

**CJI/doc.360/10 rev.1**

**REPORT ON THE ACTIVITIES ON PROMOTION OF THE  
INTERNATIONAL CRIMINAL COURT AND PRELIMINARY DRAFT OF  
MODEL  
TEXTS FOR CRIMES CONTEMPLATED IN THE ROME STATUTE**

(presented by Dr. Mauricio Herdocia Sacasa)

**I. MANDATE**

In its resolution AG/RES. 2577 (XL-O/10), the General Assembly of the OAS decided:

11. To request the Inter-American Juridical Committee, insofar as it is able and with the support of civil society, to continue promoting, using as a basis the OAS Guide on cooperation with the International Criminal Court, the adoption of national legislation in the area in states that do not yet have it; and, with collaboration from the General Secretariat and the Secretariat for Legal Affairs, to continue providing support for and promoting in the OAS Member States the training of administrative and judicial officials and academics for that purpose, and to report to the States Parties on progress thereon at the next working meeting on the International Criminal Court and to the General Assembly at its forty-first regular session.

12. Also to request the Inter-American Juridical Committee to continue its work of preparing model legislation on implementation of the Rome Statute, in particular regarding the definition of crimes within the jurisdiction of the International Criminal Court, and to present a report on the progress made at the next working meeting on the International Criminal Court.

**II. UPDATE**

**2.1 Situation of the Instruments**

Since the presentation at its last report during the 76<sup>th</sup> regular session of the Inter-American Juridical Committee held in Lima, Peru, the situation of the countries that have ratified the Rome Statute has remained the same, as follows:

The number of countries in the Inter-American System that have already ratified the Rome Statute<sup>8</sup> stands at 25, namely:

Antigua and Barbuda (18 June 2001), Argentina (8 February 2001), Barbados (10 December 2002), Belize (5 April 2000), Bolivia (27 June 2002), Brazil (14 June 2002), Canada (7 July 2002), Colombia (5 August 2002), Costa Rica (7 June 2001), Dominica (12 February 2001), the Dominican Republic (12 May 2005), Ecuador (5 February 2002),

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<sup>8</sup> Following the report made by the rapporteur, Santa Lucía sent the instrument ratifying Rome Statute No. 113, dated 18 August 2010.

Guiana (24 September 2004), Honduras (1 July 2002), Mexico (28 October 2005), Panama (21 March 2002), Paraguay (14 May 2001), Peru (10 November 2001), Saint Kitts and Nevis (22 August 2006), San Vicente and The Grenadines (3 December 2002), Trinidad and Tobago (6 April 1999), Uruguay (28 June 2002), Venezuela (7 June 2000), Surinam (15 July 2008) and Chile (29 June 2009).

The 10 countries of the Inter-American System that have not ratified the Rome Statute are: the Bahamas, Cuba, Haiti, Jamaica, Saint Lucia<sup>9</sup>, United States of America, Grenada, Guatemala, Nicaragua and El Salvador.

#### Ratifications of the APIC

The Agreement on Privileges and Immunities of the IAJC has been ratified by 14 countries of the Inter-American System, namely: Argentina (1 February 2007), Belize (14 September 2005), Bolivia (20 January 2006), Canada (22 June 2004), Ecuador (19 April 2006), Guiana (16 November 2005), Panama (16 August 2004), Paraguay (19 July 2005), Trinidad and Tobago (6 February 2003), Uruguay (1 November 2006), Mexico (27 September 2007), Honduras (1 April 2008), Colombia (15 April 2009) and the Dominican Republic (September 2009).

#### 2.2 Meetings

Following the regular session of the Inter-American Juridical Committee held in Lima, three meetings related to the theme of the International Criminal Court deserve special mention:

##### 2.2.1 Meeting in Kampala of the Revision Conference

From 31 May to 11 June 2010, the first Review Conference of the Rome Statute of the International Criminal Court took place in Kampala, Uganda.

Six resolutions and two declarations were adopted at the meeting:

- RC/Res.1, Complementarity
- RC/Res.2, The impact of the Rome Statute system on victims and affected communities
- RC/Res.3, Strengthening the enforcement of sentences
- RC/Res.4, Article 124
- RC/Res.5, Amendments to Article 8 of the Rome Statute
- RC/Res.6, The crime of aggression

Declarations:

- RC/Decl.1, Declaration of Kampala
- RC/Decl.2, Declaration on cooperation

Offers:

Some American countries (Chile, Colombia, Costa Rica, Peru, Venezuela and Mexico) made offers with regard to the next emission of laws on cooperation, implementation or initiatives toward harmonization, as the case may be.

A complete report on this meeting in Kampala, prepared by the Department of International Law of the Secretariat of Legal Affairs of the OAS can be found in Appendix I of this Report<sup>10</sup>

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<sup>9</sup> Idem.

<sup>10</sup> DDI/Doc.03/10 dated 19 July 2010.

Given their importance, the definition of Crime of Aggression is reproduced in full, together with the new war crimes added to the Statute for the case of armed conflicts that do not have characteristics of international conflict.

#### 2.2.2.1 Crime of Aggression

Amendments to the Rome Statute of the International Criminal Court related to the Crime of Aggression.

##### **Article 8 bis**

##### Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

c) The blockade of the ports or coasts of a State by the armed forces of another State;

d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Emphasis should be made that the International Criminal Court can only exercise its competence with regard to crimes of aggression committed one year after ratification or acceptance of the amendments by thirty Member States and that the Court will exercise its competence on Crimes of Aggression in accordance with this article, on condition that a decision is made after 1 January 2017 by the same majority of Member States required to

approve an amendment to the Statute.<sup>11</sup> Likewise, it is important to underscore that acts of aggression, depending on their characteristics, gravity and scale, become crimes of aggression.

