

Resolution ICC-ASP/8/Res.9

Adopted at the 10th plenary meeting, on 25 March 2010, by consensus

ICC-ASP/8/Res.9 Review Conference

The Assembly of States Parties,

Welcoming the report of the Working Group on the Review Conference,¹

Recalling its previous resolutions and reports on the Review Conference and, in particular resolution ICC-ASP/8/Res.6,² with annexes I to IV, which contain agenda items to be considered at the Review Conference, namely amendments relating to article 124, the crime of aggression, article 8 and topics for stocktaking,

Recalling its request to the Bureau to consider the issue of strengthening the enforcement of sentences and submitting a proposal for a decision to be considered at the Review Conference,³

Recalling further paragraph 5 of the ICC-ASP/8/Res.6 by which it decided to forward four topics to the Review Conference for its consideration in the stocktaking exercise, i.e. cooperation, complementarity, the impact of the Rome Statute system on victims and affected communities, and peace and justice, taking into account the need to include aspects regarding universality, implementation, and lessons learned, in order to enhance the work of the Court,

Noting the discussions in the New York Working Group and The Hague Working Group on the topics to be considered in the stocktaking exercise and the outcome of those discussions, which are reflected in the reports of the Bureau on stocktaking,⁴

Noting that the discussions on each topic of the stocktaking exercise, which are scheduled to be held on 2 and 3 June 2010, would be led by panelists with expertise in the respective areas,

Recalling further its request to the Secretariat of the Assembly to, inter alia, report to the Bureau on the status of the discussions with a view to the expeditious conclusion, through the Court, of a Memorandum of Understanding between the Government of Uganda and the Court which ensures that the provisions of the Agreement on the Privileges and Immunities of the International Criminal Court are applicable, mutatis mutandis, to the Review Conference,

Welcoming the proposal that a high-level segment be convened during the Review Conference, at which States Parties, Observer States and other States would have the opportunity to reaffirm their commitment to the fight against impunity,

¹ *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), annex II.

² *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighth session, The Hague, 18-26 November 2009* (International Criminal Court publication, ICC-ASP/8/20), vol. I, part II.

³ *Ibid.*, resolution ICC-ASP/8/Res.6, para. 7.

⁴ Report of the Bureau on stocktaking: The impact of the Rome Statute system on victims and affected communities (ICC-ASP/8/49); Report of the Bureau on stocktaking: Cooperation- Background paper and proposals for outcome (ICC-ASP/8/50); Report of the Bureau on stocktaking: Complementarity - Taking stock of the principle of complementarity: bridging the impunity gap (ICC-ASP/8/51); and Report of the Bureau on stocktaking: Peace and Justice (ICC-ASP/8/52).

1. *Decides* to convene a high-level segment at the Review Conference to afford States the opportunity to affirm their commitment to the International Criminal Court, including through pledges;
2. *Requests* the Bureau to prepare a draft high-level declaration for consideration by the Review Conference;
3. *Decides* to organize discussions for the stocktaking topics as reflected in the templates contained in annexes I to IV;
4. *Requests* the Bureau to continue its role in preparing the stocktaking exercise with a view to finalizing any outstanding aspects of the Review Conference;
5. *Requests* the Secretariat of the Assembly to assist the Bureau in this endeavour as well as to cover appropriate travel expenses of panelists to the extent that no other funding sources are available and in consultation with the Bureau;
6. *Requests* the Secretariat of the Assembly to reissue the questionnaire (note verbale ICC-ASP/8/S/PA/19) and to make available a compilation of comments submitted by States Parties in advance of the Review Conference, and *encourages* States Parties to provide information to the Secretariat in this regard;
7. *Welcomes* the decision by the Bureau to adopt the draft resolution on strengthening the enforcement of sentences contained in annex V, and to convey it to the Review Conference;
8. *Takes note of* the draft resolutions entitled “Impact of the Rome Statute system on victims and affected communities” and “Complementarity” contained in annexes VI and VII, respectively, and *decides* to forward them to the Review Conference for its consideration;
9. *Decides* to forward the draft elements of crimes contained in annex VIII to the Review Conference for its consideration;
10. *Urges* the expeditious conclusion of the Memorandum of Understanding between the Government of Uganda and the Court.

