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Report of the Working Group on Amendments

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I. Introduction

1. The present report is submitted pursuant to the mandate given by the Assembly of State Parties (“Assembly”) to the Working Group on Amendments (“Working Group”). The Working Group was established by Assembly resolution ICC-ASP/8/Res.6 for the purpose of considering amendments to the Rome Statute proposed in accordance with article 121, paragraph 1 of the Statute as well as any other possible amendments to the Rome Statute and to the Rules of Procedure and Evidence, with a view to identifying amendments to be adopted in accordance with the Rome Statute and the Rules of Procedure of the Assembly.¹

2. The Working Group’s consideration of amendment proposals to the Rome Statute and to the Rules of Procedure and Evidence is governed by the Terms of Reference set out in Assembly resolution ICC-ASP/11/Res.8, annex II.² The amendment procedure for the Rules of Procedure and Evidence is also governed by the “Roadmap on reviewing the criminal procedures of the International Criminal Court”, the main purpose of which is to facilitate a structured dialogue between key stakeholders on proposed amendments to the Rules of Procedure and Evidence.³ In endorsing the Roadmap by resolutions ICC-ASP/11/Res.8 and ICC-ASP/12/Res.8, the Assembly has reaffirmed the role of the Working Group in receiving and considering recommendations to the Assembly on proposals of amendments to the Rules of Procedure and Evidence.

3. At its twenty-first session, the Assembly invited the Working Group to continue its consideration of all amendment proposals in accordance with the Terms of Reference of the Working Group, and requested the Working Group to submit a report for the consideration of the Assembly at its twenty-second session.⁴

4. During the reporting period, the Working Group also conducted the assessment of the relevant recommendations of the Independent Expert Review (IER) pursuant to resolution ICC-ASP/19/Res.7, which had been included in the final report of the “Independent Expert Review of the International Criminal Court and the Rome Statute System”, dated 30 September 2020, and allocated to the Working Group under the “Comprehensive action plan for the assessment of the recommendations of the Group of Independent Experts, including requirements for possible future action” (Comprehensive Action Plan), submitted by the Review Mechanism on 30 June 2021 and adopted by the Bureau on 28 July.

5. The Bureau reappointed Ambassador Juan Manuel Gómez Robledo Verduzco (Mexico) as Chairperson of the Working Group at its second meeting held 14 February 2023.⁵

6. The Working Group met on 27 June and 17 October 2023 to conduct its business as mandated by the Assembly, both meetings were held in person. During its meetings the Working Group agreed to spare no effort for efficient discussions as well as openness and flexibility in the Group’s deliberations.

7. The Chair of the Working Group also held an informal meeting with the Chairs of the Study Group on Governance on 2 June 2023 on the assessment and implementation of the recommendations of the IER allocated to the Working Group under the Comprehensive Action Plan.

¹ Resolution ICC-ASP/8/Res.6, paragraph 4, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.6-ENG.pdf.

² Resolution ICC-ASP/11/Res.8, annex II: Terms of Reference of the Working Group on Amendments, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res8-ENG.pdf#page=11.

³ The Roadmap is contained in the Report of the Bureau on the Study Group on Governance to the eleventh session of the Assembly (ICC-ASP/11/31, annex I). The Revised Roadmap is contained in the Report of the Bureau on the Study Group on Governance to the twelfth session of the Assembly (ICC-ASP/12/37, annex I). The Roadmaps are available respectively at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-31-ENG.pdf and at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-ENG.pdf.

⁴ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Twenty-first session, The Hague, 5-10 December 2022* (ICC-ASP/21/20), vol. I, part III, ICC-ASP/21/Res.2, annex I, paras. 18(a) and (b), available at <https://asp.icc-cpi.int/sites/default/files/2022-12/ICC-ASP-21-20-VOL-1-ENG.pdf>.

⁵ Decision of the second meeting of the Bureau of the Assembly of States Parties, 14 February 2023, available at https://asp.icc-cpi.int/sites/default/files/asp_docs/2023-Bureau2-Agenda-Decisions.pdf.

II. Consideration of proposals to amend the Rome Statute

8. The Working Group had before it those amendment proposals previously referred to it by the Assembly at its eighth session, as well as those transmitted by the Depositary of the Rome Statute on 14 March 2014 and 15 August 2017.⁶

9. As in the past, proponents were given the opportunity, at each meeting of the Working Group, to provide updates on their proposals. All delegations were invited to comment on the different proposals before the Working Group.