#### 2.2.1.2 War Crimes

##### Amendment to article 8

What follows is a proposed guide of model texts for the crimes contemplated in the Rome Statute, together with the model text on war crimes already presented at the IJC session in Lima, Peru and contained in the Report sent to the Permanent Council on 3 May 2010.

Add the following to item e) of paragraph 2 of article 8:

- 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.

#### 2.2.2 Meeting in Mexico

During the International Conference of National Commissions of International Humanitarian Laws of Latin America and the Caribbean held in Mexico City from 30 June to 2 July 2010 under the auspices of the Secretariat of Foreign Affairs of Mexico and the International Committee of the Red Cross, on the invitation made by the Rapporteur, a report was delivered on the work carried out by the IJC on this theme (see Appendix II).<sup>12</sup>

#### 2.2.3 Meeting in El Salvador

Attending to an invitation made by the President of the Federation of Lawyers' Associations of El Salvador, Dr. Pedro Fausto Arieta, the Rapporteur took part in the event: Convention of Lawyers of El Salvador 2010 held in San Salvador on 22-23 July this year, with the aim of promoting knowledge about the International Criminal Court. The event was also attended by Dr. Miriam Spittler, Legal Councilor of the Deputy Attorney's Office of the International Criminal Court, and Dr. Ana Elizabeth Villalta Vizcarra, member of the Inter-American Juridical Committee.

During the event the Rapporteur addressed the theme: International Crime and International Jurisdiction, while Dr. Spittler spoke on Norms of Competence and Procedure of the International Criminal Court. At the end of the Convention, held in the premises of the Ministry of Foreign Affairs of El Salvador, a round table was held, coordinated by Dr. Ana Elizabeth Villalta and with the participation of the Rapporteur – who addressed in detail the work of the IJC on the matter – and Dr. Spittler – who explained the work of the IPC, followed by an intense exchange of comments, questions and answers on the part the participants. The Rapporteur of the round table was Dr. Luis Lobo Castelar.

#### 2.3 Cooperation project

As the Rapporteur pointed out in previous reports, the document “Strengthening the Cooperation of the States with the International Criminal Court on Matters of Legislation” was approved by the Committee on Evaluating Projects (CEP) on 17 December 2009. The Department of International Law of the Juridical Secretariat of the OAS informed the Inter-

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<sup>11</sup> Art. 15 bis and 15 ter Exercise of competence as regards the Crime of Aggression by referral by a State *proprio motu* and referral by the Security Council.

<sup>12</sup> The presentation was delivered, at the request of the Rapporteur, by Dr. Ana Elizabeth Villalta Vizcarra, member of the IJC, as he was unable to attend.

American Juridical Committee that there is no advance to report on the question of financing the project (August 2010), therefore it is necessary to continue to intensify efforts to procure funds to allow compliance with the steps of the project (seminars and courses).

### III. PRELIMINARY DRAFT OF MODEL TEXTS

What follows is a proposed preliminary draft of model texts for the crimes contemplated in the Rome Statute, together with the model text on war crimes already presented preliminary since the IJC session in Lima, Peru and contained in the Report sent to the Permanent Council on 3 May 2010.

#### 3.1 War Crimes

In the “Report on progress on encouraging adoption of a national legislation based on the Guide of Principles of the Inter-American Juridical Committee and training employees of Member States of the OAS to cooperate with the International Criminal Court as well as to prepare model laws for the crimes provided for in the Rome Statute”<sup>13</sup>, the Rapporteur referred to the theme of the model of articles on War Crimes and presented a list of 32 articles, explaining that it was not his *intention to structure his own model legislation when there are already substantial advances in the Rapporteur’s work for the themes of the DIH*<sup>14</sup> and the intense work being carried out by the International Committee of the Red Cross with different American countries as well as in the studies carried out by this Committee within this legislative framework. *On the contrary, it is in his interest to benefit from these advances, and to make every possible effort to enhance them.*<sup>15</sup> *As determined by the Rapporteur, the report informed that the model laws should take into account the following instruments, among others:*

- a) Four Geneva Conventions, articles 50, 51, 130 y 147, respectively.
- b) Four Geneva Conventions, articles 49, 51, 129 and 146, respectively.
- c) III Geneva Convention, article 130.
- d) The 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment, article 1.
- e) Additional Protocol I, articles 11, 51(5)(a), 75, 85(3), 85(3)(a), 85(3)(b), 85(3)(c), 85(3)(d), 85(3)(e), 85(3)(f), 85(4)(a), 85(4)(b), 85(4)(c), 85(4)(d), 85(4)(e), 86, 86(2) y 87.
- f) Additional Protocol II, article 6.
- g) Protocol II of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, article 15.
- h) The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.
- i) The United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, (Geneva, 10 October 1980).

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<sup>13</sup> OAS/Ser.Q CJI/doc.352/10 rev.1

<sup>14</sup> See, for example, **International Criminal Courts**. OAS Ser. Q CJI/doc.349/10 and **War Crimes in International Humanitarian Law**. OAS Ser.Q CJI/doc.328/O9 rev.1.

<sup>15</sup> See especially the working document **Repression of War Crimes in the National Legislation of the American States**. International Committee of the Red Cross. Advisory Service. Latin American Unit. Also, **War crimes according to the Rome Statute of the International Criminal Court and their basis in International Humanitarian Law**. Comparative Chart. Advisory Service in International Humanitarian Law, ICRC.

- j) Protocols I, II and IV of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects.
- k) Facultative Protocol of 2000 of the Convention on the Rights of the Child, articles 1 and 2.
- l) The 1994 Inter-American Convention on Forced Disappearance of Persons.
- m) Also to be taken into account are the elements of the crimes, in respect to war crimes.

In earlier reports the Rapporteur expressed his conviction that the model to be offered to countries should contain the criminal types of both the Rome Statute and the Geneva Conventions of 1949 and in particular Protocol I, taking into consideration the differences between them in order to obtain the highest possible standard. The States must bear in mind the crimes against administration of justice set forth in Article 70 of the Rome Statute.

