

Annex II

Report of the Working Group on the Review Conference

A. Introduction

1. The Working Group on the Review Conference was established by the Assembly at the first meeting of its eighth session. Mr. Marcelo Böhlke (Brazil) and Ms. Stella Orina (Kenya) continued to serve as coordinators of the Working Group at the resumed eighth session.
2. The Working Group held one meeting, on 25 March 2010 and four informal meetings, on 22 and 23 March respectively, to consider the crime of aggression, the stocktaking exercise of the Review Conference and other Review Conference- related matters.

B. Consideration of amendments: Crime of Aggression

3. The discussions on the crime of aggression were based on a non-paper by the Chairman, H.R.H. Mr. Zeid Ra'ad Zeid Al-Hussein, on outstanding issues regarding the conditions for the exercise of jurisdiction for the crime of aggression.¹ The non-paper recalled that according to proposals of the Special Working Group on the Crime of Aggression, all three existing trigger mechanisms contained in article 13 of the Statute would apply to the crime of aggression: State referral, Security Council referral, and *proprio motu* investigations. In this regard, the crime of aggression would not differ from other crimes under the Statute. However, views diverged on whether and how the crime of aggression should be treated differently regarding: a) The requirement (or not) for the alleged aggressor State to have accepted the Court's jurisdiction over the crime of aggression; and b) the requirement (or not) of a jurisdictional filter, such as a specific decision by the Security Council. The non-paper discussed these issues from a chronological perspective.

Step 1: Which situations may be investigated by the Court?

4. The first step identified in the non-paper (paragraphs 5 to 9) refers to the scope of situations which may be investigated by the Court in the case of a State referral or a *proprio motu* investigation.

Alternative 1: Do not require that the aggressor State has accepted the Court's jurisdiction over the crime of aggression

5. Under Alternative 1, the acceptance of the Court's jurisdiction over the crime of aggression by either the victim State or aggressor State would be sufficient to satisfy the precondition of article 12, paragraph 2(a) of the Statute. Alternative 1 could be realized either by using article 121, paragraph 4, for entry into force of the crime of aggression, or else article 121, paragraph 5, combined with a "positive" understanding of its second sentence.²

6. Delegations who favored this alternative considered this approach to be more effective and more consistent with the Statute's goal of ending impunity for the most serious crimes of concern to the international community. It was argued that the crime of aggression should not be subject to a jurisdictional regime that differed from the other crimes. Alternative 1 would produce the necessary deterrent effect to help secure peace and security, as it would not depend upon the acceptance by a

¹ See appendix I.

² Such as an understanding 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".

potential aggressor State. The view was expressed that Alternative 2 was tantamount to a reservation and would thus be contrary to article 120 of the Statute. Some delegations which preferred Alternative 2 also indicated their flexibility on this matter.

Alternative 2: Require that the aggressor State has accepted the Court's jurisdiction over the crime of aggression

7. Alternative 2 would require that the aggressor State has accepted the Court's jurisdiction over the crime of aggression (except in case of a Security Council referral), thus treating it differently than the other crimes in the Statute. This result could be achieved either by using article 121, paragraph 5, for entry into force of the crime of aggression, combined with a "negative" understanding of its second sentence,³ or by using other approaches to construing "acceptance" by the alleged aggressor State, such as opt-in or opt-out declarations.⁴

8. Delegations favoring Alternative 2 stressed the difference between the crime of aggression and the other crimes contained in the Statute, as the former necessarily involved an act of State and was limited to the prosecution of leaders of that State. The point was made that this approach resembled the inter-State regime for contentious cases heard by the International Court of Justice and ensured that States would not be bound by treaty obligations they had not consented to. It was also thought to be the most promising avenue for a compromise at the Review Conference. Delegations that preferred Alternative 2 expressed support for the application of article 121, paragraph 5, combined with a "negative" understanding of its second sentence. The point was made that only this "negative" understanding could be reconciled with the presence of the word "or" in that sentence.

Step 2: Prosecutor intends to proceed with an investigation. Which filter should apply?

Alternative 1: Security Council filter

9. Some delegations considered Alternative 1, under which the Court could only proceed with the express agreement of the Security Council, to be an indispensable element of a consensual outcome at the Review Conference. Only this approach was consistent with the prerogatives of the Security Council according to the Charter of the United Nations. This approach would prevent the Court from being overburdened and mired in political controversy. The view was also expressed that Alternative 1 could be acceptable if it was combined with a compulsory review clause to determine its effectiveness after a number of years. Some delegations furthermore suggested that Alternative 1 could be combined with a provision that would allow a case to proceed in the absence of a Security Council determination of an act of aggression under special circumstances, e.g. in case of consent by all States concerned, including the aggressor State. A further suggestion was to combine Alternative 1 with a "menu approach" regarding the jurisdictional filters, based on a choice by the State Party concerned, and possibly based on reciprocity between the alleged aggressor State and the victim State.

