

Annex III

Report of the Working Group on other amendments

A. Introduction

1. The Working Group on other amendments held three meetings, on 1, 4 and 10 June 2010 and one round of informal consultations on 9 June 2010. Mr. Marcelo Böhlke (Brazil) and Ms. Stella Orina (Kenya) served as Chairpersons of the Working Group. The Secretariat of the Assembly of States Parties provided the substantive servicing for the Working Group.
2. The discussions in the Group focused on two issues:
 - a) draft amendments to article 8 of the Rome Statute¹ and to the elements of crime,² which had been conveyed to the Review Conference by the eighth session of the Assembly of States Parties; and
 - b) article 124 of the Statute.

B. Amendments to article 8 of the Rome Statute

3. In introducing the draft resolution amending article 8 of the Rome Statute,³ the delegation of Belgium explained that the draft amendments were intended to extend the jurisdiction which the Court already had over the crimes in article 8, paragraph 2 (b) (xvii), (xviii) and (xix), to armed conflicts not of an international character through their inclusion in article 8, paragraph 2 (e), as new sub-paragraphs (xiii), (xiv) and (xv), respectively.⁴ These crimes are as follows: employing poison or poisoned weapons (article 8, paragraph 2 (b) (xvii)); employing asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices (article 8, paragraph 2 (b) (xviii)) and employing bullets which expand or flatten easily in the human body (article 8, paragraph 2 (b) (xix)).
4. It was stressed that the crimes that were proposed for inclusion in article 8, paragraph 2 (e), were not new crimes within the jurisdiction of the Court and that the amendment did not seek to extend the scope of the crimes but the jurisdiction of the Court.
5. It was noted that the crimes set out in preambular paragraph 8 related to weapons whose use was strictly forbidden. The crimes were serious violations of the laws and customs applicable in armed conflicts not of an international character, as reflected in customary international law, i.e. employing poison or poisoned weapons, as well as employing asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices. There was no absolute prohibition on the weapons referred to in preambular paragraph 9, i.e. bullets which expand or flatten easily in the human body and the crime was committed only if the perpetrator employed the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law. It was also stressed that law enforcement situations are excluded from the Court's jurisdiction.

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighth session, The Hague, 18-26 November 2009* (International Criminal Court publication, ICC-ASP/8/20), vol. I, part II, resolution ICC-ASP/8/Res.6, para. 3 and annex III.

² *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed eighth session, New York, 22 – 25 March 2010* (International Criminal Court publication, ICC-ASP/8/20/Add.1), parat II, resolution ICC-ASP/8/Res.9, para. 9 and annex VIII.

³ RC/WGOA/1/Rev.2.

⁴ *Ibid.*, annex I.

6. As regards the Elements of Crimes,⁵ the delegation of Belgium indicated that they mirrored precisely the Elements of Crimes for the war crimes contained in article 8, paragraph 2 (xvii), (xviii) and (xix), except that the crimes occurred in conflicts not of an international character.

7. The Working Group noted that the procedure for entry into force of the amendment to article 8 pursuant to article 121, paragraph 5, of the Statute was related to the outcome of the discussion on the other amendments. Preambular paragraph 2 would be discussed further.

8. At its second meeting, on 4 June, the Working Group adopted the draft resolution amending article 8 of the Rome Statute and decided to refer it to the Conference for adoption, subject to a decision on the amendment procedure set out in article 121.

C. Article 124

9. The Chairpersons of the Working Group introduced the options regarding article 124. These were either to delete, retain, or redraft article 124. In this respect, one delegation proposed the introduction of a “sunset” clause in article 124, with a timeframe after which it would automatically expire.

10. Some delegations supporting deletion of article 124 were ready to accept the “sunset” provision, while other delegations were against any retention of article 124, whether with or without such a provision. Some other delegations expressed a preference for the retention of article 124. Views were also expressed that, in case of amendment or deletion, the amendment procedure could be undertaken in applying article 40, paragraph 5, of the Vienna Convention on the Law of Treaties. The arguments espoused in support of these different views replicated those expressed during the consideration of article 124 by the Assembly of States Parties at its eighth session.⁶

11. Following informal consultations, held on 9 June 2010, the Working Group decided to convey a draft resolution on article 124 (see appendix II) to the Conference for adoption, whereby the Conference would decide to retain article 124 in its current form and to further review its provisions during the fourteenth session of the Assembly.

