Annexes

Annex I

Report of the Credentials Committee

Chairperson: H.E. Mr. Pieter de Savornin Lohman (Netherlands)

1. At its first plenary meeting, on 31 May 2010, the Review Conference of the Rome Statute of the International Criminal Court, in accordance with rule 14 of the Rules of Procedure of the Review Conferences (document RC/3 adopted on 31 May 2010), appointed a Credentials Committee, consisting of the following States Parties: Costa Rica, Estonia, Ireland, Lesotho, Netherlands, Republic of Korea, Serbia, Suriname and Uganda.

2. The Credentials Committee held one meeting, on 10 June 2010.

3. At its meeting on 10 June 2010, the Committee had before it a memorandum by the Secretariat, dated 10 June 2010, concerning the credentials of representatives of States Parties to the Rome Statute of the International Criminal Court to the Review Conference. The Chairman of the Committee updated the information contained therein.

4. As noted in paragraph 2.1. of the memorandum, formal credentials of representatives to the Review Conference, in the form required by rule 13 of the Rules of Procedure, had been received as at the time of the meeting of the Credentials Committee from the following 72 States Parties:

> Albania, Argentina, Australia, Austria, Belgium, Bolivia (Plurinational State of), Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Central African Republic, Chad, Chile, Colombia, Comoros, Costa Rica, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Ecuador, Estonia, Finland, France, Germany, Greece, Guinea, Hungary, Ireland, Italy, Japan, Jordan, Kenya, Lesotho, Liechtenstein, Luxembourg, Malawi, Mali, Mauritius, Mexico, Montenegro, Namibia, Netherlands, Nigeria, Norway, Panama, Paraguay, Poland, Portugal, Republic of Korea, Romania, Samoa, Senegal, Serbia, Slovakia, Slovenia, South Africa, Spain, Suriname, Sweden, Switzerland, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, Uganda, United Republic of Tanzania, Uruguay, Venezuela (Bolivarian Republic of) and Zambia.

5. As noted in paragraph 2.2. of the memorandum, information concerning the appointment of the representatives of States Parties to the Review Conference had been communicated to the Secretariat, as at the time of the meeting of the Credentials Committee, from the Head of State or Government or the Minister for Foreign Affairs, by the following 12 States Parties:

> Bangladesh, Congo, Fiji, Gambia, Georgia, Ghana, Nauru, New Zealand, Niger, Peru, Sierra Leone, and The former Yugoslav Republic of Macedonia.

6. The Chairperson recommended that the Committee accept the credentials of the representatives of all States Parties mentioned in the Secretariat's memorandum, on the understanding that formal credentials for representatives of the States Parties referred to in paragraph 5 of the present report, would be submitted to the Secretariat as soon as possible.

7. On the proposal of the Chairperson, the Committee adopted the following draft resolution:

> "*The Credentials Committee*,
>
> *Having examined* the credentials of the representatives to the Review Conference of the Rome Statute of the International Criminal Court, referred to in paragraphs 4 and 5 of the present report,
>
> *Accepts* the credentials of the representatives of the States Parties concerned."

8. The draft resolution proposed by the Chairperson was adopted without a vote.

9. The Credentials Committee recommends to the Review Conference the adoption of a draft resolution (see paragraph 11 below).

10. In the light of the foregoing, the present report is submitted to the Review Conference.

Recommendation of the Credentials Committee

11. The Credentials Committee recommends to the Review Conference the adoption of the following draft resolution:

> **"Credentials of representatives to the Review Conference of the Rome Statute of the International Criminal Court**
>
> *The Review Conference of the Rome Statute of the International Criminal Court*,
>
> *Having considered* the report of the Credentials Committee on the credentials of representatives to the Review Conference and the recommendation contained therein,
>
> *Approves* the report of the Credentials Committee."

Annex II(a)

Report of the Drafting Committee

Draft amendments to article 8 of the Rome Statute and to the elements of crime*

1. The Review Conference, at the second plenary meeting, held on 31 May 2010, pursuant to rule 67 of the Rules of Procedure, and upon the recommendation of the Bureau of the Assembly of States Parties, at its ninth meeting, held on 29 April 2010, established a Drafting Committee, with the mandate of ensuring the linguistic accuracy of and consistency between the various language versions of draft amendments to the Rome Statute.

2. The Review Conference, at its ninth plenary meeting, held on 8 June 2010, appointed the following States to serve as members of the Drafting Committee:

Arabic:	Jordan
English:	Slovenia, United Kingdom
French:	France, Gabon
Russian:	Russian Federation
Spanish:	Spain

Following the invitation by the Chairman of the Conference, China participated, as a member, in the work of the Committee.

3. Ms. Concepción Escobar Hernández (Spain) served as Chairperson. The Secretariat of the Assembly of States Parties provided the substantive servicing for the Drafting Committee.

4. The Drafting Committee held one meeting, on 9 June 2010 (morning session), to consider document RC/WGOA/1/Rev.2, which contained a draft resolution amending article 8 of the Rome Statute, the amendments to article 8, and the elements of crimes. The meetings of the Committee were open to all delegations, including observer and invited States. Gabon did not participate in the meetings of the Committee.[1]

5. The Chairperson informed the Committee that the delegations of Belgium, Canada and France had submitted comments in writing to the French version of the document, and that Spain had transmitted its comments in writing in respect of the Spanish version. Those comments had been made available to the members of the Committee by the Secretariat.

6. Following the discussions, at its first meeting, the Committee reached an agreement on the six official language versions of document RC/WGOA/1/Rev.2, and decided to convey them to the Conference.

* Previously issued as RC/DC/1 and Add.1.

[1] Gabon had been designated by the Bureau at its ninth meeting, held on 29 April 2010, to be part of the Drafting Committee.

Appendix

Draft resolution amending article 8 of the Rome Statute

The Review Conference,

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

[*Noting* article 121, paragraph 5, of the Statute which states that any amendment to articles 5, 6, 7 and 8 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance and that in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory, and confirming its understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute,][1]

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

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

Taking due account of the fact that the crimes of employing poison or poisoned weapons; of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and of employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, already fall within the jurisdiction of the Court under article 8, paragraph 2 (b), as serious violations of the laws and customs applicable in international armed conflict,

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

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

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

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

[1] This text is subject to further consideration, namely with regard to the outcome of the discussion on the other amendments.

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

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

Attachment I

Amendment to article 8

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

"(xiii) Employing poison or poisoned weapons;

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

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."

Attachment II

Elements of Crimes

Add the following elements to the Elements of Crimes:

Article 8 (2) (e) (xiii)
War crime of employing poison or poisoned weapons

Elements

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.

2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.

3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xiv)
War crime of employing prohibited gases, liquids, materials or devices

Elements

1. The perpetrator employed a gas or other analogous substance or device.

2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.[1]

3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xv)
War crime of employing prohibited bullets

Elements

1. The perpetrator employed certain bullets.

2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.

3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.

4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

Annex II(b)

Report of the Drafting Committee

Draft amendments to the Rome Statute of the International Criminal Court on the crime of aggression*

1. The Drafting Committee held four meetings, on 9 (afternoon session), 10, and 11 June 2010 (morning and afternoon sessions) to discuss the following documents relating to amendments to the Rome Statute on the crime of aggression: RC/WGCA/1/Rev.2, RC/7, and RC/DC/3. These documents contained a draft resolution on the crime of aggression, amendments to the Rome Statute on the crime of aggression, amendments to the elements of crimes, and understandings regarding amendments to the Rome Statute on the crime of aggression.

2. At the meeting held on 9 June 2010 (afternoon session), the Committee reviewed document RC/WGCA/1/Rev.2 entitled "Draft resolution: The crime of aggression". At the meeting, held on 10 June 2010, the Committee considered document RC/7 entitled "Annex III Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression". The meetings of the Drafting Committee held on 11 June 2010 (morning and afternoon sessions) reviewed document RC/DC/3 entitled "Draft resolution: The crime of aggression".

3. Following the discussions, the Committee reached an agreement on the six official language versions of documents RC/WGCA/1/Rev.2, RC/7, and RC/DC/3, and decided to convey them to the Conference.

* Previously issued as RC/DC/2 and RC/DC/3.

Appendix I

Conference Room Paper on the crime of aggression (document RC/WGCA/1/Rev.2)

Draft resolution: The crime of aggression

The Review Conference,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,[1]

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

1. *Decides* to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: "the Statute") contained in attachment I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph [4 / 5] of the Statute **[except for amendment 3, which shall enter into force in accordance with article 121, paragraph 4, of the Statute]**;[2]

2. *Also decides* to adopt the amendments to the Elements of Crimes contained in attachment II of the present resolution;

3. *Further decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in attachment III of the present resolution;

4. *Calls upon* all States Parties to ratify or accept the amendments contained in attachment I.

[Add further operative paragraphs if needed][3]

[1] *Official Records ... Seventh session (first and second resumptions) ... 2009* (ICC-ASP/7/20/Add.1), chapter II, annex II.

[2] **The suggestion has been made that all amendments could enter into force <u>for the Court</u> immediately upon adoption by the Review Conference, in accordance with article 5, paragraph 2 of the Statute, while entering into force for <u>States Parties</u> one year after their respective ratification in accordance with article 121, paragraph 5, of the Statute. Consequently, the Court could receive Security Council referrals in principle immediately after adoption, while *proprio motu* investigations and State referrals would depend on the necessary ratifications.**

[3] Such as, e.g., a possible review clause. Such a review clause could also be included in the Statute itself, e.g. in article 5, paragraph 2, or in draft article 15 *bis*.

Attachment I

Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

1. Article 5, paragraph 2, of the Statute is deleted.

2. The following text is inserted after article 8 of the Statute:

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.

3. The following text is inserted after article 15 of the Statute:

Article 15 *bis*
Exercise of jurisdiction over the crime of aggression
(State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression **in accordance with article 13 (a) and (c)**, subject to the provisions of this article.[1]

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

4. **(Alternative 1)** In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression.[2]

4. **(Alternative 2)** Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Chamber[3] has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

3 bis. The following text is inserted after article 15 bis of the Statute:

Article 15 *ter*
Exercise of jurisdiction over the crime of aggression
(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression **in accordance with article 13 (b)**, subject to the provisions of this article.[4]

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

4. In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression.[5]

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[1] The suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. "The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression." Such a paragraph would only be relevant in case article 121, paragraph 5, of the Statute were to be applied.

[2] The suggestion has been made to allow the Prosecutor to proceed with an investigation in respect of a crime of aggression if so requested by the Security Council in a resolution under Chapter VII of the United Nations Charter.

[3] The suggestion has been made to enhance the internal filter, e.g. by involving all judges of the Pre-Trial Division or by subjecting the decision of the Pre-Trial Chamber to an automatic appeals process.

[4] The suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. "The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression." Such a paragraph would only be relevant in case article 121, paragraph 5, of the Statute were to be applied.

5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. The following text is inserted after article 25, paragraph 3 of the Statute:

3 *bis* In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

5. The first sentence of article 9, paragraph 1 of the Statute is replaced by the following sentence:

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.

6. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

[5] The suggestion has been made to allow the Prosecutor to proceed with an investigation in respect of a crime of aggression if so requested by the Security Council in a resolution under Chapter VII of the United Nations Charter.

Attachment II

Amendments to the Elements of Crimes

Article 8 *bis*
Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.

2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.

3. The term "manifest" is an objective qualification.

4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person[1] in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – 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 – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

[1] With respect to an act of aggression, more than one person may be in a position that meets these criteria.

Attachment III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute once the amendment on aggression [is adopted by the Review Conference/has entered into force].

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood, in accordance with article 11, paragraph 1, of the Statute, that the Court has jurisdiction only with respect to crimes of aggression committed after the amendment [has been adopted by the Review Conference/has entered into force].

4. It is understood, in accordance with article 11, paragraph 2, of the Statute, that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless that State has made a declaration under article 12, paragraph 3.

Domestic jurisdiction over the crime of aggression

4 *bis*. It is understood that the amendments address the definition of the crime of aggression and the conditions under which the Court shall exercise jurisdiction with respect to this crime for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute. The amendments shall therefore not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

[The paragraphs below are only relevant in case the amendments are adopted in accordance with the amendment procedure set out in article 121, paragraph 5, of the Rome Statute:]

Acceptance of the amendment on the crime of aggression

5. *[Acceptance by the victim State <u>not required</u> where the aggressor State has accepted jurisdiction]* It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed by a State Party that has accepted the amendment on aggression.

6. *[**Alternative 1 – "positive" understanding:** jurisdiction without acceptance by the aggressor State]* It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed against a State Party that has accepted the amendment.

*[**Alternative 2 – "negative" understanding:** no jurisdiction without acceptance by aggressor State]* It is understood that article 121, paragraph 5, second sentence, of the Statute prevents the Court from exercising jurisdiction in respect of an act of aggression committed by any State that has not accepted the amendment.

[Insert possible further understandings]

Appendix II

Draft resolution: The crime of aggression

The Review Conference,

Recalling paragraph 1 of article 12 of the Rome Statute,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

1. *Decides* to adopt, **in accordance with article 5, paragraph 2,** of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the Statute contained in attachment I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; **and notes that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance**.

2. *Also decides* to adopt the amendments to the Elements of Crimes contained in attachment II of the present resolution;

3. *Further decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in attachment III of the present resolution;

3 *bis* *Also decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction.

4. *Calls upon* all States Parties to ratify or accept the amendments contained in attachment I.

Attachment I

Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

3. The following text is inserted after article 15 of the Statute:

Article 15 *bis*
Exercise of jurisdiction over the crime of aggression
(State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13 (a) and (c), subject to the provisions of this article.

1 *bis*. The Court may exercise jurisdiction only with respect to crimes of aggression committed at least five years after the adoption of the amendments on the crime of aggression and one year after the ratification or acceptance of the amendments by thirty States Parties.

1 *ter*. 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.**

1 *quater*. 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.

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

4. **(Alternative 1)** In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression, **[unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation.]**

4. **(Alternative 2)** Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial **Division** has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, **[and the Security Council does not decide otherwise**.**]**

5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

3 bis. The following text is inserted after article 15 bis of the Statute:

Article 15 *ter*
Exercise of jurisdiction over the crime of aggression
(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13 (b).

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed at least five years after the adoption of the amendments on the crime of aggression and one year after the ratification or acceptance of the amendments by thirty States Parties.

3. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

4. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Attachment II

Amendments to the Elements of Crimes

Article 8 *bis*
Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.

2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.

3. The term "manifest" is an objective qualification.

4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person[1] in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – 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 – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

[1] With respect to an act of aggression, more than one person may be in a position that meets these criteria.

Attachment III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute **five years after the adoption of the amendments on the crime of aggression and one year after the ratification or acceptance of the amendments by thirty States Parties.**

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood, in accordance with article 11, paragraph 1, of the Statute, that the Court has jurisdiction only with respect to crimes of aggression committed **five years after the adoption of the amendments on the crime of aggression and one year after the ratification or acceptance of the amendments by thirty States Parties.**

4. It is understood, in accordance with article 11, paragraph 2, of the Statute, that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless that State has made a declaration under article 12, paragraph 3.

Domestic jurisdiction over the crime of aggression

5. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

6. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

Other understandings

7. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

8. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.

Annex III

Report of the Working Group on the Crime of Aggression*

A. Introduction

1. The Working Group on the Crime of Aggression held eight meetings on 1, 4, and 7 to 9 June 2010. H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein (Jordan) served as Chair of the Working Group.

2. The Secretariat of the Assembly of States Parties provided the substantive servicing for the Group.

3. The discussions in the Working Group were held on the basis of two papers submitted by the Chair: a conference room paper on the crime of aggression ("conference room paper") and a non-paper containing further elements for a solution on the crime of aggression ("non-paper").

4. At the first meeting of the Working Group, the Chair introduced both documents. He recalled that, while the inclusion of the crime of aggression in the Rome Statute had been controversial in 1998, much progress had been made since then. The process had been inclusive and transparent, and marked by a spirit of cooperation. In February 2009, the Special Working Group on the Crime of Aggression had adopted proposals for amendments on the crime of aggression by consensus. The Chair noted that the conference room paper brought all the elements together and reflected progress and agreement on many issues: The definition of aggression contained no brackets; there was agreement on the leadership clause; the draft amendments were of very good technical quality and would fit well within the existing structure of the Statute; and the subsequent exercise on the Elements of Crimes had contributed further to the understanding of the definition.

5. The Chair noted that divergent views remained on the conditions for the exercise of jurisdiction. Nevertheless, much progress had been made in this regard, as reflected in the paragraphs of draft article 15 *bis* without brackets: There was agreement that all three jurisdictional 'triggers' in article 13 of the Rome Statute would apply to the crime of aggression; the Prosecutor would have to inform and cooperate with the Security Council; the best-case scenario would be one in which the Security Council and the Court would act in tandem; a determination of aggression by an organ outside the Court would not be binding on the Court, thus guaranteeing judicial independence in the application of the substantive law; and any particular requirements for an investigation into a crime of aggression would not affect investigations into any of the other three core crimes.

6. The views of delegations continued to diverge, however, on two issues: First, delegations had different opinions whether there should be a requirement that the alleged aggressor State has accepted the Court's active jurisdiction over this crime, such as through ratification of the amendments on aggression. Second, delegations had different opinions as to how the Court should proceed when the Security Council did not make a determination of an act of aggression. The Chair noted that, at this stage, most delegations that favored additional possibilities for the Court to proceed in the absence of a determination of aggression by the Security Council preferred that such a decision rest with the Court itself, for example with the Pre-Trial Chamber.

7. The Chair encouraged delegations to focus their attention on how to bridge the gap on these outstanding issues, based on the conference room paper and the ideas contained in the non-paper.

* Previously issued as RC/5.

B. Conference room paper on the crime of aggression

8. The Chair noted that the conference room paper was submitted with a view to facilitating the remaining work on the crime of aggression. The paper contained a proposed draft outcome for the Review Conference on the crime of aggression, including the following elements: (a) the draft enabling resolution on the crime of aggression with an added short preamble and additional operative paragraphs; (b) draft amendments to the Rome Statute on the crime of aggression; (c) draft amendments to the Elements of Crimes; and (d) draft understandings regarding the interpretation of the amendments. All of these texts had previously been discussed in the context of the Special Working Group on the Crime of Aggression and the Assembly of States Parties.

9. Delegations welcomed the conference room paper as accurately reflecting and consolidating the previous work on the crime of aggression. It was recalled that efforts to define aggression had begun six decades ago and that concrete efforts to give effective jurisdiction to the Court had lasted more than 12 years. A great deal of progress had been made on these complex issues. The Review Conference was a historic opportunity to complete this work and strong support was expressed for this to be done on the basis of consensus for the benefit of the Court.

10. Delegations expressed their willingness to be flexible and open to compromise and creative solutions that would bring about a solution. Confidence was expressed that a successful outcome was within reach, provided that delegations were ready to engage with one another to see what could be achieved.

1. Draft enabling resolution

11. The Chair noted that a few basic preambular paragraphs had been added to the draft enabling resolution. The draft resolution also contained additional operative paragraphs to adopt the amendments to the Elements of Crimes as well as understandings regarding the interpretation of the amendments. Furthermore, the customary call for the earliest possible ratification or acceptance of the amendments by all States Parties was added. Delegations did not raise specific issues regarding these new elements. Further operative paragraphs could be added at a later stage, such as a possible review clause.

2. Procedure for entry into force of the amendments on aggression

12. Delegations expressed divergent views regarding the procedure for entry into force of the amendments on aggression. The arguments raised in this regard are amply reflected in previous Working Group reports on the crime of aggression. Some delegations stressed that article 121, paragraph 5, of the Statute, combined with the "negative understanding" of its second sentence, was the correct procedure under the Statute. As a consequence, acceptance of the amendments on aggression by the alleged aggressor State would be required for a State referral or a *proprio motu* investigation. Other delegations stressed that article 121, paragraph 4, of the Statute should apply. A preference was also expressed for the "positive understanding" of article 121, paragraph 5, of the Statute. Under this approach, the acceptance by the alleged aggressor State would not be required, thus providing for a broader scope of jurisdiction.

13. Some delegations, while in principle favoring the application of article 121, paragraph 4, of the Statute, raised the idea of using both procedures for entry into force, thereby staggering over time the Court's exercise of jurisdiction for the crime of aggression. Article 121, paragraph 5, of the Statute would be applied to the definition as well as to the provisions dealing with Security Council referrals. The exercise of jurisdiction based on Security Council referrals would thus begin one year after the deposit of the first instrument of ratification or acceptance. Once seven-eighths of States Parties ratified the amendments on aggression, the remaining two jurisdictional 'triggers' (State Party referral and *proprio motu*) would enter into force for all States Parties based on article 121, paragraph 4, of the Statute. In this context, the idea was raised to enhance the jurisdictional filter of the Pre-Trial Chamber (draft article 15 *bis*, paragraph 4, Alternative 2, Option 2). A supplementary idea was put forward that would allow the Court to proceed

with investigations based on a State Party referral or proprio *motu* even before the entry into force for all States Parties, namely with respect to States that had already ratified the amendments and thus consented to the Court's exercise of jurisdiction.

14. These ideas were welcomed by some delegations as a creative attempt to attract consensus. It was suggested flexibility was needed regarding the entry into force mechanisms, as the respective provisions in the Rome Statute seemed to be ambiguous and not to apply well to the crime of aggression, which was already contained in article 5 of the Rome Statute. Other delegations expressed concern about the legal and technical feasibility of an approach that would draw on elements of both paragraphs 4 and 5 of article 121 of the Statute. Concern was expressed that a creative interpretation of these provisions could harm the Court's credibility. Further consideration needed to be given to these ideas, preferably on the basis of a fully developed draft text to better understand them.

3. Attachment I: Amendments on the crime of aggression

15. As requested by the Chair, the discussions focused on the outstanding issues contained in draft article 15 *bis*. Some delegations used the opportunity to reiterate their support for the definition of the crime of aggression contained in draft article 8 *bis*, recalling the delicate compromise achieved over many years through a deliberative and transparent process that was open to States Parties and non-States Parties on an equal footing.

16. With respect to the definition of aggression contained in draft article 8 *bis*. The suggestion was made to adopt an understanding clarifying that efforts to prevent war crimes, crimes against humanity or genocide were not "manifest" violations of the Charter of the United Nations. However, another view was expressed that the threshold of a manifest violation contained in draft article 8 *bis* should be deleted, since any act of aggression manifestly violated the Charter. Furthermore, a view was expressed that the definition on aggression would not reflect customary international law and that this should be recognized in the understandings. Only the most serious forms of illegal use of force constituted aggression. The definition might need to be revisited in case of a future review of the amendments on aggression.

4. Exercise of jurisdiction over the crime of aggression (draft article 15 *bis*)

17. Discussions focused on the outstanding issues contained in paragraph 4 of draft article 15 *bis* (jurisdictional filters). The arguments raised in this regard were amply reflected in previous Working Group reports on the crime of aggression. Those delegations that referred to paragraphs 1, 2, 3, 5 and 6 expressed their strong support for these paragraphs, which contained agreements on important issues.

18. Some delegations reiterated their preference for Alternative 1, which provides that the Prosecutor may only proceed with an investigation in respect of a crime of aggression where the Security Council has made a determination of aggression (Option 1) or where the Security Council has otherwise requested the Prosecutor to proceed with the investigation in respect of a crime of aggression (Option 2). A number of arguments raised in the past in support of this position were recalled: It was stated that the Security Council pursuant to article 39 of the Charter of the United Nations had the exclusive competence to determine that an act of aggression had been committed. Article 5, paragraph 2, of the Rome Statute required the amendments on the crime of aggression to be consistent with the Charter. A constructive relationship between the Court and the Security Council was essential, especially with regard to the crime of aggression, as divergent findings on the occurrence of a State act of aggression could undermine the legitimacy of both. It was also suggested that Alternative 1 was consistent with the goal of achieving universal ratification of the Rome Statute.

19. Other delegations reiterated their preference for Alternative 2, which would allow the Prosecutor to proceed under certain conditions in the absence of a determination of aggression by the Security Council. Strong support was expressed for Option 2, which would give the role of jurisdictional filter to the Pre-Trial Chamber. Delegations in favour of this internal judicial filter stressed the need for the Court to be able to act independently

and to avoid politicization, with a view to ending impunity. It was argued that this approach would respect the primary role of the Security Council in determining an act of aggression. It was also submitted that the internal judicial filter could be enhanced. Some concern was expressed that the waiting period contained in Alternative 2 (six months) might be too long. The view was also expressed that the procedure for the crime of aggression should not differ from the existing procedures for the other three crimes.