Alternative 2: No filter or non-Security Council filter

10. Delegations favoring Alternative 2 took the view that the Security Council had a primary, but not exclusive authority under the Charter of the United Nations to determine an act of aggression. The competence of the Court to try crimes of aggression under article 5, paragraph 2, of the Statute was distinct from the Security Council's powers under Chapter VII of the Charter of the United Nations. Alternative 2 would ensure that the absence of such a determination or of a "green light" decision would not lead to impunity. It was furthermore argued that the Charter bound only Member States, not other subjects of international law, such as international organizations.

³ Such as an understanding 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".

⁴ See June 2009 Princeton Report (ICC-ASP/8/INF.2), paras. 38 to 42.

Alternative 2 was also thought to respect the sovereign equality of States by eliminating the potential for double standards, in particular if no filter or the Pre-Trial Chamber filter was used.

11. Some delegations thought that alternative 2 could be envisioned only in combination with the addition of a filter, specially of a judicial filter.

12. Some delegations also emphasized that alternative 2 was more conducive to preserving the independence of the Court as a judicial body. Consequently, subjecting the ICC's jurisdiction to a prior determination by any other institution could undermine its independence. They were however prepared, in the interest of advancing consensus, to accept an internal judicial filter in the form of the Pre-Trial Chamber.

“Roll call” on conditions for the exercise of jurisdiction

13. The Chairman distributed an illustrative chart on the conditions for the exercise of jurisdiction, which contained four general combinations reflecting the respective alternatives under steps 1 and 2.⁵ The purpose of this Chart was to highlight possible ways ahead under each step with respect to State referrals and *proprio motu* proceedings. The Chairman requested all States Parties present in the room to indicate their preferred combination, with the understanding that these views were only indicative, not binding and subject to change. The purpose of this “roll call” was to assist the Chairman in understanding the positions in the room and in further advancing the work on the crime of aggression. Delegations participated actively in this exercise, and some indicated their flexibility regarding their preferred combination. Some delegations stated that they would prefer to indicate their position at a later stage. The combinations attracted varying levels of support. The view was expressed that the combinations may be too narrow for a solution and that creative thinking was required to find a compromise.

Past and future work on the crime of aggression

14. In the context of the discussion on the non-paper, some delegations addressed the past and future work on the crime of aggression in more general terms. The main goal of this exercise was to strengthen the Court. Delegations commended the progress made within the Special Working Group, in particular on the definition of aggression (draft article 8 *bis*). It was recalled that the Special Working Group had been open to all States, not just States Parties, and that its work had been conducted in a very transparent manner. The view was expressed that adopting the crime of aggression at the Review Conference was necessary to complete the Statute. Some delegations cautioned that the work on the crime of aggression should only be concluded on the basis of consensus. A few of those delegations considered that the work should not be concluded hastily. Some other delegations, however, took the view that consensus did not necessarily mean unanimity. The point was also made that the Court already had a challenging task at hand with the existing crimes and should not be overburdened. A few delegations expressed doubts regarding the definition of the act and crime of aggression which would diverge from customary international law and about the impact of adopting the crime of aggression on universality, cooperation and complementarity.

15. Most delegations showed their willingness to adopt at the Review Conference in Kampala the definition of the crime of aggression in accordance with article 5, paragraph 2, of the Rome Statute.

16. Some delegations indicated that the time was ripe for States Parties to move from their national positions on the conditions for the exercise of jurisdiction and to work towards a compromise solution. It was noted that the views regarding the conditions for the exercise of jurisdiction were still very diverse. Given the momentous decision confronting States, no stone should be left unturned in trying to reach a solution.

⁵ See appendix II.

17. The view was expressed in the plenary that the resolution on the Review Conference, and all other relevant documents, should include a wide reference to the crime of aggression as mandate of the Review Conference according to article 5, paragraph 2, of the Statute. The view was expressed that the Review Conference was also concerned with other very important issues, including other proposals for amendments to the Rome Statute and the various stocktaking issues, not only the crime of aggression.

C. Stocktaking exercise

General comments

18. As regards the general framework of this stocktaking exercise, a request was made for an appropriate coordination of side events so that they are complementary as opposed to competitive, referring to the time allocated for it as well as to the substance. In this regard, the focal point informed the Assembly that this concern had already been expressed at the New York Working Group, which was of the view that time allocated to side events should be maximized in order to enable the delegations to attend all events and meetings.

19. Some States further recalled the importance of making available on the Court's website information on the four topics of stocktaking and requested information on the appropriate channels of communication for interested States to submit their input to the focal points.

1. Peace and justice

20. The Working Group held informal consultations on peace and justice on 22 March 2010. It had before it the report of the Bureau on stocktaking: peace and justice (ICC-ASP/8/52).

21. The focal points presented the report and its annex reiterating that States and other entities are welcome to contribute their experiences and lessons learned on peace and justice by 30 April 2010 which would then be submitted for consideration by States, panelists and other participants at the Review Conference.

