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Report of the Working Group on Amendments*Contents*

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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-second 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-third 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. This was 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 2021.

5. The Bureau appointed Ambassador Juan Jose Quintana (Colombia) as Chairperson of the Working Group on 27 June 2024.⁵

6. The Working Group met on 9 September and 6 November 2024 to conduct its business as mandated by the Assembly. Both meetings were held in person.

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-second session, The Hague, ... December 2023 (ICC-ASP/22/20), vol. I, part III, ICC-ASP/22/Res...., annex ..., paras. ...18(a) and (b).

⁵ See: Agenda and decisions of the seventh meeting of the Bureau of the Assembly of States Parties (annex), 3 July 2024: https://asp.icc-cpi.int/sites/default/files/asp_docs/2024-Bureau7-Agenda-Decisions.pdf

II. Consideration of proposals to amend the Rome Statute

7. 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 Furthermore, the Working Group had before it the amendment proposals submitted by Sierra Leone⁷ and by Vanuatu.⁸

8. 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.

9. At the first meeting of the Working Group, the focal point on the preparations for the review of the amendments on the crime of aggression appointed by the Bureau, Ms. Elisa De Raes (Belgium), shared with the Working Group the scope of the work and the timeline anticipated to carry out the mandate entrusted to her.

10. On 11 November 2024, the Chair of the Working Group received a copy of a communication, dated 8 November 2024, sent to States Parties from the Permanent Representatives to the United Nations of Costa Rica, Sierra Leone, Vanuatu, Germany and Slovenia. The letter contained a discussion paper⁹ elaborated by a cross-regional group of States. The discussion paper elaborated two possible options for how article 15bis of the Rome Statute could be revised to bring the jurisdictional regime of the Court over the crime of aggression in line with its jurisdiction over genocide, war crimes and crimes against humanity. The communication requested that the Working Group convene meetings at least once per month from January to June 2025 to facilitate the discussion on the possible amendments to article 15bis of the Rome Statute, ahead of July 2025.

A. Belgium

11. At the first meeting, Belgium briefly presented its proposed amendment to article 8 of the Rome Statute.

B. Mexico

12. At the first meeting, Mexico briefly introduced its proposed amendment to article 8, paragraph 2 (b), of the Rome Statute.

C. Sierra Leone

13. On 5 May 2023, Sierra Leone had 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 and on 9 September 2024.

14. At the first meeting, Sierra Leone introduced its proposal to amend articles 7 and 8 of the Rome Statute as well as the respective amendments to the Elements of Crimes. Sierra Leone responded to questions by States.

15. At the second meeting, Sierra Leone invited delegations to consult and to communicate to it any concerns they might have.

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 (ICCASP/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.

⁷ Annex I.

⁸ Annex II.

⁹ Annex III.

D. Trinidad and Tobago

16. At the first and second meetings, Trinidad and Tobago decided not to present its proposal on this occasion.

E. South Africa

17. At the first and second meetings, South Africa decided not to present its proposal on this occasion.

F. Kenya

18. At the first and second meetings, Kenya decided not to present its proposal on this occasion.

G. Vanuatu

19. The proposal submitted by Vanuatu was circulated by the Secretariat of the Assembly on 9 September 2024, while the proposed Elements of Crimes were disseminated on 6 November 2024.

20. At the first meeting, Vanuatu introduced the proposal to amend the Rome Statute to include an independent crime of ecocide in article 5, and the corresponding changes to the preamble and article 8.

21. At the second meeting, Vanuatu introduced the draft Elements of Crimes, which had been circulated by the Secretariat on 6 November.

III. Consideration of proposals to amend the Rules of Procedure and Evidence

22. During 2024, the Working Group did not receive any proposal to amend the Rules of Procedure and Evidence.

IV. Assessment of recommendation R78 of the Group of Independent Experts

23. The Study Group on Governance conveyed to the Working Group a letter, dated 30 August 2024, regarding recommendation R78¹⁰ of the Group of Independent Experts, which proposed that in the long term, States Parties consider having the term of office of the Registrar increased to a total of seven to nine years, but without the possibility of re-election. This would require an amendment to article 43, paragraph 5, which sets out a term of five years, with the Registrar eligible for re-election once.