A. Belgium

10. At its first meeting held on 27 June 2023, Belgium reminded that three out of four proposals of amendments to article 8 of the Rome Statute which it had proposed in 2009 in relation to war crimes were adopted at the sixteenth session of the Assembly in 2017, recalled that amendments 1 and 2 were adopted in the Kampala Review Conference in 2010 and amendment 3 was adopted by the Assembly at its fourteenth session in 2015. Belgium informed the Working Group that the process for Belgium's ratification of these amendments, together with the last adopted amendment to article 8 to include starvation as a war crime in non-international armed conflict was still ongoing, and emphasized that the Belgian domestic legislation is in conformity with these amendments. Belgium took the opportunity to encourage States Parties to consider ratifying all war crimes amendments, and all proposed amendments adopted so far.

11. Concerning the fourth amendment proposed, Belgium indicated that they had decided in the course of negotiations and in the spirit of compromise, to postpone the consideration of the proposal regarding the use of anti-personnel mines, and that it intended to continue working on the criminalization of anti-personnel mines since it presents clear added value to Belgium and the co-sponsoring States, while requesting that this proposal remain on the table and that Belgium continues to favor the adoption of the amendments by consensus. Belgium noted that at this stage it was preferable to continue bilateral discussions on the matter before resuming discussions in the Working Group, although this analysis may evolve and if it does, it would ask the Working Group to reexamine the proposal after the twenty-second session of the Assembly.

B. Mexico

12. At its first meeting held on 27 June 2023, Mexico indicated that it intended to maintain on the agenda of the Working Group the proposal of amendment to article 8(2)(b) of the Rome Statute on the use of nuclear weapons. Mexico further stated that in this context, it would like to discuss its amendment proposal at a later stage in the Working Group.

C. Sierra Leone

13. On 5 May 2023, Sierra Leone sent a notification via the Secretariat of the Assembly informing the Working Group of its intention to submit proposed amendments to Articles 7 and 8 of the Rome Statute. The proposal submitted by Sierra Leone was circulated by the Secretariat of the Assembly on 24 May 2023.

14. At its first meeting held on 27 June 2023, Sierra Leone informed that the proposal put forth aimed at closing the identified legal gaps for slavery and slave trade crimes under the Rome Statute, as the Rome Statute did not contain provisions for the slave trade under crimes against humanity in Article 7 of the Rome Statute, and slavery and the slave trade as war crimes under Article 8 of the Rome Statute, and noted that the notification to the Working Group of the proposal was to facilitate broad discussion before sending the formal

⁶ These amendment proposals are contained in the Report of the Working Group on Amendments to the thirteenth session of the Assembly (ICC-ASP/13/31) and the Report of the Working Group to the sixteenth session (ICC-ASP/16/22), available respectively at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-31-ENG.pdf and https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-22-ENG.pdf. Having been notified to the Depositary, they are also found at the United Nations Treaty Collection, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en.

notification to the UN Secretary-General, in line with para. 7 of the Terms of Reference of the Working Group (ICC-ASP/11/Res.8). In this connection, Sierra Leone underscored that the Rome Statute did not contain provisions for slave trade as a war crime or crime against humanity, and that while the crime of slavery was firmly established in international law the Rome Statute did not allow for perpetrators to be accountable in this context, which was a legal omission that created impunity gaps. Recalling that the criminality of slavery was a *jus cogens* norm, the proposal posits that slavery should be explicitly enumerated in the Rome Statute, especially in light of the twenty-fifth anniversary of the adoption of the Statute.

15. The Chair of the Working Group proposed holding an informal meeting on the proposal for a technical discussion, which would not prejudice bilateral discussions on the matter.

D. Trinidad and Tobago

16. No further updates were provided by Trinidad and Tobago concerning its proposal during the intersessional period.

E. South Africa

17. No further updates were provided by South Africa concerning its proposal during the intersessional period.

F. Kenya

18. No further updates were provided by Kenya concerning its proposal during the intersessional period.

III. Consideration of the procedure for amending the Rules of Procedure and Evidence

19. At its first meeting held on 27 June 2023, the Chair of the Working Group reviewed the work done in 2022, recalling that the Working Group had put forth to the Assembly the adoption of rule 140 *bis* to the Rules of Procedure and Evidence, which was adopted during the Assembly sessions held in December 2022 by resolution ICC-ASP/21/Res.5 on 9 December 2023. The adoption of rule 140 *bis* to the Rules of Procedure and Evidence thus implemented recommendation 206 of the IER.

