against humanity during the election violence of 2008 have been prosecuted for such crimes – since its complementarity legislation applies only to crimes committed since January 2009 - and only a handful have been prosecuted for ordinary crimes. A discussion on key elements of a strategy to promote positive complementarity should not only consider the work of the Court but also the important role that the Assembly and states parties can play in this regard, noting that to date the Assembly has not addressed this issue.

COOPERATION

The obligation to implement the Rome Statute also encompasses the duty to enact legislation which permits states parties to comply with the requests for cooperation by the Court. Only 41 of the 110 states parties have enacted legislation on some forms of cooperation with the Court. In addition, there are increasing instances of states parties failing to comply with specific requests for cooperation from the Court. Similarly, a number of intergovernmental organizations have yet to enter into cooperation agreements with the Court. The Review Conference is therefore an important opportunity to review the implementation of the Assembly's 66 recommendations on cooperation and to consider what more can be done by the Assembly and the Court to promote cooperation and to respond effectively to instances of non-cooperation.

2. DELETING ARTICLE 124

Amnesty International strongly opposed the inclusion of Article 124 in the Rome Statute, which it termed the "licence to kill" provision. Amnesty International notes that only two states parties ultimately made declarations under Article 124 and that France revoked its declaration before the

⁷ Amnesty International, *International Criminal Court: The failure of states to enact effective implementing legislation* (AI Index: IOR 40/019/2004), available at: <http://www.amnesty.org/en/library/info/IOR40/019/2004/en>.

seven-year period expired. Colombia's declaration has just expired. Amnesty International believes there is no justifiable basis to maintain this provision in the Rome Statute relating to war crimes. It has not been necessary to encourage states – which continue to have complementarity obligations to investigate and prosecute genuinely war crimes during the period when an Article 124 declaration is in effect – to ratify the Rome Statute and there have been numerous states engaged in international or national armed conflict which have nevertheless ratified the Rome Statute without making such a declaration. It should either be deleted or – if it is decided to retain it for new crimes - amended to exclude its application for genocide, crimes against humanity and war crimes.

3. COMMENTS ON PROPOSALS TO INCORPORATE NEW CRIMES INTO THE ROME STATUTE

In addition to considering amendments to provide the Court with jurisdiction over the crime of aggression, additional proposals have been put forward for the Review Conference to adopt amendments to add other crimes - terrorism and drug trafficking - and to expand the list of prohibited weapons in the definition of war crimes including adding anti-personnel mines, chemical, biological weapons and nuclear weapons.

During the Rome Conference, Amnesty International strongly supported the inclusion of genocide, crimes against humanity and war crimes in the Rome Statute. In relation to proposals to add other crimes, at that time our organization warned against adding other crimes on the basis that it could delay ratification of the Rome Statute or require a separate consent regime and, possibly, separate procedures and defences.⁸ To a large extent these concerns remain today. The Court is still a very new institution and there is a long way to go to achieve universal ratification. Amnesty International remains concerned that the consent amendment process for new crimes under article 121(5) will prove complex in practice and the scope of the court's jurisdiction will need to be clarified on how it affects states that do not accept amendments.

Amnesty International, therefore, urges states parties to proceed carefully with their consideration of all proposals to add new crimes to the Rome Statute, which is designed to end impunity for "the most serious crimes of concern to the international community as a whole".⁹

GENERAL PRINCIPLES ON ADDING NEW CRIMES

In considering each of the proposals to add crimes, Amnesty International urges states parties to consider the following principles to safeguard the existing mandate of the International Criminal Court and to guarantee the integrity and ensure the broadest support for the Rome Statute:

- (1) Amendments must not scale back on the important achievements in the Rome Statute. In particular:
 - The same procedures for referring crimes to the Court should be available for all the

⁸ See: Amnesty International, *International Criminal Court: Making the Right Choices - Part I: Defining the crimes and permissible defences and initiating prosecution* AI Index: IOR 40/001/1997, 1 January 1997, pp. 21-22.