24. On 9 September 2024, the co-Chairs of the Study Group on Governance, Ambassador Arnoldo Brenes Castro (Costa Rica) and Ambassador René Miko (Czech Republic), informed the Chair of the Working Group that the outcome of the assessment of R78 by the Study Group on Governance in October 2023 had been negative, which would entail proposing an amendment to the Rome Statute.

25. At its 6 November 2024 meeting, the Working Group discussed the recommendation. The outcome of the discussion was a negative assessment of recommendation R78 of the Group of Independent Experts. That decision was conveyed to the Review Mechanism.

¹⁰ R78 : In the long-term, States Parties are recommended to consider amending the provisions referring to the Registrar's term to limit it to a 7 – 9 years non-renewable mandate.

V. Information on the status of ratification 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. As at 12 November 2024, the Kampala amendment to article 8 had been ratified by 46 States Parties;¹¹ the Kampala amendments on the crime of aggression had been ratified by 46 States Parties;¹² the amendment to article 124 had been ratified by 23 States Parties;¹³ 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 22 States Parties;¹⁴ 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 had been ratified by 20 States Parties; the amendment to article 8, paragraph 2 (b) and article 8, paragraph 2(e) relating to laser 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 had been ratified by 20 States Parties;¹⁵ 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 18 States Parties.¹⁶

VI. Decisions and recommendations

29. The Working Group recommends that regular meetings be held throughout 2025, including, if necessary, in the expert meeting format.

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

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

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

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

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

¹⁵ 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.

¹⁶ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-g&chapter=18&clang=_en.

Annex I

Amendments to articles 7 and 8 of the Rome Statute of the International Criminal Court

Proposal submitted by Sierra Leone to amend the Rome Statute

Draft amendment text

Rome Statute, article 7: Crimes against humanity

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(c) Enslavement, *and/or the slave trade*

2. For the purpose of paragraph (c):

(c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person

(c) “Slave trade” means all acts involved in the capture, acquisition or disposal of a person with intent or knowledge to reduce that person to slavery; all acts involved in the acquisition of an enslaved person with a view to selling or exchanging that person; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged, and, in general, every act of trade or transport of an enslaved person by whatever means of conveyance.

Elements of crimes

Article 7(1)(c)(-1)

Crime against humanity of enslavement

Elements

1. The perpetrator exercises the powers attaching to the right of ownership over a person, such as by purchasing, selling, lending, or bartering such a person, ***controlling the sexual autonomy or sexual integrity of a person*** or persons, or imposing on them a similar deprivation of liberty.

2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Elements of crimes

Article 7(1)(c)(-2)

Crime against humanity of the slave trade

Elements

1. The perpetrator is involved in the capture, acquisition, or disposal of a person with intent or knowledge to reduce that person to slavery; all acts involved in the acquisition of an enslaved person with a view to selling or exchanging that person; all acts of disposal by sale

or exchange of a person acquired with a view to being sold or exchanged, and, in general, every act of trade or transport of an enslaved person by whatever means of conveyance.

2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Rome Statute, article 8: War Crimes

2. For the purpose of this Statute, “war crimes” means:
 - (b) Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, namely, any of the following acts:
 - (xxvii) *Committing slavery as defined in article 7, paragraph 2(c).*
 - (xxviii) *Committing the slave trade as defined in article 7, paragraph 2(c).*
 - (c) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
 - (xvi) *Committing slavery as defined in article 7, paragraph 2(c).*
 - (xvii) *Committing the slave trade as defined in article 7, paragraph 2(c).*

Elements of Crimes

Article 8(2)(b)(xxvii)

War crime of slavery during an international armed conflict

Elements

1. The perpetrator exercises the powers attaching to the right of ownership over a person, such as by purchasing, selling, lending or bartering such a person, *or controlling the sexual autonomy or sexual integrity of a person* or persons, or by imposing on them a similar deprivation of liberty.
2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Elements of crimes

Article 8(2)(b)(xxviii)