20. The Chair also outlined the preliminary programme of work for 2023, stressing that there were ten recommendations allocated to the Working Group in the “Comprehensive action plan”: R214, R215, R381 and 384 on the continuity of proceedings; R202 and R203 on the appropriate standard for representation by *amicus* briefs; R218 on departure from established practice and jurisprudence; and R344 the stay of reparations pending appeal against conviction and/or sentence, which were co-assigned to the Study Group on Governance and the Working Group. Therefore, the Working Group would need to wait for the discussions within the Study Group to continue and to receive their outcome in the form of amendment proposals.

21. The Chair recalled the two letters circulated by the Secretariat on 23 June 2023 as part of the communication between the SGG and the judiciary on potential amendments. He mentioned that the Study Group was also meeting on 27 June 2023 to consider the way forward, in particular, on recommendation 214 related to the continuity of proceedings, and that there was a possibility that the Working Group would be able to discuss amendment proposals once the SGG had an outcome on this discussion.

22. On 28 September 2023, the Study Group on Governance decided to submit to the Working Group proposals for the addition of new rules 69 *bis* and 140 *ter* to the Rules of Procedure and Evidence of the Court, and submitted for the consideration of the Working Group an amendment to article 39(2)(b) of the Rome Statute, further to a proposal put forth by the Court’s Advisory Committee on Legal Texts.

23. On 17 October 2023, the Chair invited the Chef de Cabinet to the President of the Court to brief the Working Group on the background of the process and history of the proposed amendments.

24. During deliberations, delegations viewed the proposal for the addition of new rules 69 *bis* and 140 *ter* to the Rules of Procedure and Evidence of the Court favorably. New rule 69*bis* relates to judicial notice of adjudicated facts in final judgements, the proposal was made by the judges. On the other hand, new rule 140 *ter* addresses continuation of trial proceedings in the permanent absence of a judge. This matter had been discussed in previous years and is also included in R214 of the Independent Experts Review.⁷

25. Concerning the addition of new rule 140 *ter*, several delegations expressed support to the proposal submitted by the SGG. Namely, to adopt the new rule 140 *ter* together with the amendment to article 39 paragraph 2(b) of the Rome Statute. This second amendment to provide a statutory foundation to rule 140 *ter*.

26. Other delegations were of the view that discussions should continue. A view was expressed that although the first sentence of paragraph 1 of Article 74 of the Rome Statute did not explicitly allow judges to be replaced while a case is proceeding, the proposed draft rule 140*ter* was based on an interpretation that a replacement is permitted; and therefore they understood that the addition of rule 140 *ter* is consistent with paragraph 1 of Article 74. Concerning the text of the proposed draft rule 140 *ter*, a view was expressed that the text needed to be amended to ensure that the rehearing and continuation of the hearing indicated in sub-rule 1 of 140 *ter* should be conducted together with the replacement judge, as this was not clearly stipulated in the proposed text, and that it was also important to ensure that the qualifications of a replacement judge as stipulated in sub-rule 3 should apply to all replacement judges appointed in accordance with the provisions of 140 *ter*.

27. Taking all views into consideration, R214 of the Independent Expert Review, as well as the previous discussion in the framework of the SGG, the Chair further proposed that the Working Group submit to the Assembly of States Parties for consideration at its twenty-second session the amendment proposal to rule 69 *bis* and Rule 140 *ter* to the Rules of Procedure and Evidence and the proposal for an amendment to article 39 (2)(b) of the Rome Statute (Annexes I and II).

IV. Information on the status of ratifications of the Kampala amendments to the Rome Statute as well as on the amendments adopted at the fourteenth, sixteenth and eighteenth sessions of the Assembly

28. The Working Group was kept regularly informed of any ratifications of the amendments to the Rome Statute adopted at the 2010 Review Conference, the fourteenth session, the sixteenth session and the eighteenth session of the Assembly. Since the submission of its last report, Mexico had ratified the Kampala amendment to article 8; Niger had ratified the Kampala amendments on the crime of aggression; Slovenia, Mexico Uruguay, Germany and Chile had ratified the three amendments to article 8, paragraph 2(b) and to article 8, paragraph 2(e), of the Rome Statute relating respectively to weapons which use microbial or other biological agents, or toxins, weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays and weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices; and Slovenia, Uruguay and Germany had ratified the amendment to article 8, paragraph 2(e) relating to intentionally using starvation of civilians as a method of warfare by depriving them of objects