As mentioned above, after the report made by the Rapporteur in Lima, the Revision Conference approved three additions to article 8 in the form of Amendments:

- 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.<sup>16</sup>

Such crimes already figure in item b) of paragraph 2 of article 8 as grave violations of the laws and customs applicable to international armed conflicts. What is done now is to incorporate them, but this time in the context of an armed conflict that has no international characteristics and has been related to it.

This double application for these war crimes had already been fully contemplated by the Rapporteur in his earlier Report, and his preliminary proposal of draft model texts applied indistinctly to both situations (international armed conflicts and armed conflicts not of an International nature), and consequently his position was fully validated in Kampala.

Presented below is the preliminary draft of the model texts with some small alterations<sup>17</sup>:

**Article 1. (Willful killing)** Whoever, during an armed conflict, willfully kills a person protected by International Humanitarian Law,<sup>18</sup> will be punished with ...

**Article 2. (Torture and inhuman treatment)** Whoever, during an armed conflict, tortures, treats cruelly or inhumanely, affects seriously the physical integrity or health, or

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<sup>16</sup> In the case of the first two, grave violations of the laws and customs applicable to armed conflicts that lack international characteristics, in accordance with common International Law. In the case of the third, this also constitutes a grave violation of the laws and customs applicable to armed conflicts that lack international characteristics.

<sup>17</sup> From article 18 onwards of the preliminary draft, the phrase implicit in the rapporteur's earlier report "on the occasion of armed conflict" was added.

<sup>18</sup> In general, what is understood by "a person protected by the IHL" are those protected by the Conventions of Geneva and their Additional Protocols. Legislations can incorporate an article to identify such people, as Nicaragua did on including the wounded, sick or shipwrecked, sanitary or religious personnel, combatants who have laid down their arms, prisoners of war and people detained during armed conflict, civilians and the civilian population, in accordance with the ratified instruments (Art. 489). Colombia did the same in Law 599 dated 24 July 2000.

otherwise causes great pain or suffering to a person protected by International Humanitarian Law, will be punished with ...

**Article 3. (Mutilation and medical experiments)** Whoever, during an armed conflict, submits a person protected by International Humanitarian Law to physical mutilation or medical or scientific experiments of any kind or extraction of tissues or organs which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons, will be punished with ...

**Article 4. (Sexual crimes)** Whoever, during an armed conflict, commits acts of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence against a person protected by International Humanitarian Law, will be punished with...

**Article 5. (Apartheid)** Whoever, during an armed conflict, commits against a person protected by International Humanitarian Law an inhuman act with the intention of maintaining an institutionalized regime of oppression and systematic domination of one racial group over one or more racial groups, will be punished with...

**Article 6. (Racial discrimination)**<sup>19</sup>. Whoever, during an armed conflict, carries out practices of racial segregation against any protected person, will be punished with...

**Article 7. (Outrages against personal dignity)** Whoever, during an armed conflict, commits outrage against the personal dignity of a person protected by International Humanitarian Law, especially by means of humiliating or degrading treatment, will be punished with...

**Article 8. (Taking of hostages)** Whoever, during an armed conflict, takes as a hostage a person protected by International Humanitarian Law, will be punished with...

**Article 9. (Unlawful detention)** Whoever, during an armed conflict, illegally deprives a person protected by International Humanitarian Law of his or her freedom, will be punished with...

**Article 10. (Delaying repatriation)**<sup>20</sup> Whoever, during an armed conflict, unjustifiably delays repatriation of prisoners of war or civil persons, will be punished with...

**Article 11. (Denial of judicial guarantees)** Whoever, during an armed conflict, deprives a person protected by International Humanitarian Law of his or her right to fair and regular trial, will be punished with...

**Article 12. (Obligation to serve in enemy forces)** Whoever obliges a prisoner of war or any other person protected by International Humanitarian Law to serve in the forces of a party engaged in armed conflict with the party on which such persons depend, will be punished with...

**Article 13. (Looting)**<sup>21</sup>. Whoever, during an armed conflict, dispossesses a cadaver or protected person of his or her effects will be punished with...

**Article 14. (Failing to lend first-aid measures and humanitarian assistance)**<sup>22</sup>. Whoever, on the occasion of an armed conflict and being obliged to lend humanitarian help and assistance to protected persons, and fails to do so, will be punished with...

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<sup>19</sup> Text adopted from Art. 137 of the Colombian Penal Code. Penal Code of Nicaragua, Art. 491.

<sup>20</sup> This comes from Art. 85 (4) (b) of Additional Protocol I.

<sup>21</sup> Text adopted from Art. 151 of the Colombian Penal Code.

<sup>22</sup> Text adopted from Art. 152 of the Colombian Penal Code. Penal Code of Nicaragua, Art. 506.

**Article 15. (Causing obstacles against sanitary and humanitarian tasks)<sup>23</sup>.** Whoever, during an armed conflict, causes obstacles against or impedes the medical, sanitary or first-aid personnel or the civil population to carry out the sanitary and humanitarian tasks that in accordance with the norms of International Humanitarian Law can and should be carried out, will be punished with...

**Article 16. (Abolishing rights)** Whoever, during an armed conflict, declares abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party protected by International Humanitarian Law, will be punished with...

**Article 17. (Deportation or illegal transfer)** Whoever, during an armed conflict, illegally deports or transfers a person protected by International Humanitarian Law, in particular when the transfer is to a territory occupied by the population of the occupying power, deports or transfers inside or outside the territory occupied all or parts of the population of this territory, or orders the displacement of the civil population unless this is required for the safety of the civilians involved or for imperative military reasons, will be punished with...