War crime of the slave trade during an international armed conflict

Elements

1. *The perpetrator is involved in the capture, acquisition, or disposal of a person with intent or knowledge to reduce that person to slavery; all acts involved in the acquisition of an enslaved person with a view to selling or exchanging that person; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged, and, in general, every act of trade or transport of an enslaved person by whatever means of conveyance.*
2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Elements of crimes

Article 8(2)(e)(xvi)

War crime of slavery during a non-international armed conflict

Elements

1. The perpetrator exercises the powers attaching to the right of ownership over a person, such as by purchasing, selling, lending or bartering such a person, *or controlling the sexual autonomy or sexual integrity of a person* or persons, or by imposing on them a similar deprivation of liberty.
2. The conduct took place in the context of and was associated with an armed conflict not of an international character.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Elements of crimes

Article 8(2)(e)(xvii)

War crime of the slave trade during a non-international armed conflict

Elements

1. *The perpetrator is involved in the capture, acquisition, or disposal of a person with intent or knowledge to reduce that person to slavery; all acts involved in the acquisition of an enslaved person with a view to selling or exchanging that person; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged, and, in general, every act of trade or transport of an enslaved person by whatever means of conveyance.*
2. The conduct took place in the context of and was associated with an armed conflict not of an international character.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Annex II

Proposal submitted by Vanuatu to amend the Rome Statute

Addition of a preambular paragraph 2bis:

“Concerned that the environment is daily threatened by severe destruction and deterioration, gravely endangering natural and human systems worldwide,”

Addition to Article 5:

“(e) The crime of ecocide.”

Addition of Article 8ter:

“Article 8ter Ecocide

1. For the purpose of this Statute, “ecocide” means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.
2. For the purpose of paragraph 1:
 - (a) “Wanton” means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
 - (b) “Severe” means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;
 - (c) “Widespread” means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;
 - (d) “Long-term” means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;
 - (e) “Environment” means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.”

We note that consequential amendments may also be required for other provisions of the Rome Statute, such as Article 9, and to the ICC Rules of Procedure and Evidence, and the Elements of Crimes.

Draft Elements of crime of Ecocide

Article 8ter Ecocide

Introduction

3. The term ‘acts’ includes single acts or omissions, as well as cumulative acts or omissions.

Elements

1. The perpetrator committed acts that were substantially likely to cause severe and either widespread or long-term damage to the environment.
2. The perpetrator knew of the substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.
3. The acts were
 - (a) unlawful, meaning contrary to applicable national or international law, or

(b) wanton, meaning that the foreseeable damage would be clearly excessive in relation to the foreseeable social and economic benefits.

4. The perpetrator

(a) was aware of the factual circumstances that established the unlawfulness of the acts; or

(b) recklessly disregarded damage which would be clearly excessive in relation to the social and economic benefits anticipated.

Draft Elements of crime with Explanatory commentary

The following section offers explanatory commentary for delegations with respect to the proposed elements.

Article 8ter Ecocide

Introduction

1. *The term ‘acts’ includes single acts or omissions, as well as cumulative acts or omissions.*

Commentary

1. Like other ICC Statute crimes, the proposed Article 8ter uses the term “acts” (see e.g. Article 6 “the following acts”, Article 7 “the following acts”, “inhumane acts”). As noted in the Elements of Crimes and in jurisprudence, the term “acts” as used in Rome Statute definitions can encompass a single act and also culpable omissions. The Independent Expert Panel for the Legal Definition of Ecocide (“the Panel”), which drafted the proposed Art 8 ter, observed that “the word ‘acts’ includes single acts or omissions, or cumulative acts or omissions.”¹ While the Elements of Crimes often converts plural terms (eg “acts”) into the singular (e.g. “act”), the plural is maintained in these proposed Elements, for clarity and consistency with the text.