⁷ This recommendation is available at the Independent Expert Review of the International Criminal Court and the Rome Statute System: https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/ICC-ASP-19-16-ENG-IER-Report-9nov20-1800.pdf, it reads: "R 214: The Rome Statute should be amended to provide for the assignment of a substitute judge to enable a trial to continue following the substitute judge certifying that they have familiarized themselves with the record of the proceedings".

indispensable to their survival, including willfully impeding relief supplies.⁸

29. As of 10 November 2023, the Kampala amendment to article 8 had been ratified by 45 States Parties;⁹ the Kampala amendments on the crime of aggression had been ratified by 45 States Parties;¹⁰ the amendment to article 124 had been ratified by 20 States Parties;¹¹ the amendment to article 8, paragraph 2(b) and to article 8, paragraph 2(e) relating respectively to weapons which use microbial or other biological agents, or toxins, had been ratified by 17 States Parties;¹² the amendments to article 8, paragraph 2(b) and to article 8, paragraph 2(e) relating to weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays and weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices has been ratified by 15 States Parties;¹³ and the amendment to article 8, paragraph 2(e) relating to intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies had been ratified by 13 States Parties.¹⁴

V. Decisions and recommendations

30. The Working Group recommends to the Assembly the adoption of a draft resolution on rule 69 *bis* and 140 *ter* as contained in the draft resolution on amendments to the Rules of Procedure and Evidence of the International Criminal Court (annex I).

31. The Working Group further recommends to the Assembly the adoption of a draft resolution on the amendment of article 39 of the Rome Statute (annex II).

32. The Working Group recommends that regular meetings be held throughout 2024, including, if necessary, in expert meetings format.

33. The Working Group concludes its intersessional work by recommending to the Assembly the inclusion of language in the omnibus resolution (annex III).

⁸ The list of the States that ratified relevant amendments is available at the United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en.

⁹ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-a&chapter=18&clang=_en.

¹⁰ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en.

¹¹ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-c&chapter=18&clang=_en.

¹² https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-d&chapter=18&clang=_en.

¹³ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-e&chapter=18&clang=_en;

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-f&chapter=18&clang=_en.

¹⁴ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-g&chapter=18&clang=_en.

Annex I

Draft resolution on amendments to the Rules of Procedure and Evidence of the International Criminal Court

The Assembly of States Parties,

Recalling the need to conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence, and *inviting* the organs of the Court to continue to engage in such a dialogue with States Parties,

Recognizing that enhancing the efficiency and effectiveness of the Court is of *common* interest both for the Assembly of States Parties and the Court,

Recalling operative paragraphs 1 and 2 of resolution ICC-ASP/9/Res.2 and article 51 of the Rome Statute,

Further recalling paragraph 9 of annex I to resolution ICC-ASP/20/Res.5,

Taking note with appreciation of the consultations undertaken within the Study Group on Governance and the Working Group on Amendments,

Noting the report of the Working Group on Amendments¹ and the report of the Bureau on the Study Group on Governance,²

1. *Decides* that the following rule 69 *bis* be inserted after rule 69 of the Rules of Procedure and Evidence:

“Rule 69 *bis*

Judicial notice of adjudicated facts in final judgments

1. At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties and the participants, may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Court relating to matters at issue in the current proceedings to the extent that they do not relate to the acts, conduct or mental state of the accused as charged and provided that such notice would not be prejudicial to or inconsistent with the rights of the accused.

2. Judicial notice in accordance with sub-rule 1 may be taken only where a fact or the authenticity of documentary evidence has been finally determined by the Appeals Chamber or by a Trial Chamber where there has been no appeal or the finding has not been challenged on appeal.

3. When taking notice of adjudicated facts, a Trial Chamber shall consider whether the fact is, *inter alia*:

- (a) relevant to an issue in the proceedings;
- (b) distinct, concrete, and identifiable;
- (c) identified with adequate precision by the requesting party;
- (d) taken as formulated by the requesting party and not differing in any substantial way from the formulation of the original judgment;
- (e) not be unclear or misleading in the context in which it is placed in the requesting party's motion;
- (f) does not contain characterisations of an essentially legal nature; and
- (g) not based on an agreement between the parties to the other proceedings.

4. Where the Trial Chamber has decided to take judicial notice in accordance with sub-rule 1, a party may challenge the fact or authenticity of the documentary evidence by referring to existing contradicting evidence or by introducing evidence to the contrary. In

¹ ICC-ASP/22/29.

² ICC-ASP/22/7.

such case, the Trial Chamber may authorise the submission of evidence supporting the adjudicated fact or the authenticity of the documentary evidence.