5. Attachment II: Amendments to the Elements of Crimes

20. Some delegations took the opportunity to express their satisfaction with the draft amendments to the Elements of Crimes, which enjoyed wide consensus. A view was expressed that more time could usefully be spent drafting the Elements of Crimes.

6. Attachment III: Understandings regarding the amendments on the crime of aggression

21. The Chair noted that the draft understandings contained in attachment III of the conference room paper had previously been discussed in the Special Working Group on the Crime of Aggression, but had now for the first time been brought together as a single document. Delegations generally welcomed the understandings, which provided useful clarifications to the draft amendments on the crime of aggression.

7. Referrals by the Security Council

22. The first understanding would clarify the moment from which the Court would be allowed to exercise jurisdiction over the crime of aggression on the basis of a Security Council referral. Two main options were provided in this regard (adoption of amendments/entry into force). No detailed discussion was held on this choice, which would mainly depend on the applicable procedure for entry into force and which would equally apply to the third understanding. Some delegations expressed the view that these understandings should refer to the entry into force of the amendments on aggression rather than their adoption. However, the opposite view was also expressed, which was seen as consistent with the wording of article 5, paragraph 2, of the Statute.

23. The second understanding would clarify that, in case of a Security Council referral, the consent of the State concerned would not be required. Delegations did not express concerns about these two understandings.

8. Jurisdiction *ratione temporis*

24. The third and fourth understanding would clarify the application of article 11 of the Statute (non-retroactivity) to the crime of aggression. Delegations did not express concerns about these two understandings.

9. Acceptance of the amendments on the crime of aggression

25. The fifth and sixth understanding would clarify the application of the second sentence of article 121, paragraph 5, of the Statute to the amendments on the crime of aggression. Delegations discussed the two alternatives contained in the sixth understanding ("positive" versus "negative" understanding) in connection with the discussion on the applicable procedure for entry into force (cf. the discussions and arguments reflected in paragraphs 12 to 14 above, with further references). No strong concerns were raised in respect of the fifth understanding, which would clarify that the acceptance of the amendments on the crime of aggression by the alleged aggressor State would suffice for the Court to exercise jurisdiction, even where the victim State had not accepted the amendments. Nevertheless, it was also suggested that the consent of a victim State may be appropriate or necessary in certain situations.

C. Chair's non-paper on further elements for a solution on the crime of aggression

26. The Chair noted that the non-paper contained a number of elements that could be helpful in addressing certain issues regarding the draft amendments on the crime of aggression. Delegations generally welcomed the ideas contained therein, especially to the extent that they could help forge an agreement.

1. Timing of exercise of jurisdiction

27. The non-paper suggested that a provision delaying the Court's exercise of jurisdiction over the crime of aggression could address concerns expressed by some delegations. Some delegations expressed interest in this idea. Some submitted that, while they did not consider it necessary, it might help allay fears that the Court may be too young to exercise jurisdiction over the crime of aggression. It was cautioned, however, that the delay ought not to be too long. The comment was made that no such provision was necessary in connection with article 121, paragraph 4, of the Statute. Some support was also expressed for the immediate entry into force of the amendments on aggression.

2. Review clause

28. The non-paper suggested that a review clause might be useful to accommodate concerns of delegations that have shown flexibility in their position on the exercise of jurisdiction. Several delegations were open to this idea. It was submitted that the review period should be relatively long to allow for a proper assessment of the Court's exercise of jurisdiction over the crime of aggression. Some delegations stressed that they did not consider such a clause necessary, but that it could be acceptable if it would help attract consensus. However, it was also suggested that such a clause might only delay the resolution of outstanding issues, create instability in the interim and impact domestic criminal law.

3. Domestic jurisdiction over the crime of aggression

29. The non-paper suggested that the consequences of adopting amendments on the crime of aggression for the exercise of domestic jurisdiction could be addressed in the understandings (see the detailed explanations in paragraph 4 of the non-paper). Specifically, the understandings could clarify that the amendments on the crime of aggression created neither the right nor the obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State. In general, support was expressed for such an understanding. This was an important issue and the current drafting was useful. It was submitted that the drafting could be further improved.

D. Further proceedings of the Working Group

30. Following the discussions held in the Working Group on 4 June 2010, the Chair submitted two revised versions of the conference room paper. Informal meetings of the Working Group were held on 7 and 8 June 2010.

E. Recommendation

31. At its last meeting, on 9 June, the Working Group decided to forward the conference room paper contained in appendix I to the Plenary of the Review Conference of the Rome Statute for its consideration.

Appendix I

Conference Room Paper on the crime of aggression (document RC/WGCA/1/Rev.2)

Draft resolution: The crime of aggression

The Review Conference,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,[1]

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

1. *Decides* to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: "the Statute") contained in attachment I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph [4 / 5] of the Statute **[except for amendment 3, which shall enter into force in accordance with article 121, paragraph 4, of the Statute]**;[2]

2. *Also decides* to adopt the amendments to the Elements of Crimes contained in attachment II of the present resolution;

3. *Further decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in attachment III of the present resolution;

4. *Calls upon* all States Parties to ratify or accept the amendments contained in attachment I.

[Add further operative paragraphs if needed][3]

[1] *Official Records ... Seventh session (first and second resumptions) ... 2009* (ICC-ASP/7/20/Add.1), chapter II, annex II.

[2] **The suggestion has been made that all amendments could enter into force <u>for the Court</u> immediately upon adoption by the Review Conference, in accordance with article 5, paragraph 2 of the Statute, while entering into force for <u>States Parties</u> one year after their respective ratification in accordance with article 121, paragraph 5, of the Statute. Consequently, the Court could receive Security Council referrals in principle immediately after adoption, while *proprio motu* investigations and State referrals would depend on the necessary ratifications.**

[3] Such as, e.g., a possible review clause. Such a review clause could also be included in the Statute itself, e.g. in article 5, paragraph 2, or in draft article 15 *bis*.

Attachment I

Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

1. Article 5, paragraph 2, of the Statute is deleted.

2. The following text is inserted after article 8 of the Statute:

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.

3. The following text is inserted after article 15 of the Statute:

Article 15 *bis*
Exercise of jurisdiction over the crime of aggression
(State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression **in accordance with article 13 (a) and (c)**, subject to the provisions of this article.[1]

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

4. **(Alternative 1)** In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression.[2]

4. **(Alternative 2)** Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Chamber[3] has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

3 bis. The following text is inserted after article 15 bis of the Statute:

Article 15 *ter*
Exercise of jurisdiction over the crime of aggression
(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression **in accordance with article 13 (b)**, subject to the provisions of this article.[4]

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

4. In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression.[5]

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[1] The suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. "The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression." Such a paragraph would only be relevant in case article 121, paragraph 5, of the Statute were to be applied.

[2] The suggestion has been made to allow the Prosecutor to proceed with an investigation in respect of a crime of aggression if so requested by the Security Council in a resolution under Chapter VII of the United Nations Charter.

[3] The suggestion has been made to enhance the internal filter, e.g. by involving all judges of the Pre-Trial Division or by subjecting the decision of the Pre-Trial Chamber to an automatic appeals process.

[4] The suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. "The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression." Such a paragraph would only be relevant in case article 121, paragraph 5, of the Statute were to be applied.

5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. The following text is inserted after article 25, paragraph 3 of the Statute:

3 *bis* In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

5. The first sentence of article 9, paragraph 1 of the Statute is replaced by the following sentence:

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.

6. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

[5] The suggestion has been made to allow the Prosecutor to proceed with an investigation in respect of a crime of aggression if so requested by the Security Council in a resolution under Chapter VII of the United Nations Charter.

Attachment II

Amendments to the Elements of Crimes

Article 8 *bis*
Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.

2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.

3. The term "manifest" is an objective qualification.

4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person[1] in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – 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 – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

[1] With respect to an act of aggression, more than one person may be in a position that meets these criteria.

Attachment III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute once the amendment on aggression [is adopted by the Review Conference/has entered into force].

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood, in accordance with article 11, paragraph 1, of the Statute, that the Court has jurisdiction only with respect to crimes of aggression committed after the amendment [has been adopted by the Review Conference/has entered into force].

4. It is understood, in accordance with article 11, paragraph 2, of the Statute, that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless that State has made a declaration under article 12, paragraph 3.

Domestic jurisdiction over the crime of aggression

4 *bis*. It is understood that the amendments address the definition of the crime of aggression and the conditions under which the Court shall exercise jurisdiction with respect to this crime for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute. The amendments shall therefore not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

[The paragraphs below are only relevant in case the amendments are adopted in accordance with the amendment procedure set out in article 121, paragraph 5, of the Rome Statute:]

Acceptance of the amendment on the crime of aggression

5. *[Acceptance by the victim State <u>not required</u> where the aggressor State has accepted jurisdiction]* It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed by a State Party that has accepted the amendment on aggression.

6. *[**Alternative 1 – "positive" understanding:** jurisdiction without acceptance by the aggressor State]* It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed against a State Party that has accepted the amendment.

*[**Alternative 2 – "negative" understanding:** no jurisdiction without acceptance by aggressor State]* It is understood that article 121, paragraph 5, second sentence, of the Statute prevents the Court from exercising jurisdiction in respect of an act of aggression committed by any State that has not accepted the amendment.

[Insert possible further understandings]

Appendix II

Conference Room Paper on the crime of aggression (document RC/WGCA/1/Rev.1)

Draft resolution: The crime of aggression

The Review Conference,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,[1]

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

1. *Decides* to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: "the Statute") contained in attachment I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph [4 / 5] of the Statute;

2. *Also decides* to adopt the amendments to the Elements of Crimes contained in attachment II of the present resolution;

3. *Further decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in attachment III of the present resolution;

4. *Calls upon* all States Parties to ratify or accept the amendments contained in attachment I.

[Add further operative paragraphs if needed][2]

[1] *Official Records … Seventh session (first and second resumptions) … 2009* (ICC-ASP/7/20/Add.1), chapter II, annex II.

[2] Such as, e.g., a possible review clause. Such a review clause could also be included in the Statute itself, e.g. in article 5, paragraph 2, or in draft article 15 *bis*.

Attachment I

Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

1. Article 5, paragraph 2, of the Statute is deleted.

2. The following text is inserted after article 8 of the Statute:

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.

3. The following text is inserted after article 15 of the Statute:

Article 15 *bis*
Exercise of jurisdiction over the crime of aggression

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.[1]

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

4. **(Alternative 1)** In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression.[2]

4. **(Alternative 2)** Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Chamber[3] has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. The following text is inserted after article 25, paragraph 3 of the Statute:

3 *bis* In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

5. The first sentence of article 9, paragraph 1 of the Statute is replaced by the following sentence:

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.

6. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

[1] The suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. "The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression." Such a paragraph would only be relevant in case article 121, paragraph 5, of the Statute were to be applied.
[2] The suggestion has been made to allow the Prosecutor to proceed with an investigation in respect of a crime of aggression if so requested by the Security Council in a resolution under Chapter VII of the United Nations Charter.
[3] The suggestion has been made to enhance the internal filter, e.g. by involving all judges of the Pre-Trial Division or by subjecting the decision of the Pre-Trial Chamber to an automatic appeals process.

Attachment II

Amendments to the Elements of Crimes

Article 8 *bis*
Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.

2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.

3. The term "manifest" is an objective qualification.

4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person[1] in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – 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 – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

[1] With respect to an act of aggression, more than one person may be in a position that meets these criteria.

Attachment III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute once the amendment on aggression [is adopted by the Review Conference/has entered into force].

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood, in accordance with article 11, paragraph 1, of the Statute, that the Court has jurisdiction only with respect to crimes of aggression committed after the amendment [has been adopted by the Review Conference/has entered into force].

4. It is understood, in accordance with article 11, paragraph 2, of the Statute, that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless that State has made a declaration under article 12, paragraph 3.

Domestic jurisdiction over the crime of aggression

4 *bis*. It is understood that the amendments address the definition of the crime of aggression and the conditions under which the Court shall exercise jurisdiction with respect to this crime for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute. The amendments shall therefore not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

[The paragraphs below are only relevant in case the amendments are adopted in accordance with the amendment procedure set out in article 121, paragraph 5, of the Rome Statute:]

Acceptance of the amendment on the crime of aggression

5. *[Acceptance by the victim State <u>not required</u> where the aggressor State has accepted jurisdiction]* It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed by a State Party that has accepted the amendment on aggression.

6. *[**Alternative 1 – "positive" understanding:** jurisdiction without acceptance by the aggressor State]* It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed against a State Party that has accepted the amendment.

*[**Alternative 2 – "negative" understanding:** no jurisdiction without acceptance by aggressor State]* It is understood that article 121, paragraph 5, second sentence, of the Statute prevents the Court from exercising jurisdiction in respect of an act of aggression committed by any State that has not accepted the amendment.

[Insert possible further understandings]

Appendix III

Conference Room Paper on the crime of aggression (document RC/WGCA/1)

A. Explanatory Note

1. The present Conference Room Paper is submitted by the Chair with a view to facilitating the remaining work on the crime of aggression. The paper contains a proposed draft outcome for the Review Conference on the crime of aggression, including the following elements:

(a) **The draft enabling resolution on the crime of aggression**, as forwarded to the Review Conference by resolution ICC-ASP/8/Res.6, with an added short preamble and additional operative paragraphs relating to the Elements of Crimes (OP 2) and the understandings regarding the interpretation of the amendments (OP 3), as well as the customary call for ratification or acceptance of the amendments (OP 4);

(b) **The draft amendments to the Rome Statute on the crime of aggression** (attachment I), as forwarded by resolution ICC-ASP/8/Res.6;

(c) **The draft amendments to the Elements of Crimes** (attachment II), as forwarded by resolution ICC-ASP/8/Res.6;

(d) **Draft understandings regarding the interpretation of the amendments** on the crime of aggression, as previously discussed by the Special Working Group on the Crime of Aggression, notably at its last session in February 2009.[1]

2. The present paper thus sets out a complete framework of texts to successfully conclude the work on the crime of aggression at the Review Conference. All of the text elements contained in this paper, including the draft understandings contained in attachment III, have previously been discussed in the context of the Special Working Group and the Assembly of States Parties.

3. The focus of our efforts at the Review Conference should be on bridging the remaining gaps. A number of additional elements that could be helpful in this regard and that could be added to this framework are submitted in a separate non-paper.

B. Draft resolution: The crime of aggression

The Review Conference,

Recalling **paragraph 2 of article 5 of the Rome Statute,**

Recalling **also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,**

Recalling **further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and** ***expressing its appreciation*** **to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,**[2]

Taking note **of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,**

[1] February 2009 Report of the Special Working Group, contained in *Official Records ... Seventh session (first and second resumptions) ... 2009* (ICC-ASP/7/20/Add.1), chapter II, annex II, paras. 27 to 41 ("Other substantive issues regarding aggression to be addressed by the Review Conference").
[2] *Official Records ... Seventh session (first and second resumptions) ... 2009* (ICC-ASP/7/20/Add.1), chapter II, annex II.

1. *Decides* to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: "the Statute") contained **in attachment I of** the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph [4 / 5] of the Statute;

2. *Also decides* to adopt the amendments to the Elements of Crimes contained in attachment II of the present resolution;

3. *Further decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in attachment III of the present resolution;

4. *Calls upon* all States Parties to ratify or accept the amendments contained in attachment I.

[Add further operative paragraphs if needed][3]

[3] **Such as, e.g., a possible review clause. Such a review clause could also be included in the Statute itself, e.g. in article 5, paragraph 2, or in draft article 15 *bis*.**

Attachment I

Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

1. Article 5, paragraph 2, of the Statute is deleted.

2. The following text is inserted after article 8 of the Statute:

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.

3. The following text is inserted after article 15 of the Statute:

Article 15 *bis*
Exercise of jurisdiction over the crime of aggression

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

4. **(Alternative 1)** In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression,

Option 1 – end the paragraph here.

Option 2 – add: unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.

4. **(Alternative 2)** Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression,

Option 1 – end the paragraph here.

Option 2 – add: provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

Option 3 – add: provided that the General Assembly has determined that an act of aggression has been committed by the State referred to in article 8 *bis*;

Option 4 – add: provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 *bis*.

5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. The following text is inserted after article 25, paragraph 3 of the Statute:

3 *bis* In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

5. The first sentence of article 9, paragraph 1 of the Statute is replaced by the following sentence:

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.

6. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

Attachment II

Amendments to the Elements of Crimes

Article 8 *bis*
Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.

2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.

3. The term "manifest" is an objective qualification.

4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person[1] in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – 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 – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

[1] With respect to an act of aggression, more than one person may be in a position that meets these criteria.

Attachment III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute once the amendment on aggression [is adopted by the Review Conference/has entered into force].

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction ratione temporis

3. It is understood, in accordance with article 11, paragraph 1, of the Statute, that the Court has jurisdiction only with respect to crimes of aggression committed after the amendment [has been adopted by the Review Conference/has entered into force].

4. It is understood, in accordance with article 11, paragraph 2, of the Statute, that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless that State has made a declaration under article 12, paragraph 3.

[The paragraphs below are only relevant in case the amendments are adopted in accordance with the amendment procedure set out in article 121, paragraph 5, of the Rome Statute:]

Acceptance of the amendment on the crime of aggression

5. *[Acceptance by the victim State <u>not required</u> where the aggressor State has accepted jurisdiction]* It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed by a State Party that has accepted the amendment on aggression.

6. *[**Alternative 1 – "positive" understanding:** jurisdiction without acceptance by the aggressor State]* It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed against a State Party that has accepted the amendment.

*[**Alternative 2 – "negative" understanding:** no jurisdiction without acceptance by aggressor State]* It is understood that article 121, paragraph 5, second sentence, of the Statute prevents the Court from exercising jurisdiction in respect of an act of aggression committed by any State that has not accepted the amendment.

[Insert possible further understandings – see separate non-paper]

Appendix IV

Non-paper by the Chair on further elements for a solution on the crime of aggression (document RC/WGCA/2)

1. The present non-paper submitted by the Chair contains a number of elements that may be helpful in addressing certain issues regarding the draft amendments on the crime of aggression and are therefore recommended to the consideration of delegations.

2. **Timing of the entry into force of the amendments:** Concerns have been raised at the prospect of an early entry into force of the amendments on the crime on aggression in case article 121, paragraph 5, of the Statute was to be applied. Such concerns could possibly be addressed by a provision specifying that the Court should begin exercising jurisdiction over the crime of aggression at a later stage only. Such a provision would not as such affect the timing of the entry into force of the amendments, but would effectively delay the Court's exercise of jurisdiction. Such a provision would therefore have to be placed in draft article 15 *bis* and could read:

> ***Article 15 bis***
> ***Exercise of jurisdiction over the crime of aggression***
> *[…]*
> *7. The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression.*

3. **Review clause**: The suggestion has been made that in the search for a compromise on the outstanding issues regarding the conditions for the exercise of jurisdiction, a review clause may be necessary to accommodate the concerns of delegations that have shown flexibility in their position. Such a review clause could be added to draft article 15 *bis*:

> ***Article 15 bis***
> ***Exercise of jurisdiction over the crime of aggression***
> *[…]*
> *8. The provisions of this article shall be reviewed [x] years after the Court may exercise jurisdiction over the crime of aggression.*

4. **Domestic jurisdiction over the crime of aggression**: Concerns have been raised that the consequences of adopting the amendments on the crime of aggression for the domestic exercise of jurisdiction over this crime are unclear, thus raising questions regarding the application of the principle of complementarity. The Special Working Group concluded at its early stages that no changes to article 17 of the Rome Statute – regarding inadmissibility of cases before the Court – were necessary when incorporating the crime of aggression.[1] This conclusion, however, does not address the question whether the amendments on the crime of aggression would, legally or effectively, require or encourage States to exercise domestic jurisdiction over the crime of aggression with respect to acts of aggression committed by <u>other</u> States, based on either the passive personality principle (as a victim State) or based on an assumption of universal jurisdiction. In fact, article 17 of the Rome Statute merely refers to "a State which has jurisdiction" over crimes, but does not address the question as to when States should establish such jurisdiction. The issue could possibly addressed by adding a relevant paragraph to the understandings contained in annex III of the draft outcome on the crime of aggression:

> *It is understood that the amendments address the definition of the crime of aggression and the conditions under which the Court shall exercise jurisdiction with respect to this crime for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute. The amendments shall therefore not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.*

[1] 2004 Princeton report, contained in *Official Records … Third Session … 2004* (ICC-ASP/3/25), annex II, paragraphs 20-27.

Appendix V

Non-papers submitted by delegations

A. Non-paper submitted by the delegations of Argentina, Brazil and Switzerland as of 6 June 2010[1]

Draft resolution on the crime of aggression

The Review Conference,

[…]

1. *Decides* to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: "the Statute") contained in annex I of the present resolution, which are subject to ratification or acceptance **simultaneously through one single instrument of ratification or acceptance, and that amendments 1, 2, 4, 5 and 6** shall enter into force **one year after the deposit of one instrument of ratification or acceptance** in accordance with **article 121, paragraph 5,** of the Statute **and amendment 3 shall enter into force one year after the deposit of instruments of ratification or acceptance by seven-eighths of States Parties in accordance with article 121, paragraph 4, of the Statute.**

[…]

Annex I: Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

(Security Council referral)

1. Article 5, paragraph 2, of the Statute is replaced by the following text:

2. The Court may exercise jurisdiction over the crime of aggression **as defined in article 8 *bis*,** in accordance with article 13, **paragraph (b)**, subject to the provisions of this paragraph.

(a) Where the Prosecutor **examines a situation referred to him or her by the Security Council and** concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

(b) Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

(c) In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression, unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.

(d) A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

(e) This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

[1] This non paper builds on the Chairman's Conference Room paper of 5 June 2010. New language is in bold.

2. The following text is inserted after article 8 of the Statute:

Article 8 *bis*
Crime of aggression

[…]

3. The following text is inserted after article 15 of the Statute:
(State referral, proprio motu)

Article 15 *bis*
Exercise of jurisdiction over the crime of aggression

1. The Court may exercise jurisdiction over the crime of aggression **as defined in article 8 *bis*** in accordance with article 13 **(a) and (c)**, subject to the provisions of this article.

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

4. Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. The following text is inserted after article 25, paragraph 3 of the Statute:

3 *bis* In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

5. The first sentence of article 9, paragraph 1 of the Statute is replaced by the following sentence:

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.

6. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

B. Non-paper submitted by the delegation of Canada as of 8 June 2010[2]

Article 15 *bis*
[…]

1. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

2. Where the Security Council has not made such a determination within six (6) months after the date of notification and where a State Party has declared its acceptance of this Paragraph, at the time of deposit of its instrument of ratification or acceptance or at any time thereafter, the Prosecutor may proceed with an investigation of a crime of aggression provided that

(a) the Pre-trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in Article 15; and

(b) [all state(s) concerned with the alleged crime of aggression][the state on whose territory the alleged offence occurred and the state(s) of nationality of the persons accused of the crime] have declared their acceptance of this Paragraph.

[2] This proposal is intended as contributing towards an eventual compromise package. As such it is compatible with other proposals that may assist in a consensus resolution, such as a potential provision allowing for a delay in the ability of the Court to exercise its jurisdictional competence.

Annex IV

Report of the Working Group on other amendments*

A. Introduction

1. The Working Group on other amendments held three meetings, on 1, 4 and 10 June 2010 and one round of informal consultations on 9 June 2010. Mr. Marcelo Böhlke (Brazil) and Ms. Stella Orina (Kenya) served as Chairpersons of the Working Group. The Secretariat of the Assembly of States Parties provided the substantive servicing for the Working Group.

2. The discussions in the Group focused on two issues:

(a) Draft amendments to article 8 of the Rome Statute[1] and to the elements of crime,[2] which had been conveyed to the Review Conference by the eighth session of the Assembly of States Parties; and

(b) Article 124 of the Statute.