Elements

1. *The perpetrator committed acts substantially likely to cause severe and either widespread or long-term damage to the environment.*

Commentary

2. The terms “severe”, “widespread”, “long-term” and “environment” are defined in paragraph 2 of Article 8 ter. The definitions are adapted from international humanitarian law and environmental law, as explained in the Panel’s commentary. The terms “severe”, “widespread” and “long-term” appear in the 1977 First Additional Protocol to the Geneva Conventions (‘API’) (Arts 35(3) and 55(1)), in Article 8(2)(b)(iv) of the Rome Statute, in the 1976 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (“ENMOD”), and in the 1991 International Law Commission draft of an international crime of willful and severe damage to the environment.

3. While ENMOD uses the disjunctive (“widespread, long-lasting *or* severe”), API and the Rome Statute use the conjunctive formulation “widespread, long-term *and* severe”. The Panel proposed a mid- point between these two options: the threatened harm must be “severe” to be classed as ecocide, and it must be either widespread or long-term.

¹ The Panel’s commentary is available at <https://ecocidelaw.com/definition/>.

2. *The perpetrator knew of the substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.*

Commentary

4. Article 30 provides the default mental element for Rome Statute crimes where no mental element is otherwise stated. With respect to consequences, the default standard has been interpreted to require an awareness of a near certainty that the consequences will occur. Given that environmental harms often cannot be anticipated with “near certainty”, the Panel concluded that the default mens rea standard was too narrow and would not capture highly culpable conduct.

5. Article 30 allows alternative mental elements to be stipulated (“unless otherwise provided”). Both the Rome Statute and the Elements of Crimes recognize several departures from the default standard. For example, some provisions employ a “should have known” standard,² and others modify what must be intended or foreseen.³ Some provisions require only knowledge of *risks*, for example that “the perpetrator knew that the conduct *could result* in death or serious injury” (Elements for Art. 8(2)(b)(vii)-1, 8(2)(b)(vii)-2, 8(2)(b)(vii)-3, and Arts 8(2)(b)(vii)-4).

6. The proposed Art 8 ter specifies a mental element, displacing the default rule of Article 30. The standard is “knowledge that there is a substantial likelihood” of the prohibited environmental damage. The standard is akin to national law standards such as recklessness or *dolus eventualis*.

3. *The acts were*

- (a) *unlawful, meaning contrary to applicable national or international law, or*
- (b) *wanton, meaning that the foreseeable damage would be clearly excessive in relation to the foreseeable social and economic benefits.*

Commentary

7. At this moment, many activities that create severe adverse environmental impacts are nonetheless the least destructive available way to serve essential needs, given current technology. These activities may include housing developments, air transportation, ground transportation, energy production, and food production. Much work must be done to continue to reduce the harms of such activities. However, Article 8 ter does not propose a blanket criminalization of all such activity. Article 8 ter excludes activities that are legal, socially beneficial, responsibly operated to minimize impact, and less environmentally harmful than available alternatives. Such activities will be regulated by areas of law other than the crime of “ecocide”.

8. Thus, Article 8 ter focuses on the gravest cases of irresponsible conduct and reserves the criminal sanction of “ecocide” for acts that are “unlawful or wanton”. The terms “unlawful” and “wanton” are drawn from the ICC Statute (Article 8(2)(a)(iv))⁴ and from international humanitarian law. As the Panel notes in its commentary, in the context of ecocide, these terms must be informed by environmental law principles.

9. The term “unlawful” refers to acts prohibited under either applicable international or national law. The Panel noted that international treaties and customary law currently contain relatively few absolute prohibitions on conduct. Most regulation is at the national level, and

² See eg Article 28 and the elements for Art 6(e), 8(2)(b)(vii), 8(2)(b)(xxvi), 8(2)(e)(vii).

³ See eg Elements of Crimes, Article 6, Introduction, para (c); Article 7, Introduction, para 2; Article 8, Introduction, para (b) and (c).

⁴ Article 8(2)(a)(iv): “extensive destruction and appropriation of property, not justified by military necessity, and carried out unlawfully and wantonly.”

thus the definition includes conduct unlawful in national law. Either type of illegality (national or international) suffices, and thus national laws cannot permit activity that is illegal in international law. As the Panel noted in its commentary, some international crimes refer to national law in assessing unlawfulness.