**Article 18. (Prohibited attacks)** Whoever, during an armed conflict, attacks the civilian population or civilian persons or objects, or launches an indiscriminate attack in the knowledge that such attack will cause loss of life, injuries to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive<sup>24</sup>, or attacks cities or villages which are undefended,<sup>25</sup> or dwellings or buildings which are undefended and which are not military objectives, or attacks a person in the knowledge that he has laid down his arms, or attacks buildings dedicated to religion, education, art, science or charitable purposes, as well as places where the sick and wounded are gathered, provided they are not military objectives, will be punished with...

**Article 19. (Attacking dangerous forces)<sup>26</sup>.** Whoever, during an armed conflict, attacks works or installations that contain dangerous forces in the knowledge that such attack will cause deaths or wounds to among the civilian population or possibly excessive damage to civilian objects, will be punished with...

**Article 20. (Attacking demilitarized zones)<sup>27</sup>.** Whoever, during an armed conflict, attacks undefended sites or demilitarized zones, will be punished with...

**Article 21. (Attacking objects and installations of a sanitary nature)<sup>28</sup>.** Whoever, during an armed conflict, attacks or destroys ambulances or sanitary means of transportation, field or permanent hospitals, depots for first-aid material, sanitary convoys, goods meant for assisting and aiding protected persons, sanitary and demilitarized zones or objects and installations of a sanitary nature duly marked with the conventional signs of the Red Cross or Red Crescent, will be punished with...

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<sup>23</sup> Text adopted from Art. 153 of the Colombian Penal Code.

<sup>24</sup> The Rome Statute refers to “manifestly” excessive damage with regard to military advantage. Since these qualitative conditions are not found in article 85 (3) (b) of Additional Protocol I, the rapporteur accordingly opts for the more rigorous criminal type.

<sup>25</sup> The Rome Statute adds “and that are not military objectives”. However, Art. 51 (5) (a) of Additional Protocol I prohibits indiscriminate attacks.

<sup>26</sup> In this case the text was taken from Art. 14 in order to make clearer and briefer penal type.

<sup>27</sup> In this case the text was taken from Art. 14 in order to make clearer and briefer penal type. The Penal Code of Nicaragua defines demilitarized zones as those granted this status by verbal or written agreement, Art. 513.

<sup>28</sup> Text adopted from Art. 156 of the Colombian Penal Code.



**Article 22. (Attacking or illicitly using cultural objects and places of devotion)**<sup>29</sup>. Whoever, during an armed conflict, attacks and destroys historical monuments, works of art, educational installations or places of devotion that make up the cultural heritage of peoples, or uses such goods to support military efforts, will be punished with...

**Article 23. (Attacking humanitarian missions)**<sup>30</sup>. Whoever, during an armed conflict, attacks personnel, installations, material, units or vehicles participating in a mission of preservation of the peace or humanitarian assistance in accordance with the Charter of the United Nations and entitled to the protection granted to civilians or civilian objects, will be punished with...

**Article 24. (Prohibited arms)** Whoever, during an armed conflict, employs poison or poisoned weapons, or asphyxiating, poisonous or other gases or any analogous liquid, material or devices, or bullets that expand or flatten easily inside the human body, such as hard-envelope bullets that do not cover the core completely or are pierced with incisions, or any other arms, projectiles, materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which have indiscriminate effects in violation of international law, will be punished with...

**Article 25. (Causing hunger)**<sup>31</sup> Whoever, during an armed conflict, intentionally uses starvation of the civilian population as a method of warfare by depriving them of the indispensable means for their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions, will be punished with...

**Article 26. (Treachery)** Whoever, during an armed conflict, kills or wounds treacherously a combatant adversary, will be punished with...

**Article 27. (Improper use of signs)** Whoever, during an armed conflict, uses improperly a flag of truce, the national flag or the military insignia or uniform of the enemy or the United Nations, as well as the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury, will be punished with...

**Article 28. (No quarter given)** Whoever, during an armed conflict, declares that no quarter shall be given or no survivors remain,<sup>32</sup> will be punished with...

**Article 29. (Human shields)**<sup>33</sup> Whoever, during an armed conflict, uses the presence of a person protected by International Humanitarian Law to render certain areas or military forces immune from military operations, will be punished with...

**Article 30. (Children)** Whoever, during an armed conflict, conscripts or enlists children under the age of 18 years<sup>34</sup> into the armed forces or groups or using them to participate actively in hostilities, will be punished with...

**Article 31. (Destruction and appropriation of property)** Whoever, during an armed conflict, destroys or confiscates enemy property not justified by military necessity, or loots a city or village, even when taken by storm, will be punished with...

**Article 32. (Violating a truce)**<sup>35</sup> Whoever, during an armed conflict, violates a truce or agreed armistice, will be punished by .....

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<sup>29</sup> Text adopted from Art. 157 of the Colombian Penal Code.

<sup>30</sup> Text adopted from Art. 155 of the Colombian Penal Code.

<sup>31</sup> Argentina also makes it a war crime in conflicts of any nature (Law 26.200).

<sup>32</sup> Code of Panama. Law n. 14, Art. 441.

<sup>33</sup> The rapporteur fails to see why this crime is not considered of the same nature as armed conflict, since people are equally affected in both situations.

<sup>34</sup> The 2000 Facultative Protocol to the Convention on Children's Rights establishes the age of 18 years, which is why the Rapporteur preferred to raise the minimum age from 15 to 18. The Argentinean law does the same by implementing the Rome Statute (Law 26.200).

### 3.2 Genocide

**Article 1.- Genocide**<sup>36</sup>. Whoever, with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, because of their belonging to same, causes:

- 1 - The killing of members of the group will be punished with...
- 2 - Serious bodily or mental harm to members of the group will be punished with...
- 3 – Forced pregnancy of female members of the group will be punished with...
- 4 – Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part will be punished with...
- 5 – Imposing measures intended to prevent births within the group will be punished with....
- 6 – Forcibly transferring children of the group to another group will be punished with....