22. There was a wide consensus among States as regards the participation of States Parties, Observer States, other States and civil society at the panels and their contribution to the discussions. In addition, some delegations were of the view that States Parties should have a higher profile in the discussions and to express their views on the topic. In this connection, the focal points indicated that the final decision as to the organization of the panels is to be taken by the Bureau, however, the views expressed by delegations shall be taken into account in order to have as wide a representation by all parties as possible.

23. Furthermore, some States stressed the importance that the final outcome under the topic "peace and justice" would be precise, factual reflection of deliberations and discussions.

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

24. The Working Group held informal consultations on the impact of the Rome Statute system on victims and affected communities on 22, 24 and 25 March 2010. It had before it the Report of the Bureau on stocktaking: The impact of the Rome Statute system on victims and affected communities (ICC-ASP/8/49), a draft resolution and a template for the stocktaking exercise on the issue.

25. During the discussions, support was expressed for the general approach as described in the template and, specifically, for the important role given to outreach in this stocktaking exercise.

26. With regard to the request of a delegation for the need to coordinate the substance of side events, the focal points reassured that an indicative short list of side events had already been prepared, and that they would attempt to do their best in ensuring appropriate coordination.

27. A concern was expressed regarding the composition of the proposed panel, as it might give the impression that issues related to victims are associated with women. In reply, the focal points clarified that it was not the intention to gather female participants only, but those with most expertise on the matter.

28. As regards the participation at the panels in general, the focal points informed the Assembly that the list of the invited panelists is still tentative. Furthermore, the focal points underlined that they are aiming to have an interactive panel with sufficient time for participation by States Parties and other stakeholders.

29. During the informal consultations, broad support was expressed for the draft resolution. The Working Group agreed that it formed a sound basis for further consultations during the Review Conference. It addressed the main issues at stake, focussing on the key aspects concerning the impact of the Rome Statute system on victims and affected communities. The changes introduced were mainly of a linguistic nature, as well as adding a reference to the United Nations Security Council resolutions on children in armed conflict. A delegation wished to include language underlining the importance of ensuring transparency in the management of the Trust Fund for Victims.

3. Cooperation

30. The Working Group held informal consultations on cooperation on 23 March 2010. It had before it the Report of the Bureau on stocktaking: cooperation- Background paper and proposals for outcome (ICC-ASP/8/50).

31. The focal points highlighted the need to learn from best practices and the importance of recirculating the Secretariat's questionnaire on the Plan of Action so as to receive the replies in advance of the Review Conference. The focal points indicated that the specific outcome on the topic would result from the forthcoming discussions, which would have to bear in mind the updated report of the Court on cooperation, since it should be substance which determined form.

32. It was stressed that the issue of cooperation needed to remain under constant review by the Assembly. A view was expressed that international practice proves that cooperation could be accomplished by persuasive means, including through improved information sharing and that apart from having implementing legislation, which is certainly desirable, another important point is the degree of effectiveness of the practice of States in prosecuting crimes and fighting impunity.

33. In terms of the possible outcomes of the Conference, reference was made to the need for a follow-up by future sessions of the Assembly. The view was also expressed that sufficient time and effort had to be devoted to a public information strategy for the Court.

34. Furthermore, reference was made to the importance of giving due consideration to the experiences provided by ad hoc tribunals. A different view was expressed regarding cooperation with the ad hoc tribunals. The view was also expressed that the best form of cooperation with the Court was for States not to compromise the jurisdiction of the Court with bilateral agreements. It was noted that even States that were not parties to the Rome Statute could share their experiences in capacity building, assisting victims and strengthening the rule of law.

35. The representative of the Democratic Republic of the Congo spoke on behalf of the African States Parties to the Rome Statute and indicated that, in their view, there seemed to be a need to consider the relationship between article 27, paragraph 2, and article 98, paragraph 1, of the Rome

Statute. It was stated that a discussion was needed regarding the interpretation of the relationship between these two articles, insofar as the immunities of officials of non-States parties were concerned. The question at hand was whether there was scope to have such a discussion within the topic of cooperation during the resumed eighth session and at the Review Conference. However, while some delegations expressed their interest in this proposal, other delegations expressed the view that this issue should be dealt with in the long term since it is a complex one that would need a more profound analysis than what would be possible before and during the Review Conference. The point was made that, if there was room for interpretation on articles 27 and 98, such interpretation should be undertaken by the Court in an independent manner and not by the States Parties, in accordance with article 119 of the Rome Statute.

4. Complementarity

36. The Working Group held informal consultations on complementarity on 23 and 24 March 2010. It considered the Report of the Bureau on stocktaking: complementarity. Taking stock of the principle of complementarity: bridging the impunity gap (ICC-ASP/8/51), as well as a draft resolution on complementarity (ICC-ASP/8/L.17/Rev.1, annex VII).