B. Amendments to article 8 of the Rome Statute

3. In introducing the draft resolution amending article 8 of the Rome Statute,[3] the delegation of Belgium explained that the draft amendments were intended to extend the jurisdiction which the Court already had over the crimes in article 8, paragraph 2 (b) (xvii), (xviii) and (xix), to armed conflicts not of an international character through their inclusion in article 8, paragraph 2 (e), as new sub-paragraphs (xiii), (xiv) and (xv), respectively.[4] These crimes are as follows: employing poison or poisoned weapons (article 8, paragraph 2 (b) (xvii)); employing asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices (article 8, paragraph 2 (b) (xviii)) and employing bullets which expand or flatten easily in the human body (article 8, paragraph 2 (b) (xix)).

4. It was stressed that the crimes that were proposed for inclusion in article 8, paragraph 2 (e), were not new crimes within the jurisdiction of the Court and that the amendment did not seek to extend the scope of the crimes but the jurisdiction of the Court.

5. It was noted that the crimes set out in preambular paragraph 8 related to weapons whose use was strictly forbidden. The crimes were serious violations of the laws and customs applicable in armed conflicts not of an international character, as reflected in customary international law, i.e. employing poison or poisoned weapons, as well as employing asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices. There was no absolute prohibition on the weapons referred to in preambular paragraph 9, i.e. bullets which expand or flatten easily in the human body and the crime was committed only if the perpetrator employed the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law. It was also stressed that law enforcement situations are excluded from the Court's jurisdiction.

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

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* Previously issued as RC/6/Rev.1.

[1] *Official Records … Eighth session … 2009* (ICC-ASP/8/20), vol. I, part II, ICC-ASP/8/Res.6, para. 3 and annex III.

[2] *Official Records … Resumed eighth session … 2010* (ICC-ASP/8/20/Add.1), part II, ICC-ASP/8/Res.9, para. 9 and annex VIII.

[3] RC/WGOA/1/Rev.2.

[4] Ibid., annex I.

[5] Ibid., annex II.

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

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

C. Article 124

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

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

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

[6] *Official Records … Eighth session … 2009* (ICC-ASP/8/20), annex II, paras. 6 to 13.

Appendix I

Draft resolution amending article 8 of the Rome Statute

The Review Conference,

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

Noting article 121, paragraph 5, of the Statute which states that any amendment to articles 5, 6, 7 and 8 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance and that in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory, and confirming its understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute,

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

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

Taking due account of the fact that the crimes of employing poison or poisoned weapons; of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and of employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, already fall within the jurisdiction of the Court under article 8, paragraph 2 (b), as serious violations of the laws and customs applicable in international armed conflict,

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

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

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

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

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

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

Attachment I

Amendment to article 8

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

"(xiii) Employing poison or poisoned weapons;

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

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."

Attachment II

Elements of Crimes

Add the following elements to the Elements of Crimes:

Article 8 (2) (e) (xiii)
War crime of employing poison or poisoned weapons

Elements

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.

2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.

3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xiv)
War crime of employing prohibited gases, liquids, materials or devices

Elements

1. The perpetrator employed a gas or other analogous substance or device.

2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.[1]

3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xv)
War crime of employing prohibited bullets

Elements

1. The perpetrator employed certain bullets.

2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.

3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.

4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

Appendix II

Draft resolution on article 124

The Review Conference,

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

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

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

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

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

1. *Decides* to retain article 124 in its current form;

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

Annex V(a)

Stocktaking of international criminal justice

The impact of the Rome Statute system on victims and affected communities

Final report by the focal points (Chile and Finland)*

Contents

* Previously issued as ICC-ASP/9/25.

I. Introduction

1. This final report has been prepared by the focal points, Chile and Finland, in accordance with the procedures agreed by the Assembly of States Parties ("Assembly"), whereby a final report was specifically listed as one outcome for this topic.

2. The focal points would like to extend their gratitude to the multitude of different people and stakeholders who have contributed to the stocktaking exercise and without whose dedication and expertise the results would have been much less substantial. The constructive approach by everyone involved throughout the process was remarkable and is proof of the widely recognized importance of engaging victims and affected communities and learning about the impact the Rome Statute system is having on them.

3. The aim of this final report is to highlight the key elements of the preparatory process, discussion and results of this unique stocktaking exercise at the Review Conference in Kampala. In this way, the report can serve as a reference for any further discussions the Assembly of States Parties may have as a follow-up to Kampala. The findings can be also used for benchmarking, possibly when the stocktaking exercise is repeated at some point in the future.

II. The road to Kampala

4. Following a proposal by Chile and Finland, which received strong support from various States Parties and non-governmental organizations (NGOs), the Assembly decided, at its eighth session, that the topic "The impact of the Rome Statute system on victims and affected communities" would be one of the four sub-items to be discussed in the context of the Review Conference agenda item "Stocktaking of international criminal justice".[1] At its eighteenth meeting, on 15 December 2009, the Bureau appointed the respective countries as focal points to prepare the topic for the Review Conference.

5. The goal of the stocktaking exercise for this topic was to engage, through an inclusive approach, victims and affected communities in the Review Conference and to highlight the importance of the Rome Statute system and the Court for them; and to contribute to identifying areas in which the Court's positive impact could be strengthened, including any actions that States and non-State actors could take to further enhance those processes nationally.

6. From the 11 to 17 February 2010, the Governments of Finland and Chile sent representatives to Uganda to participate in a programme of visits to Northern Uganda coordinated by the organization "No Peace Without Justice". The focal points had a fruitful exchange at grassroots level with victims and their communities and obtained first-hand information about the work of the Court and the problems faced in a situation country.

7. At The Hague Working Group meeting on 3 February 2010, the focal points held informal discussions on the modalities for taking stock of the impact of the Rome Statute system on victims and affected communities. On that occasion the Court and civil society representatives updated the States Parties on the status of victims' issues in the context of the Rome Statute system.

8. A report entitled "The impact of the Rome Statute system on victims and affected communities" was discussed and subsequently adopted by the Bureau.[2] It was agreed that the substantive discussion should concentrate on the following specific areas, with a focus on current situation countries or situations under analysis and taking into account lessons learned from other international criminal tribunals:

(a) The role of outreach in impacting victims' expectations of obtaining justice and their enhanced knowledge of their legal rights;

[1] *Official Records ... Eighth session ... 2009* (ICC-ASP/8/20), vol. I, part II, ICC-ASP/8/Res.6, para. 5 and annex IV.
[2] ICC-ASP/8/49.

(b) Especially in situation countries, the importance of recognizing victims' rights to justice, participation and reparation, including nationally and particularly for specific groups of victims, e.g. women and children;

(c) A review of how the Trust Fund for Victims has contributed towards individual dignity, healing, rehabilitation, and empowerment and areas in which its work could be enhanced.

9. At its resumed eighth session, held in New York from 22 to 25 March 2010, the Assembly adopted the focal points' proposed template for stocktaking modalities. Likewise, the text of the resolution was discussed and agreed by States Parties with a view to its adoption at the Review Conference.[3]

10. At the fourth meeting of The Hague Working Group, on 28 April 2010, the focal points introduced a discussion paper entitled "The impact of the Rome Statute system on victims and affected communities", which summarized in a single document the key points for the panel discussion in Kampala.[4] Furthermore, the Court introduced a report entitled "Turning the lens – victims and affected communities – on the Court and the Rome Statute system",[5] as well as a Registry and Trust Fund for Victims (TFV) fact sheet;[6] and the Office of the Prosecutor introduced its policy paper on victims' participation.[7] All these documents would serve as background material for delegations preparing for the Review Conference.

III. Kampala Review Conference

A. Official segment

11. The fifth plenary session of the Review Conference on 2 June 2010 was dedicated to stocktaking of the impact of the Rome Statute system on victims and affected communities. The session was opened by the focal points for this stocktaking topic, namely Chile and Finland. The United Nations Secretary-General's Special Representative for Children and Armed Conflict, Radhika Coomaraswamy, delivered a keynote speech highlighting the importance of justice for victims and the special needs of children and women.[8]

12. The panel discussion was introduced by a short movie entitled "The promise of the Rome Statute system for victims and affected communities: are we there yet?". The subsequent discussion panel was chaired by Mr. Eric Stover of the Berkeley Human Rights Center and composed of Ms. Justine Masika Bihamba, coordinator of the Synergy of Women for Victims of Sexual Violence – DRC (Synergie des femmes pour les victimes des violences sexuelles), Ms. Carla Ferstman, Director of REDRESS, Ms. Silvana Arbia, Registrar of the International Criminal Court, Ms. Binta Mansaray, Registrar of the Special Court for Sierra Leone, Ms. Elisabeth Rehn, Chairperson of the Board of Directors of the TFV, and Mr. David Tolbert, President of the International Center for Transitional Justice (ICTJ).

13. Speakers addressed the importance of victims' participation in the Court's proceedings, the central role of outreach, issues linked to the protection of victims, witnesses and intermediaries, the issue of reparations and the role of the TFV. Special emphasis was given not only to the progress made so far by the Court, but also to the way forward. The panel was followed by a question-and-answer session by States and civil society.[9]

[3] *Official Records ... Resumed Eighth Session ... 2010* (ICC-ASP/8/20/Add.1), part II, ICC-ASP/8/Res.9. The template can be found in annex I of the resolution.
[4] RC/ST/V/INF.4.
[5] RC/ST/V/INF.2.
[6] RC/ST/V/INF.3.
[7] RC/ST/V/M.1.
[8] http://www.icc-cpi.int/Menus/ASP/ReviewConference/Stocktaking/Stocktaking.htm
[9] ICC video summaries of this panel are available on the ICC YouTube Channel:
- Part 1: http://www.youtube.com/watch?v=1oDcYQZW7uY;
- Part 2: http://www.youtube.com/watch?v=ePiZz22_Qw4.

14. At the end of the panel discussion the moderator drew some preliminary conclusions with respect to achievements, challenges and proposals for the way forward. A draft informal summary by the focal points of the panel's findings was circulated during the Review Conference.[10] The conclusions of the panel were as follows:

(a) Achievements

(i) The Court, States Parties and civil society have recognized and vigorously reaffirmed the importance of victim-related provisions and the innovative mandate of the Rome Statute.

(ii) The Court is taking its mandate seriously and has developed a strategy to facilitate victim participation. This is manifest in the number of victims who have applied and participated in the proceedings before the Court.

(iii) Outreach activities have been intensified and special focus programmes have been developed.

(iv) The Trust Fund for Victims is up and running and its programmes, which have been welcomed by victims, are making a clear impact.

(b) Challenges

(i) Victims still lack sufficient information about the Court and its procedures.

(ii) This is particularly true for women and children who, for a variety of reasons, are unable to access information about the Court. This also applies to people living in remote areas.

(iii) Because of this information gap, many victims have unrealistic expectations of the process and reparations.

(iv) Security is clearly a concern for victims and witnesses who have interacted with the Court.

(v) The role of intermediaries still remains unclear.

(vi) Visibility and resources for the Trust Fund are still limited.

(c) The way forward

(i) The Court needs to find creative ways to strengthen its two-way dialogue with victims and affected communities.

(ii) The Court's outreach activities need to be further optimized and adapted to the needs of victims.

(iii) A specific policy needs to be developed for addressing the needs of women and children.

(iv) More protective measures are needed for victims and witnesses.

(v) A comprehensive policy towards intermediaries should be finalized by the Court and implemented.

(vi) Field operations should be reinforced and linked to strategic planning and the allocation of resources.

(vii) The Trust Fund should be congratulated for conducting a monitoring and evaluation programme of its current project and encouraged, where prudent, to increase its visibility.

[10] RC/ST/V/1.

(viii) Finally, the Court and its staff cannot walk this road alone. They need the stewards of the Court—the State Parties—to continue their commitment, support and leadership.

B. Findings and recommendations of civil society side events during the Review Conference

15. The findings and recommendations of the various side events organized during the Review Conference by civil society greatly assisted an understanding of the impact of the Rome Statute system and ways to further enhance it. The findings which relate to the specific focal areas identified in the preparatory documents and which seemed to enjoy wide support at the various side events are highlighted below. The Victims Rights Working Group (VRWG) of the Coalition for the International Criminal Court (CICC) adopted the following outcome recommendations following their side event.

1. The CICC VRWG agreed outcome recommendations following the "Civil society taking stock" panel

(a) Recommendations to States

(i) Arrests: effective multilateral and bilateral cooperation is needed to execute arrest warrants.

(ii) Protection: further cooperation agreements needed, including relocation and protection agreements; support for the newly established ICC relocation fund needed; national witness and victim protection legislation needed, including provision for psychosocial support and necessary resources for implementation.

(iii) Reparations and access to justice: national reparations programmes, including long-term rehabilitation programmes are needed to fulfil States' primary responsibility to repair victims; adequate implementing legislation on asset tracking and freezing must be adopted; implementation of principles and mechanisms for victims to be heard in relevant national processes.

(b) Recommendations in support of the Court

(i) Outreach: States need to support the Court in increasing its outreach capacity, with gender-specific programmes executed in partnership with civil society organizations and information on victim participation specifically addressed to victims and victim communities.

(ii) Field presence: States need to support the Court in increasing the profile and staffing levels of field offices, inter alia to ensure context-specific information and outreach and to contribute to increased protection.

(iii) Prosecutions: States should assist and cooperate with the Prosecutor, particularly in ways that can ensure effective investigation and prosecution of gender-based crimes and avoid perceptions of bias.

(iv) Protection: States need to support the Court in further developing the range of measures to protect victims and witnesses on the ground, especially vulnerable victims such as women, victims of gender-based crimes, and children; and in developing and adopting strategies to protect intermediaries.

(v) Victim participation: States need to ensure resources for effective and meaningful participation, including adequate field presence and support of intermediaries.

(vi) Legal representation: States need to ensure sufficient resources for an adequate and comprehensive legal aid scheme, including external common legal representation of victims.

(vii) In situ proceedings: States need to support the Court in ensuring that hearings take place within the relevant regions to ensure increased visibility and access to justice, while ensuring protection for victims.

(viii) Reparations and the TFV: States need to support increased outreach activities to sensitize populations about reparations proceedings, in particular to manage expectations.

(ix) TFV: States need to provide generous and regular support to the TFV; outreach is needed on the mandate of the Fund and on procedures for enabling victims to benefit from assistance.

2. Other findings from Kampala side events

(a) Victim participation

16. The civil society organizations generally recognized the progress made from the early stages of international criminal justice (examples: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)), when no active involvement for victims was granted, to the Rome Statute system, where victims are given an important role.

17. This development should be seen as adding to the fight against impunity, also the wish to have content for justice – justice being the means to an end – the end being people. It is essential to ensure that justice has a reparative effect for victims, who are the main beneficiaries of the system.

18. Some victims' legal representatives pointed out that while the rights of victims were clearly stated in the Rome Statute, many of the rights victims currently enjoyed had been concretely specified through the legal proceedings before the Court over the past several years.

19. At many side events it became evident that at community level expectations are high as to what the Court can or should do. That is why it is important for civil society to work at grass-roots level to ensure that communities do not raise their hopes too high, only to have them frustrated. After all, healing and reconciliation need to happen at the national level.

20. At one side event addressing the massive trauma experienced by victims/survivors, the importance of a holistic approach to (massive) trauma was raised, and the need to see victims' participation and justice as one essential element in the process of healing for individuals and societies. There is a very strong need for many victims to tell their story and be heard and, secondly, to see the perpetrators facing justice. However, the search of justice can be a way of revictimization. It is important that sufficient psychological support is available when these issues are handled.

21. Many civil society representatives throughout various situation countries testified that participation is in principle a major event, but in many situations proceedings and trials have not (yet) taken off. Arrest warrants need to be enforced; if they are not, then the hope will be forlorn.

22. In the same vein, the trial process, even when it has started, is complex and takes a very long time. Many survivors die before they see the end result. Also, the charges might not cover all the harms suffered – especially problematic are the gender-based crimes, victims of which suffer high levels of stigmatization. The issue of meeting – and managing – victims' expectations throughout the process should not be underestimated.

23. In the affected communities, there are huge areas where there is no Court intervention and the Court has to rely on NGOs as intermediaries, for example to distribute information or help to fill in forms. In many cases, there are security concerns, especially in cases where the perpetrators have not been arrested, or no effective action has been taken at the national level to protect victims, witnesses or intermediaries.

24. It is not clear to many victims, or civil society representatives, how victims can come forward to participate in this process, or how crimes can be documented or evidence given by a witness. In the case of many crimes, a long time passes between the crime and the investigation. Furthermore, a crime such as rape, which to start with is taboo in many societies, is also difficult to prove.

25. Participants from areas under preliminary examination or investigation by the Prosecutor of the Court, such as Palestine, Colombia and Afghanistan, highlighted the positive impact of the Rome Statute system and the hopes raised by the announcement of the Court's involvement in the respective areas, but also the ensuing frustration and negative impact given the lack of progress to date.

(b) Role of outreach

26. It became evident that most issues and problems relating to participation in, and understanding of the Court's work have a direct link to outreach activities.

27. It was often pointed out that trials will only be meaningful to the communities if there is outreach and if outreach is proactive, mindful of the cultural setting and sensitive to peoples' opinions of the Court and the various trials.

28. Civil society representatives stressed that in communities there are no unified opinions regarding justice. Opinions vary based on exposure to violence, gender, wealth and education. Outreach needs to be tailored to specific audiences, children should talk to children. Outreach needs to be local.

29. On the other hand, the people targeted also have a voice. Victims have to be informed and this information will help them speak up. They need to be informed throughout the case.

30. Many civil society participants in the Review Conference side events felt that the Court needed to keep an active presence in the field, closer to communities. More outreach and resources were needed to actively engage communities.

31. At one side event on outreach, an example was given of a study carried out in the Central African Republic (CAR): outreach typically reaches wealthy, educated men. However, in the CAR the prosecution case relates to sexual violence. Women are a key audience. Hence there is a tangible need for local innovative outreach to women, targeting the vulnerable groups not reached by ongoing outreach efforts.

32. Another example was given from Cambodia (Extraordinary Chambers) of a weekly TV talk show about the trials that attracts 1.5 to 2 million viewers in a country of 14 million people, 10 million of whom have access to television. There is also a virtual tribunal currently in development, which will help the legacy phase. Some innovative features for inspiration include: building a broad-based partnership between national and international NGOs, adapting a variety of media for different phases of the trial process, reaching a range of audiences. For example, filming in different parts of the country, tours of the court in the killing fields, court officials were invited to meet villagers (150-200 individuals) at dialogues with emphasis on justice, followed by afternoon sessions on reconciliation, with psychologists participating.

(c) Reparations and the role of the Trust Fund for Victims

33. Many civil society participants from the Democratic Republic of the Congo (DRC) were unhappy with the fact that the scope of the charges in the Lubanga case leaves aside rape, which means that huge number of victims cannot have access to justice and reparations. They expressed the need for some form of recognition by the Court, and TFV projects could be helpful in this regard.

34. At a side event on gender justice, it was pointed out that more attention needs to be paid to the particularized harms women, girls and children experience during armed conflict. The crimes against women continue to be under-investigated and under-prosecuted. Through the TFV the Court has been able to support victims of gender-based violence, though the number of projects is very limited to date.

35. As a concrete example of the impact of the Court in the DRC, it was pointed out that the armed forces stopped recruiting children when they heard what happened to Lubanga. However, as the demobilization did not go well, the former child soldiers have still not gone back to school. This has led to an increase in the exploitation of natural resources, with many former child soldiers being exploited in the extraction process, and women continue to be raped when out in the fields. The point was made, therefore, that in the context of reparations or TFV projects, attention should be paid to getting former child soldiers back to school, training or employment.

36. It was also noted that physical rehabilitation projects have impacted victims positively. Victims feel the Court has heard their plea. However, support is still very minimal – and outreach is very small. The TFV needs more resources in order to be able to support more victims.

37. It was widely felt that the transparency of the TFV needs to be increased at the field level – more information is needed about projects and how to access them.

38. One proposal from a civil society representative was that the TFV must prioritize on life-saving interventions; some victims had died before being assisted medically. Processes to access the fund can take months, sometimes a year. Mechanisms should be identified so that the TFV can fast-track the implementation of urgent projects.

39. A concern was raised that concepts and categories – such as the victims qualifying for immediate assistance by the TFV, the victims of the case, of the situation, participating victims, direct and indirect victims – are such that confusion is caused among communities and at some stage they might even cause jealousy or cause hostilities to be reopened.

40. An example was cited from the Inter-American system, where the legal representatives of victims work in coordination with teams providing psychological assistance to victims to help define the model of reparations – on an individual basis, or a model based on psychosocial assistance – i.e. based on a community perspective.

41. It was recommended that a multidisciplinary examination of the potential beneficial impact of reparations should be carried out. The justice process throughout should contribute to healing rather than to re-traumatizing victim**s.** The Court should maintain a clear focus on reparative justice.

C. Way forward after Kampala

42. The stocktaking exercise of the ICC Review Conference has been described by many as a success, including the sub-item on the impact of the Rome Statute on victims and affected communities. The focal points agree that the goals set for engaging the victims and their communities in the Review Conference and identifying the current strengths, weaknesses, opportunities and threats for the Court and the Rome Statute system as part of the impact were largely met. Everybody should now have enough information to know where we stand. The question is – where do we go from here? It is important that the required changes and improvements get the same level of dedication as their identification. This decision will ultimately define the success or failure of the stocktaking exercise.

43. The focal points are of the view that these findings should be thoroughly reflected in the various organs of the Court, the Assembly and civil society organizations as they go about their regular activities. As the issues raised relate directly to the core business of all the organs of the Court, they should therefore be incorporated and mainstreamed throughout the process, from strategic planning and prioritization to decision-making and financing these activities, as well as in implementation at field level. The designation of one or two focal points for "victims issues" within the Assembly and its working groups could prove to be helpful for a more permanent follow-up, for example within the Strategic Plan.

44. In order to pave the way for discussion on follow-up, the focal points would like to end this report by summarizing some possible improvement measures arising from the findings and the resolution.

1. Strategic planning process including the Court's Strategy on Victims

45. The Court should look again in a coordinated manner and with a sense of urgency at its Strategic Plan and Strategy on Victims. It should ensure that the mechanisms for participation in judicial proceedings are as accessible as possible, avoiding unnecessary complexities or documents that are impossible to obtain. The application forms as well as their processing should be simplified.

46. The Strategy on Victims should include measurable and time-bound objectives. It should also clearly define the criteria of participation as well as modalities for receiving reparations, so that victims can make informed choices. The criteria should be obvious to the man on the street–and the woman in the village. Furthermore, the criteria, as well as the modalities of the participation process – such as the full implications of participation and the possible progress and delays the process may entail – should be clearly explained to potential applicants. Outreach has a large role to play here.

47. While the outreach activities of the Court represent a major generational, substantive and technological step forward from earlier international criminal tribunals, the findings show that there still is need for improvement. Paradoxically, messages need to be more targeted and, at the same time, they need to reach wider audiences, often in extreme geographical and security conditions. The successful experience of another recent tribunal, the Extraordinary Chambers in the Courts of Cambodia, has proven the effectiveness of in situ visits by Court officials (including judges), and of audiovisual tools in reaching wider audiences. But how to reach those distant villages, where rape is still an ongoing reality? Does the Court have any other alternatives than to rely on the intermediaries at the grass-roots level?

48. The Court's strategy on intermediaries is a matter that in light of the findings of the stocktaking would seem to require urgent attention, for example in the context of the Court's strategic planning process. Practice established in the field should not be the guiding principle for the Court's operations. There are plenty of examples of how the lack of a coherent approach creates confusion among victims and the intermediaries dealing with them, security issues and, in the worst case, problems for the trials. While the temptation is great to use the intermediaries to have the means to meet the ends, the use of intermediaries should be based on sustainable practice and Court-wide policy.

2. Budget

49. Implementing some of the findings and recommendations arising from the stocktaking exercise implies reconsidering current operations and, consequently, reallocating or adding resources in some areas. Ideally this would be closely linked to the strategic planning process mentioned above.

50. As the budget discussions following Kampala are taking place in a stringent economic environment, it will be difficult to envisage major budgetary increases in any single area. Yet, it could be argued that some expenses coupled with strategic goals represent more of an investment than a running cost. For example, a review of the Court's audiovisual production capabilities, or finding ways of obtaining better access to public television channels would be useful in this regard.