**Article 2. Apology for genocide**<sup>37</sup>. Whoever by any means makes a direct, public instigation to commit or justify conduct that constitutes genocide, or intends to reinstall regimes that support such conduct will be punished with....

### 3.3 Crimes of lese-humanity<sup>38-39</sup>

**Article 1. General provision.** The types contemplated in this section will sanction crimes of lese-humanity that are committed in the framework of a generalized<sup>40</sup> or systematic<sup>41</sup> attack against the civilian population on the part of a State or organization where the author is aware of or intends his conduct to be part of this attack<sup>42</sup>

**Article 2. Homicide.** Whoever kills a person will be punished with...

<sup>35</sup> Penal Code of Nicaragua, Art. 499.

<sup>36</sup> The source for this norm is Art. 101 of the Colombian Penal Code. It adds as a cause: provoking forced pregnancy as a form of genocide. In respect to the groups liable to protection, there exists a tendency to aggregate social and political groups.

<sup>37</sup> The basis for this norm is Art. 25, 3, e) of the Rome Statute. Some Latin America Codes include it (the case of Colombia and the Argentinean and Uruguayan implementation laws, as well as the draft implementation in Ecuador).

<sup>38</sup> The model observed has been the Rome Statute, the elements of the Crimes of Lese-Humanity, the International Penal Code of Germany and some provisions of the draft implementation of Peru, as well as different conventions, including the Convention on forced disappearance of persons.

<sup>39</sup> One point that should be borne in mind is whether one wants to separate some crimes of lese-humanity that can only be committed during a generalized or systematic attack against the civilian population (murder, extermination, deportation, crimes of sexual violence, persecution and apartheid) from those that can be either part of a generalized attack or crimes of lese-humanity, even when committed outside this framework (slavery, torture, arbitrary detention and forced disappearance of persons). In the latter case, when these are committed as part of a generalized or systematic attack, the punishment would increase. The benefit of this last option is that one could codify simultaneously the obligations of States on matters of human rights and international criminal law, but one would be going beyond what is strictly set forth in Art. 7 of the Rome Statute. By way of reference, see the draft law of crimes of Peru and the implementation law of Uruguay.

<sup>40</sup> Here, *generalized* has the meaning of the cumulative effect of a series of inhumane acts or the singular effect of an act of this nature committed with extraordinary dimensions (Criminal Tribunal for former Yugoslavia. The case of Kordic and Cerkez, paragraph 179).

<sup>41</sup> Here, *systematic* is understood as the organization of a series of acts that follow a regular pattern based on a common plan or policy involving the use of public or private resources (Criminal Tribunal for Ruanda. The case of Musema, paragraph 24).

<sup>42</sup> This last phrase is found in Art. 7, numeral 3 of the Elements of Crimes.

**Article 3. Extermination.** Whoever submits a population or part of a population to conditions of life designed to cause their physical destruction, in whole or in part, will be punished with...

**Article 4. Slavery.** Whoever practices slavery or exercises attributes of property rights over a person, especially women or children, will be punished with...

**Article 5. Arbitrary detention.** Whoever deprives the personal freedom of a person in violation of the fundamental norms of International Law will be punished with...

**Article 6. Deportation or forced transfer of the population.** Whoever forcibly deports or transfers a person who finds himself or herself legally in a territory, displacing them to another territory by means of expulsion or other coercive measures in violation of the rules set forth in International Law will be punished with...

**Article 7. Torture.** Whoever willfully causes physical or mental pain to a person under his custody or control that are not merely the result of the sanctions permitted under International Law, or submits that person to cruel, inhuman or degrading treatment, will be punished with...

**Article 8. Sexual crimes.** Whoever commits acts of rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence will be punished with...

**Article 9. Persecution.** Whoever persecutes members of a group or community whose identity is based on political, racial, national, ethnic, cultural, religious, gender or other motives recognized as unacceptable by International Law will be punished with...

**Article 10. Forced disappearance of persons.** Whoever forcibly deprives a person of his or her freedom, whatever this form may take<sup>43</sup>, followed by refusal to communicate or remain silent about the detention, destination or whereabouts of that person, with the intention of keeping him or her removed from the protection of the law, will be punished with...

**Article 11. Apartheid.** Whoever commits against a person any of the inhuman acts described herein with the intention of maintaining an institutionalized regime of oppression and systematic domination of a racial or ethnic group over one or more racial or ethnic groups, will be punished with...

Annex

OEA/Sec.Gral.  
DDI/doc.03/10  
19 de julio 2010  
Original: Español

## **CORTE PENAL INTERNACIONAL: RESULTADOS DE LA CONFERENCIA DE REVISIÓN DEL ESTATUTO DE ROMA**

Informe Ejecutivo

*Generalidades*

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<sup>43</sup> The formulation of the Rome Statute refers expressly to apprehending, detention or sequestering; however, the formula of the Inter-American Convention on forced disappearance of persons is broader: “whatever the form that this takes” and omits the phrase “for a prolonged period”, which is restrictive.

1. Entre el 31 de mayo y el 11 de junio de 2010 se llevó a cabo en Kampala, Uganda, la primera Conferencia de Revisión del Estatuto de Roma de la Corte Penal Internacional [“Estatuto”, “CR” y “CPI”, respectivamente]. El presente documento contiene una breve síntesis de los principales resultados alcanzados en esta reunión.