5. Where the Trial Chamber has decided to take judicial notice in accordance with sub-rule 1, the Trial Chamber shall assess such judicially noticed adjudicated fact or documentary evidence to determine what conclusions, if any, can be drawn when considering it together with all the evidence before it.”

2. *Further decides* that the following rule 140 *ter* be inserted after rule 140 *bis* of the Rules of Procedure and Evidence:

“Rule 140 *ter*

Continuation of trial proceedings in the permanent absence of a judge

1. If a judge assigned to a Trial Chamber, for reasons enumerated in rule 38, sub-rule 1, is unable to complete any trial which has already commenced the hearing of evidence, and no alternate judge has been assigned, the remaining judges of the Trial Chamber will report to the Presidency as to the need for a replacement judge and may order either a rehearing or the continuation of the hearing from that point. The continuation of the hearing can only be ordered with the consent of all the accused, except as provided for in sub-rule 2 below.

2. If, in the circumstances mentioned in sub-rule 1, an accused does not consent, the remaining judges of the Trial Chamber may nonetheless decide whether or not to continue the hearing before that Trial Chamber with a replacement judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice.

3. This decision is subject to appeal pursuant to article 82, paragraph 1 (d). If the decision to continue the hearing with a replacement judge does not result in an appeal, or the Appeals Chamber confirms the decision, the Presidency shall assign to the existing bench a replacement judge, who, however, can join the bench only after he or she has certified that he or she has familiarized himself or herself with the record of the proceedings. Such certification process shall be considered to satisfy the requirement of presence at all stages of the trial in article 74, paragraph 1. Only one replacement under this rule may be made.

4. Apart from the procedures established in this rule, the trial shall otherwise be suspended until this certification is filed. Once the certification in sub-rule 3 has occurred, the replacement judge shall participate fully in all aspects of the trial, including deliberations in accordance with rule 142.

5. If, in a trial where the Presidency has assigned an alternate judge in accordance with article 74, paragraph 1 and rule 39, a judge is unable to continue sitting, the trial shall continue with the alternate judge replacing the judge who is unable to continue sitting.”

Annex II

Amendment to article 39 of the Rome Statute

The Assembly of States Parties,

Noting article 121, paragraphs 1 and 2, of the Rome Statute of the International Criminal Court which permits the Assembly of States Parties to adopt any proposed amendment to the Rome Statute after the expiry of seven years from the entry into force of the Statute,

Noting also article 122, paragraph 1, of the Statute which states that amendments to provisions of this Statute which are of an exclusively institutional nature may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party,

Recalling the need to conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence, and inviting the organs of the Court to continue to engage in such a dialogue with States Parties,

Recognizing that enhancing the efficiency and effectiveness of the Court is of common interest both for the Assembly of States Parties and the Court,

Recalling operative paragraphs 1 and 2 of resolution ICC-ASP/9/Res.2 and article 51 of the Rome Statute,

Further recalling paragraph 9 of annex I to resolution ICC-ASP/20/Res.5,

Taking note with appreciation of the consultations undertaken within the Study Group on Governance and the Working Group on Amendments,

Noting the report of the Working Group on Amendments¹ and the report of the Bureau on the Study Group on Governance,²

1. *Decides* to adopt the following amendment to article 39(2)(b) of the Rome Statute of the International Criminal Court.

Insert in Article 39(2)(b) the following chapeau:

Article 39
Chambers

- 2 (b) “Without prejudice to the replacement of a judge, as provided for in the Rules of Procedure and Evidence,”

¹ ICC-ASP/22/29.

² ICC-ASP/22/7.

Annex III

Draft text for the omnibus resolution

1. The following paragraphs of the 2022 omnibus resolution (ICC-ASP/21/Res.2), located in in the section on the consideration of amendments, remain unchanged and are to be reflected as follows:

167. *Welcomes* the report of the Working Group on Amendments;¹

168. *Calls upon* all States Parties to ratify or accept the amendment to article 124;

169. *Also calls upon* all States Parties to ratify or accept the amendments to article 8 adopted at the sixteenth and eighteenth sessions of the Assembly;²

2. Paragraph 18 of annex I (Mandates) of the 2022 omnibus resolution (ICC-ASP/21/Res.2) is replaced by the following:

“a) *invites* the Working Group to continue its consideration of all amendment proposals, in accordance with the Terms of Reference of the Working Group; and

b) *requests* the Working Group to submit a report for the consideration of the Assembly at its twenty third session.”

¹ ICC-ASP/24/22/2229.

² ICC-ASP/16/Res.4 and ICC-ASP/18/Res.5.