37. The focal points introduced the draft resolution on complementarity and stressed that in their approach they had focused on ways in which domestic jurisdictions could be strengthened through capacity building and assistance between States and international organizations. It was not the intention to create a development agency or new donor mechanisms. It was pointed out that a draft resolution had been proposed as an outcome and as a means to obtain a concrete and tangible result. In this respect, it was also clarified that a resolution would not create new obligations or alter in whatever form existing obligations for States Parties, nor would it affect in any way the admissibility of new cases, which remains a judicial decision.

38. On the issue of the panel discussion, it was pointed out that States Parties, non-States Parties and civil society would have the opportunity to participate and their contributions would be reflected in the outcome of the discussions. There would also be opportunities to participate during the side events scheduled to take place.

39. Many delegations expressed support for the Report of the Bureau and the draft resolution including the use of the term “positive complementarity”. The point was made that the term “positive complementarity” was not found in the Rome Statute. The focal points explained that the term “positive complementarity” meant activities and actions whereby national jurisdictions are strengthened and enabled to conduct genuine national proceedings. Many delegations were of the view that the report and resolution were in line with the Rome Statute.

40. However, some Observer States expressed the view that the use of the term “positive complementarity” may raise confusion with the concept of complementarity as stipulated in the Rome Statute; that the report of the Bureau exceeded the Rome Statute while defining the inability and unwillingness of States; and that a contradiction exists in the report regarding the role of the Court in what is referred to as “positive complementarity”.

D. Other Review Conference-related issues

1. Strengthening the enforcement of sentences

41. At its fifth meeting, on 23 March 2010, the Bureau adopted, pursuant to resolution ICC-ASP/8/Res.6, a draft resolution on strengthening the enforcement of sentences and decided to forward it to the Review Conference for its consideration (ICC-ASP/8/Res.9, annex V).

2. High-level declaration

42. At its tenth meeting, on 25 March 2010, the Assembly decided to prepare a draft high-level declaration for the approval of the Bureau, which would be conveyed to the Review Conference for its consideration. The high-level declaration, which would be prepared in the context of the New York Working Group with Mexico as the focal point, would deal mainly with three points: the reaffirmation of the commitment of States Parties to the Rome Statute, a reference to the stocktaking exercise without establishing a linkage to the outcome of the exercise itself, and the pledges to be made by States Parties, Observers and other States. A view was expressed that the high-level declaration should be more ambitious and make reference to the main issue to be discussed in Kampala, the crime of aggression. As regards the relationship between the high-level declaration and the other expected outcomes of the Conference, a query was raised as to whether it would be preferable to be more restricted with the resolutions and include in the high-level declaration some uncontroversial outcomes on the four topics of the stocktaking exercise.

43. On the other hand, some delegations expressed full support for the declaration, which should go beyond States Parties to reflect the fight against impunity of the international community as a whole.

44. The consultations would take place during the month of April in New York so that a draft could be sent to the Bureau, for approval, at the beginning of May. Thereafter the draft declaration would be forwarded to the Review Conference for its approval during the first week of the Conference, most likely after the general debate to take advantage of the presence in Kampala of high-level representatives.

3. Pledges

45. The Netherlands and Peru, which had been designated as focal points by the Bureau for this issue, stressed that the Review Conference provided a unique opportunity to fight impunity and to receive contributions from States Parties, Observers and other States. The pledges referred to in the explanatory note (appendix II) would be both specific and action-oriented in order to be reachable within a particular timeframe. The list of topics provided in the paper for pledges was not meant to be a closed one or limited to the stocktaking exercise. Furthermore the Review Conference would not be the end of the process but rather the beginning and States would thus still have the chance to renew their pledges or make new ones after the Conference.

46. The point was made that there was a need to bear in mind that the Rome Statute is a legally-binding treaty and that therefore it may be necessary to clarify how the idea of pledges, taken from other legal fora, could interact within the framework of the International Criminal Court.

4. Belgian proposal on the elements of crime

47. At the tenth meeting of its eighth session, on 25 March 2010, the Assembly decided to forward to the Review Conference the draft elements of crime⁶ corresponding to the proposed amendment contained in annex III to resolution ICC-ASP/8/Res.6.

5. Memorandum of Understanding with the Government of Uganda

48. The Working Group was informed that the host State and the Court had agreed on the provisions of the Memorandum of Understanding and that consequently steps would be taken to conclude the Memorandum of Understanding before mid-April.

⁶ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed eighth session, New York, 22 - 25 March 2010* (International Criminal Court publication, ICC-ASP/8/20/Add.1), resolution ICC-ASP/8/Res.9, annex VIII.