⁹ Rome Statute, Preamble.

crimes.

- The existing provisions governing the right to a fair trial, including the presumption of innocence, must be applied to all crimes.
 - The principles of criminal responsibility and defences applicable to all crimes must be consistent with the strictest requirements of international law.
- (2) The United Nations Security Council or other bodies must not be allowed to infringe the independence and impartiality of the Court. In particular:
- The Security Council or other body must not pre-empt the judicial determinations of the Court on any aspect of crimes.
 - The Security Council must not be given any additional powers to preclude the Court from acting in relation to any crimes.
 - The Security Council must not be permitted to refer individual cases, but only situations.
- (3) Amendments must not weaken support for international justice and/or result in withdrawals from the Rome Statute. In particular:
- Amendments should only be considered if they enjoy overwhelming support of states parties from all regions.
 - Recognizing that the existing provisions of the Rome Statute are not entirely clear on the amendment process for the crime of aggression an appropriate solution which enjoys consensus of all states parties should be found.
 - If Article 121(5) of the Rome Statute is used for the crime of aggression or for any other crime added into the Rome Statute, the Review Conference should clarify by consensus the meaning of the second sentence in relation to the Court's jurisdiction over: crimes committed by the nationals of states that have accepted the amendment on the territories of states that have not; and crimes committed by the nationals of states that have not accepted the amendment on the territories of states that have. Any solution must be consistent with the Court's jurisdiction set out in Article 12 of the Rome Statute.
 - Consequential amendments that are not specific to the new crimes must follow the process under article 121 (4).

CRIME OF AGGRESSION

Amnesty International does not take a position on the definition of the crime of aggression because its mandate - to campaign for every person to enjoy all of the human rights (civil and political and economic, social and cultural rights) enshrined in the Universal Declaration of Human Rights and other international human rights standards - does not extend to the lawfulness of the use of

force.¹⁰ The organization however recognizes that, in addition to defining the crime of aggression, the Review Conference will also consider the conditions under which the Court will exercise jurisdiction over aggression and a range of other amendments which may have broader implications for the work of the Court in prosecuting genocide, crimes against humanity and war crimes.

At the conclusion of its work, the Special Working Group on the Crime of Aggression recognized that there remain significantly different views on the conditions under which the International Criminal Court may exercise jurisdiction over the crime. Although there appears to be agreement that the Prosecutor must first ascertain whether the United Nations Security Council has made a determination on whether a crime of aggression has been committed, disagreement exist on under which circumstances, if any, the Prosecutor can proceed with an investigation if the Security Council has not determined that the crime has been committed. The Special Working Group identifies six options in its final report:

“(Alternative 1) In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression,

Option 1 – end the paragraph here.

Option 2 – add: unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.

(Alternative 2) Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression,

Option 1 – end the paragraph here.

Option 2 – add: provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

Option 3 – add: provided that the General Assembly has determined that an act of aggression has been committed by the State referred to in article 8 bis;

Option 4 – add: provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 bis”.

Amnesty International is strongly opposed to Alternative 1 (options 1 and 2) and Alternative 2 Option 3 of the Discussion paper which requires a determination by the United Nations Security Council or the General Assembly that aggression has been committed or a request by the Security Council for the Prosecutor to investigate. The requirement for any political body to make a prior determination or request for the International Criminal Court to investigate and prosecute crimes under its jurisdiction was rejected by the Rome Conference, recognizing that such a process would seriously undermine the Court's independence and threaten its credibility. Creating such a requirement for the crime of aggression would politicize the International Criminal Court and undermine the efforts to ensure universal support its work, which could ultimately affect its ability to prosecute other crimes under its jurisdiction.

¹⁰ *Statute of Amnesty International* (available at: <http://web.amnesty.org/pages/aboutai-statute-eng>), para.1.