*Documentos aprobados*

2. La Conferencia adoptó seis resoluciones y dos declaraciones (anexos al presente Informe), a saber:

Resoluciones:

- RC/Res.1, Complementariedad.
- RC/Res.2, Impacto del sistema del Estatuto de Roma sobre las víctimas y las comunidades afectadas.
- RC/Res.3, El fortalecimiento del cumplimiento de las penas
- RC/Res.4, El artículo 124
- RC/Res.5, Enmiendas al artículo 8 del Estatuto de Roma
- RC/Res.6, El crimen de agresión

Declaraciones:

- RC/Decl.1, Declaración de Kampala
- RC/Decl.2, Declaración sobre la cooperación

3. El tema más complejo de los que se ocupó la CR fue sin duda el de la enmienda al Estatuto con el fin de incorporar el crimen de agresión como crimen de competencia de la CPI (RC/Res. 6). Adicionalmente, se aprobó una enmienda al Artículo 8, sobre crímenes de guerra (RC/Res. 5) y se examinó la cuestión del Artículo 124 (disposición transitoria, RC/Res. 4). Otros temas considerados por la Conferencia como parte del ejercicio de balance del funcionamiento de la Corte incluyen los de la complementariedad (RC/Res.1), la cooperación (RC/Decl.2) y el impacto de la Corte en las víctimas y las comunidades afectadas (RC/Res.2), así como la relación entre los conceptos de justicia y paz y el cumplimiento de las penas (RC/Res.3).

*Agresión – Definición del crimen*

4. En relación con el crimen de agresión, el mandato de la CR era doble, puesto que contemplaba tanto la aprobación de una definición del crimen, para efectos del procesamiento de individuos por la CPI, como la determinación de las condiciones para el ejercicio de la competencia de la Corte, las cuales, por mandato del propio Estatuto, deben ser compatibles con la Carta de las Naciones Unidas (Artículo 5 (2)).
5. Con respecto a la definición del crimen, la CR adoptó una disposición mediante la cual se incorpora un nuevo Artículo *8bis* al Estatuto de Roma, en el cual se dispone que, a los efectos del Estatuto, una persona comete un “crimen de agresión” cuando, estando en condiciones de controlar o dirigir efectivamente la acción política o militar de un Estado, dicha persona planifica, prepara, inicia o realiza un acto de agresión que por sus características, gravedad y escala constituya una violación manifiesta de la Carta de las Naciones Unidas (RC/Res.6, Anexo I, punto 2).
6. En esta definición básica del *crimen de agresión* se incorporan los siguientes conceptos:
  - i) La noción de que, para efectos penales, la agresión constituye lo que se denomina un “crimen de liderazgo”, es decir que únicamente puede acusarse del mismo a personas que estén en condiciones de controlar o dirigir efectivamente la acción política o militar de un Estado.

- ii) La noción (consecuencia de la anterior) de que el crimen de agresión (por un individuo) está indisolublemente ligado a un acto de agresión (por un Estado): quien comete el crimen es la persona que “planifica, prepara, inicia o realiza” el acto de agresión que se describe en la definición.
  - iii) La noción de que no todo acto de agresión da lugar a un crimen de agresión, ya que debe satisfacerse un umbral de gravedad muy específico: el acto en cuestión debe constituir, por sus características, gravedad y escala, una “violación manifiesta” de la Carta.
7. Además, en el párrafo 2 del nuevo Artículo 8bis se consagra, por vía ejemplificativa, una definición complementaria del *acto de agresión* que se menciona en el párrafo 1. De un lado, se consagra allí en forma general que  

A los efectos del párrafo 1, por “acto de agresión” se entenderá el uso de la fuerza armada por un Estado contra la soberanía, la integridad territorial o la independencia política de otro Estado, o en cualquier otra forma incompatible con la Carta de las Naciones Unidas.
  8. Del otro lado, se incluye un listado de actos (7 en total) y se dispone que cualquiera de ellos será caracterizado como un acto de agresión “independientemente de que haya o no declaración de guerra”. Este listado y el lenguaje correspondiente a cada acto fueron extraídos de la Resolución 3314 (XXIX) de la Asamblea General de las Naciones Unidas, de 14 de diciembre de 1974, o “Definición de la Agresión”.
  9. Es importante resaltar que estos criterios son pertinentes únicamente respecto de la determinación de que se ha cometido un acto de agresión por parte de un Estado y en contra de otro y no tienen por lo tanto ninguna connotación penal. En otras palabras, los únicos entes que habrán de considerar si una actuación determinada por parte de un Estado se identifica con una de las conductas descritas en el párrafo 2 del nuevo Artículo 8bis son el Consejo de Seguridad<sup>44</sup> o la División de Cuestiones Preliminares, bajo uno de los sistemas de procesamiento previstos en los nuevos Artículos 15bis y 15ter (Ver párrafos 11-14, *infra*). Bajo ambos sistemas, al Fiscal de la CPI únicamente le corresponderá evaluar si, una vez se ha determinado por otros medios que un Estado ha cometido un acto de agresión, el crimen descrito en el párrafo 1 del Artículo 8bis ha sido cometido por determinado individuo o individuos y, en caso afirmativo, iniciar los correspondientes procesamientos penales.
  10. Estos y otros aspectos que se derivan de la definición adoptada son desarrollados además en unos “Elementos de los Crímenes” que también aprobó la CR (RC/Res.6, Anexo II). Adicionalmente, es importante tener en cuenta que la Conferencia también adoptó dos “Entendimientos sobre las Enmiendas Relativas al Crimen de Agresión” que se refieren directamente a la definición descrita. Ellos son los siguientes:

#### Entendimiento 6

Se entiende que la agresión es la forma más grave y peligrosa del uso ilegal de la fuerza, y que una determinación sobre si un acto de agresión ha sido cometido requiere el examen de todas las circunstancias de cada caso particular, incluyendo la gravedad de los actos correspondientes y de sus consecuencias, de conformidad con la Carta de las Naciones Unidas.

#### Entendimiento 7

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<sup>44</sup> Conviene recordar que el propósito último de la Resolución 3314 era justamente el de recomendar al Consejo de Seguridad que tuviera en cuenta esa definición “como orientación para determinar, de conformidad con la Carta, la existencia de un acto de agresión” (Párrafo operativo 4).