Appendix I

Crime of Aggression

Non-paper by the Chairman on outstanding issues regarding the conditions for the exercise of jurisdiction

1. The present non-paper is aimed at facilitating discussions at the resumed session with respect to the major outstanding issues regarding the “conditions for the exercise of jurisdiction” over the crime of aggression. It is intended to sharpen the focus of the discussions on this topic held at the June 2009 Princeton Club meeting and should thus be read together with the report of that meeting¹ and in particular the non-paper on the conditions for the exercise of jurisdiction contained in annex III.
2. It is recalled that according to the proposals of the Special Working Group on the Crime of Aggression², all three existing trigger mechanisms would apply to the crime of aggression: State referral, Security Council referral, and *proprio motu* investigation (draft article 15 *bis*, paragraph 1). In this regard, the crime of aggression would not differ from the other crimes under the Statute.
3. Questions remain though as to whether and how the crime of aggression should be treated differently from the other crimes regarding:
 - a) The requirement (or not) for the alleged aggressor State to have accepted the Court’s jurisdiction over the crime of aggression; and
 - b) The requirement (or not) of a jurisdictional filter, such as a specific decision by the Security Council.
4. These open questions could usefully be discussed from the angle of the chronological sequence of proceedings at the Court.

Step 1: Which situations may be investigated by the Court?

5. For the existing crimes under the Statute, and on the basis of any of the three trigger mechanisms of article 13, the Prosecutor may evaluate information and subsequently initiate an investigation in accordance with article 53, paragraph 1. In case of a State referral or a *proprio motu* investigation, however, the pre-conditions set out in article 12 of the Rome Statute apply. Therefore, an investigation may only be opened if (a) the State on the territory of which the conduct occurred is a State Party, or (b) the crime was committed by a national of a State Party.³ No such restriction applies to Security Council referrals, as they are based on Chapter VII of the United Nations Charter.

¹ June 2009 Princeton Report (ICC-ASP/8/INF.2).

² February 2009 Report of the Special Working Group, contained in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19-23 January and 9-13 February 2009* (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, part I.B.

³ Alternatively, the State in question may also have accepted jurisdiction “with respect to the crime in question” in accordance with article 12, para. 3. Presumably, this provision could also be fully applicable to the crime of aggression.

Alternative 1: Do not require that the aggressor State has accepted the Court's jurisdiction over the crime of aggression

6. If the crime of aggression were to be incorporated into the Statute in a manner equal to the other crimes, then the acceptance by either the victim State or the aggressor State of the Court's jurisdiction over the crime of aggression would be sufficient to satisfy the pre-condition of article 12, paragraph 1 (a), of the Statute. In a typical case, the Court could thus open an investigation into a crime of aggression based solely on the victim State's acceptance of the Court's jurisdiction over the crime of aggression. This would result in a broader scope for future investigations than under Alternative 2 below, since potential victim States are presumably more likely to have accepted the Court's jurisdiction over the crime of aggression than potential aggressor States, and since victim States could furthermore accept the Court's jurisdiction after the fact under the ad hoc procedure of article 12, paragraph 3, of the Statute.

7. This result could be achieved with two legal techniques:⁴

- a) Using article 121, paragraph 4, for entry into force; or
- b) Using article 121, paragraph 5, for entry into force, combined with a "positive" understanding of its second sentence.⁵

Alternative 2: Require that the aggressor State has accepted the Court's jurisdiction over the crime of aggression

8. In previous discussions on the crime of aggression, the view has also been held that the Court should only be allowed to open an investigation into a crime of aggression *proprio motu* or on the basis of a State referral if the aggressor State has accepted the Court's jurisdiction over the crime of aggression.⁶ This would not apply to Security Council referrals which do not depend upon the consent of the States concerned.⁷ Note also that the aggressor State's acceptance of the Court's jurisdiction would in any event not be required for the Court to investigate other crimes under the Statute.⁸

9. This result could be achieved with two legal techniques:⁹

- a) Using article 121, paragraph 5, for entry into force, combined with a "negative" understanding of its second sentence,¹⁰ or
- b) Using other, more "creative" approaches to construing "acceptance" by the alleged aggressor State, such as opt-in or opt-out declarations.¹¹

⁴ Based on the assumption that the crime of aggression is typically also committed on the territory of the victim State. See the discussion on the issue of territoriality in the February 2009 Report of the Special Working Group, paras. 38 and 39.

⁵ Such as an understanding 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". Such an understanding could be included in the enabling resolution; see the discussions on this topic in the February 2009 Report of the Special Working Group, paras. 31-37.

⁶ Note that this question does not apply to Security Council referrals which do not require any form of consent by the State(s) concerned.

⁷ See the February 2009 Report of the Special Working Group, paras. 28 and 29.

⁸ See draft article 15 *bis*, para. 6.

⁹ Based on the assumption that the crime of aggression is typically also committed on the territory of the victim State.

¹⁰ Such as an understanding 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" Such an understanding could be included in the enabling resolution; see the discussions on this topic in the February 2009 Report of the Special Working Group, paras. 31-37.

¹¹ See the June 2009 Princeton Report (ICC-ASP/8/INF.2), paras. 38 to 42.

Step 2: Prosecutor intends to proceed with an investigation. Which filter should apply?