Amnesty International also has concerns about Alternative 2, option 4 for the International Court of Justice (ICJ) to make a prior determination on whether an act of aggression has been committed. There does not appear to be any reasonable justification for the allocating the initial determination to another international court. The judges of the International Criminal Court include those elected on the basis of their expertise in international law - the same expertise of the judges of the ICJ. In the event that there is a determination by the ICJ that an act of aggression has been committed, the International Criminal Court will in any event need to consider the exact same issue independently of that decision.

Alternative 2, option 1 and 2 appear to respect the independence of the International Criminal Court. Amnesty International believes if a prior determination of an act of aggression is required, then it is essential that it be made by the International Criminal Court – not an external body. The proposal in option 2 to extend the Article 15 procedure for a *proprio motu* application by the Prosecutor to start an investigation to state referrals under Article 13 (a) of the Rome Statute deviates from the procedures for other crimes under the Rome Statute. However, the option would not pose any significant problems to the Court's work, as long as it is clearly indicated that this procedure would only apply to the crime of aggression and not state referrals of other crimes.

The Special Working Group's Report also notes another proposal that is expected to receive further consideration. The proposal submitted by Belgium - known as the "red light" proposal – appears to seek middle ground between alternative 2, options 1 and 2 and other proposals – by providing that the Security Council could stop the International Criminal Court from investigating by making a determination that the crime of aggression has not been committed. Although the proposal appears to limit the role of the Security Council's proposed in Alternative 1, Amnesty International remains concerned that it would still open the International Criminal Court's work to political interference in some cases. There is, of course, nothing to stop the Security Council from making a determination that aggression has not been committed regarding any situation before the Court. No doubt the Court would consider such a resolution as well as other information available to it in making its determination on the issue.

EXPANDING THE USE OF PROHIBITED WEAPONS AS WAR CRIMES

Belgium's three-part proposal deserves strong consideration and adoption, if it achieves overwhelming support in all regions.

The first part of the proposal seeks to apply the prohibition of weapons listed in relation to international armed conflict to non-international armed conflict, including poison weapons, asphyxiating weapons and bullets that expand or flatten in the human body. Amnesty International supports the aims of the proposal to harmonize the rules applicable to international and non-international armed conflicts. Under customary rules of international humanitarian law, the use of poison or poisoned weapons – which cause superfluous injury and unnecessary suffering and/or are inherently discriminatory - is prohibited in non-international armed conflicts.¹¹ Similarly, under rules of customary international humanitarian law, the use of bullets which expand or flatten easily in the human body - causing superfluous injury and unnecessary suffering - is prohibited in non-

¹¹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press and Geneva: International Committee of the Red Cross, Rule 72.

international armed conflicts.¹² Amnesty International, therefore, opposes their use as a method of warfare in a non-international armed conflict and can see no rationale why they should not be incorporated as war crimes in the Rome Statute

The second part of the proposal seeks to add biological weapons, chemical weapons and anti-personnel mines to the list of prohibited weapons for both international and non-international armed conflicts. Under rules of customary international humanitarian law, the use of biological and chemical weapons is prohibited in both international and non international armed conflicts.¹³ Biological and chemical weapons are prohibited methods of warfare as they are by nature indiscriminate (and are of a nature to cause superfluous injury or unnecessary suffering.). Although landmines are not yet banned outright by rules of customary international humanitarian law, Amnesty International opposes the manufacture, transfer and use worldwide of anti-personnel landmines as inherently indiscriminate weapons of warfare. The organization, therefore, supports all elements of this part of the proposal.

The third part of the proposal prohibits the use of other weapons in both international and non-international armed conflict including non-detectable fragments and blinding laser weapons. Under rules of customary international humanitarian law, the use of weapons "the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body" is prohibited in both international and non-international armed conflict.¹⁴ Similarly, blinding laser weapons are prohibited.¹⁵ The organization, therefore, supports all elements of this part of the proposal.