Se entiende que al determinar si un acto de agresión constituye o no una violación manifiesta de la Carta de las Naciones Unidas, los tres elementos de características, gravedad y escala deben tener la importancia suficiente para justificar una determinación de violación “manifiesta”. Ninguno de los elementos puede bastar por sí solo para satisfacer el criterio de violación manifiesta.<sup>45</sup>

*Agresión – Activación de la competencia*

11. De otro lado, la determinación de las condiciones para activar la competencia de la Corte con respecto al crimen de agresión fue objeto de una solución considerablemente más compleja. En primer lugar, se adoptaron dos enmiendas separadas al Artículo 15 del Estatuto, que se ocupa de las facultades del Fiscal, a saber, un nuevo Artículo 15*bis*, que se ocupará de aquellos casos en los que un Estado parte remite a la CPI una situación en la que se parezca haber cometido un crimen de agresión o en los que el Fiscal, *proprio motu*, inicia una investigación en el mismo sentido; y un nuevo Artículo 15*ter*, que regula la situación en la cual esta remisión es hecha por el Consejo de Seguridad. La diferencia fundamental entre estos dos regímenes radica en que en el segundo caso no se exige el consentimiento del Estado involucrado, lo cual es consonante tanto con la Carta como con el propio Estatuto de Roma.<sup>46</sup>
12. En todo caso, estos dos sistemas jurisdiccionales tienen dos rasgos comunes, a saber, (uno) que la Corte únicamente podrá ejercer su competencia respecto de crímenes de agresión que sean cometidos un año después de que las enmiendas sean ratificadas por 30 Estados partes; y (dos) que el ejercicio de esa competencia quedará sujeto a que los Estados Partes adopten una decisión al respecto después del 1 de enero de 2017.<sup>47</sup>
13. En el nuevo Artículo 15*bis* se consagran las condiciones para que la Corte pueda ejercer competencia con respecto al crimen de agresión cuando el asunto no es llevado ante ella por el Consejo de Seguridad (RC/Res.6, Anexo I, punto 3). En primer lugar, se consagra un sistema de exclusión (“opting-out”) con respecto a la aceptación de la competencia de la Corte, consistente en que el Estado parte en el Estatuto que no esté dispuesto a aceptar que la CPI ejerza competencia respecto de un crimen de agresión resultante de un eventual acto de agresión cometido por ese Estado tiene la posibilidad de declarar de antemano que no acepta esa competencia. Si un Estado parte no hace esta declaración, se entenderá que acepta la competencia de la Corte respecto del crimen de agresión. En segundo lugar, se consagra una garantía especial respecto de Estados no partes en el Estatuto: la Corte no ejercerá su competencia sobre el crimen de agresión cuando éste sea cometido por los nacionales de ese Estado o en su territorio. Debe subrayarse que esta disposición individualiza claramente el crimen de agresión respecto de los restantes crímenes de competencia de la Corte, a ninguno de los cuales se aplica esta restricción.
14. El problema más complejo que tuvo que considerar la CR se refería a las competencias del Consejo de Seguridad en materia de agresión bajo la Carta de las Naciones Unidas. La enmienda adoptada como Artículo 15*ter* parte de la base de que si se comete un crimen resultante de un acto de agresión y el Consejo de Seguridad hace la determinación prevista en el Artículo 39 de la Carta, el Fiscal podrá iniciar la

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<sup>45</sup> Los Entendimientos 4 y 5 también se refieren a la definición del crimen de agresión, pero esta vez con respecto a la falta de efectos de las enmiendas en el plano del derecho internacional general y al ejercicio de jurisdicción nacional respecto del mismo.

<sup>46</sup> Esto queda precisado también en el Entendimiento 2.

<sup>47</sup> Estas condiciones son acumulativas, tal como se precisa en los Entendimientos 1 y 3.

investigación respectiva. Pero cuando no se realiza esta determinación y transcurren 6 meses desde la fecha en la que el Fiscal ha notificado al Secretario General que ha llegado a la conclusión de que existe fundamento razonable para iniciar una investigación por este crimen, el nuevo Artículo 15*bis* autoriza a este funcionario a iniciar los procedimientos, aunque sólo si la División de Cuestiones Preliminares emite una autorización a este respecto. Se añade además que esto procede únicamente si el Consejo mismo no decide lo contrario de conformidad con las facultades que ya le confiere el Artículo 16 del Estatuto.

15. Finalmente, en la Resolución adoptada por la Conferencia relativa a las enmiendas a los artículos 5, 8 y 15 del Estatuto se establece con claridad que ellas “estarán sujetas a ratificación o aceptación y entrarán en vigor de conformidad con lo dispuesto en el párrafo 5 del artículo 121 del Estatuto”. En el mismo documento se señala además que la declaración de exclusión (“opting-out”) que se menciona en el Artículo 15*bis* podrá ser depositada por cualquier Estado parte “antes de la ratificación o aceptación”.

*Crímenes de guerra – Enmienda al Artículo 8 del Estatuto*

16. La CR aprobó también una enmienda al Artículo 8 del Estatuto, en el cual se define la categoría penal de los crímenes de guerra (RC/Res.5, Anexo I). La enmienda afecta el apartado e) del párrafo 2 del Artículo 8, en el cual se enumeran ciertas conductas como constitutivas de “violaciones graves de las leyes y los usos aplicables en los conflictos armados que no sean de índole internacional, dentro del marco establecido de derecho internacional”. La enmienda consiste en añadir a dicho apartado tres nuevas conductas que en adelante se considerarán como crímenes de guerra para los fines del Estatuto cuando sean cometidos en el marco de este tipo de conflictos. Ellas son:

- Emplear veneno o armas envenenadas (nuevo literal xiii);
- Emplear gases asfixiantes, tóxicos o similares o cualquier líquido, material o dispositivo análogos (nuevo literal xiv);
- Emplear balas que se ensanchan o aplastan fácilmente en el cuerpo humano, como balas de camisa dura que no recubra totalmente la parte interior o que tenga incisiones (nuevo literal xv).