Annex I

Stocktaking of International Criminal Justice

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

Template¹

1. Format of the debate

Panel discussion on the impact of the Rome Statute system on victims and affected communities: the role of the outreach, victim's participation, reparations, and Trust Fund for Victims in creating the impact

2. Names of keynote speaker, panelists and moderator

Keynote speaker: Mrs. Radhika Coomaraswamy, Special Representative for the Secretary General of the United Nations for Children and Armed Conflict (to be confirmed)

Moderator and Rapporteur: Mr. Eric Stover, Director of the Human Rights Center of the University of Berkeley, author of numerous books on war crimes and international criminal justice

Panelists:

Mrs. Justine Masika Bihamba, co-founder and coordinator of Synergie des femmes pour les victimes des violences sexuelles (SFVS), an umbrella organization of many local initiatives

Ms. Elisabeth Rehn, Chairperson of the Board of Directors of the Trust Fund for Victims

Mrs. Carla Ferstman, Director of Redress, an international human rights organization with a mandate to assist victims of torture and related international crimes to obtain justice

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

Mrs. Binta Mansaray, Registrar of the Special Court for Sierra Leone (to be confirmed)

Mrs. Sonia Robla, Head of Public Information and Documentation Section, International Criminal Court (to be confirmed)

3. Tentative program of work

Wednesday 2 June 2010

10:00-10:05 Introduction by a short film

10:05-10:20 Keynote speech

¹ An updated version of this template may be found at <http://www.icc-cpi.int/Menus/ASP/ReviewConference>.

10:20-12:00 Panel Discussion

12:00-12:45 Dialogue with the audience

12:45-13:00 Conclusions

13:00-15:00 Side event on the Trust Fund for Victims following the panel discussion, sponsored by Chile and Finland (organized by the Trust Fund for Victims)

4. Expected outcomes

Declaration (as part of the wider declaration on the Review Conference)

Resolution

Pledges (implementing national measures and legislation relevant to victims/witnesses)

Increased financial support for the Trust Fund for Victims

A final report with compilation of conclusions, contributions and relevant documentation, covering also to the extent possible relevant side events that take place during the Review Conference.

5. Background materials

The Hague Working Group report of 5 March 2010 (the main substantive content referred to in the annex)

A background paper (to be prepared ahead of the Review Conference)

6. Additional information: List of side events, activities and publications

For the purpose of comprehensiveness, the focal points wish to share the relevant events, activities and publications for the stock-taking exercise that they have been informed of. The focal points will not have any organizational role in these events, but will try to collect in the final report any possible conclusions these events might bring to the stock-taking exercise.

Events during Review Conference

Events planned to be organized **at the Conference building:**

- Open Society Initiative: Outreach panel;
- Coalition for the International Criminal Court (CICC): Civil society taking stock: Impact of the Rome Statute on Victims and Affected Communities;
- International Center for Transitional Justice (ICTJ): Taking stock of the impact of the ICC in Kenya, Uganda, the Democratic Republic of the Congo, Sudan and Colombia;
- Uganda Coalition for the International Criminal Court (UCICC) / No Peace Without Justice (NPWJ) / Hurinet: briefing on pre-Conference missions to Uganda;
- Victims' Rights Working Group (VRWG) event on victims' participation; and
- International Refugee Rights' Initiative: panel on intermediaries.

Events planned to be organized **at the People's Space**, a forum at the Review Conference venue for civil society:

- The Victims' Rights Working Group: a commemoration event prior to the start of the Review Conference;
- The Victims' Rights Working Group: an expert meeting on massive trauma; and
- The Women's Initiatives for Gender Justice: side event "Women's Court", bringing women's rights and peace activists from the situation countries.

Pre-Review Conference activities

The Victims' Rights Working Group's questionnaire as part of outreach and sensitization initiatives for the Review Conference by Uganda Victims Foundation (UVF), La Ligue pour la Paix et les Droits de l'Homme (LIPADHO)² and womens' organizations in the eastern Democratic Republic of the Congo; a Uganda Victims' Foundation (UVF) / REDRESS workshop was held in February in Lira, northern Uganda, bringing members in 14 districts of the north to discuss inter alia, the questionnaire (with participation of NGOs from the Democratic Republic of the Congo);

Human Rights Network/Uganda Coalition for the International Criminal Court (HURINET/UCICC) and No Peace Without Justice, visits by delegates of States Parties to Uganda to meet with victims, affected communities and other relevant stakeholders;

The Women's Initiatives for Gender Justice in cooperation with the Nobel Women's Initiative, convenes in April an "International Gender Justice Dialogue" with 80-90 gender experts, feminist legal theorists and practitioners, peace mediators, jurists, women's rights advocates, political leaders, and other key actors. Participants will identify the strategic directions required for advancing gender justice through implementation and use of the Rome Statute and the Court in preparation for the Review Conference; and

Human Rights Network/Uganda Coalition for the International Criminal Court "Pre"-Review Conference bringing civil society together, with working groups on each of the stocktaking topics, in the week before the Review Conference.