3. Cooperation and complementarity

51. Protection of witnesses and victim participants was a major concern. This area falls traditionally in the sphere of cooperation, and it has more recently also been discussed in the context of complementarity and the need to strengthen the ability of national governments to protect witnesses, victims, judges and prosecutors. States, the Court and other stakeholders should step up their efforts to seek and exchange information on the various possibilities and best practices, including innovative arrangements such as tripartite agreements or the role that regional organizations can play.

52. When discussing the impact of the Rome Statute system on victims, it is imperative to recognize the negative impact that the unimplemented arrest warrants have. Time after time it became evident that the lack of execution of arrest warrants presents a big threat to the Court's credibility in the eyes of the victims (among others) and thus the real possibility of a backlash. Therefore, finding ways to improve the execution of the Court's arrest warrants should be a matter of priority to all States Parties and to those supporting the Court.

53. As to reparations, due to the massive nature of the crimes, and with the Court being the court of last resort with a policy of prosecuting only those most responsible, the States (both situation countries and other States) also have a fundamental role to play within the Rome Statute system from the point of view of complementarity. In establishing national reparation systems, General Assembly resolution 60/147 of 16 December 2005 (Basic Principles and Guidelines on the Right to a Remedy) could serve as a reference. With this in mind, States should not wait until the end of a judicial cycle for the victims to be compensated but could, for example, already prioritize within existing or future development projects for victims of crimes falling under the Rome Statute.

4. Trust Fund for Victims and reparations issues

54. It was encouraging to observe in the findings the positive impact that the TFV has been able to create amongst victims who have been either direct or indirect beneficiaries of its assistance under the "second mandate" of the TFV.

55. Yet, the minimal resources it has collected though voluntary contributions come nowhere near meeting the needs of the potential beneficiaries. Unfortunately, one of the expected outcomes of this stocktaking exercise, namely pledges to the TFV, was not as great a success as it could have been given the positive evaluation of the TFV's activities and its impact among victims. Still, some new donors joined in, which is always a positive development. However, the TFV clearly needs to sharpen up its fundraising strategies, and States and other stakeholders need to become more sensitive to these activities. One way to do so, in addition to responding to the TFV's call for contributions, is to seek synergies between TFV projects and States' development projects.

56. The TFV also needs to work more in disseminating accurate information within the communities regarding the mandates and purpose of the TFV in order to avoid misperceptions about its activities or resources, leading to disappointment and frustration among victims. Again, outreach is called for.

57. With regard to the first mandate and the future role of the TFV in implementing possible reparations orders by the Court, there was nothing yet to take stock of in Kampala. However, it was felt that, while safeguarding the judicial independence of the Chambers in this matter, the issue could be raised at the Assembly from a policy perspective.

Appendix I

Resolution RC/Res.2[1]

[1] See *Official Records … Review Conference … 2010* (RC/11), part II.A.

Appendix II

Informal summary by the focal points*

A. Introduction

1. At its fifth plenary meeting, held on 2 June 2010, the Review Conference conducted a stocktaking exercise on the issue of Impact of the Rome Statute system on victims and affected communities on the basis of the template that had been adopted by the Assembly of States Parties at its resumed eighth session[1], its updated version[2] and the discussion paper[3].

2. The co-focal points Finland and Chile delivered the opening remarks expressing their gratitude to those who participated in the preparatory work in a constructive and result oriented manner.

B. Keynote Speech by Ms. Radhika Coomaraswamy, Special Representative of the United Nation Secretary-General for Children and Armed Conflict

3. Ms. Coomaraswamy underlined the important role of the International Criminal Court in helping break the silence of victims who have suffered the most serious crimes of concern to the international community. She further emphasized that breaking the silence was a first act of healing. She embraced the Rome Statute for having created a conceptual clarity by defining the details of war crimes, such as conscripting or enlisting child soldiers and having established provisions for rehabilitation and reparations.

4. She emphasized that the right of victims to participate in various stages of the proceedings before the Court was one of the more innovative aspects of the Rome Statute. She stressed that as long as the due process rights of the defendant are protected, and the Victims Participation and Reparation Section is allowed to assist victims with the organization of their legal representation before the Court, this was truly a positive step forward.

5. Ms. Coomaraswamy also referred to the difficult challenge of ensuring the safety of victims who testify as witnesses and victim participants; she noted with satisfaction different measures adopted by the Court in this respect.

6. Ms. Coomaraswamy underlined that justice must also mean reparation and rehabilitation of victims. In this respect, she referred to the Trust Fund for Victims, observing that its role was not only to provide Court ordered reparation, but also psychological and physical rehabilitation and financial support. She encouraged the strengthening of international efforts to develop its capacity and in this regard, she called upon all States Parties to support the Trust Fund to the fullest.

7. With regards to the situation of children in armed conflict in particular, she underlined that strengthening the community of a child victim is extremely important also in the post-conflict rehabilitation period. Reintegration of child soldiers back into their communities is essential for them to have a future, and she recommended that the Trust Fund for Victims focuses on this issue. In addition, she stressed the establishment of a gender sensitive programme was also a matter of urgency.

C. Panel discussion

8. Panelists had been invited to address three of the Rome Statute's key precepts concerning victims and affected communities, along with their associated challenges:

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* Previously issued as RC/ST/V/1.

[1] *Official Records … Resumed eighth session … 2010* (ICC-ASP/8/20/Add.1), part II, ICC-ASP/8/Res.9, annex I.
[2] RC/ST/V/INF.1.
[3] RC/ST/V/INF.4.

(a) Victim participation and reparations, including protection of victims and witnesses;

(b) The role of outreach; and

(c) The role of the Trust Fund for Victims.

9. The panelists were:

(a) Ms. Justine Masika Bihamba, co-founder and coordinator of Synergie des Femmes pour les Victimes des Violences Sexuelles;

(b) Ms. Elisabeth Rehn, Chairperson of the Board of Directors of the Trust Fund for Victims;

(c) Ms. Carla Ferstman, Director of Redress;

(d) Mr. David Tolbert, President of the International Center for Transitional Justice;

(e) Ms. Binta Mansaray, Registrar of the Special Court for Sierra Leone

(f) Ms. Silvana Arbia, Registrar of the International Criminal Court

10. The panel was moderated by Mr. Eric Stover, Faculty Director of the Human Rights Center of the University of California, Berkeley.

1. Victim participation and reparations, including protection of witnesses

11. The moderator opened the discussion by asking each panelist why victims' participation is so important and what the Court has done to encourage it.

12. The panelists agreed on the importance of victims' participation and the need to reinforce the position of victims as the stakeholders and beneficiaries of the Rome Statute.

13. Ms. Arbia observed that the Rome Statute was a landmark in strengthening victims' rights by codifying their right to participation. She confirmed that this right is now a reality. To date 2.648 victims have submitted applications for participation and 770 have been authorized to participate in the proceedings. She indicated that the experience made victims feel that they can contribute to the establishment of the truth and that their suffering is acknowledged. She further indicated that in many national legal systems, the only role for victims in criminal proceedings is as witnesses, whereas the Rome Statute enables victims to participate in proceedings, meaning that they can present their views, as well as express their concerns directly to the judges where their interests are affected.

14. Ms. Ferstman pointed out that before the International Criminal Court victims of the most serious crimes have mainly been spoken about, however, now they can speak for themselves. She added that the development of the case law recognizes former child soldiers as victims instead of perpetrators and allows them to participate in the proceedings. She further underlined the importance of identifying specific groups, such as women's associations in situation countries, so that victims can be supported in their efforts to access legal representation at the ICC through people they know and can trust – and in that light, also highlighted the need to support intermediaries in terms of the services they provide to victims trying to participate.

15. Mr. Tolbert highlighted the fact that the Rome Statute has moved the victims from the periphery to the heart of proceedings which was a revolutionary development in international criminal justice should be celebrated. At the same time, however, this presented a number of challenges. He equally emphasized the importance of giving victims a voice in criminal proceedings, stressing that victims' participation was significant not only for the victims themselves but also for the historical record and legacy of the Court, as well as for the international criminal justice system, in general.

16. Ms. Rehn spoke about victims' expectations and highlighted specific problems faced by victims in their daily lives. In particular, she referred to women suffering from sexual violence as a tactic of war, as well as from stigma when returning back to their communities. She underlined the importance of encouraging women to participate and thereby ensuring outcomes that are beneficial to them.

17. Introduced by the moderator as the eyes and ears on the ground, Ms. Masika Bihamba expressed her concerns regarding the lengthy procedures, as well as the low number of victims admitted as participants in the proceedings compared to the number of victims who have applied. She indicated that traumatization resulting from the crimes committed against women was a serious problem and the fact that they often had to live aside by those who attacked them could worsen the traumatic situation. She added that the community expected that reparations should appropriately respond to these concerns.

18. It was highlighted that in order to strengthen the position of victims, and informing them of their rights, as well as to narrow the geographical distance between the Court and the victims, it was crucial that they were informed by the Court about their right to participate, including comprehensive information about the nature and scope of their rights under the Rome Statute and the Rules of Procedure and Evidence.

19. With regard to the access to legal representation, it was indicated that major challenges were the lack of sufficient financial means as well as communication problems, the latter resulting from the fact that legal representatives were usually not located in the same country as the Court and that they conducted their activities in cities, at a far distance from many victims living in remote areas. In this connection, it was observed that grassroots groups could play a more important role in assisting legal representatives to take instructions from clients, as well as helping victims understand more fully the Court's legal procedures.

20. Regarding the complex nature of the application process in submitting the required documents that prove the entitlement to victim status, it was suggested setting up a time-frame for the application process. It was also observed that avoiding frustration from the side of victims, who wished to participate in proceedings, was a major challenge to be addressed. In addition, assistance at grassroots level could prove helpful also in this respect.

Victim and witness protection

21. The panelists highlighted the fundamental importance of ensuring appropriate protection of victims and witnesses.

22. Ms. Arbia recalled that victims' rights under the Statute are not limited to participation in proceedings before the Court, but also include the rights to be protected and to be awarded reparation. She emphasized that adequate protection of victims is a prerequisite for their participation in proceedings as victims or witnesses; it was thus crucial that the process of enabling victims to apply for participation could be done in a safe and secure environment so as not to put them at risk. In this context, Ms. Arbia further highlighted the importance of cooperation in ensuring protection and confidentiality for participating victims, as well as the need to put in place domestic measures with a view to strengthening complementarity, which is a core principle of the Rome Statute.

23. Mr. Tolbert observed that his experience in international *ad hoc* tribunals had revealed that confidentiality was a key issue in order to ensure appropriate protection of witnesses. Moreover, a robust relocation programme for witnesses should be set up so as to guarantee relocation to a safe place should their lives be at risk due to their interaction with the Court if they were to return to their respective countries. In this respect, he underlined the need for States to enter into witness relocation agreements with the Court. He stressed that these protection measures needed to be implemented professionally and that the Court could gain expertise through cooperation with States and other international tribunals who could share their experience in this area. He further noted that the Court's presence on the ground was very important in order to ensure victims' protection, recalling that a number of field offices had already been established. In addition, coordination between the different organs and units of the Court was essential.

24. In addition, Ms. Masika Bihamba pointed to the importance of protecting intermediaries who could be the targets of attacks because of their assistance to the Court.

2. The role of outreach

25. The panelists underlined the importance of a robust outreach programme in order to make the Court better known, understood and reachable for the affected populations.

26. Ms. Arbia explained that the Court's outreach programme was a two-way communication between the Court and affected communities, which also helped to inform the Court on specific situation related circumstances. She observed that the programme was established to make judicial proceedings accessible to victims and affected communities in countries where the Court operated, through the dissemination of information that was tailored to the specific geographical and cultural background of victims, as well as to the crimes they had suffered. She emphasized that intermediaries, such as religious or community leaders, played a crucial role in reaching victims. She further stressed the importance of starting outreach activities at an early stage, referring to the successful missions of outreach teams in Kenya that had been undertaken even before the commencement of investigations. In addition, she underlined the importance of having recourse to modern means of communication so as to ensure effective outreach.

27. Mr. Tolbert referred to Court's outreach activities as building on the work done in this field by the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and hybrid tribunals, such as the Special Court for Sierra Leone (SCSL). Recalling the experience of the ICTY, he indicated that it was only when the Tribunal realized that they did not have much impact on the ground and that there were misconceptions of its role that the interaction with victims' groups and communities started under his direction. At that time, the term outreach was established and activities ensuring the understanding of the Tribunal's activities were gradually developed. Mr. Tolbert highlighted that outreach is not a panacea, but that it can be very powerful for victims and help to make the Court meaningful in a concrete way.

28. Ms. Mansaray highlighted that most of the challenges identified during the panel discussion could be addressed through a robust outreach programme. She highlighted the importance of reaching the most vulnerable groups of population, particularly children and women, through information that is specifically targeted so as to take their needs into consideration. She noted that cooperation with local NGOs can be very useful to this end. She also pointed out that outreach should not only focus on victims' rights, but also on fair trial rights of the defendant, as this is the way that the trials can be understood to be fair and balanced, thus facilitating the acceptance of the eventual outcome of the proceedings. Finally, she observed that managing the expectations of victims, of whom only a very limited number would be able to participate in Court proceedings, was another critical challenge the Court faced with regard to victims' participation. Otherwise, these unrealistic expectations, when not met, could negatively affect the way victims perceived the Court and international criminal justice in general.

29. As regards the situation in the Democratic Republic of the Congo, Ms. Masika Bihamba expressed concerns about the fact that to date, despite the Court's establishment of a field office in Bunia, the Court's activities, as well as its support to civil society involved in raising awareness of the Court in communities, still needed to be improved in order to meet victims' expectations.

30. Several panelists stressed that adequate funding is a prerequisite for effective outreach activities and called upon States Parties to support the Court to fulfill its mandate in this regard.

3. The role of the Trust Fund for Victims

31. Ms. Rehn explained that the main functions of the Trust Fund for Victims were to provide physical rehabilitation, psychological assistance and material support. She noted that considerable progress has already been achieved. Thirty-four programmes were currently in place in the eastern Democratic Republic of the Congo, in northern Uganda, and in the near future in the Central African Republic, all reaching approximately 42,000 individuals as direct beneficiaries and close to 200,000 benefiting indirectly from the Fund. However, she expressed concern about insufficient financial means available to the Fund and therefore called upon States to increase their contributions to the Trust Fund, which largely depended on voluntary contributions. It was generally agreed that more funding should be made available in order to ensure a meaningful assistance to victims.

32. Ms. Masika Bihamba pointed to the importance of implementing specific measures to support women who had become victims of sexual crimes and consequently often suffered from trauma and stigmatization. In her view, such assistance to date has been insufficient and should not be limited to financial aid. She further observed that her organization based in Democratic Republic of the Congo assisted women in finding a job and integrating them into a local community.

33. Ms. Ferstman underlined that the Trust Fund for Victims formed the reparative part of the Court and should be regarded as an integral part of the Rome Statute system. In concrete terms, she urged States to contribute to the Trust Fund so as to increase its resources, as well as to take measures allowing the freezing and seizure of the assets of perpetrators so they can also be injected into the TFV. She further highlighted that the adoption of national measures was crucial in order to complement the Court's activities in support of victims. Ms. Arbia also reaffirmed the importance of complementarity in this regard.

D. Interactive segment between panelists and delegations

34. The interventions of States and stakeholders reaffirmed the importance of the role given to victims under the Rome Statute system. In addition, many delegations presented concrete proposals on how to further enhance the Court's activities in strengthening the position of victims in the three main areas under discussion.

35. One delegation underlined the important role of field offices in ensuring adequate victims' protection and participation, as well as outreach, noting that activities have to be coordinated; this presence was important in order to facilitate all operations of the Court, including investigations. Another delegation pointed to the potentially increasing role NGOs could play in the future outreach activities of the Court.

36. A detailed proposal was put forward to further improve victims participation based on experience at the national level; measures include establishing offices of judicial information, a prosecutor being in charge of direct contacts with victims, special judicial support programme, including teams of social workers, and teams supporting victims' groups. Civil society could also perform some of these activities. In addition, the same delegation proposed measures to promote access to compensation and reparation mechanisms to include to education, employment and recognition and commemoration of victims.

37. One international organisation emphasized the importance to appropriately address the victims' "right to know" what has happened to their loved ones, noting that the work carried out by the ICC, including forensic investigations and exhumations, could be particularly valuable and relevant in this regard.

38. One question was posed as to the lessons learned from the experience of the International Criminal Tribunal for the former Yugoslavia with regard to cases where women who suffered sexual crimes were facing the perpetrators in the Court room. In this connection, Mr. Tolbert observed that in order to protect the interests of women and children who are testifying as witnesses, a sensitivity training programme for prosecutors and judges is essential. Moreover, the possibility of remote testimony should be granted.

39. One question was raised as to the possible role States could play in developing a policy regarding reparations. Ms. Arbia noted that to date, the Court has not yet awarded any reparations; at the same time she agreed that States could play a role in this process.

40. One delegation enquired on the financial support available to help implement protection measures at the national level. Ms. Arbia explained that a new arrangement had been created for the relocation of witnesses, namely a tripartite agreement between the Court, the contributing State and the State of relocation.

41. As regards the Trust Fund for Victims, a proposal was made to confer an additional task on the Trust Fund, namely to guide and counsel States willing to improve and strengthen their system of reparations, for example, by adopting guidelines or a code of conduct.

42. In general, the need to support the Court and the Trust Fund for Victims with sufficient financial means was underlined.

E. Conclusions

43. The panel was concluded by preliminary conclusions drawn by the moderator addressing achievements, challenges and proposals for the way forward.

1. Achievements

44. The Court, States Parties and Civil Society have recognized and vigorously re-affirmed the importance of victim-related provisions and the innovative mandate of the Rome Statute.

45. The Court is taking its mandate seriously and has developed a strategy to increase victim participation. This is manifest in the number of victims who have applied and participated in the proceedings before the Court.

46. Outreach activities have been intensified and special focus programs have been developed.

47. The Trust Fund is up and running and its programmes have been welcomed by victims and are making a clear impact.

2. Challenges

48. Victims still lack sufficient information about the Court and its procedures.

49. This is particularly true for women and children who, for a variety of reasons, are unable to access information about the Court. This also applies to people living in remote areas.

50. Because of this information gap, many victims have unrealistic expectations of the process and reparations.

51. Security is clearly a concern for victims and witnesses who have interacted with the Court.

52. The role of intermediaries still remains unclear.

53. Visibility and resources for the Trust Fund are still limited.

3. The way forward

54. The Court needs to find creative ways to strengthen its two-way dialogue with victims and affected communities.

55. The Court's outreach activities need to be further optimized and adapted to the needs of victims.

56. A specific policy needs to be developed for addressing the needs of women and children.

57. More protective measures are needed for victims and witnesses.

58. A comprehensive policy towards intermediaries should be finalized by the Court and implemented.

59. Field operations should be reinforced and linked to strategic planning and the allocation of resources.

60. The Trust Fund should be congratulated for conducting a monitoring and evaluation program of its current project and encouraged where prudent to increase its visibility.

61. Finally, the Court and its staff cannot walk this road alone. They need the Stewards of the Court—the State Parties—to continue their commitment, support, and leadership.

Appendix III

Discussion paper*[1]

A. Introduction

1. Attention to the concerns of victims of mass violence has grown significantly since the first major international war crimes trials at Nuremberg and Tokyo, where the voices of victims were largely absent. Regional human rights bodies, such as the European Court for Human Rights and the Inter-American Court, have developed *effective remedies* that States are obligated to provide to victims of serious violations of international human rights. These procedural and substantive rights also have been codified in two important United Nations declarations[2] and the Rome Statute of the International Criminal Court (hereafter "the ICC").

2. The Rome Statute, which provides the legal underpinning for the ICC, gives victims an innovative role as witnesses, participants and beneficiaries of reparations. In doing so, the ICC recognizes that it has "not only a punitive but a restorative function" reflecting the "growing international consensus that participation and reparations play an important role in achieving justice for victims."[3]

3. Despite the Court's many achievements in its eight years of operation, it still faces numerous challenges in its efforts to uphold and promote the rights of victims. Moreover, the 111 States Parties to the Rome Statute could play a more active role assisting the ICC in its efforts, as well as initiating and promoting programs at the national level to improve access of victims and affected communities to justice and reparations. To that end, this paper examines three of the Rome Statute's key precepts concerning victims and affected communities – along with their associated challenges:

(a) The importance of recognizing victims' rights to justice, participation, and reparation, including nationally, and particularly for specific groups of victims (e.g., women and children) in situation countries;

(b) The contribution of the Trust Fund for Victims toward individual dignity, healing, rehabilitation, and empowerment, and areas in which its work could be enhanced, including obtaining more funds; and

(c) The role of outreach in enhancing victims' knowledge of their legal rights and calibrate their expectations of obtaining justice.

B. Victims and affected communities in the Rome Statute system

4. The ICC Rules of Procedure and Evidence define "victims" as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." Victims may also include "organizations or institutions that have sustained direct harm to any of their property dedicated to religion, education, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."[4] Victims can interact with the Court in distinct ways including as

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* Previously issued as RC/ST/V/INF.4.

[1] This discussion paper was researched and written by Eric Stover, Camille Crittenden, and Alexa Koenig (University of California, Berkeley), Victor Peskin (Arizona State University), and Tracey Gurd (Open Society Justice Initiative) in coordination with the focal points (Finland and Chile) on this stock-taking topic and in consultation with a wide range of civil society actors and victims representatives, as well as the Court.

[2] These principles found expression in instruments such as the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985), available at: http://www.un.org/documents/ga/res/40/a40r034.htm, and the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005), available at http://www2.ohchr.org/english/law/remedy.htm.

[3] See *Report of the Court on the Strategy in Relation to Victims*, document ICC-ASP/8/45, 10 November 2009, Introduction, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf (hereafter "*Strategy in Relation to Victims*").

[4] Rule 85, *Rules of Procedure and Evidence, International Criminal Court*, in *Official Records … First session … 2002* (ICC-ASP/1/3 and Corr.1), part II.A; available at http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-

victim participants, witnesses, applicants or recipients of reparations, or individuals who otherwise communicate with the prosecutor or the Court regarding specific situations.[5]

5. While neither the Rome Statute nor the ICC's procedural rules explicitly define the term "affected communities", these communities are understood to include direct victims of war crimes and crimes against humanity, as well as a broader population or group which has been the collective target of an attack as defined in the definition of crimes within the Court's jurisdiction, and may share a common experience of victimization. Since reparations may be granted collectively, it is also useful to consider how certain crimes, such as conscripting and enlisting children in hostilities, can affect specific populations or groups as a whole. In this regard, the successful reintegration and rehabilitation of former child combatants may be dependent on reparations aimed at strengthening the security and cohesiveness of the family and community.

6. Three sections and units of the ICC (in addition to the Office for Public Counsel for Victims, Trust Fund for Victims, and the Office of the Prosecutor) have direct contact with victims and affected communities. The Victims Participation and Reparation Section of the Registry facilitates victim participation in proceedings before the Court, *inter alia*, by informing them of their rights, assisting in the application for participation, and organizing legal representation. Together with the Registry's Outreach Unit, the Section aims to improve awareness about the Court's work and educate affected communities about their legal rights. The Victims and Witnesses Unit is responsible for providing protection and support to witnesses and victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, including logistical arrangements and counseling. In addition, there are two semi-autonomous entities, the Office of Public Counsel for Victims and the Trust Fund for Victims. While the Office for Public Counsel for Victims offers legal support and assistance to victims and their legal representatives, the Trust Fund for Victims provides support to victims in the form of physical rehabilitation, psychological assistance, and material support and, if instructed by a chamber of the Court, may implement reparations awards following a conviction. The Trust Fund for Victims works with survivors and their communities as full-fledged partners in designing effective and locally relevant interventions.

C. Recognizing the rights of victims to justice, participation and reparation

7. Article 68 of the Rome Statute enables victims to present their views and concerns to the court when their personal interests are affected, and "at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." It also values "positive engagement with victims" and its implementation ensures that the "unique perspective" of victims will be actively brought into the justice process.[6] Rule 90 of the ICC's Rules of Procedure and Evidence allows victims to "be free to choose a legal representative" or to choose a common legal representative with other victims. Victim participation has increased significantly since the start of first trial: after a careful beginning with only four victims participating in the confirmation of charges hearing in the Lubanga case, there are now almost 350 victims admitted in the Katanga trial. Overall, victims have been actively participating in all cases before the Court.