In relation to Mexico's proposal to add nuclear weapons to article 8, Amnesty International opposes the use, possession, production and transfer of nuclear weapons, given their indiscriminate nature. This has been confirmed by the International Court of Justice in its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*¹⁶ and by the Human Rights Committee in General Comment 14.¹⁷ However, the International Court of Justice did not "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."¹⁸ Amnesty International, therefore, supports in principle the proposal. However, recognizing that the proposal will no doubt be controversial for a number of states parties and observers, it will be important to consider whether the overwhelming support required for all new crimes can be achieved.

¹² *Ibid.*, Rule 77.

¹³ *Ibid.*, Rules 73 and 74.

¹⁴ *Ibid.*, Rule 79.

¹⁵ *Ibid.*, Rule 86.

¹⁶ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 8 July 1996, I.C.J. Rep. 1996, p. 226.

¹⁷ Human Rights Committee, General Comment No. 14: Nuclear weapons and the right to life (Art. 6), 9 September 1984.

¹⁸ *Advisory Opinion, supra*, n. 16.

CRIME OF “TERRORISM”

Amnesty International notes the proposal by the Netherlands to include an amendment along the lines of the existing text of Article 5 (2) of the Rome Statute to define and establish the conditions under which the International Criminal Court would exercise jurisdiction of the crime of “terrorism”.

Amnesty International campaigns for the investigation and prosecution of crimes that are commonly termed “terrorism”. However, the organization avoids using this term “terrorism” wherever possible. Instead, these crimes can be defined as existing crimes under international law, including crimes against humanity and war crimes. Although the organization understands the view that including a crime of “terrorism” in the Rome Statute would strengthen global efforts to investigate and prosecute these serious crimes, it is concerned that there is the risk that introducing this amendment to recognize a crime that has not yet been defined may have the effect of weakening the efforts to bring to justice perpetrators of terrorist acts that amount to crimes already within the jurisdiction of the ICC.

DRUG TRAFFICKING CRIMES

Amnesty International recognizes that it is legitimate for governments to take appropriate law-enforcement measures against drug trafficking and that states should exercise due diligence in investigating acts of violence and related crimes connected to the offence, in fair trials without recourse to the death penalty. The organization however takes no position on whether this crime should be added to the jurisdiction of the International Criminal Court, with the exception of the general principles recommended above.

4. OTHER PROPOSALS

NORWAY’S PROPOSAL TO AMEND ARTICLE 103 ON ENFORCEMENT OF SENTENCES.

Amnesty International acknowledges the problem that the Norwegian proposal seeks to address in proposing an amendment to Article 103 recognizing that more prison facilities must be made available to enforce sentences of the International Criminal Court. The organization remains concerned that only two states – both from the European Union - have entered into enforcement of sentences agreements and calls on all states parties to commit themselves to doing so in accordance with international law and standards. Furthermore, as a campaigning organization that promotes improvements in prison conditions, Amnesty International supports efforts to improve national prison conditions to ensure that they meet international law and standards.

Amnesty International is, however, concerned that the proposal which appears to recognize efforts to improve only individual facilities – as opposed to the overall national prison conditions - may not be consistent with Article 106 (2), which provides:

“The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.”

The concern for equality of treatment with regard to national prison conditions in the receiving state reflected in Article 106 (2), is, in Amnesty International's view, an important one. Isolated efforts to improve individual facilities or sections of facilities will do little to address the overall culture of poor treatment of detainees and there is a real risk that, without systemic change, such facilities could fall back below international standards.

Amnesty International, therefore, urges Norway and states parties to ensure that the proposal is consistent with the requirements of Article 106 (2).

POSSIBLE AFRICAN UNION PROPOSAL TO AMEND ARTICLE 16

The Rome Statute is not perfect. It represents a delicate and not always happy compromise, balancing many unrelated articles and provisions. Although it may well have been almost the best that could have been achieved in the circumstances, Amnesty International made clear on the eve of the adoption of the Rome Statute that it was dismayed by many important provisions. Indeed, it continues to believe that many of the articles could be significantly improved.