10. After having conducted the preliminary analysis, the Prosecutor may conclude on the basis of the available evidence and information that there is a “reasonable basis” to proceed with an investigation in respect of a crime of aggression. At this stage (either before or after the official initiation of an investigation in accordance with article 53 of the Statute), the question of the appropriate jurisdictional filter arises. According to draft article 15 *bis*, paragraphs 2 and 3, the Prosecutor must first inform the United Nations Secretary-General and thus give the Security Council an opportunity to evaluate the information and documents submitted by the Prosecutor and possibly make a determination of an act of aggression, in which case the Prosecutor may proceed with the investigation. Divergent views remain, however, for the scenario in which the Security Council does not make such a determination. The proposals of the Special Working Group on the Crime of Aggression reflect two broad alternatives:

Alternative 1: Security Council filter

11. According to Alternative 1, the Court would only be able to proceed if the Security Council expressly agrees with this course of action, either by making a determination of aggression (option 1), or by giving the Court a procedural “green light” (option 2).

Alternative 2: No filter or non-Security Council filter

12. According to Alternative 2, the absence of a determination of aggression by the Security Council would not by itself prevent the Court from proceeding. Instead, either no further filter would apply (option 1), an ICC-internal judicial filter would apply (option 2), or the General Assembly (option 3) or the International Court of Justice (option 4) would serve as jurisdictional filters.

13. As the Review Conference is fast approaching, it is crucial for the Chair to get a clear sense of delegations’ views on these two core questions. All States Parties will therefore be requested to express their pertinent views at the resumed session.

Attachment

Illustrative chart on conditions for the exercise of jurisdiction

On the basis of the different possible approaches to Step 1 and Step 2 described in the non-paper on the conditions for the exercise of jurisdiction, four general¹ combinations can be identified as below. The purpose of presenting these general combinations is to highlight several possible ways to move forward. The focus is on State referrals and *proprio motu* proceedings, since Security Council referrals do not require the consent of the State(s) concerned.

Combination 1:	Combination 2:	Combination 3:	Combination 4:
Acceptance by aggressor State required + SC filter	Acceptance by aggressor State <i>not</i> required + SC filter	Acceptance by aggressor State required + non-SC or no filter	Acceptance by aggressor State <i>not</i> required + non-SC or no filter
<i>Step 1: Prosecutor may only investigate situations where the <u>aggressor</u> State has accepted the Court's jurisdiction over the crime of aggression and present that case to the Security Council.</i>	<i>Step 1: Prosecutor may investigate any situation in which the <u>victim</u> State has accepted the Court's jurisdiction over the crime of aggression and present that case to the Security Council.</i>	<i>Step 1: Prosecutor may only investigate situations where the <u>aggressor</u> State has accepted the Court's jurisdiction over the crime of aggression and present that case to the Security Council.</i>	<i>Step 1: Prosecutor may investigate any situation in which the <u>victim</u> State has accepted the Court's jurisdiction over the crime of aggression and present that case to the Security Council.</i>
<i>Step 2: Prosecutor may only proceed with the Security Council's agreement.</i>	<i>Step 2: Prosecutor may only proceed with the Security Council's agreement.</i>	<i>Step 2: Prosecutor may proceed in the absence of a SC determination, either without any external filter² or on the basis of a "broader" filter (GA, ICJ).</i>	<i>Step 2: Prosecutor may proceed in the absence of a SC determination, either without any external filter or on the basis of a "broader" filter (GA, ICJ).</i>

¹ These are "broad strokes" that summarize and merge various positions expressed and do not necessarily reflect all the views expressed in every detail.

² The Pre-Trial Chamber could serve as an internal filter.

Appendix II

Explanatory Note on Pledges

A. Introduction

The first Review Conference of the Rome Statute to be held in Uganda in 2010 (the "Conference") is a significant milestone for the International Criminal Court (the "ICC"). It will be a unique opportunity for States to assess and reflect on the progress of the Rome Statute and the ICC, and reaffirm their commitments to combat impunity for the most serious crimes of concern to the international community, namely genocide, crimes against humanity and war crimes.

The Conference will include a high-level segment where States Parties, Observer States and other States¹ can reaffirm their commitment to the fight against impunity. States Parties and those who are willing to do so would likely wish to reiterate, among others, their commitment to the national implementation of the Rome Statute, their willingness to provide assistance or support to such efforts in other States, or their ongoing commitment to cooperate with the ICC, including enforcement of sentences rendered by the ICC.

The stocktaking part of the Conference will involve a review of international criminal justice more broadly, focused on four topics: 1) Complementarity; 2) Cooperation; 3) The impact of the Rome Statute system on victims and affected communities; and 4) Peace and Justice.² Such a broad focus on stocktaking should include an assessment of progress of ratification and implementation of the Rome Statute and other treaties of international humanitarian law, the Geneva Conventions and their Additional Protocols.