8. Organizations such as Human Rights Watch have noted that active engagement of victims in proceedings can help make a crucial link between The Hague and affected communities and cultivate a "sense of investment in ICC proceedings."[7] Indeed, according to the Victims Rights Working Group (VRWG, a network of over 300 national and international civil society groups and experts), victims who have applied to participate in the ICC's processes see the ICC as having real and specific meaning for their hopes of

4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf (hereafter *"Rules of Procedure and Evidence"*).

[5] International Criminal Court, *Strategy in Relation to Victims*, above footnote 3.

[6] International Criminal Court, *Strategy in Relation to Victims,* above footnote 3, at p. 1.

[7] Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, 11 July 2008, at http://www.hrw.org/en/reports/2008/07/10/courting-history-0, at p.114 (hereafter "*Courting History*").

accessing justice. Many victims who have participated directly in the ICC's proceedings have provided positive feedback, stating that they felt valued by having their concerns heard and welcoming the opportunity of being part of a larger judicial process.[8]

9. Though most victims participate through legal representatives acting on their behalf, three victim-participants have addressed the Court directly in the trial of Thomas Lubanga (who is charged with the conscription, enlistment and use of child soldiers in the conflict in the Democratic Republic of the Congo). In January 2010, a former schoolteacher who said he was beaten when trying to stop the conscription of his students, told the ICC that his court appearance "was an opportunity for us to be able to [tell] the world what happened … and ask for reparations if possible."[9] The legal representatives of victims also recognize that judges can benefit from the presence of victims in the courtroom as they can provide them with a "different picture" of the "reality of the situation." One legal representative in the Lubanga case noted that the testimonies of victims can help their own communities "understand that these young people who were in that group [of child soldiers] are not to be considered as criminals but as victims."[10]

10. However, the Court faces numerous challenges in its efforts to make participation meaningful for victims. Among the issues to be addressed are victims' need for clear information about the timeline of investigations and prosecutions, logistical and psychological support, legal representation, physical security, and the possibility of reparations.

11. Vulnerable populations, such as women and children (and especially survivors of sexual violence crimes), often have the least access to information about the Court because they are less likely to possess radios or attend community forums. Indeed, outreach strategies executed in partnership with local, grassroots women's organizations can help women and girls break through the social, physical, and psychological barriers that often hinder their access to the ICC.[11] In northern Uganda the Victims Rights Working Group has noted that the Court has implemented "excellent gender outreach" activities[12] and has "brought awareness of the rights to justice" to both male and female victims.[13]

12. Still, some victims who have chosen to participate in ICC proceedings report frustration with the application process. According to a March 2010 report by the Victims Rights Working Group, victims in the Democratic Republic of the Congo have found the process "slow" and "bureaucratic."[14] Redress has highlighted the long processing time for applications for victim participation in the Democratic Republic of the Congo, leading to backlogs and diminishing access for victims. The organization noted in its November 2009 report that since 2006 "over two hundred applicants in the Democratic Republic of the Congo situation alone have been waiting" for a response to their application to participate in the proceedings.[15]

13. The legal representatives of victims also play an important role in promoting victim participation. This is especially true of legal representatives from situation countries, who are well placed to facilitate regular, sensitive, and culturally appropriate communication with their clients. That said, many victims lack the funds to engage legal representation[16] in which case they may rely on rule 90, paragraph 5, of the ICC's Rules of Procedure and Evidence which states that "a victim or a group of victims who lack the necessary means to

[8] Victims Rights Working Group, *The Impact of the Rome Statute System on Victims and Affected Communities*, 22 March 2010, at: http://www.vrwg.org/Publications/05/Impact%20of%20ICC%20on%20victims%20DRAFT%2022%20march%202010%20FINAL.pdf, at pp. 14-15 (hereafter "*Impact of the Rome Statute System*").
[9] See Wakabi Wairangala, *Victim Tells Court His Village Wants Reparations*, 12 January 2010, available at http://www.lubangatrial.org/2010/01/12/victim-tells-court-his-village-wants-reparations/.
[10] See Wakabi Wairagala, *Q&A with Luc Walleyn, Lawyer for Victims in Lubanga's Trial*, 13 January 2010, available at: http://www.lubangatrial.org/2010/01/13/qa-with-luc-walleyn-lawyer-for-victims-in-lubanga%e2%80%99s-trial/.
[11] Women's Initiatives for Gender Justice, *Report Extract: Rape and Sexual Violence Committed in Ituri, in Making a Statement,* 2nd Edition (February 2010), available at http://www.iccwomen.org/publications/articles/docs/MaS22-10web.pdf, at pp. 23-25.
[12] Victims Rights Working Group, *Impact of the Rome Statute System,* above footnote 8, at p. 6.
[13] Ibid.
[14] Ibid., at pp. 4-6
[15] Redress, *Victims' Central Role in Fulfilling the ICC's Mandate*, November 2009, at: http://www.vrwg.org/Publications/02/ASP%208%20Paper%20FINAL%20Nov%202009.pdf at p. 4 (hereafter "*Victims' Central Role*").
[16] Ibid., at p. 6.

pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance." The subject of legal representation and legal aid for victims has been most recently discussed by the Assembly of States Parties at its eighth session[17] and it will be important to keep monitoring and assessing how well victims are accessing legal representation and aid in the years ahead.

14. Victim and witness protection is a critical component of the Court's work. The Rome Statute recognizes that victims and their families need privacy, psychological assistance, and safety, including protection from retaliation and intimidation, in order to give meaningful effect to victims' access to justice. Article 68 of the Rome Statute requires the Court to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses," while article 43 sets up a Victims and Witnesses Unit in the Registry to provide protection and support.

15. The Victims and Witnesses Unit has three levels of protection that it implements in the courtroom and in the field to protect and support victims as witnesses and participants. These include preventive measures in the field, Court-ordered measures (such as the use of pseudonyms), and a full protection program. The Unit also is developing a system of "intermediate" measures (such as shorter-term, in-country relocations or international relocations at high risk times), as well as pre-emptive ones (such as an innovative use of 20 neighborhood watch initiatives in the capital of Bangui in the Central African Republic, as well as assistance from local police forces). However, the needs are great and the Court cannot meet them alone. States could do much more to help the Court provide relocation and other protective measures to victims and witnesses.

16. The Court has recognized that the provision of psychosocial support for victim witnesses, particularly for vulnerable groups such as women and children, is extremely important – and is taking significant steps to provide such care. Some of these steps include having the Victims and Witnesses Unit orient victim witnesses to the lay-out of the courtroom and the proceedings, providing support from an experienced psychologist, and offering guidance to judges and parties on how to question vulnerable witnesses in a sensitive manner. In addition, the Court has addressed the issue of protection for participating victims who are not appearing as witnesses in trial proceedings. However, to date, there are no specific protection and support measures in place in situation countries tailored to the needs of victim applicants.

17. Safety issues also have emerged in relation to those who assist victims. The International Bar Association, for example, cited the instance of a Congolese legal representative against whom threats escalated when the first ICC trial started and the visibility of lawyers for victims increased.[18] Similarly, civil society has raised concerns about the status of intermediaries, namely individuals or organizations that assist the various organs of the Court, who may face threats on account of such assistance. Although the ICC's basic texts do not explicitly refer to obligations to protect intermediaries, decisions of the Court over the last few years have both acknowledged the work of intermediaries (in the victim context intermediaries have been described as "essential to the proper progress of the proceedings")[19] and has recognized the existence of an obligation to protect "persons at risk on account of their work with the Court"[20] in certain circumstances. Without appropriate protection and support, fewer individuals from countries under preliminary analysis or investigation may be willing to represent or assist victims, thus

[17] *Official Records … Eighth session … 2009* (ICC-ASP/8/20), vol. I, part II, resolution ICC-ASP/8/Res.3, paras. 22-26.

[18] International Bar Association, *First Challenges: An examination of recent landmark developments at the International Criminal Court*, June 2009, available at: http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx.

[19] See International Criminal Court Pre Trial Chamber I, Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08*, November 4, 2008, ICC-01/04-545 04-11-2008, available at http://www.icc-cpi.int/iccdocs/doc/doc583202.pdf, at paragraph 25.

[20] See, for example, International Criminal Court Trial Chamber I, Prosecutor v Thomas Lubanga Dyilo, *Decision issuing corrected and redacted versions of "Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing Tu Quoque Information" of 5 December 2008"*, 2 June 2009, ICC-01/04-01/06-1924, available at: http://www.icc-cpi.int/iccdocs/doc/doc695273.pdf, at paragraph 34.

undermining victims' access to the ICC's processes, as well as the Court's ability to reach out to victims and otherwise implement its mandate.

18. Finally, the Rome Statute provides for reparations. Article 75 sets out the reparations regime, and allows the Court to "make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.'' Before making such an order, victims can make representations to the Court. Such reparation orders may be implemented by the Trust Fund for Victims as ordered by the Chamber (discussed in greater detail below).

19. The ICC has not yet had any experience with reparations – nor has the only other internationalized criminal tribunal that is enabled to provide reparations (the Extraordinary Chambers in the Courts of Cambodia) – so policies are likely to evolve over time. However, the ICC has already recognized that "every effort must be made to ensure that reparations are meaningful to victims," including consultations with victims to determine the most appropriate and effective forms of reparations. The Court has also recognized that communication about reparations awards is necessary to ensure they are as widely known as possible by victims and affected communities.[21] However, it is inherently impossible to repair the losses and fully alleviate the suffering caused by heinous international crimes, and outreach is needed to manage the expectation of victims and respond to their concerns.

20. Given the magnitude and nature of reparations that are needed, the Court's role can only be complementary to that of a national response. In this respect, the experiences of national reparation programs in several post-conflict countries could be instructive to States Parties who, in the general framework of the Rome Statute system, wish to develop material and moral compensation initiatives for victims and affected communities. For example, the Truth and Reconciliation Commission in Sierra Leone noted that the success of its proposed reparations mechanisms would be dependent upon the government's willingness to commit to long-term policy goals and a strong national budget. It also argued that a national response was needed to guarantee the sustainability, continuity, and ultimate success of the program. Further, the Commission said the reparations program did not need to compete with Sierra Leone's other important priorities, such as overcoming poverty and guaranteeing the social, economic, and cultural rights of all its inhabitants, but it could easily compliment efforts at social and economic development by improving the distribution of basic needs and services, such as education, health care, and social security, while also supporting economic development in marginalized areas of the country that were seriously affected by the conflict.[22]

D. The contribution of the Trust Fund for Victims

21. Article 79, paragraph 1, of the Rome Statute provides that "[a] Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of crimes within the jurisdiction of the Court." The Trust Fund was created to perform two distinct functions:

(a) Implement court-ordered reparation awards arising from individual cases before the ICC (reparations can be funded from fines and forfeitures ordered against convicted persons,[23] and may be supplemented by the Trust Fund's "other resources."[24]); and

(b) Provide physical, psychological, and material assistance to victims and their families in ICC situation countries using voluntary funding from States, organizations and individuals.[25]

[21] International Criminal Court, *Strategy in Relation to Victims,* above footnote 3, at p. 9.
[22] Report and Proposals for the Implementation of Reparations in Sierra Leone, Mohamad Suma and Cristián Correa, December 2009, at: http://www.ictj.org/static/Africa/SierraLeone/ICTJ_SL_ReparationsRpt_Dec2009.pdf.
[23] See rule 98, *Rules of Procedure and Evidence*, above footnote 4.
[24] See Regulation 56, Regulations of the Trust Fund for Victims, available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP4-Res-03-ENG.pdf (hereafter "*TFV Regulations"*).
[25] See rule 98, *Rules of Procedure and Evidence,* above footnote 4.

22. Guided by the concept of "local ownership and leadership," the Trust Fund aims to breathe life into the principles of dignity, healing, rehabilitation and empowerment of victims by working with them to rebuild their lives.

23. While the Trust Fund for Victims has not yet implemented any ICC reparations orders, as no trials have been completed and therefore no case has reached the reparations phase, it has provided assistance to victims in Uganda and the Democratic Republic of the Congo since 2007. As of March 2010, the Trust Fund had launched 15 projects benefiting 26,750 direct victims in the Democratic Republic of the Congo[26], and 16 projects benefiting 15,550 direct victims in northern Uganda.[27] Among its programs in Uganda is a project that provides medical operations and care to people whose faces and bodies have been disfigured by soldiers or rebels. Another project in the Democratic Republic of the Congo is helping to rehabilitate and reintegrate child soldiers back into their communities and provide psychosocial care and counseling to rape survivors. Since 2009, the Trust Fund has developed monitoring and evaluation tools to assess the effectiveness of its programs.[28]

24. That the Fund has been able to reach so many victims is not due to an over-abundance of resources or funds. The Trust Fund's secretariat maintains six full-time staff and is guided by five pro bono board members. By March 2010, the Trust Fund had collected a cash income of €5.65 million since 2002, when the Rome Statute came into force. Of that, €3.78 million were allocated to general assistance projects in the Democratic Republic of the Congo and Uganda. In October 2009, the Trust Fund also applied to the ICC to start projects in the Central African Republic in 2010[29] and an additional €600,000 for potential projects in the Central African Republic is earmarked from the remaining €1.87 million. The need to attract more funding is quite clear, if the Trust Fund is to conduct successfully its mandate, also in view of future reparations.

25. As the Trust Fund for Victims enters its fourth year of active field operations, it faces enormous challenges including increasing its visibility while at the same time managing the high expectations of victims who hope to benefit from future reparations and the Fund's general assistance activities. In general, a large number of potential beneficiaries remain unaware of the role of the Fund.[30] And although the Trust Fund has launched a specific appeal for victims of sexual and gender-based violence, its potential to help those survivors has not yet been fully realized.

26. In those situation countries where the Trust Fund has been active, many victim groups seem pleased with its work. According to a January 2010 survey by the Victim Rights Working Group, victims groups whose members had benefited from Trust Fund assistance noted that the Fund's activities had created "hope, trust, confidence and a sense of belonging by the victims." Still, other groups were disappointed that they had been unable to access the Fund's programs and questioned the selection process for beneficiaries. Redress also has expressed concern that Congolese victims lack information about how to apply for reparations (separate from that required to apply to participate in ICC proceedings) and often are confused about the type of reparations that may be awarded (e.g. collective, as opposed to individual).[31]

E. The role of outreach

27. For many survivors of mass violence, acquiring information about the ICC – let alone access to it – can be a tremendous challenge. The barriers they face are many, and often difficult to surmount. The main barrier is simply a lack of knowledge about the

[26] Recognizing Victims & Building Capacity in Transitional Societies, Spring 2010 Programme Progress Report, p.14, http://www.trustfundforvictims.org.
[27] Ibid., p. 19.
[28] Ibid., p. 4-5.
[29] Under the TFV's Regulation 50, the Fund's Board members must notify the relevant ICC chamber of its proposed activities in a situation country when it considers it necessary "to provide physical or psychological rehabilitation or material support for the benefit of victims and their families."
[30] FIDH Position Paper no. 13, *Recommendations to the Assembly of States Parties*, *The Hague, November 14-22, 2008*, http://www.fidh.org/IMG/pdf/FIDHPositionPaperASP7_Nov2008.pdf, p. 12-13; FIDH *Position Paper no. 14, Recommendations to the Assembly of States Parties, The Hague, November 18-28. 2009,* http://www.fidh.org/IMG/pdf/ASP532ang.pdf, p. 12-13.
[31] Redress, *Victims' Central Role,* above footnote 15.

existence of the ICC or a lack of awareness about what it is and how it works. In addition, some victims may find it too psychologically or emotionally painful to follow the progress of trials, or are simply not interested in pursuing justice. Others will confront logistical obstacles including the sheer geographical divide between the Court and affected communities, a multiplicity of languages, poor systems of communication, and lack of access to unbiased and accurate information about the Court. There may be a lack of understanding about judicial processes in general, or an attribution to international judicial institutions of the perceived faults of national judicial systems, such as lengthy proceedings, corruption or a lack of due process. Lastly, communities can become polarized in the wake of war and mass violence and victims may fear for their personal security if they try to make contact with the Court.

28. Despite these challenges, the Court recognizes that access to justice is fundamental for victims to realize their right to a remedy. The ICC views outreach as a process for "establishing sustainable, two-way communication between the Court and communities affected by situations that are the subject of investigations or proceedings. It aims to provide information, promote understanding and support for the Court's work, and to provide access to judicial proceedings."[32]

29. To accomplish these goals, the ICC has created an infrastructure to facilitate communication with victims and provide access to its mechanisms for justice and reparations. It has tried to inform affected populations about legal developments at the ICC and its limitations and receive feedback from victims and affected communities about their justice needs and expectations for the Court. Civil society has recognized that the Court's outreach and communications efforts are vital for "facilitating participation and legal representation of victims in the proceedings; explaining due process rights; [and] facilitating redress for affected communities."[33]

30. The ICC has identified victims who may be entitled to participate in proceedings or receive reparations as a key target of its outreach activities and continues to develop strategies specifically to reach them, communicate their rights, and provide up-to-date information about ICC decisions.[34] It also has acknowledged that if "the rights of victims are to be effective, victims must first be aware of their right to participate so that they can take informed decisions about whether and how to exercise it, and must be assisted to apply to participate throughout if they wish to do so." The Court faces significant challenges in this effort: first, to reach the victims themselves, and second, to provide accurate and relevant information.

31. In response to these challenges, the ICC has systematically been increasing both the quality and scope of its outreach efforts with affected communities. In 2009 alone, field teams held a total of 365 interactive sessions involving 39,665 people in situation-related countries during the year. Potentially, a further 34 million people were regularly offered information about the ICC through local radio and television programs.[35] An outreach audiovisual team produced several programs including "ICC at a Glance" with summaries of the Court's proceedings; "News from the Court," presenting other events at the ICC; and "Ask the Court," a series in which senior ICC officials answer questions from participants during outreach activities and events in the field. Such progress notwithstanding, the Outreach Unit acknowledges that "a lot more needs to be done to increase the Court's visibility within the affected communities."[36]

32. Some victims who have been reached by the ICC's outreach programs have welcomed the effort to keep them informed. According to the Victims Rights Working Group, victims in South Kivu in the eastern Democratic Republic of the Congo have indicated that "visits of the delegates of the ICC for outreach and sensitization have been

[32] International Criminal Court, *Integrated Strategy for External Relations, Public Information and Outreach*, at: http://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf (hereafter "*Integrated Strategy*").

[33] Coalition for the International Criminal Court, *Report on the Eighth Session of the Assembly of States Parties to the Rome Statute*, January 2010, available at: http://www.coalitionfortheicc.org/documents/CICC_-_ASP_8_Report.pdf, p. 27.

[34] International Criminal Court, *Strategy in Relation to Victims*, above footnote 3, at p. 4.

[35] See 'Executive Summary,' International Criminal Court, *Outreach Report 2009*, at http://www.icc-cpi.int/NR/rdonlyres/8A3D8107-5421-4238-AA64-D5AB32D33247/281271/OR_2009_ENG_web.pdf, at pp. 1-4.

[36] Ibid., at p. 19.

reassuring." In Uganda, victims have said that "the existence of the ICC has brought awareness of the rights to justice, and that many victims have knowledge about the ICC, its role, and its strength."[37] Still, reaching victims, particularly in rural and remote areas, often is a difficult task. Redress lamented in November 2009 that "[t]he majority of victims of the crimes being prosecuted by the Court, particularly women and girls, are still unaware of the Court's proceedings."[38]

33. Meeting the challenge of the variety of information needs also has been difficult. The Court has recognized that not all victims need or want the same type of information – but as Human Rights Watch has noted, the ICC must still be ready to respond to the variety of information needs of victims. As Redress highlighted in November 2009, "[t]oo many victims are still reporting that they do not know how to get in touch with the Court, or that the representatives that conduct outreach are unable to respond to more specific questions about victim participation or the Prosecutor's strategy."[39] This is heightened in the case of vulnerable populations, such as children and women, who often face more challenges in receiving information and making their views known.

34. Surveys and research by nongovernmental organizations suggest that the ICC's outreach initiatives have been welcomed and are gradually improving awareness and perceptions of the Court in some communities. A population-based survey conducted in northern Uganda in 2007 found that around 60 percent of respondents knew of the ICC, a significant increase from two years earlier, when only 27 percent had heard of the court.[40] That said, the depth of their knowledge about the Court was fair to poor and only 2 percent of respondents knew how to access the Court. Results of a Victims Rights Working Group questionnaire distributed to victims groups in January 2010 found that the impact of the ICC was "highly dependant on whether communities have been specifically targeted for outreach activities." Areas where outreach activities had taken place saw "an increased knowledge among victims and affected communities about the ICC and its mandate."[41] Civil society have also encouraged the Court to make itself more visible to affected communities, including through making its field presence more accessible,[42] ensuring high level officials regularly travel to and engage with affected populations[43], and holding *in situ* hearings in situation countries[44].

F. Conclusion

35. By engaging victims in trial proceedings, reparation programs, and outreach activities, the Court not only acknowledges and recognizes their suffering and losses, it also helps to make proceedings in The Hague more relevant to communities affected by mass violence. Indeed, if done in a meaningful and consultative way, formal recognition of victims, coupled with effective outreach programs, can help cultivate a sense of local ownership of ICC proceedings and lay the groundwork for greater acceptance of facts established by the Court's judgments. Such efforts can also help reduce the likelihood of future conflict and strengthen a tenuous peace. A further indirect impact can be the empowerment of victims as active members in the rebuilding of their war-torn societies, recognizing them as subjects – and not merely as objects – in the process. Since victims are the main beneficiaries of justice, the Court also can benefit from the perspectives of

[37] Victims Rights Working Group, *Impact of the Rome Statute System,* above footnote 8, at p. 6.
[38] Redress, *Victims' Central Role,* above footnote 15, at p. 3.
[39] Ibid.
[40] Phuong Pham, Patrick Vinck, Eric Stover, Andrew Moss, Marieke Wierda, and Richard Bailey, *When the War Ends: A Population-based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda*, December 2007, p. 5. The survey was conducted under the auspices of the Human Rights Center of the University of California, Berkeley, Payson Center for International Development, and the International Center for Transitional Justice.
[41] Victims' Rights Working Group, *Impact of the Rome Statute System,* above footnote 8, at pp. 6-8.
[42] See for example, No Peace Without Justice, *The International Criminal Court Field Presence*, November 2009, at: http://www.npwj.org/sites/default/files/documents/File/Field%20Operations%20Paper%20November%202009.pdf
[43] See, for example, Human Rights Watch, *Courting History*, above footnote 8, at p. 114.
[44] See, for example, Human Rights Watch, *Courting History*, above footnote 8, at p. 114. See also article 3, paragraph 3, of the Rome Statute, which provides: "The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute."

victims, not only in the conduct of judicial proceedings but also in the development of institutional policies.

36. As States Parties contemplate the stock-taking item on the impact of the Rome Statute on victims and affected communities at the Review Conference, they may wish to consider the Court's achievements and challenges presented in this discussion paper. For ease of reference, the key findings regarding challenges for the Court and States Parties, as appropriate, are listed below:

(a) Victim participation and reparations

(i) Improving the link between effective outreach and victim participation;

(ii) Enhancing outreach efforts so as to more effectively engage marginalized and vulnerable populations such as women and children;

(iii) Easing the backlog of victim participation applications to victim participation;

(iv) Streamlining the process for applying for legal aid;

(v) Recognizing the psychological needs of victim witnesses, especially among vulnerable populations such as women and children;

(vi) Providing protective measures not only to victim witnesses at serious risk, but also to participating victims who are not witnesses, and others who assist the work of the court;

(vii) Signing cooperation agreements between States Parties and the ICC for the permanent relocation of victims and witnesses at serious risk, and to work with the ICC to create a system of "temporary measures" of protection as necessary;

(viii) Signing cooperation agreements between States Parties and the ICC to track, freeze, and seize convicted persons' assets when a reparation order has been issued; and

(ix) Developing mechanisms to address reparations at the national level and help to facilitate victims' rights to truth, justice and reparations, with a particular focus on ensuring access and benefits for women and children.

(b) Trust Fund for Victims

(i) Increasing contributions to the Trust Fund for Victims;

(ii) Increasing the Trust Fund's visibility and outreach efforts both to inform people about its work and to manage expectations about what it can realistically achieve; and

(iii) Increasing the Trust Fund's engagement with vulnerable groups, such as child victims and victims of sexual violence so that they can access and benefit from its general assistance work.