10. The General Introduction to the Elements, para 6, observes that the requirement of “unlawfulness” is generally not specified in the Elements. However, in many crimes, where unlawfulness under a different regime of law is an important material element of the crime, the Elements explicitly note the “unlawful” requirement.⁵

11. The term “wanton” employs a balancing test akin to the balancing test in Article 8(2)(b)(iv), the war crime of disproportionate attacks. However, the test is modified for a broader peacetime context. As noted by the Panel, the test refers to environmental principles, which balance long-term social, economic, and environmental harms and benefits, through the concept of sustainable development. The “wanton” test allows direct application of those basic principles where the national system has manifestly failed to apply them.

12. In Article 8ter, “wanton” is defined as a mental element. The proposed Elements stipulate a corresponding material element, as has been done in other Elements where appropriate.⁶ The adjective “foreseeable” is used, to make clear that the assessment for the material element is concerned with risks foreseeable at the time of the conduct.

4. *The perpetrator*

(a) was aware of the factual circumstances that established the unlawfulness of the acts; or

(b) recklessly disregarded damage which would be clearly excessive in relation to the social and economic benefits anticipated.

Commentary

13. The proposed mental element for “unlawfulness” is the same as in the crime of aggression: awareness of the factual circumstances that established the unlawfulness. This approach is used in many Elements for war crimes that contain a legal material element.⁷ Given that the unlawfulness is an essential element of the offence, and given that a person might exercise all appropriate diligence and yet reasonably not be aware of an unforeseeable legal defect, the Assembly of States Parties could choose to include some reference to mistake of law under Article 32(2).⁸

14. The term “recklessly disregarded” in Art 8ter encompasses a person who was aware of likely severe harms and limited benefits and proceeded nonetheless. But the term is broader than awareness, as it includes those who recklessly “disregard” such matters and thus fail to even consider them. In other words, it includes those who rendered themselves ignorant because of reckless disregard for, or indifference to, their applicable duties of environmental responsibility. This approach corresponds to jurisprudence in war crimes law, that “wanton” includes not only “intent” but also “reckless disregard”.⁹

⁵ See for example, the crime of aggression, as well as Arts 7(1)(d), 7(1)(e), 7(1)(f), 7(1)(h), 8(2)(a)(iv), 8(2)(b)(vii).

⁶ See eg Elements, Article 8(2)(b)(iv).

⁷ See eg Article 8(2)(a) element 3 and 5, and similar elements throughout the war crimes provisions.

⁸ One alternative would be to adopt the approach taken in Article 8(2)(b)(vii): “the perpetrator knew or should have known” of the unlawfulness, instead of awareness of factual circumstances. Those Elements explain, in a footnote, that this standard reflects the interplay with Article 32(2) (mistake of law). Alternatively, the Assembly of States Parties could adopt the “awareness of factual circumstances” test, but add a footnote noting that the Court will determine the applicability of a defence under Article 32(2) (mistake of law). Such a footnote would clarify that a mistake of law defence is not necessarily precluded. Such a defence might be important for persons who acted with all appropriate diligence to comply with environmental regulations and who could not be expected to know of a particular latent legal defect (for example, reasonable reliance on a reviewing body that is later unexpectedly held to have lacked jurisdiction).

⁹ ICRC, *Commentary to Geneva Convention I*, Article 50, Section D(6)(c) (2016); ICRC, *Commentary to Geneva Convention II*, Article 51, Section D(6)(c) (2017).

Annex III

Discussion paper submitted by Costa Rica, Sierra Leone, Vanuatu, Germany and Slovenia to amend the Rome Statute

Discussion Paper

Harmonizing the ICC's jurisdiction over all four Rome Statute crimes

Jurisdictional limitations in the Kampala amendments on the crime of aggression

The crime of aggression is one of the four crimes over which the ICC has jurisdiction in accordance with Article 5 of the Rome Statute. However, specific conditions for the exercise of jurisdiction over the crime of aggression are established in Articles 15*bis* and 15*ter* of the Rome Statute.

