

Resolution RC/Res.5*

Adopted at the 12th plenary meeting, on 10 June 2010, by consensus

RC/Res.5

Amendments to 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 provisions 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 referred to 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 referred to 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,

* See Depositary Notification C.N.651.2010 Treaties-6, dated 29 November 2010, available at <http://treaties.un.org>.

1. *Decides* to adopt the amendment to article 8, paragraph 2 (e), of the Rome Statute of the International Criminal Court contained in annex 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 annex II to the present resolution.

Annex 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.”

Annex 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.

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.

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.