⁵ Ibid., annex II.

⁶ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighth session, The Hague, 18-26 November 2009* (International Criminal Court publication, ICC-ASP/8/20), Annex II, paras. 6 to 13.

Appendix I

Draft resolution amending article 8 of the Rome Statute

The Review Conference,

Noting article 123, paragraph 1, of the Rome Statute of the International Criminal Court which requests the Secretary-General of the United Nations to convene a Review Conference to consider any amendments to the Statute seven years after its entry into force,

Noting article 121, paragraph 5, of the Statute which states that any amendment to articles 5, 6, 7 and 8 of the 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 and that in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory, and confirming its understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute,

Confirming that, in light of the provision of article 40, paragraph 5, of the Vienna Convention on the Law of Treaties, States that subsequently become States Parties to the Statute will be allowed to decide whether to accept the amendment contained in this resolution at the time of ratification, acceptance or approval of, or accession to the Statute,

Noting article 9 of the Statute on the Elements of Crimes which states that such Elements shall assist the Court in the interpretation and application of the crimes within its jurisdiction,

Taking due account of the fact that the crimes of employing poison or poisoned weapons; of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and of 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, already fall within the jurisdiction of the Court under article 8, paragraph 2 (b), as serious violations of the laws and customs applicable in international armed conflict,

Noting the relevant elements of the crimes within the Elements of Crimes already adopted by the Assembly of States Parties on 9 September 2000,

Considering that the abovementioned relevant elements of the crimes can also help in their interpretation and application in armed conflict not of an international character, in that *inter alia* they specify that the conduct took place in the context of and was associated with an armed conflict, which consequently confirm the exclusion from the Court's jurisdiction of law enforcement situations,

Considering that the crimes proposed in article 8, paragraph 2 (e) (xiii) (employing poison or poisoned weapons) and in article 8, paragraph 2 (e) (xiv) (asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices) are serious violations of the laws and customs applicable in armed conflict not of an international character, as reflected in customary international law,

Considering that the crime proposed in article 8, paragraph 2 (e) (xv) (employing bullets which expand or flatten easily in the human body), is also a serious violation of the laws and customs applicable in armed conflict not of an international character, and understanding that the crime is committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law,

1. *Decides* to adopt the amendment to article 8, paragraph 2 (e), of the Rome Statute of the International Criminal Court contained in attachment I to the present resolution, which is subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5, of the Statute;

2. *Decides* to adopt the relevant elements to be added to the Elements of Crimes, as contained in attachment II to the present resolution.

Attachment I

Amendment to article 8

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

“(xiii) Employing poison or poisoned weapons;

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

(xv) 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.”

Attachment II

Elements of Crimes

Add the following elements to the Elements of Crimes:

Article 8 (2) (e) (xiii)

War crime of employing poison or poisoned weapons

Elements

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xiv)

War crime of employing prohibited gases, liquids, materials or devices

Elements

1. The perpetrator employed a gas or other analogous substance or device.
2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.¹
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

¹ Nothing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to the development, production, stockpiling and use of chemical weapons.

Article 8 (2) (e) (xv)

War crime of employing prohibited bullets

Elements

1. The perpetrator employed certain bullets.
2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.
3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Appendix II

Draft resolution on article 124

The Review Conference,

Recognizing the need to ensure the integrity of the Rome Statute,

Mindful of the importance of the universality of the founding instrument of the International Criminal Court,

Recalling the transitional nature of article 124, as decided by the Rome Conference,

Recalling that the Assembly of States Parties forwarded article 124 to the Review Conference for its possible deletion,

Having reviewed the provisions of article 124 at the Review Conference in accordance with the Rome Statute,

Decides to retain article 124 in its current form,

Also decides to further review the provisions of article 124 during the fourteenth session of the Assembly of States Parties to the Rome Statute.