(c) Outreach

(i) Increasing its presence in ICC situation countries and those under preliminary analysis;

(ii) Developing more effective, innovative tools and strategies to reach the affected communities, also in rural and remote areas; and

(iii) Developing more effective tools and strategies to reach women, children, and other vulnerable populations.

Annex V(b)

Stocktaking of international criminal justice

Peace and justice

Moderator's Summary*

A. Introduction

At its sixth plenary meeting, held on 2 June 2010, the Review Conference conducted a stocktaking exercise on the issue of Peace and justice on the basis of the template that had been adopted by the Assembly of States Parties at its resumed eighth session,[1] its updated version,[2] the background papers,[3] as well as other additional contributions received.[4]

The programme of work, prepared by the co-focal points, Argentina, the Democratic Republic of the Congo and Switzerland, consisted in an introduction by the moderator, Mr. Kenneth Roth; interventions by the four panelists, Mr. David Tolbert, Mr. James LeMoyne, Mr. Barney Afako and Mr. Youk Chhang; an interactive segment between the panelists and participants in the panel; and a summary of the moderator.

B. Introduction by the moderator: Mr. Kenneth Roth, Executive Director of Human Rights Watch

1. Mr. Roth began the discussions by stressing that there was no impunity anymore for the most serious crimes and that this fact had changed the world as we knew it. The panel would examine the consequences of this new world of justice and the role played by the establishment of the International Criminal Court ("the Court").

2. In introducing the topic, the moderator affirmed that justice is an important end in its own right. Mr. Roth also pointed out that there were already quite a few examples of the interaction between peace and justice. From these examples, it was possible to extract some preliminary lessons learned:

(a) In the short term

(i) The dire consequences that had been predicted would occur from pursuing justice had fortunately not materialized.

(ii) Indicting war criminals had helped move forward peace processes by marginalizing detrimental actors.

(iii) In contrast, incorporating those with records of past abuses into governments in an effort to secure peace often had had unanticipated negative long-term effects.

(iv) Amnesties (implicit or explicit) also often did not lead to the hoped-for peace. Instead, in several cases, they had sent a dangerous message that abuses would be tolerated and therefore had encouraged more violence.

(b) In the long term

(i) Failing to address crimes could result in renewed cycles of violence even years later. Political leaders may seek to manipulate suspicions and mistrust that result from past impunity.

* Previously issued as RC/ST/PJ/1/Rev.1.

[1] *Official Records ... Resumed eighth session ... 2010* (ICC-ASP/8/20/Add.1), part II, ICC-ASP/8/Res.9, annex II.

[2] RC/ST/PJ/INF.1.

[3] RC/ST/PJ/INF.2, RC/ST/PJ/INF.3, RC/ST/PJ/INF.4, and RC/ST/PJ/INF.5.

[4]. RC/ST/PJ/M.1, RC/ST/PJ/M.2, RC/ST/PJ/M.3, RC/ST/PJ/M.4, RC/ST/PJ/M.5, RC/ST/PJ/M.6, RC/ST/PJ/M.7, and *Nuremberg Declaration on peace and justice* (Finland, Germany and Jordan), UN doc. A/62/885, 19 June 2008.

(ii) On the other hand, international justice may have the benefit of encouraging national prosecutions and instigate legal reforms at the national level.

3. In finalizing his introduction, Mr. Roth nevertheless cautioned that were also a few examples that contradicted these lessons learned.

C. Panelists

1. Mr. David Tolbert, President of the International Center for Transitional Justice

4. As his first remark, Mr. Tolbert emphasized that, some years ago, the topic of peace and justice would have been addressed as "peace versus justice'' instead of "peace and justice'' as it is done today. That said, there were a number of real tensions and issues that needed to be addressed.

5. In the first place, Mr. Tolbert pointed out that amnesties for crimes under the Statute were now definitively off the table. Although acknowledging that long-term benefits of pursuing justice far outweighed any possible short-term benefits of amnesties, the short-term impact, on ongoing negotiations, of pursuing indictments would have to be considered.

6. In this connection, he stressed that the role of the Prosecutor needed to be properly understood. In Mr. Tolbert's view, the Prosecutor must have an understanding of the situation in the ground, not in the sense of allowing political considerations to influence the decision as such to issue indictments or initiate investigations, but regarding their timing. In short, while a Prosecutor who plays politics is not desirable, he or she must have a good understanding of the political issues at stake. In the case of the Court, Mr. Tolbert pointed out, the Prosecutor has applied an additional criterion, which is not in the Statute, focusing on those most responsible for the crimes. In order to avoid the danger of politicization, this criterion must be applied to all cases, in a clear, transparent and public way.

7. Finally, Mr. Tolbert explained that, in addition to international criminal justice, there are other non-judicial mechanisms that can also be used in order to create a viable post-conflict society, bearing in mind that, in order to do so, the past needs always to be dealt with. These other mechanisms, such as truth and reconciliation commissions, reparations (not limited to compensation), and fundamental reforms, including in the security sector, could be a fundamental complement to the use of criminal justice for those responsible of the most serious crimes. In Mr. Tolbert's view, traditional justice can be also a supplement to criminal justice but its effectiveness needs to be evaluated in every particular case.

2. Mr. James LeMoyne, Mediator, former Special Adviser for Colombia to the United Nations Secretary-General

8. Mr. LeMoyne explained that justice is but one of the many items on the agenda of a given peace negotiation process. Mr. LeMoyne expressed the view that peace processes that take justice into account are more sustainable and lasting than those that do not, although there were also some examples where peace processes had been successful without addressing justice.

9. Referring to the challenges facing mediators, Mr. LeMoyne explained that the most rapid way of pursuing human rights was to end wars and, he added, that should always be the first priority on a mediator's agenda. In this regard, if mediators would be allowed to have a degree of flexibility on how to approach justice issues, in particular regarding timing, that would help their work considerably. Nevertheless, this flexibility should not be extended to the most serious crimes under the Rome Statute.

10. In this connection, Mr. LeMoyne stressed that it is very important that the parties involved in peace processes understand the fact that amnesty for the most serious crimes is no longer an option, that a new world has come into place. This, of course, makes peace processes more difficult although every case is different and so are also the persons involved. Eventually, when things go well, the dynamics of the process itself will change the position of the negotiating parties over time but, in order for that to happen, it is

essential, in Mr. LeMoyne's view, that mediators are able to build an environment in which the different actors may express themselves in a very frank and open way.

11. Based on his own personal experience on an ongoing peace process, Mr. LeMoyne expressed doubts as to what extent the idea of a new era of international justice had penetrated the minds of potential perpetrators and the public in general, beyond the international justice community. In any case, he made the point that the advent of international criminal justice was a development as revolutionary as the end of slavery or the recognition of women's rights. As we were only in the early days of this process, Mr. LeMoyne concluded, a long way lay ahead of us.

3. Mr. Barney Afako, Legal Adviser to the Chief mediator on the Ugandan peace process negotiations

12. Mr. Afako began his remarks by stating that, in his view, there was an undeniable dilemma between peace and justice, which would persist for as long as there would be ongoing conflicts. He explained that it is the pressure to act in the interest of their population that make governments go to the negotiating table in cases such as Northern Uganda's. Amongst other things, policymakers have to confront and address the consequences of conflicts, such as displaced populations, poverty and HIV.

13. The experience in Uganda demonstrated that communities affected by war advocated a flexible approach to the issue, although there was not a single answer as to the question of victims' views in the Northern Ugandan conflict. When the discourse about access to justice began in 1999 in Northern Uganda, the option of granting amnesty to the Lord's Resistance Army was viewed by the war-affected population as a necessary signal to insurgents that negotiations to end the conflict were undertaken in a serious manner.

14. With the involvement of the Court, Mr. Afako explained, there was jubilation within the affected communities at the prospect of the arrest of the LRA leaders and high expectations that the conflict would end soon and children soldiers would be demobilized. These hopes were dampened once it was understood that the Court itself did not have the capacity to enforce its arrest warrants and that this was a matter for States. Affected communities went back to confronting the peace and justice dilemma.

15. On the question whether the Court's indictments had pushed the LRA to come to the negotiating table, Mr. Afako observed that the Juba talks had not been the first instance where the LRA had been participating in negotiations only to withdraw at a later stage. Although he could not be categorical about it, in his view, the Court's arrest warrants had played a key role in the LRA leadership's decision not to sign the Juba agreement. However, the negotiations had taken place in the new context where the international community, through the Rome Statute, had chosen a legal regime that required prosecutions for the most serious crimes and this could complicate peace negotiations. The Ugandan people and the international community would have to live with the consequences of that decision.

16. Mr. Afako pointed out that, in parallel to the Juba agreement which envisaged national justice processes and thus the coming into play of the complementarity principle, an informal track had been pursued aimed at persuading the LRA leadership that this would address their concerns regarding the Court's indictments. But these efforts had been cut short as patience had waned with the entire process. In any case, this second track, in Mr. Afako's view is an open one with the possibility for the Ugandan Government to act on the basis of the Juba text at any time. A Special Division of the High Court to deal with the most serious crimes remained in place as a legacy of the Juba text.

4. Mr. Youk Chhang, Director of the NGO Documentation Center of Cambodia

17. Mr. Chhang explained that he came to the Review Conference to bring the point of view of a victim of the Cambodian genocide that had taken the lives of 2 million people in what was otherwise a most beautiful country.

18. Mr. Chhang stressed the fact that victims wanted justice, no matter how much time had elapsed since mass atrocities had been perpetrated. The case of Cambodia, where it had

taken thirty years to set up a mechanism to prosecute perpetrators was telling. Mr. Chhang also stressed that the establishment of the Extraordinary Chambers in the Courts of Cambodia ("the ECCC") constituted a long-awaited response to the demands for justice from the victims, who had never forgotten what they had endured, even if their voices had not been heard for a long time. Victims needed recognition and the trials restored the sense of humanity.

19. In Mr. Chhang's opinion, justice was principally about the future. Justice was essential for broken societies to move forward and played a crucial preventive role. In this context, it was also important to address the issue of how history was reflected in school-books, investing in the education of the younger population, thus promoting its understanding of human rights principles, and the Cambodian genocide.

20. The process of collecting evidence, in which Mr. Chhang had been actively involved, began when the situation in the country had not fully stabilized, thus presenting political security and networking challenges. Moreover, victims were initially reluctant to come forward because genocide as always been a political act. However, over a 15-year period more than a million documents and film had been collected, 20,000 mass-graves had been mapped and excavated, 196 prison facilities had been located, and interviews concerning 10,000 perpetrators had been conducted.

21. Mr. Chhang emphasized also that he did not want the ECCC to devote its efforts to outreach or other non judicial matters, become an NGO or a history department. He wanted a real Court that acted as a Court. What people in Cambodia expected was final judgments. In this connection, Mr. Chhang recalled that people in Cambodian villages were confused when they received contradictory information from visits by different institutions or organs, such as the United Nations, prosecutors and NGOs conducting outreach activities.

D. Interactive segment between the panelists and participants

22. During the segment of the panel devoted to interaction between the panelists and participants, numerous States Parties, non-States Parties, international organizations and non-governmental organizations commented on the different issues raised by the moderator and the panelists.

23. In response to points raised in the discussion, Mr. Afako, observed that the debate should continue in a holistic way and not be narrowed down to the question of pursuing criminal charges. As Mr. Tolbert also noted, other mechanisms were available. However, the principle that there was no amnesty for crimes under the Rome Statute should apply to all transitional justice mechanisms.

24. Mr. LeMoyne made the point that more conversations or interaction between the Court, mediators and other legal practitioners would help to bring about a better understanding of how a more durable peace could be attained through justice.

25. Replying to questions regarding victims, Mr Afako stated that, in negotiating peace processes, taking into account the views of victims was critical. Both he and Mr. LeMoyne pointed out that, in their experience, victims wanted peace in the beginning and, once peace was obtained, they demanded justice. Mr. Chhang observed that while no sentence could satisfy victims who had lost everything, the truth resulting from a justice process provided hope for the future. Mr. LeMoyne stressed the importance of education in the context of peace processes, both in terms of stating the historical facts as well as the non-violent means available for conflict resolution.

26. Mr. LeMoyne believed that the two main threats for the Court would be open defiance of arrest warrants and the possible perception that situations investigated by the Court had the effect of prolonging wars instead of stopping them.

27. The point was made that a broader definition of peace should be applied. According to this view, peace would not only mean the cessation of hostilities but also addressing the consequences of war, such as disease and poverty, which do not allow peace to take root.

28. Mr. Tolbert observed that justice could also promote dialogue among communities and debate, more generally, as for instance in the case of Cambodia, where the first trial of the ECCC had had a huge impact.

E. Summary of the moderator

29. Summarizing the discussion, Mr. Roth stressed that these were the early days of the International Criminal Court and that the Court needed the support of all. Although in the early stages of its existence, the establishment of the Court had indeed brought about a paradigm shift; there was now a positive relation between peace and justice. Nevertheless, there were also tensions between the two that had to be acknowledged and addressed. In the past, this had been done, in a very unbalanced way, through amnesty laws, with varying degrees of effectiveness. Now, it was acknowledged, amnesty was no longer an option for the most serious crimes under the Rome Statute.

30. Sequencing which was one option being put forward by several to resolve possible tensions between peace and justice, had been successful in some cases but had resulted, in others, in *de facto* amnesties. Distinct from sequencing, it was noted that, within its discretion, the Prosecutor could affect the timing of the issuance of arrest warrants. Article 16 of the Statute provided an option for the United Nations Security Council to defer investigation or prosecution in the interest of maintaining international peace and security.

31. The debate had pointed to some of the new challenges resulting from the Court's existence. Mediators had to find ways to convince parties to come to the negotiating table against the backdrop of actual or possible indictments.

32. Regarding the effects of international justice, it could indeed result in marginalizing those who fomented war and encouraged justice efforts at the national level, but the potential deterrent effect of justice would only come into play if justice were perceived to be the norm rather than an exceptional measure. There was also a dilemma about whether justice did not sometimes prolong war in the short term. On the other side, it was clear that in the long run, justice prevented wars.

33. It was generally agreed that non-judicial mechanisms, very useful in themselves, should not be seen as an alternative, but rather supplementary to criminal justice processes, with the Court concentrating on those responsible for the most serious crimes.

34. As for victims, experience showed that their views shifted over time, with an immediate goal for peace followed by a quest for justice. Questions arose as to how to educate victims about the option of pursuing justice, without unduly raising their expectations.

35. In conclusion, the moderator observed that the establishment of the Court constituted a development as momentous as the adoption of the Universal Declaration of Human Rights. He called on States to translate their commitment into actions, in particular, through executing arrest warrants and helping to reinforce the rule of law across the globe, but also by building new institutions, social and economic, to achieve, in the long term, justice in a broader sense.

36. Mr. Roth called upon States and other stakeholders to stand up to those defiant of the Court. Justice, he concluded, is never going to be without enemies.

Annex V(c)

Stocktaking of international criminal justice

Taking stock of the principle of complementarity: bridging the impunity gap

Informal summary by the focal points*

A. Introduction

1. At its seventh plenary meeting, held on 3 June 2010, the Review Conference conducted a stocktaking exercise on the issue of complementarity on the basis of the template that had been adopted by the Assembly of States Parties at its resumed eighth session[1], its updated version,[2] the Report of the Bureau on stocktaking: Complementarity[3] and the focal points' compilation of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute crimes.[4]

2. The co-focal points, Denmark[5] and South Africa,[6] in their opening remarks, recalled that the Court was complementary to national jurisdictions and would operate only where a State was unable or unwilling to carry out investigations and prosecutions. They noted that the global challenge was for States to assist each other to fight impunity where it began, i.e. at the national level. Although having primary jurisdiction to investigate and prosecute the crimes within the jurisdiction of the Court, some States did not have the capacity to do so, which could lead to an impunity gap. They noted that the role that the Court could play in positive complementarity was limited by the nature of the institution and its resources. All efforts at bridging the impunity gap should be done with sensitivity to context and environment.

3. Furthermore, they expressed that the Prosecutor had wisely chosen to prosecute those most responsible. It was thus of utmost importance for States and organizations to work together to close the impunity gap and ensure that domestic systems were prepared to deal with the crimes in the jurisdiction of the Court. It was key that national jurisdictions be provided with the tools to deal with these crimes.

4. The moderator noted that the term "complementarity" was not reflected in the Rome Statute. He expressed the view that it had conveyed the idea of an antagonistic relationship between the Court and States. However, once the Statute entered into force, a new approach evolved whereby complementarity was viewed in more positive manner. The concept of positive complementarity then emerged, in the Prosecutorial strategy and in the documentation before the Conference. Furthermore, he opined that positive complementarity could not exist without negative complementarity.

* Previously issued as RC/ST/CM/1.
[1] *Official Records … Resumed eighth session … 2010* (ICC-ASP/8/20/Add.1), part II, ICC-ASP/8/Res.9, annex IV.
[2] RC/ST/CM/INF.1.
[3] ICC-ASP/8/51.
[4] RC/ST/CM/INF.2.
[5] Ambassador Thomas Winkler, Under-Secretary for Legal Affairs, spoke on behalf of Denmark.
[6] H.E. Mr. Andries Carl Nel, Deputy Minister of Justice and Constitutional Development, spoke on behalf of South Africa.

B. Panel discussion

5. Six panelists had been invited to address the Conference. The panel was moderated by Professor William A. Schabas.

1. United Nations High Commissioner for Human Rights

6. The United Nations High Commissioner for Human Rights, Ms. Navanethem Pillay, recalled that, in the traditional understanding of the hierarchy of international tribunals, the ad hoc tribunals established by the United Nations Security Council took precedence over national jurisdictions. The new approach of complementarity was not hierarchical and she viewed as positive the fact that States had the primary responsibility to investigate and prosecute the crimes within the jurisdiction of the Court.

7. As High Commissioner for Human Rights, her chief concern in this regard was to ensure that there were no gaps in the prosecution of violations of human rights. She recalled that the primary responsibility for the investigation and prosecution of violations of human rights law that amounted to violations of international human rights law rested with States. Where States were unable to do so due to lack of capacity, her Office stood ready to assist them to build capacity in the justice sector. International cooperation was offered to States through the United Nations system via the mandate of her office. Her office was a voice for victims and would continue to advocate on their behalf to ensure accountability for atrocities.

8. Where States took a deliberate decision not to investigate or prosecute because of unwillingness, she would intercede directly to encourage them to assume their international responsibilities. Failing that, she would raise concerns regarding the situation and would continue efforts in this regard.

9. While the term “complementarity” was not defined in the Statute, the Statute did not, however, suggest the Court may never exercise jurisdiction unless a State had proved unwilling or unable to do so. She also referred to the jurisprudence of the Appeals Chamber of the Court that where a State took no action, there was nothing to prevent the Prosecutor from commencing an investigation.

10. As regards how her Office could assist States to fulfil their obligations under the principle of complementarity, it had committed to judicial capacity building in States, helped in monitoring violations, facilitated commissions of inquiry into violations. It had also established a mapping project which enabled it to maintain a clear picture of the incidence, patterns and frequency of human rights violations.

11. She also noted that the “most responsible” policy had only recently evolved and had its origins in the Special Court for Sierra Leone, and that the Prosecutor of the International Criminal Court (the Court) had adopted this as part of the Prosecutorial strategy.

2. Mr. Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia

12. Mr. Brammertz addressed the relationship between international and national jurisdictions, and the impact that the completion strategy might have on how the Court was viewed at the national and international levels.

13. He noted that, although the Court was a permanent court, it would be necessary to put in place a completion strategy for each individual situation. A lesson learned from the ad hoc tribunals was that the sooner the completion strategy was defined, the better.

14. In the experience of the International Criminal Tribunal for the former Yugoslavia (ICTY), the completion strategy had not been the main focus at the inception and, in fact, after the Balkans war, cooperation with national jurisdictions had been difficult. The tribunal began to focus on complementarity only after the adoption of the relevant Security Council resolutions on the completion strategy. Cases were then transferred to national jurisdictions in the region. He recalled that, at the inception of the ad hoc tribunals, complemenarity was a “side-product” while today it had become a main priority.

15. Incentives had been created to encourage cooperation with the ICTY and relevant tools had been put in place, e.g. a transition team which served as an interface with local prosecutors. An extensive database had been made available to prosecutors in the region and, in 2009, the ICTY integrated a liaison prosecutor from the region to provide assistance to the tribunal and vice-versa.

16. He noted that the best forum for dealing with crimes was the location where they were committed, closer to affected communities and in the local language. He therefore viewed as positive the willingness of local judiciaries to deal with the crimes and to ensure that measures were put in place to do so.

17. The Security Council had made clear that the ICTY would continue to deal with cases against the main perpetrators and refer the low and mid-level ones to national jurisdictions. He saw this as an effective way of dealing with national jurisdictions while respecting international jurisdictions.

18. The moderator queried whether this method of reserving for international tribunals only those most responsible did not have pitfalls e.g. it would telegraph to persons that unless they were at the top level, they need not be concerned about the international tribunals.

19. Mr. Brammertz noted that the notion was based on the fact that international tribunals cannot deal with all cases. However, the notion was changing and was being looked at from situation to situation.

20. The moderator expressed the view that the process of transferring cases back to national jurisdictions, as indicated in rule 11 *bis* of the Rules of Procedure of the Tribunals, could be termed “complementarity in reverse”.

3. Hon. Justice Akiiki Kiiza, High Court of Uganda, Head of the Special War Crimes Division

21. Judge Kiiza addressed the experience of the relationship with the Court from the perspective of the national level, in particular the establishment of the War Crimes Division of the High Court of Uganda.

22. He recalled that it was the Government of Uganda that had referred the situation in Uganda to the Court, thus taking up its international responsibility. Regarding the issuance of the arrest warrants by the Court against the five indictees, he referred to the view that the Lord’s Resistance Army (LRA) had thereby been prompted to start peace talks. The referral to the Court had therefore had positive results for Uganda, since there had been peace since 2006.

23. The Juba peace talks had included an agreement on accountability. A special Division of the High Court, the War Crimes Division, consisting of four judges, had been established to try individuals suspected of atrocities. The War Crimes Division worked in partnership with the Court.

24. He appealed to the Court and international bodies for assistance in capacity building e.g. the training of prosecutors in the Special Investigations and Prosecutions Unit within the War Crimes Division, as well as for assistance from States Parties, the Court or international organizations in capacity building.

25. He noted that the national courts were ready and willing to try anyone brought before them, and had the competence and the capacity to try everyone, including the indictees before the Court. It had not yet heard cases but might soon do so in respect of lieutenants and other military personnel who had not been indicted by the Court.

26. With the recently adopted implementing legislation, as well as the existing Geneva Conventions Act, the possibility and the capacity now existed to prosecute persons at the domestic level accused of the crimes within the jurisdiction of the Court.

27. He further noted that the War Crimes Division was the first of its kind in Africa and recommended that States Parties that had not established national tribunals consider doing so, as this would assist them in fulfilling their responsibilities in respect of the jurisdiction of the Court.

28. As regards training, he indicated that Uganda could benefit from the Court, the ad hoc tribunals, seminars, internships to enable staff to gain greater experience.

4. Colonel Toussaint Muntazini Mukimapa, Deputy Auditor General, Kinshasa, Democratic Republic of the Congo

29. Col. Muntazini Mukimapa addressed the experience of complementarity in Democratic Republic of the Congo. He stated that the Democratic Republic of the Congo had referred three nationals to the Court, and was a model for cooperation with the Court.

30. At the national level, the Democratic Republic of the Congo had put in place arrangements to prosecute persons who committed serious crimes under the Rome Statute. After ratifying the Rome Statute in 2002, the Democratic Republic of the Congo had established a military court in November 2002 with jurisdiction over Rome Statute crimes. The first sentence had been delivered in February 2006 and marked the first time that a national jurisdiction had condemned the Congolese State with respect to civil responsibility for sexual violence.

31. He noted that there was an important impunity gap in respect of crimes committed before 2002, since neither the Court's jurisdiction nor the penal code of the Democratic Republic of the Congo had retroactive effect. After 2002, there were two strategies, i.e. cooperation with the Court on the basis of a request sent to the Court regarding the situation in the Democratic Republic of the Congo since 1 July 2002; and domestic military jurisdictions in respect of criminal matters.