Se aprobó también, en calidad de Anexo II a esta enmienda, los “Elementos de los Crímenes” correspondientes a estos nuevos delitos.

17. Cabe registrar que estas conductas ya constituían crímenes de competencia de la Corte en virtud del apartado b) del párrafo 2 del artículo 8, en tanto que violaciones graves de las leyes y costumbres aplicables a los conflictos armados internacionales. El propósito de la enmienda es el de extender dicha aplicación a los conflictos no internacionales, bajo la convicción –expresada en los considerandos de la resolución respectiva– de que, a la luz del derecho internacional consuetudinario, esas conductas constituyen violaciones graves de las denominadas “leyes y costumbres” aplicables a esos conflictos.

*El Artículo 124*

18. En el Artículo 124 del Estatuto, titulado “Disposición de transición” se consagró la posibilidad de que un Estado al hacerse parte declarara que no aceptaría la competencia respecto de crímenes de guerra “cuando se denuncie la comisión de uno de esos crímenes por sus nacionales o en su territorio”. Como en la misma

disposición se establecía que lo dispuesto en ese artículo sería reconsiderado en la primera Conferencia de Revisión del Estatuto, durante un tiempo esta consideró la posibilidad de suprimir este artículo, teniendo en cuenta que tan solo dos Estados parte se han acogido a esta salvaguardia.<sup>48</sup>

19. Sin embargo, la CR decidió finalmente mantener esta disposición en el cuerpo del Estatuto, en el entendido de que el tema será revisado nuevamente durante el 14 período de sesiones de la Asamblea de Estados partes, que se llevará a cabo en 2015 (RC/Res.4).

*Ejercicio de balance de la justicia penal internacional (“Stocktaking”)*

20. Finalmente, la CR realizó un ejercicio de balance de la justicia penal internacional hasta la fecha y produjo varias decisiones en las cuales se reafirman las obligaciones derivadas del Estatuto de Roma, se expresa un compromiso claro de los Estados participantes en cuanto a seguir impulsando el desarrollo de la justicia penal internacional y se identifican unas áreas en las cuales se requiere una acción concertada de parte de los Estados y la Corte misma. Estas decisiones se refieren a aspectos de gran importancia, tales como la complementariedad (RC/Res.1); la cooperación de los Estados con la Corte (RC/Decl.2); el impacto de la Corte en las víctimas y las comunidades afectadas (RC/Res.2); y justicia y paz. De otra parte se adoptó una resolución sobre el cumplimiento de las penas (RC/Res.3).
21. la Conferencia adoptó también la “Declaración de Kampala”, en la cual se recogen compromisos programáticos en todas estas áreas. En forma significativa, la CR decidió designar el día 17 de julio, día de la aprobación del Estatuto de Roma en 1998, como “Día de la Justicia Penal Internacional”.

*Evaluación preliminar*

22. En términos generales, puede decirse que desde el punto de vista jurídico la CR fue exitosa, ya que logró alcanzar consenso en torno a una definición del crimen de agresión que tiene buenas posibilidades de ser aceptada por un elevado número de los Estados partes en el Estatuto. También se obtuvo acuerdo general en cuanto a la determinación de las condiciones para el ejercicio de la competencia sobre este crimen y, aunque la solución alcanzada a este respecto no está exenta de dificultades, parece representar un paquete aceptable para un buen número de Estados. En la medida en que un componente esencial de este paquete está representado por una garantía específica que protege a Estados no partes en el Estatuto contra procesamientos relativos al crimen de agresión que los puedan afectar, es posible también anticipar desarrollos positivos con respecto a la actitud de dichos Estados frente al Estatuto, lo cual puede constituir un logro significativo para la Corte. Sin embargo, la activación definitiva de esta competencia fue aplazada por un plazo mínimo de siete años, cuando los Estados partes adopten una decisión después del 1 de enero de 2017.
23. Con respecto a los crímenes de guerra, que es probablemente la categoría de conductas punibles que presenta mayores dificultades para algunos Estados, se decidió mantener la cláusula de salvaguardia contenida en el Artículo 124, con el compromiso de revisar nuevamente el tema en el año 2015. Como resultado de esto, aquellos Estados que decidan vincularse al Estatuto en los próximos años podrán todavía, si lo desean, beneficiarse de esa salvaguardia y exceptuar la competencia de la Corte sobre crímenes de guerra que los afecten por un período de 7 años. También se amplió el catálogo de crímenes de guerra que se cometen en el marco de conflictos

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<sup>48</sup> Francia y Colombia.



armados sin carácter internacional, en lo que puede interpretarse como un desarrollo positivo del derecho internacional humanitario de índole convencional.

24. Finalmente, un aspecto interesante es que la CR no tomó ninguna decisión con respecto a la ampliación del catálogo de crímenes de competencia de la CPI. Debe recordarse que mediante una Resolución aprobada por la Conferencia de Roma se recomendó que la CR examinara los crímenes de terrorismo y los relacionados con el tráfico de drogas “con miras a llegar a una definición aceptable y a que queden comprendidos en la lista de crímenes de la competencia de la Corte”<sup>49</sup>. La CR no acogió esta recomendación y no se ocupó de esta cuestión.<sup>50</sup>

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Anexo: Resoluciones y Declaraciones aprobadas por la Conferencia de Revisión

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<sup>49</sup> Resolución E de la Conferencia de Roma.

<sup>50</sup> Esto se hizo de conformidad con una decisión tomada durante la Asamblea de Estados Partes celebrada en La Haya en diciembre de 2009, consistente en diferir la consideración de otros delitos para ser incluidos dentro de la competencia de la Corte a la próxima Asamblea, la cual se llevará cabo a finales de 2010. Hay varias propuestas que serán consideradas en esa oportunidad.