The unique opportunity that the Conference presents for States Parties to affirm their commitments to the Rome Statute must be seized.

A suggested process for pledges is hereby presented to ensure that the outcome of the Conference is as concrete as possible, with precise benchmarks and commitments by States, individually and collectively.

B. Content of Pledges

Pledges are a means by which States can make tangible their outcome from the Conference. These pledges can take the form of national pledges by individual States or joint national pledges by two or more States underlining their commitment to work together towards a common goal. Regional or other groups can also choose to make joint pledges.

Pledges should be specific, achievable, action-oriented and should indicate in measurable terms the objectives to be reached within a concrete period of time. Pledges in this context are political commitments which may relate to treaty obligations or extend beyond these, and are not primarily financial commitments. It is suggested that the content of pledges should be focused on the first three stocktaking topics, namely: 1) Complementarity; 2) Cooperation; and 3) The impact of the Rome Statute system on victims and affected communities.

¹ Taking into account rules 1, 12 and 71 of the Draft Rules of Procedure of the Review Conferences (resolution ICC-ASP/6/Res.2)

² Paragraph 5 of resolution ICC-ASP/8/Res.6.

The content of the pledges could consist of the following:

- a) States can pledge to reaffirm their intention to take steps to ratify/accede to the Rome Statute;
- b) States can pledge to reaffirm their intention to take steps to ratify/accede to the Agreement on Privileges and Immunities of the International Criminal Court;
- c) States can pledge to adopt specific national measures implementing the Rome Statute;
- d) States can pledge to adopt specific national measures implementing the Agreement on Privileges and Immunities of the International Criminal Court;
- e) States can pledge to work actively with other States on specific initiatives to promote universality and implementation of the Rome Statute;
- f) States can pledge to express their commitment to work with other stakeholders, including international and regional organizations, in the implementation of the complementarity regime at international and national levels;
- g) States can pledge to reaffirm their commitment to have national structures able to efficiently follow the implementation process of the Rome Statute, including national committees on international humanitarian law;
- h) States can pledge to express, in view of the fundamental principle of complementarity, their willingness to provide other States with technical assistance to include crimes set out in articles 6, 7 and 8 of the Rome Statute, as punishable offences under their national laws, to establish jurisdiction over these crimes, and to ensure effective enforcement of those laws;
- i) States can pledge to organize various events, seminars, conferences promoting the ICC and supporting ratification and implementation of the Rome Statute and other treaties of international humanitarian law;
- j) States can pledge to adopt national policies directed towards the mainstreaming of ICC support across ministries and within regional and international organizations, including with regard to support for the enforcement of court decisions;
- k) States can pledge with regard to cooperation, including contributions to arrest operations and the execution of arrest warrants (e.g., judicial assistance, extradition, surrender, adoption of legislation or promulgation of regulations, designation of officials or departments, adoption of policies/procedures, training, etc.);
- l) States can pledge to engage in a process to conclude agreements with the ICC on enforcement of sentences, protective measures for witnesses including witnesses relocation, and/or interim release of defendants;
- m) States can pledge with regard to victims and affected communities (e.g. adoption of legislation or promulgation of regulations concerning reparations or other subjects, creation of policies and programs, consultation processes, etc.);
- n) States can pledge to contribute to the Trust Fund for Victims; and
- o) States can pledge to contribute to the Trust Fund for the participation of the least developed countries and other developing States in the sessions of the Assembly of States Parties.

In addition to these, States may present their own proposal for pledges in connection with any of the three areas of stocktaking identified above.

C. Registration of Pledges

1. Prior to the Review Conference

States should submit their pledges in writing and electronically to the Secretariat of the Assembly of States Parties (email: asp@icc-cpi.int or fax: +31-70-515 8376) by 14 May 2010, using the enclosed draft "Pledge registration form" (attachment I). States may also consult the draft "Sample Pledges" (attachment II) for further guidance on pledges concerning specific areas.

States are encouraged to move beyond general statements of intent to specific action they plan to undertake. The pledges submitted will not be announced (unless otherwise requested) until the Conference. States may wish to announce their pledges during the general debate at the Conference.

2. During the Review Conference

Pledges officially submitted could be compiled and included in the outcomes of the Conference, for example in an annex to the high-level declaration or the stocktaking outcome documents.

3. Follow-up on Pledges

In order to ensure appropriate follow-up of the pledges, it is suggested that:

- a) Information on the pledges made by States are included in the Conference report;
- b) States are invited to designate a focal point who will be in charge of following up and reporting on the implementation of their pledges; and
- c) States are invited to report on their pledges at future sessions of the Assembly of States Parties.

The making of pledges at the Review Conference should not be seen as a single and final step. States may wish to agree to an ongoing process of implementing pledges, which may include subsequent amendments to pledges already made at the Conference as well as new pledges pursuant to ongoing work by the Assembly of States Parties.