32. Among the key challenges for the principle of complementarity in the Democratic Republic of the Congo were: a lack of implementing legislation; a lack of human resources; training and a lack of know-how in the protection of victims, sexual violence, serious crimes, exhumations; infrastructure, e.g. prison facilities, as there was no functioning military prison for the completion of the judicial process; operational capacity, i.e. a lack of matériel, since the Democratic Republic of the Congo was emerging from war; the need for restructuring of the army; training of army personnel; localization of the army and those who can investigate; the identification of suspects, since most military persons bore assumed names, making investigation of someone with a pseudonym difficult; access to displaced populations; and infrastructure, e.g. security, bad roads.

33. The strategy put in place to cover the impunity gap in the Democratic Republic of the Congo included training, e.g. capacity building with the Human Rights and Rule of Law Divisions of MONUC, as well as bilateral cooperation, e.g. with NGOs.

34. The moderator noted that the Lubanga case marked the first time that the Pre-Trial Chamber had decided on admissibility in light of article 17. The judges developed the principle of inactivity, i.e. that the Democratic Republic of the Congo system seemed capable of prosecution, but because it was inactive as it was not possible at the time to prosecute cases of recruitment of child soldiers at the national level, the Court had jurisdiction. He noted further, that the Democratic Republic of the Congo was now showing that it was capable of judging all cases.

35. Col. Muntazini Mukimapa indicated in this regard that the situation in the Democratic Republic of the Congo had been referred to the Court on the basis of action by the State. At the time, the judiciary had not been in a position to carry out investigations. The Democratic Republic of the Congo was ready to cooperate with the Court in respect of prosecutions. The transfer of the situation to the Court did not mean that the State had defaulted on its primary responsibility but the inactivity had been due to fact that the crime of recruiting child soldiers was not included in the penal code.

5. Ms. Geraldine Fraser-Moleketi, Director, Democratic Governance Group in the Bureau for Development Policy, United Nations Development Programme

36. Ms. Geraldine Fraser-Moleketi addressed the role of development assistance by the United Nations Development Programme (UNDP).

37. She indicated that UNDP, as the development arm of the United Nations, looked at many challenges that needed to be confronted to reduce poverty and create a fertile ground for human development. UNDP based its interventions on agreement with the respective Governments. It was engaged in rule of law programmes in approximately 90 countries, 30 of which were affected by or had emerged from violent conflict, and all interventions were based on the principle of national ownership. UNDP was not engaged in producing normative frameworks or in monitoring the situation of human rights, but ensured that development efforts were based on the principle of inclusion, participation, equality and non-discrimination. The main focus in its rule of law programming was in the area of capacity development as one of the preconditions for national ownership.

38. UNDP had adopted an integrated approach to transitional justice and rule of law. It had been noted that international assistance for transitional justice mechanisms was of limited impact if wider rule of law and peace building efforts were not taken into account. Among the actions that UNDP could take were to inform the judiciary about international law and promote its use in domestic practice; help develop legislation and implement witness protection programmes; develop communication strategies with the public for cases of gender-based violence and organized crime. She noted that building capacity in the justice sector, e.g. for drafting and enacting legislation, increasing the number of executions of court decisions, building outreach and legal awareness, providing for broad-based free legal aid programmes could reciprocally increase the effectiveness of processing cases of serious crimes.

39. The work of UNDP also touched on conflict-related prosecutions and efforts to deepen national accountability mechanisms, e.g. in Colombia, UNDP had begun to facilitate an intergovernmental process whose aim was to strengthen prosecutorial capacity and reparations programmes that centred both on national mechanisms and community-level initiatives.

40. In addition, across regions, UNDP had provided targeted support for criminal justice in criminal cases of international concern, e.g. developing the capacity of the Bosnia and Herzegovina State Court's War Crimes Chamber and district level courts, as well as the development of the national strategy for war crimes prosecutions. Also, in Timor-Leste, as part of a sector-wide assistance to judicial reform, UNDP provided support for developing prosecutorial capacity, and assisted the Commission for Reception, Truth and Reconciliation with training of commissioners/district representative and community outreach efforts.

6. Mr. Karel Kovanda, Deputy Director General for External Relations, European Commission

41. Mr. Kovanda addressed the role of international donors in international cooperation and, in this regard, focused on the measures undertaken by the European Union.

42. He referred to the main areas in which the European Union provided assistance, including direct assistance to the Court, to civil society and to state institutions through extensive development progammes. Assistance was also provided to NGOs in some situation countries, e.g. in the Democratic Republic of the Congo and Kenya. Support was provided to some countries under preliminary investigation e.g. Afghanistan, including to its transitional justice platform. Furthermore, support was available for civil society monitoring as well as the traditional justice mechanisms in Rwanda.

43. In addition to support for the Court, the European Union also provided support to other tribunals, including the ICTY, the International Criminal Tribunal for Rwands (ICTR), the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Chamber in Kosovo. The efforts of these other courts and tribunals did not cover the crimes within the jurisdiction of the Court but were indispensible judicial mechanisms for closing the impunity gap for past crimes.

44. He noted that the key lessons learned were that willingness mattered, since a lack of political will to remove those in power could hinder programmes of reform; the voluntary nature of assistance; the importance of prioritizing, i.e. immunity must be high on the agenda of the affected State, although the government of a country that has emerged from conflict may face economic issues; yet Rome Statute crimes must be given precedence to other concerns; and understanding the impact of impunity, i.e. without a broad consensus that impunity leads to the perpetuation of violence, it would be difficult to argue against those who advocate approaches other than accountability.

45. As regards future action, he suggested that it might be useful to translate a common understanding of what is encompassed by complementarity into a tool kit of complementarity that would incorporate accountability into assistance and cooperation projects; guidelines; lessons learned; and what should be avoided future. The tool kit could be developed jointly with States, the United Nations Office on Drugs and Crime (UNODC), the Office of the High Commissioner for Human Rights (OHCHR), the Commonwealth Secretariat, the Court, civil society, the European Union. The tool kit would facilitate those involved in rule of law programmes, post conflict etc.

46. He noted that the report of the Bureau referred to horizontal and vertical complementarity but that it did not elaborate on the latter. He expressed the view that vertical complementarity extends to ensuring that the neighbouring States are equipped to deal with, the LRA members if captured on their territory.

47. He suggested that the most useful means should be sought to implement the recommendations of the Report of the Bureau on stocktaking: Complementarity,[7] as well as those set out in the focal points' compilation of projects.[8]

[7] ICC-ASP/8/51.

[8] Focal points' compilation of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes (RC/ST/CM/INF.2).

Annex V(d)

Stocktaking of international criminal justice

Cooperation

Summary of the roundtable discussion*

A. Introduction

1. At its eighth plenary meeting, held on 3 June 2010, the Review Conference conducted a stocktaking exercise on the issue of cooperation on the basis of the template that had been adopted by the Assembly of States Parties at its resumed eighth session[1] and further elaborated in preparation of the Review Conference.[2]

2. The following five panellists had been invited to address five specific questions, grouped in two clusters, related to the issue of cooperation:

(a) Cluster I

(i) Ms. Amina Mohamed, Permanent Secretary in the Ministry of Justice, National Cohesion and Constitutional Affairs, Kenya;

(ii) Mr. Adama Dieng, Registrar of the United Nations International Criminal Tribunal for Rwanda; and

(iii) Mr. Akbar Khan, Director of the Legal and Constitutional Affairs Division, Commonwealth Secretariat.

(b) Cluster II

(iv) Ms. Patricia O´Brien, United Nations Under-Secretary-General for Legal Affairs; and

(v) Judge Sang-Hyun Song, President of the International Criminal Court.

3. Judge Philippe Kirsch, former President of the International Criminal Court and Ad-Hoc Judge at the International Court of Justice, served as moderator.

B. Statements by the panellists

1. Implementing legislation: specific issues which individual States Parties have encountered and good practices in this area (Ms. Amina Mohamed)

4. In her presentation, Ms. Mohamed referred to Kenya's recent experience in establishing mechanisms for the punishment of genocide, crimes against humanity and war crimes, and to Kenya's cooperation with the Court.

5. One such mechanism was the International Crimes Act, which entered into force in 2009. The Act recognized international crimes under the Rome Statute and made provisions for their prosecution under the national legal system. It also provided for a legal basis for cooperation with the Court by, inter alia, obligating the Government of Kenya to comply with any requests by the Court for assistance.

* Previously issued as RC/ST/CP/1/Rev.1.
[1] *Official Records … Resumed eighth session … 2010* (ICC-ASP/8/20/Add.1), part II, ICC-ASP/8/Res.9, annex III.
[2] RC/ST/CP/INF.1.

6. In this connection, Ms. Mohamed indicated that as a best practice, the Government of Kenya had involved government departments, civil society organizations and human rights institutions in the development of the legislation, which had contributed to its broad acceptance by the public. One of the challenges Ms. Mohamed referred to however related to the variance of the sentences allowed under the Rome Statute and the existing penalties under Kenya's penal legislation.

7. Ms. Mohamed further observed that Kenya had become a situation country in 2010 when the Court's Pre-Trial Chamber had authorized the Prosecutor to initiate a *proprio motu* investigation into the post-election violence that had occurred in 2007-2008 after the attempts of the Government to establish a local tribunal had failed. Nonetheless, the Government of Kenya was undertaking reforms in various sectors, including the legal and justice sector, to enhance its national capacity to investigate and prosecute international crimes. Moreover, a Constitutional review process would provide a stronger policy, legal and institutional framework for the promotion of the rule of law, respect for human rights and the elimination of social injustice.

8. In conclusion, Ms. Mohamed observed that no State was immune from violence without strong institutions and an effective legal system with the necessary checks and balances. She reiterated the full support of the Kenyan Government to the Court and encouraged other States Parties, in particular from the Group of African States, to do the same.

2. Supplementary agreements and arrangements and other forms of cooperation and assistance: experiences in relation to the Court and other international judicial bodies - a consideration of the challenges and how these might be overcome (Mr. Adama Dieng)

9. At the outset, Mr. Dieng observed that the International Criminal Tribunal for Rwanda, being established by the United Nations Security Council, could demand State compliance which, under article 28 of its Statute, entailed cooperation without undue delay in the investigation and prosecution of accused persons.

10. Mr. Dieng stressed that the ad hoc tribunals relied greatly on the cooperation of States in order to fulfil their mandates. Initially, such cooperation had been envisaged as a one-way street. Within a short period of time, however, the Tribunal was in a position to offer assistance to States, inter alia, by providing access to its records. Mr. Dieng advised the Court to consider developing policies on this aspect of cooperation.

11. Mr. Dieng observed that requests for arrest and surrender were often mistakenly treated as requests for extradition, which could give rise to unwarranted, extensive domestic judicial reviews causing unnecessary delays. These challenges could possibly be overcome by clarifying more systematically the differences between extradition and surrender. Similarly, entering into supplementary agreements establishing administrative transfers of indictees could be considered.

12. With regard to implementing legislation, Mr. Dieng observed that the Tribunal had faced a major challenge in the exchange of information and collection of evidence, arising from the incompatibility between domestic laws, especially from civil law systems, and the procedure followed by international jurisdictions, which was mainly based on common law systems. Mr. Dieng recommended that the Court enter into a dialogue with States Parties that had enacted implementing legislation to address this issue.

13. Mr. Dieng noted that cooperation on matters related to witnesses had been secured by, inter alia, the appointment of focal points in relevant States and by seeking the cooperation of national law enforcement agencies. In some instances, the ad hoc tribunals had been able to relocate witnesses and their families without entering into any formal agreements, but on the basis of individual requests for cooperation. The enforcement of sentences and relocation of acquitted persons however had been problematic due to it being a non-mandatory element of cooperation.

3. Challenges encountered by States Parties in relation to requests for cooperation: how these might be overcome (Mr. Akbar Khan)

14. In his statement, Mr. Khan stressed that without State cooperation the Court would fail in its mandate. Effective cooperation did not only relate to mandatory forms of cooperation referred to in the Statute, but also to other areas in which there was no specific obligation to cooperate.

15. Mr. Khan observed that although the current status of State cooperation was promising, a high number of requests from the Registry remained outstanding, particularly regarding witness relocation. Furthermore, no agreements had been concluded on interim release. As regards the defence teams, Mr. Khan stressed the need for obtaining timely support from States Parties so as to ensure that the principles of equality of arms and fair trial were upheld.

16. On the issue of implementing legislation, Mr. Khan invited States Parties to reflect on the challenges they had faced in order for innovative solutions to be developed through dialogues and sharing best practice. Mr. Khan noted that implementing legislation was the best way forward to securing timely cooperation. In the absence thereof, he recommended that States Parties consider entering into ad hoc arrangements and framework agreements with the Court so as to ensure timely cooperation until implementing legislation was in place. Mr. Khan recalled that the establishment of national focal points or domestic task forces to mainstream the Court would also be useful in securing State cooperation.

17. Mr. Khan stressed that the absence of cooperation could have financial consequences. The failure to identify and freeze assets could, for example, result in the accused being deemed indigent, which in turn would put a strain on the Court's budget for legal aid.

18. Mr. Khan reiterated that the Commonwealth Secretariat would stand ready to assist its States with ratifying and implementing the Rome Statute and that, looking ahead, the issue of cooperation would need to remain on the agenda of the Assembly of States Parties in order to discern and share best practice and to help identify possible sources of assistance.

4. Cooperation with the United Nations and other intergovernmental bodies, including regional bodies: consideration of the present situation and ways in which it can be developed (Ms. Patricia O'Brien)

19. In her statement, Ms. O'Brien focused on the principles governing cooperation between the United Nations and the Court. While noting the special relationship between the two institutions, Ms. O'Brien stressed that the United Nations was only a secondary source on which the Court could rely; the primary source for cooperation were the States Parties to the Statute.

20. Ms. O'Brien referred to the UN-ICC Relationship Agreement which had been signed in 2004 and was based on the fundamental principle that the United Nations would cooperate with the Court, whether in the administrative, logistical or legal field, whenever feasible, with due regard to the United Nations Charter and applicable rules as defined by international law. The Relationship Agreement further served as a legal basis for the conclusion of further arrangements, including the Memorandum of Understanding between the United Nations and the Court concerning cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the Court. Other arrangements allowed for the provision of telecommunication facilities for the Court's field presence and transportation services.

21. While referring to the relationship between the United Nations and the Court as being solid, Ms. O'Brien observed that a number of challenges had to be overcome, the most important of which concerned the sharing of confidential information in the case against Mr. Thomas Lubanga Dyilo. Such challenges arose because both the United Nations and the Prosecutor were struggling to balance competing obligations. Ms. O'Brien indicated in this regard, that the United Nations had to reconcile its will to cooperate with the Court with the need to ensure the safety of its personnel and the continuation of its

activities and operations in the field. Ms. O'Brien indicated that the Court and the United Nations had put in place a procedure that allowed for these tensions to be resolved in an appropriate manner and to the satisfaction of the judges of the Court.

5. Enhancing knowledge, awareness and support for the Court: including through mainstreaming and galvanizing public support for and cooperation with the Court within States, including for the enforcement of Court decisions and arrest warrant (Judge Sang-Hyun Song)

22. In his presentation, President Song focused on the connection between enhancing knowledge, awareness and support for the Court and cooperation. As such, he identified four areas in which this link proved to be vital.

23. First, President Song recalled that the Court relied heavily on diplomatic and public support and observed in this regard that, in the past, diplomatic pressure had led to the arrest and surrender of accused persons to the ad hoc tribunals. With regard to the International Criminal Court, President Song observed that, while cooperation generally had been forthcoming, a number of States Parties had indicated that they were not in a position to comply with cooperation requests as they had not yet met their obligations under article 88 of the Rome Statute. Moreover, despite the fact that cooperation was a legal obligation, the Court did not have the means to enforce it except for referring a case on non-cooperation to the Assembly of States Parties or to the Security Council under article 87 of the Statute. In addition, President Song noted that it would be inappropriate for a judicial institution to urge States Parties to take particular actions or recommend ways to exert pressure on other States Parties to execute arrest warrants or enforce other decisions. Consequently, it would be for the Assembly to consider how to best use the political and diplomatic tools at its disposal to foster and enhance cooperation with the Court.

24. Secondly, President Song indicated that increasing knowledge and awareness of the Court's activities could contribute to securing voluntary cooperation by both States Parties and non-States Parties, for example with regard to the enforcement of sentences and the relocation of witnesses. Moreover, as the Court may not be able to carry out its core functions without the voluntary assistance of States, it would be in the interest of the Assembly of States Parties to raise awareness about its necessity and to encourage States to provide such assistance.

25. Thirdly, President Song observed that mainstreaming issues related to the Court and increased awareness of the importance of cooperation within national and international systems would allow States Parties and international organizations to provide effective and timely cooperation. Finally, increasing knowledge, awareness and support would, in the long term, contribute to building a culture of respect for the Court and its decisions and requests.

26. In conclusion, President Song invited States Parties to issue general reminders about the Court's importance, in addition to advocating for particular forms of cooperation.

C. Observations of States and other stakeholders

1. Cooperation in general

27. States Parties agreed that effective cooperation with the Court would define how successful the Court would be in the fight against impunity. Consequently, the point was made that States Parties should aim at fully complying with the mandatory obligations contained in the Rome Statute, in particular with regard to the execution of arrest warrants. It was also noted that it was increasingly crucial for States Parties to support the enforcement of the decisions of the Court and to ratify without delay the Agreement on Privileges and Immunities. The important role of other stakeholders, including intergovernmental and non-governmental organizations, in contributing to the success of the Court was emphasized. A regional organization referred to its legal and political framework in support of the Court, which included an agreement on cooperation and assistance with the Court, and encouraged other organizations to enter into similar agreements.

28. Reference was further made to the need for strong diplomatic support for the Court, which was essential for it to carry out its mandate. In this regard, States Parties welcomed the voluntary cooperation provided by a number of non-States Parties and invited other States to follow the same approach where it was consistent with their domestic law. Other States observed that, in pursuing efficient cooperation with the Court, States Parties should not impose obligations on third parties. The view was also held that indicting a Head of State could jeopardize effective cooperation with the Court.

29. Several States Parties referred to cooperation as a two-way street, governing, on the one hand, the relationship between the Court and States Parties and, on the other hand, the relationship between States Parties. It was considered important for States Parties to continue to focus on the fulfilment of their own obligations under the Statute by ensuring that procedures were being implemented at the national level for all forms of cooperation. The point was further made that such cooperation of States Parties should include support for defence teams and respect for the independence and functional immunity of defense counsel.

30. States Parties agreed that the universality of the Rome Statute would have a positive impact on cooperation and welcomed, in this regard, that one State had sought assistance from others in its efforts to ratify the Statute.

2. Implementing legislation and supplementary agreements

31. A number of States Parties had referred to the steps they had taken in domesticating the Rome Statute and in meeting their obligations under the Statute. These included the designation of national focal points to address cooperation requests from the Court, specific procedures on cooperation involving all national stakeholders and provisions for the arrest and surrender of accused persons. A number of States Parties indicated their willingness to support others in their efforts to enact implementing legislation, inter alia, through information sharing, assisting in drafting and by providing financial support. In this connection, States Parties were encouraged to conclude bilateral or regional agreements so as to provide funding for support to other States Parties. As an example, reference was made to the Justice Rapid Response mechanism.

32. Others indicated that their existing national legislation already provided a solid basis for cooperation with the Court and therefore did not require any amendment. It was observed in this regard that the ways in which States Parties cooperated with the Court could vary, which called for a flexible approach by the Court. In this connection, the question was raised whether comprehensive implementing legislation was required, as piecemeal legislation could be more manageable for some States Parties.

33. Several States Parties referred to the specific challenges they were facing in the process of developing implementing legislation. These related, inter alia, to the lack of resources and political, structural and legal obstacles. Several States Parties expressed an interest in receiving assistance from other States Parties or regional bodies. As regards the latter, the need was expressed for regional bodies to ensure the high quality of implementing legislation enacted by its States Parties and to engage in the sharing of best practices in this regard. In general, the point was made that any implementing legislation should meet certain quality standards so as to allow for effective cooperation with the Court.

34. The Plan of Action questionnaire on implementing legislation, issued by the Secretariat of the Assembly of States Parties on two occasions, was welcomed as a useful tool in assessing the current status and in identifying the challenges that States Parties had faced in drafting implementing legislation. Moreover, it was observed that identifying the main obstacles encountered by States Parties could assist other States in overcoming similar difficulties in the domestication of the Rome Statute.

35. Several States Parties also stressed the importance of entering into supplementary agreements with the Court on, inter alia, the relocation of witnesses, the enforcement of sentences and on interim release. A flexible approach from the Court in the conclusion of such agreements, however, would be required to take into account the diversity of national systems.

D. Conclusions of the moderator

36. The moderator expressed his appreciation to the panelists, States and civil society for their interventions, which had contributed to a rich and constructive debate and had provided several useful suggestions for the future.

1. Sharing experiences and assistance to others

37. The moderator took from the debate that several States Parties had a wealth of experience in cooperating with the Court and were willing to share these experiences, including by providing technical and other assistance in certain areas. He recalled in this regard, the important role of regional bodies and other organizations in providing support in terms of drafting implementing legislation, information sharing and best practice. The moderator further observed that the problem did not seem to be that possibilities of assistance were lacking but that States Parties were often unaware of where to go to receive appropriate assistance. The Assembly of States Parties and the Court, with due regard to its judicial mandate, could have a role in identifying where assistance could be obtained.

2. Implementing legislation and other national procedures

38. The fact that a number of States Parties had indicated that they were not in a position to cooperate with the Court as they had not met their obligations under article 88 of the Statute,[3] signalled the need for further action. The moderator stressed the importance of ensuring that States Parties were in a position to comply with their obligations under international law, which remained binding regardless of the situation in domestic law.

39. The moderator also indicated that, when certain States Parties had clear obligations to execute arrest warrants but were unable to do so, cooperation would become diluted. The problem, however, would remain intact and could have significant consequences for the Rome Statute system. He stressed the importance of considering efficient ways to give effect to the decisions of the Court. The moderator further stressed the importance of increasing the number of ratifications of the Agreement on Privileges and Immunities.

40. The moderator further observed that having procedures available under national law was not synonymous with implementing legislation. Great diversity in national practices existed and national systems and processes took many different forms, which in some instances allowed for cooperation without legislation. The situation thus varied from State to State.

41. In this connection, the moderator observed that several States Parties had taken a number of additional measures, aside from legislation, to streamline internal processes so as to allow for more effective cooperation with the Court. Such measures could include for example appointing national focal points or establishing task forces.

3. Voluntary agreements and cooperation

42. With regard to voluntary agreements, the moderator stressed that, although agreements on the relocation of witnesses, the enforcement of sentences and interim releases were concluded with States Parties on a voluntary basis, they were of considerable importance. It was therefore in the interests of the entire Assembly of States Parties to raise awareness and to encourage States Parties to conclude such agreements. In this connection, the moderator stressed the need for creativity in creating voluntary agreements, inter alia, by allowing flexibility and by entering into ad hoc arrangements and framework agreements so as to ensure timely cooperation.

[3] States Parties shall ensure that there are procedures available under their national law for all the forms of cooperation which are specified in Part 9 of the Statute.

43. The moderator further recalled, that during the discussion among States Parties, some delegations had stressed the distinction between mandatory and non-mandatory cooperation. In noting the legitimacy of that distinction, the moderator observed that the distinction should not become a dividing line between cooperation and non-cooperation. Of crucial importance was the use of the necessary means in order to achieve the objectives set by States in Rome.

44. The moderator reiterated that public and diplomatic support was of considerable importance in the achievement of successful cooperation between States Parties and the Court. States Parties could contribute to this by regularly reminding others of the Court's importance, in particular when circumstances were difficult. Moreover, the cooperation by non-States Parties could be of crucial importance to the Court.

4. Cooperation with the United Nations

45. On the topic of cooperation between the Court and the United Nations, the moderator noted that the Court was generally satisfied with this relationship and the cooperation provided. The moderator acknowledged that States Parties held the principal responsibility for cooperation with the Court. However, as a secondary source, cooperation by the United Nations was of primary importance due to its global reach and operational capacities.

46. In order to maintain a stable relationship, the Court's presence could be enhanced at periodic meetings of various United Nations humanitarian agencies and other relevant agencies, which would, inter alia, contribute to the mainstreaming of the Court.