However, the organization recognized from the moment the Rome Statute was adopted that any attempt to make major changes at the early stages of the new permanent International Criminal Court's existence in one area could lead immediately to calls for changes in other areas that are completely unconnected, but which are in their current form as part of the general political bargain reached at Rome. For that reason, when the International Criminal Court was at that time under intense attack by one state, Amnesty International joined the international consensus shared by other members of civil society and the Like-Minded Group of states that it was essential to protect the integrity of the Rome Statute. Although the threat to the Court's existence has receded somewhat, it has not yet gone away. Non-states parties can participate as observers at the Review Conference and, if some of them decide to participate, they might well press for amendments that would undermine the International Criminal Court in return for ending their opposition to the Court. For these reasons, Amnesty International continues to believe that until the International Criminal Court is firmly on its feet and the campaign against it has been decisively defeated that it would be very risky at this stage of the Court; development to seek substantive changes other than the four envisaged under the Rome Statute or the Final Act, unless other proposals receive overwhelming support from all regions.

Amnesty International believes that referral of situations being considered by the Security Council to the Prosecutor is one positive way of bringing cases before the International Criminal Court.¹⁹ Permitting such referrals makes unnecessary the establishment of *ad hoc* tribunals in the future. It also enables the Security Council in Chapter VII situations to exercise its powers under that Chapter to assist the court in implementing its orders and judgments, particularly when there has been a complete breakdown of national systems or even defiance of the international criminal court. Nevertheless, the Security Council cannot refer individual cases, but only entire situations. The referral must not limit the power of the Prosecutor to investigate on his or her own initiative

¹⁹ Amnesty International, *International criminal court: Making the right choices – Part I defining the crimes and permissible evidence and initiating a prosecution*, AI Index: IOR 40/001/1997, January 1997, pp. 111-112.

individual cases within the natural geographic and temporal scope of the situation or to suspects of a particular nationality, in contrast to the geographic limits on the Prosecutor with regard to the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the temporal and nationality limits with regard to the ICTR.

Amnesty International has consistently opposed permitting the Security Council, a political body, to have the power, whether through Article 16 or some other procedure, to prevent or delay a prosecution either of the nationals of its members or those of other states by an international criminal court from the moment such control of the docket was proposed by the International Law Commission.²⁰ Such power gives the Security Council the ability to give persons suspected or accused of the gravest possible crimes under international law amnesties, undermining the rule of law and the very reason for a permanent, international criminal court. It would be inconsistent with the fundamental principle that there can be no peace without justice. The organization has also consistently opposed the use by the Security Council of Article 16 to suspend investigations and prosecutions as an obstruction of justice.²¹ However, the best method for the foreseeable future to address this political interference, sadly, built into the Rome Statute, will be to persuade permanent and non-permanent members of the Security Council to refrain from ever using it again.

For all these reasons, Amnesty International would unequivocally oppose any proposal, were it to be made, to compound the political interference with the independence of the International Criminal Court by expanding Article 16 to permit another political body, the UN General Assembly, the power to obstruct international justice by preventing an investigation or a prosecution of genocide, crimes against humanity or war crimes to proceed.

²⁰ Ibid. See also Amnesty International, Memorandum to the International Law Commission: Establishing a just, fair and effective permanent international criminal tribunal, AI Index: IOR 40/007/1994, 12 June 1994 (<http://asiapacific.amnesty.org/library/Index/ENGIOR400071994?open&of=ENG-325>) ("Any suggestion that the Prosecutor has not proceeded with a case for reasons of international politics or the wishes of one or more states would seriously damage the authority of the Tribunal.").

²¹ See, for example, Amnesty International, *International Criminal Court: the unlawful attempt by the Security Council to give US citizens permanent impunity from international justice*, AI Index: IOR 40/006/2003, May 2003; *International Criminal Court: Security Council renewal of unlawful Resolution 1487 providing impunity for peace-keepers would be a further set-back for international justice*, AI Index: IOR 51/006/2004, May 2004.

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