D. Contact information

Should there be any questions about pledges, please do not hesitate to approach the focal points for pledges: Ms. Ceta Noland, Permanent Mission of the Netherlands to the United Nations (cd.noland@minbuza.nl); and Mr. Gonzalo Bonifaz, Permanent Mission of Peru to the United Nations (gbonifaz@unperu.org).

In addition, in relation to the Plan of action for achieving universality and full implementation of the Rome Statute of the ICC: Ms. Eva Šurková (facilitator on the Plan of Action), Permanent Mission of Slovakia to the United Nations (eva.surkova@mzv.sk).

Attachment I

**Review Conference
Rome Statute of the International Criminal Court
Pledge registration form**

(Name(s) of State(s)) hereby pledges (max. 10 lines):

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(Note: Pledge should include specific dates)

Proposed implementation steps (in 2011 or if later, please specify - ____):

-
-
-

Sponsor(s) of the pledge: (name of State(s)):

Contact information for responsible official(s):	
Full name:	Date:
Title/organization:	Place:
Email:	Signature:
Additional contact information for person/service/institution in charge of follow-up:	
.....	

Return Information:

Please submit this Pledge registration form to the Secretariat of the Assembly of States Parties (email: asp@icc-cpi.int or fax: +31-70-515-8376).

Attachment II

I. Sample Pledge (A)

Review Conference

Rome Statute of the International Criminal Court

Pledge registration form

REPUBLIC OF ELBONIA hereby pledges (max. 10 lines):

TO PRESENT TO PARLIAMENT BY **30 JUNE 2011** A DRAFT LAW FOR THE AMENDMENT OF DOMESTIC PENAL LEGISLATION TO INCLUDE ALL ROME STATUTE CRIMES, AS WELL AS OTHER GRAVE BREACHES AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW.

(Note: Pledge should include specific dates)

Proposed implementation steps (in 2010 and 2011):

- ➔ Inter-ministerial working group under the lead of the Minister of Justice to be established (by September 2010).
- ➔ Completion of working draft law (by December 2010)
- ➔ Consultations on working draft law (inter-ministerial, academic and outside experts) (by February 2011)
- ➔ Completion of draft for submission (by May 2011)

Sponsor of the pledge: REPUBLIC OF ELBONIA

Contact information for responsible official(s):

Full name:	Date: 1 May 2010
Dr. Abdul Vladamir Mercado	
Title/organization:	Place: Centreville, Elbonia
Ministry of Foreign Affairs & International Trade	
Email: Mercado.Abdul@gov.el	Signature:
	XXXXXXXXXXXXXXXX

Additional contact information for person/service/institution in charge of follow-up:

Dr. Alma Singh-Abdou, Director, Legislative Drafting, Ministry of Justice, Singh-Abdou.Alma@gov.el, Private Bag 146, Ministry of Justice, Government House, Centreville, Elbonia. Direct line: + 399 649 7577

Return Information:

Please submit this Pledge registration form to the Secretariat of the Assembly of States Parties (email: asp@icc-cpi.int or fax: +31-70-515-8376).

II. Sample Pledge (B)

**Review Conference
Rome Statute of the International Criminal Court
Pledge registration form**

REPUBLIC OF SHOULDERIA hereby pledges (max. 10 lines):

TO PROVIDE TECHNICAL ADVICE, PURSUANT TO A REQUEST FROM THE REPUBLIC OF ELBONIA, IN SUPPORT OF THEIR PLEDGE CONCERNING A DRAFT LAW FOR THE AMENDMENT OF DOMESTIC PENAL LEGISLATION TO INCLUDE ALL ROME STATUTE CRIMES, AS WELL AS OTHER GRAVE BREACHES AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

(Note: Pledge should include specific dates)

Proposed implementation steps (in 2010 and 2011):

- ➔ Experts from Shoulderia to take part in a drafting workshop in Elbonia with experts of Elbonia's inter-ministerial working group (by November 2010)
- ➔ Experts from Shoulderia to contribute to consultations on a working draft law (by February 2011)
- ➔ Experts from Shoulderia to provide comments on further draft law (by April 2011).

Sponsor(s) of the pledge: Shoulderia

Contact information for responsible official(s):	
Full name:	Date: 2 May 2010
Dr. Sara Sing-Amatete	
Title/organization:	Shoulderton, Shoulderia
Permanent Secretary	
Ministry of Foreign Affairs & Regional Integration	
Email: ssing-amatete@gov.sh	Signature:
	XXXXXXXXXX
Additional contact information for person/service/institution in charge of follow-up:	
Col. Mwalimu Chang-Alvarez, Chair, National Inter-Ministerial IHL Committee, c/o Legal Services, Department of Defence. PO Box 4700, Shoulderton, Shoulderia	
MChangAlvarez@gov.sh DoD main switchboard: + 445 28787 424242	

Return Information:

Please submit this Pledge registration form to the Secretariat of the Assembly of States Parties (email: asp@icc-cpi.int or fax: +31-70-515-8376).