5. Way forward

47. As regards the way forward, the moderator observed that States Parties and other stakeholders had expressed a keen interest in sharing experiences and in providing or receiving assistance. Also, the need for enhancement of public information, of understanding of the mandate and operations of the Court permeated all other topics.

48. Irrespective of the achievements of the Review Conference, the moderator considered it important to continue the work on cooperation, inter alia, by having a standing discussion on cooperation to review and keep the issue alive, to help understand where the challenges lie for States Parties in providing cooperation and to discern and share best practice and to help identify where assistance might be found. Continuation of the consideration of the functioning of the system and following-up on the implementation of previous resolutions of the Assembly could be part of this exercise.

49. The moderator observed that continued consideration of the issue of cooperation had already led to some results. As at 3 June 2010, 30 additional States Parties had replied to the Plan of Action questionnaire on implementing legislation, bringing the total to 42.

50. The moderator recommended that the issue of communication between the Court and States Parties be reviewed. Formal meetings were useful to convey information but did not always allow for a full understanding of positions or the underlying reasons for those positions. Although the Court had its specific judicial mandate, the question how it could assist in facilitating cooperation could be considered.

51. In sum, the moderator stressed the importance of pursuing more targeted interaction. Tackling specific challenges might be achieved through informal channels instead of large meetings.

Annex VI

Statements by States Parties in explanation of position after the adoption of resolution RC/Res.5, on the amendments to article 8 of the Rome Statute

A. Statement by Belgium

The Review Conference has just witnessed a historic moment: the adoption of the first amendment to the Rome Statute. The negotiations on this amendment could not have been brought to such a successful conclusion without the support of a large number of delegations and the willingness of everyone to achieve results.

Ever since this proposal was first launched, Belgium has emphasized that it could not envision the adoption of such amendment other than by consensus, which is what we have.

We would like to thank in particular the other 18 States Parties, from every region of the world, which agreed to co-sponsor this proposal. Our thanks go once again, therefore, to Argentina, Austria, Bolivia, Bulgaria, Burundi, Cambodia, Cyprus, Germany, Ireland, Latvia, Lithuania, Luxembourg, Mauritius, Mexico, Romania, Samoa, Slovenia and Switzerland for their unfailing support. We would also like to thank all those others who subsequently gave their strong support to our proposal.

By adding, with this first amendment, three war crimes to the list of war crimes that fall within the jurisdiction of the International Criminal Court in circumstances of armed conflict not of an international character and by choosing, to that end, three war crimes which already fall within the jurisdiction of the International Criminal Court in circumstances of international armed conflict, the States Parties are embarking on a process which aims, in line with modern international humanitarian law, to ensure that war crimes are prosecuted and the victims protected regardless of the armed conflict in which the crimes have been perpetrated. In this respect too, the process initiated by the adoption of this first amendment is vital.

B. Statement by France[1]

France welcomes the spirit of consensus that prevailed during the proceedings which led to the adoption of the resolution amending article 8 of the Rome Statute.

France underlines that this document makes up a whole. The new crime defined in article 8, paragraph 2 (e) (xv), is constituted once the intentional element referred to in the resolution has been established, that is to say the fact of employing the bullets in question to uselessly aggravate suffering or the wounding effect upon the target of such bullets.

[1] Canada, Israel and the United States of America associated themselves with this statement.

Annex VII

Statements by States Parties in explanation of position before the adoption of resolution RC/Res.6, on the crime of aggression

Statement by Japan

From the very outset of this Review Conference, Japan has been repeatedly emphasizing the paramount importance of fostering of the International Criminal Court that can function truly effectively on the basis of total confidence of the international community.

It is my sad duty to state that, all the *bona fide* efforts of many participants and your tireless efforts notwithstanding, the draft resolution you are proposing now does not live up to this requirement as it stands.

As I have repeatedly pointed out in both formal and various informal settings, this delegation continues to have serious doubt as to the legal integrity of the amendment procedure this draft resolution is based upon. In light of the absolute necessity of the legal integrity for a treaty dealing with criminal responsibility of individuals, the upshot of adopting such a resolution, I am afraid, is the undermining of the credibility of the Rome Statute and the whole system it represents. We have also a serious concern that this amendment may entail non-negligible difficulties in our relationship with the ICC system.

We have a serious concern in terms of policy direction of this draft resolution as well. As we have pointed out in various informal settings, we have a serious problem with the new article 15 *bis* 1 *quater*[1]. For example, the government of a State Party surrounded by non States Parties will have a difficulty in selling to its parliament an amendment which unjustifiably solidifies blanket and automatic impunity of nationals of non State Parties: a clear departure from the basic tenet of article 12 of the Statute.

This being said, it is with a heavy heart that I declare that, if all the other delegations are prepared to support the proposed draft resolution as it stands, Japan will not stand in the way of a consensus.

[1] Article 15 *bis* 1 *quater* has become article 15 *bis* 5 in resolution RC/Res.6.

Annex VIII

Statements by States Parties in explanation of position after the adoption of resolution RC/Res.6 on the crime of aggression

A. Statement by Brazil

The Brazilian delegation is of the view that the amendments adopted today represent a comprehensive compromise deal that is acceptable to all States Parties, even though it does not reflect entirely any delegation's initial position on the matter. It is clear that all delegations participating in the debates had to make substantial concessions in order to achieve this delicate balance, which was finally adopted by consensus.

Furthermore, our understanding is that the amendments on the crime of aggression were duly adopted and are now an integral part of the Rome Statute of the International Criminal Court. In light of our agreement, States Parties will have to make a decision to "activate" the current provisions by consensus or, if necessary, a two-thirds majority. This decision can and should be taken under the framework of the Assembly of States Parties at its sixteenth session in 2017. In our view, a Review Conference is neither required nor desirable to "activate" the referred amendments, which can be reviewed seven years after their entry into force.

B. Statement by France[1]

Let me start by telling you how much we appreciated your efforts during our proceedings, those of our coordinator and the will of delegations to arrive at an outcome consistent with international law on the issue of the crime of aggression.

In this spirit, France has decided not to oppose the consensus, despite the fact that it cannot associate itself with this draft text as it disregards the relevant provisions of the Charter of the United Nations enshrined in article 5 of the Rome Statute.

In article 15 *bis*, paragraph 8, the text restricts the role of the United Nations Security Council and contravenes the Charter of the United Nations under the terms of which the Security Council alone shall determine the existence of an act of aggression.

Under these conditions, France cannot depart from its position of principle.

C. Statement by Japan

As we have attracted the attention of all the participants, on many occasions, we have serious doubts regarding the legality of the amendment procedures contained in the amendments which have been just adopted. There are many problems, but I will limit myself, at this point in time, by pointing out three major problems we see, in addition to what I have already mentioned.

(a) What is the basis of the amendments?

Article 5, paragraph 2, is invoked as the basis with respect to "amendment", whereas article 121, paragraph 5, is invoked as the basis with respect to "entry into force". This is a typical "cherry picking" from the relevant provisions related to the amendment, that is, in Japan's view, very difficult to justify. We have serious doubt as to the validity of article 5, paragraph 2, as a basis of amendment to the Statute, if we adhere to a sound interpretation of the Rome Statute as agreed upon in Rome. The upshot is a highly accentuated complication in the legal relation after the amendment between States Parties, as well as the relation between States Parties and non-States Parties, which is extremely unclear and hard to understand.

[1] The United States of America associated themselves with this statement.

(b) What happens to article 5, paragraph 2?

How can we possibly delete article 5, paragraph 2, of the Statute in accordance with article 5, paragraph 2, itself? This is nothing but a "legal suicide" or "suicide of legal integrity".

(c) What happens to a non-State Party that desires to accede to the Rome Statute after the adoption of the amendments?

How can we be certain that such a newly acceding country will be bound by the amended Rome Statute, while we see no provisions stipulating about the entry into force of the amendments *per se*? This is an issue that should be squarely addressed, if we are genuinely serious about enhancing the universality of the International Criminal Court.

Japan regrets that the amendments based on such a dubious legal foundation have been adopted, in spite of our repeated caveat. Now that they are adopted, Japan believes that it is incumbent upon States Parties to sort out all the legal ambiguities and loose-ends so that we can share a common understanding on all the relevant issues of interpretation without which there is no effective functioning of the amended Statute. This should be done in a form of understanding to be worked out in subsequent Assembly meetings. As the head of my Delegation, appointed to represent Japan in this Review Conference, it is my duty to register, at this juncture, that the future cooperation of Japan with the International Criminal Court will hinge upon whether the Assembly can deliver on this with your cooperation.

Last but not least, let me touch upon the issue of the obligation to cooperate, which is of great importance for an effective functioning of the Court. As we have already pointed out during this Conference, the Assembly should work out a common understanding on this issue as well. This is a subject too important to ignore if we really mean to strengthen the International Criminal Court.

D. Statement by Norway

Norway condemns any act of aggression. At the same time, I would like to underline three points, important for my delegation:

(a) The Norwegian Government believes that the International Criminal Court must exercise its jurisdiction as a matter of priority with regard to genocide, crimes against humanity and war crimes. We know that the resources of the Court are limited and that any investigation concerning the crime of aggression would be extremely resource consuming, because it could entail investigating on the basis of allegations without access to substantial evidence on all relevant elements. We trust that the latter would not lead to any less priority given to compliance with international humanitarian law. This has also a bearing on the exercise of prosecutorial discretion.

(b) We interpret the term "manifest" in article 8 *bis*, paragraph 1, in conformity with the understanding reached. In the consideration as to whether Norway shall proceed to a ratification of the amendment adopted, Norway will include an assessment as to whether any further clarification would be called for as a precondition for the entry into force of the amendment for Norway.

(c) In cases of manifest acts of aggression, we consider that it is incumbent on the Security Council of the United Nations and its individual members to fully take into account the possibility of referring such situations to the Court in accordance with the Charter. We are convinced that the investigation, including the gathering of necessary evidence with regard to the crime of aggression, is to a considerable extent dependent on the effective cooperation of States.

E. Statement by the United Kingdom

The United Kingdom has fundamental issues of principles at stake with regard to aggression, but recognizes that others do too. In my delegation's view, the text that has been adopted cannot derogate from the primacy of the United Nations Security Council in relation to the maintenance of international peace and security. In that respect, I would like to draw attention to Article 39 of the United Nations Charter.

As both a Permanent Member of the United Nations Security Council and a State Party to the International Criminal Court, the United Kingdom strongly believes that there should be a mutually reinforcing relationship between the Council and the Court. The United Kingdom is committed to working to achieve this.

The United Kingdom is pleased that, under your leadership, Mr. President, and working closely with other delegations, it has been possible to reach a consensual outcome that preserves everyone's position, and which forms a solid basis for future discussions.

The United Kingdom looks forward to continuing the discussion of these issues, whether in 2017 or thereafter.

Annex IX

Statements by Observer States after the adoption of resolution RC/Res.6 on the crime of aggression

A. Statement by China

The Chinese delegation would like to make the following statement with regard to article 15 *bis* and article 15 *ter* of the amendments on the crime of aggression which were just adopted:

The Chinese delegation is of the view that the above-mentioned two articles failed to reflect the idea that, with respect to the issue of an act of aggression, it is necessary for the Security Council to make a determination of its existence first before the International Criminal Court could exercise jurisdiction over the crime of aggression. The existence of an act of aggression should be determined by the Security Council. This is not only what is provided by the United Nations Charter, but it is also what is required by article 5, paragraph 2, of the Rome Statute with regard to articles on the crime of aggression. The Chinese delegation is concerned with the above-mentioned failure.

B. Statement by Cuba

The Cuban delegation reiterates its opinion regarding the need for having achieved a definition of the crime of aggression that is generic and not limited solely to the use of armed force by a State, leaving aside other forms of aggression that may also violate the sovereignty, territorial integrity or political independence of another State.

We would also like to point out that, in the opinion of this delegation, the phrase "by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations" is ambiguous and may give rise to problems, as it would be the Court itself that would qualify these elements, with the usual subjective factor. For Cuba, the use of force by a State in a manner inconsistent with the Charter of the United Nations constitutes in itself a violation of the Charter.

Cuba reaffirms its commitment to help implement a system of international criminal justice that is truly efficient and in compliance with the rules of international law and, in particular, with the Charter of the United Nations.

C. Statement by the Islamic Republic of Iran

The Islamic Republic of Iran had high expectations of the Review Conference of the Rome Statute of the International Criminal Court. It had hoped that the Conference would be put to good use, not only to criminalize the act of aggression, but also to determine without restriction the conditions for the exercise of the Court's jurisdiction with respect to this crime, thus bringing to completion the work begun by the Nuremberg Tribunal. My delegation was confident that wisdom would in the end prevail over political considerations and the short-term interests of States. Many of the delegations who travelled to Kampala were determined to ensure the Court's jurisdiction in respect of the crime of aggression would be exercised in exactly the same conditions as those provided for in the Rome Statute for other crimes within the Court's jurisdiction. Such an approach would certainly have facilitated accession to, or ratification of, the Statute by a larger number of States, whom the Islamic Republic of Iran would probably have joined.

As our deliberations draw to a close, I cannot conceal our disappointment. In truth, during these past two weeks, the rigid positions of a minority of States have left little room for the dialogue that should be a feature of negotiations at international conferences. This rigidity was behind a whole raft of proposals which were not very transparent, generally one-sided and showed little regard for the concerns of the majority. The results achieved by the Conference are hardly encouraging – and even less so considering that implementation of the most promising clauses has been postponed indefinitely.

As far as the crime of aggression is concerned, the delegation of the Islamic Republic of Iran wishes to comment on the understandings regarding the amendments to the Rome Statute of the International Criminal Court that appear in annex III of the resolution adopted by the Conference. Any act of aggression is serious by its very nature, irrespective of its consequences. We should not take as a basis the United Nations General Assembly resolution defining aggression to distinguish between acts of aggression according to their consequences. The reference in the aforementioned resolution to "catastrophic consequences" concerns, according to its text, the illegal use of force with weapons of mass destruction. Our second comment concerns the reference, in the understanding, to the Charter of the United Nations. In the view of the Islamic Republic of Iran, this reference, included at the request of our delegation, would limit the use of legal armed force to the two cases provided for by the Charter: legitimate individual self-defence where a State is the object of armed aggression; and when the Security Council under Chapter VII of the Charter authorizes the Member States of the United Nations to use armed force.

D. Statement by Israel

As Israel has underlined throughout this process, several serious concerns and questions over the definition of the act of aggression still remain, including the degree to which it may depart from customary international law, in particular as regards “act of aggression”. Among other things, we remain concerned of the ambiguity and lack of sufficient legal clarity surrounding the interpretation of certain terms. In this respect, we note the useful interpretative understandings adopted by the Review Conference, and consider them to be an integral part of the amendment.

E. Statement by the Russian Federation

Mr. President, let me first of all thank you for the enormous effort you have made in order to achieve this result. Yourself, Prince Zeid and your whole team have done an enormous job. You have made it possible for the Conference to reach a consensus on the resolution on the crime of aggression.

As in any consensus, not all the elements of the consensus decision satisfy everyone. In particular we do not consider that the consensus decision which was found here reflects to the full extent the existing system of maintenance of peace and security headed by the Security Council and first of all in the sphere of the Security Council prerogatives in defining the existence of an act of aggression. Anyway, the decision is taken and we will continue to work with it.

We believe that the consensus decision contained in paragraph 3 of both articles 15 *bis* and 15 *ter* will be exercised in practice in full compliance with the United Nations Charter. We will work towards this goal.

F. Statement by the United States of America

The United States associates itself with the critical point of principle expressed in the views just presented by the Governments of France and the United Kingdom regarding the primacy of the Security Council under Article 39 of the United Nations Charter in determining the existence of an act of aggression and the Council’s primary responsibility with regard to matters of international peace and security.

We believe that the Review Conference has made a wise decision to delay implementation of the crime of aggression to permit examination of the practical implications of the two methods being proposed for the operationalization of this crime. We note with interest your new provisions, which state first, that affirmative decisions must be taken after 1 January 2017 with regard to both Security Council referrals and referrals *proprio motu* and by States; and second, that those decisions must be made by the same majority of States Parties as is required for the adoption of an amendment to the Rome Statute. As our deliberations here these past two weeks have plainly shown, there is an important difference between the procedures that should be used for constitutional

decisions of the International Criminal Court and for routine decisions of this body. Decisions regarding organic amendments to the Rome Statute should take place in periodic, constitutional gatherings such as the Review Conference - where the precedents set by this Review Conference strongly indicate that the rule of decision is consensus - and not as part of contested votes held amid the shifting representation and ordinary decision-making that occurs at regular meetings of the Assembly of States Parties, where there are many distractions, and complex questions of constitutional architecture cannot be as fully and thoughtfully evaluated.

For that reason, and based on our broad discussion with many delegations here, we understand that there is broad support for any decisions to be taken after 1 January 2017 regarding potential adoption of jurisdictional conditions for the exercise of the crime of aggression to be taken at a future Review Conference, where the decisions must be taken at least by the same majority of States Parties as is required for the adoption of an amendment to the Rome Statute or preferably by consensus. We also believe that at such a Review Conference, the States Parties should be allowed to consider any related amendments proposed for the Statute with the aim of strengthening the Court. We read the wording of paragraphs 3 of new articles 15 *bis* and 15 *ter* to allow for this sensible approach. In sum, examining the need for amendments and other organic changes to the Rome Statute at Review Conferences, rather than at ordinary Assembly of States Parties meetings will be the wisest, most prudent strategy for developing the International Criminal Court as a sound international institution.

Annex X

List of documents

RC/1	Provisional agenda
RC/1/Add.1	Annotated list of items included in the provisional agenda
RC/2	Report of the Court on cooperation: update
RC/3	Draft rules of procedure of the Review Conferences
RC/4	Kampala Declaration
RC/5	Report of the Working Group on the Crime of Aggression
RC/6	Draft Report of the Working Group on other amendments
RC/6/Rev.1	Report of the Working Group on other amendments
RC/7	Conference Room Paper on the Crime of Aggression. Annex III. Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression
RC/8	Conference Room Paper on the Crime of Aggression. Annex III. Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression
RC/9	Pledges
RC/10	Draft resolution submitted by the President of the Review Conference. The Crime of Aggression
RC/10/Add.1	Annex III. Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression
RC/DC/1	Drafting Committee. Draft amendments to article 8 of the Rome Statute and to the elements of crime
RC/DC/1/Add.1	Drafting Committee. Draft resolution amending article 8 of the Rome Statute
RC/DC/2	Drafting Committee. Draft resolution: The crime of aggression
RC/DC/3	Drafting Committee. Draft resolution: The crime of aggression
RC/L.1	Draft report of the Review Conference of the Rome Statute
RC/L.2	Draft report of the Credentials Committee
RC/L.2/Rev.1	Draft report of the Credentials Committee
RC/L.3	High-level Declaration
RC/L.4	Draft resolution on strengthening the enforcement of sentences
RC/L.5	Draft resolution on complementarity
RC/L.6	Draft resolution on the impact of the Rome Statute system on victims and affected communities

RC/WGCA/1	Conference Room Paper on the Crime of Aggression
RC/WGCA/1/Rev.1	Conference Room Paper on the Crime of Aggression
RC/WGCA/1/Rev.2	Conference Room Paper on the Crime of Aggression
RC/WGCA/2	Non-Paper by the Chair. Further elements for a solution on the Crime of Aggression
RC/WGCA/3	Draft Report of the Working Group on the Crime of Aggression
RC/WGOA/1	Draft resolution amending article 8 of the Rome Statute
RC/WGOA/1/Rev.1	Draft resolution amending article 8 of the Rome Statute
RC/WGOA/1/Rev.2	Draft resolution amending article 8 of the Rome Statute
RC/WGOA/2	Draft resolution on article 124
RC/ST/V/1	Stocktaking of international criminal justice. Impact of the Rome Statute system on victims and affected communities. Draft informal summary by the focal points
RC/ST/V/INF.1	Stocktaking of International Criminal Justice. The impact of the Rome Statute system on victims and affected communities. Template
RC/ST/V/INF.2	Turning the Lens. Victims and Affected Communities on the Court and the Rome Statute system
RC/ST/V/INF.3	Registry and Trust Fund for Victims. Fact Sheet
RC/ST/V/INF.4	The impact of the Rome Statute system on victims and affected communities. Discussion paper
RC/ST/V/M.1	Policy Paper on Victims' Participation (OTP)
RC/ST/V/M.2	Victims and reparation: The Colombian experience. By: Eduardo Pizarro Leongómez. President of the National Reparation and Reconciliation Commission – Colombia. Member of the ICC Trust Fund for Victims. June, 2010
RC/ST/V/M.3	Colombia: Impact of the Rome Statute and the International Criminal Court (ICTJ)
RC/ST/V/M.4	Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court (ICTJ)
RC/ST/V/M.5	Kenya: Impact of the Rome Statute and the International Criminal Court (ICTJ)
RC/ST/V/M.6	Sudan: Impact of the Rome Statute and the International Criminal Court (ICTJ)
RC/ST/V/M.7	Uganda: Impact of the Rome Statute and the International Criminal Court (ICTJ)
RC/ST/V/M.8	ICC Review Conference: Renewing Commitment to Accountability (FIDH)
RC/ST/V/M.9	Advancing Gender Justice – A Call to Action (WIGJ)
RC/ST/V/M.10	Rapport de la journée de Réflexion sur la révision du Statut de Rome organisée par la SYCOVI (Synergie des ONG Congolaises pour les Victimes)
RC/ST/PJ/1	Stocktaking of International Criminal Justice. Peace and justice. Draft Moderator's Summary

RC/ST/PJ/INF.1	Stocktaking of International Criminal Justice. Peace and justice. Template
RC/ST/PJ/INF.2	Reflections on the role of the victim during transitional justice processes in Latin America (Ms. Katya Salazar Luzula, Executive Director, Due Process of Law Foundation, Washington D.C.)
RC/ST/PJ/INF.3	The Importance of Justice in Securing Peace (Mr. Juan E. Méndez, Visiting Professor, Washington College of Law, American University, and Special Adviser to the Prosecutor of the ICC on Crime Prevention)
RC/ST/PJ/INF.4	Managing the Challenges of Integrating Justice Efforts and Peace Processes (Ms. Priscilla Hayner, Senior Advisor, Centre for Humanitarian Dialogue, and advisor to the International Center for Transitional Justice)
RC/ST/PJ/INF.5	Confronting Impunity: The role of Truth Commissions in Building Reconciliation and National Unity (Ms. Yasmin Sooka, Executive Director of the Foundation for Human Rights, South Africa)
RC/ST/PJ/M.1	Transitional justice in Colombia, justice and peace law: an experience of truth, justice and reparation, Ministry of Foreign Affairs of Colombia, May 2010
RC/ST/PJ/M.2	Beyond peace versus justice: fighting impunity in peace building contexts, Ministry of Foreign Affairs of The Netherlands and the International Center for Transitional Justice, 16-17 September 2009
RC/ST/PJ/M.3	Dealing with the past in peace mediation, Federal Department of Foreign Affairs of Switzerland, September 2009
RC/ST/PJ/M.4	Ministerial Declaration of the Human Security Network on peace and justice, Human Security Network, 23 September 2009 (Costa Rica)
RC/ST/PJ/M.5	Commissioning justice, truth commissions and criminal justice, Amnesty International, April 2010
RC/ST/PJ/M.6	Stocktaking: peace and justice, Mr. David Tolbert, May 2010
RC/ST/PJ/M.7	Uganda's twenty thousand kidnapped children, from "A Billion Lives", pages 197-214, Mr. Jan Egeland, 2008
RC/ST/CM/1	Stocktaking of international criminal justice. Taking stock of the principle of complementarity: bridging the impunity gap. [Draft] Informal summary by the focal points
RC/ST/CM/INF.1	Stocktaking of International Criminal Justice. Complementarity. Template
RC/ST/CM/INF.2	Focal points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes
RC/ST/CP/1	Stocktaking of International Criminal Justice. Cooperation. [Draft] Summary of the roundtable discussion
RC/ST/CP/2	[Draft] Declaration on cooperation
RC/ST/CP/INF.1	Stocktaking of International Criminal Justice. Cooperation. Template
RC/ST/CP/INF.2	Draft outcome document on cooperation
RC/ST/CP/M.1	Compilation on implementing legislation 2009
RC/ST/CP/M.2	Compilation on implementing legislation 2010. Part I
RC/ST/CP/M.3	Compilation on implementing legislation 2010. Part II