Article 15*ter* of the Rome Statute deals with the referral of a situation by the Security Council and corresponds to the ICC's standard jurisdictional regime over genocide, crimes against humanity, and war crimes. However, Article 15*bis* of the Rome Statute, which deals with the referral of a crime of aggression situation by a State Party or a *proprio motu* investigation by the Prosecutor, currently deviates significantly from the Statute's general jurisdictional regime.

- Article 15*bis* (4) allows States Parties to opt-out of the ICC's jurisdiction over the crime of aggression.
- Article 15*bis* (5) provides an explicit exclusion from the ICC's jurisdiction for crimes committed by nationals or on the territory of Non-States Parties to the Rome Statute.

These provisions significantly limit the ICC's exercise of jurisdiction over the crime of aggression, even though all four Rome Statute crimes are crimes under general customary international law. Therefore, amendments to the Kampala amendments on the crime of aggression are necessary to harmonize the ICC's jurisdiction over all four of the Rome Statute's core crimes.

Application of amendment provisions of the Rome Statute

It is subject to further discussion which amendment provision in the Rome Statute – Article 121 (4)¹ or 121 (5)² – should be chosen to adopt amendments that revise the conditions for the ICC's exercise of jurisdiction over the crime of aggression. The application of Article 121 (4) would mean that new amendments would enter into force for all once accepted by seven-eighths of States Parties. The application of Article 121 (5), foresees the entry into force individually for each State Party that ratifies the new amendments. However, the second sentence of article 121 (5), could limit the ICC's jurisdiction over the crime of aggression, unless specifically addressed.

Amendment proposals to harmonize jurisdiction

The first option presented below is for adoption under Article 121 (4), while the second option presented below is for adoption under Article 121 (5). Both options should allow the ICC to exercise its jurisdiction over the crime of aggression in accordance with the general rule in Article 12 (2) of the Rome Statute and future declarations by non-States Parties accepting the ICC's jurisdiction under Article 12 (3). These are the jurisdictional rules that apply to the ICC's other core crimes and should also apply to the crime of aggression.

¹ 121 (4): Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

² 121 (5): 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. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

OPTION 1

Article 15*bis* (4) is amended and Article 15*bis* (5) is deleted.

- 4. The Court may, in accordance with Article 12, exercise jurisdiction over a crime of aggression, ~~arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.~~ (Article 15*bis* (4) AMENDED)

- ~~5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.~~ (Article 15*bis* (5) DELETED)

This first option is mostly a simple deletion of the paragraphs that unduly limit the Court's jurisdiction over the crime of aggression, while retaining the existing reference to Article 12 in order to make explicit that it is in fact the Rome Statute's general jurisdictional regime that shall also apply to the crime of aggression.

OPTION 2

This option provides for the adoption of the amendments under Article 121 (5), which comes with the risk that the second sentence of Article 121 (5) would apply and therefore limit the ICC's jurisdiction over the crime of aggression. Namely, there is a view that the second sentence of article 121(5) requires ratification by both the territorial State and the State of nationality, which is not the case for the general jurisdictional regime of the ICC under Article 12 of the Rome Statute.

Article 15*bis* (4) and (5) are therefore replaced by the following text inserted after article 15*bis* (3):

- 4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression if one or more of the following States have ratified or accepted the aggression amendments, or have accepted the exercise of the jurisdiction of the Court over the crime of aggression in accordance with paragraph 5.

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

- 5. If the acceptance of a State that has not ratified or accepted the aggression amendments, or which is not a Party to this Statute, is required under paragraph 4, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court over the crime of aggression in accordance with article 12, paragraph 3.

This second option tries to address the risks associated with adopting the amendments under Article 121 (5). While it is not uncontested, there is a view that the second sentence of article 121(5) would represent a restriction of the Court's jurisdiction over the crime of aggression, which does not exist for the other core Rome Statute crimes and would therefore run counter to harmonization efforts.

Annex IV

Draft text for the omnibus resolution

1. The following paragraphs of the 2023 omnibus resolution (ICC-ASP/22/Res.3), 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 2023 omnibus resolution (ICC-ASP/22/Res.3) 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-fourth session.”

¹ ICC-ASP/23/Res.3.

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