Written contributions/background papers

Report of the activities of the Trust Fund for Victims;

Longitudinal Study on the Lessons Learned on the impact of the Trust Fund for Victims;

Uganda Victims' Foundation report following the 15-17 February workshop on the Impact of the Court on victims and affected communities;

Victims' Rights Working Group substantive paper on the impact of the Court on victims and affected communities, following the results of the questionnaire;

Eventual Uganda Victims' Foundation/REDRESS paper on impact of the Court on the Ugandan peace process and corresponding legislation, e.g. International Crimes Bill, Reconciliation Bill;

Ligue pour la Paix et les Droits de l'Homme report/paper on the impact of the Court on victims and affected communities in the eastern Democratic Republic of the Congo;

Human Rights Network/Uganda Coalition for the International Criminal Court and No Peace Without Justice: Report on visits by State delegates to Uganda;

² An NGO based in the Democratic Republic of the Congo, in Ituri and North Kivu.

Avocats Sans Frontières (ASF) report: the Democratic Republic of the Congo and the Rome Statute System: 7 years after ratification: the expectations and perceptions of Congolese victims who had sought to participate in criminal proceedings before the national courts and the International Criminal Court; and

International Center for Transitional Justice briefing paper on case studies on the International Criminal Court's impact on Kenya, Uganda, the Democratic Republic of the Congo, Sudan and Colombia, and possibly a briefing paper on reparations and the International Criminal Court.

Annex II

Stocktaking of International Criminal Justice

Peace and justice

Template¹

1. Format

Panel discussion

2. Participants (subject to change depending on availability)

Moderator: Mr. Kenneth Roth (Executive Director of Human Rights Watch)

Keynote speaker: Mr. Kofi Annan (former Secretary-General of the United Nations and Nobel Peace Prize laureate)

Panelists

- Mr. David Tolbert (President of the International Center for Transitional Justice)
- Mr. James LeMoyne (former Special Adviser for Colombia to the United Nations Secretary-General; has been involved in the processes in Colombia, El Salvador, Guatemala, Haiti, Nicaragua, Northern Ireland and the former Yugoslavia)
- Ms. Yasmin Sooka (member of the Truth and Reconciliation Commissions of South Africa and Sierra Leone; lawyer, adviser for different peace processes such as in Liberia and in Afghanistan)
- Mr. Chhang Youk (Director of the Documentation Center of Cambodia, an NGO which has been at the forefront of documenting the crimes of the Khmer Rouge)

3. Tentative programme of work

Keynote speech (15 minutes)

Intervention of panelists (1 hour)

Questions, answers and comments between the room and the panelists (1 hour and 30 minutes). It is expected that this part of the segment will be devoted to interaction between the panelists and participants, including the possibility of making brief comments. The first 45 minutes will be reserved for interaction with States Parties.

Summary of the moderator (15 minutes)

4. Expected outcome

Moderator's summary

¹ An updated version of this template may be found at <http://www.icc-cpi.int/Menu/ASP/ReviewConference>.

5. Background material

Background papers to be produced by 30 April 2010 (authors subject to change depending on availability)

- The importance of justice in securing peace (Mr. Juan Méndez - Former President of the International Center for Transitional Justice; visiting professor at the American University Washington College of Law)
- Managing the challenges of integrating justice efforts and peace processes (Mr. Martti Ahtisaari – Former President of Finland and Nobel Peace Prize laureate)
- Truth and reconciliation processes as a complement to criminal justice (Mr. Barney Afako – Legal Adviser to the Chief Mediator on the Ugandan peace process negotiations)
- Safeguarding the interests of victims (Ms. Katya Salazar Luzula – Executive Director of the Due Process of Law Foundation)

Other contributions by States and other entities are welcome to share specific experiences and lessons learned on peace and justice by 30 April 2010. It is already foreseen that Mr. Carlos Castresana, Head of The International Commission Against Impunity in Guatemala, will be making such a contribution.

6. Additional information

Definition of the topic

- The preamble to the Rome Statute recognizes the link between peace and justice, stating that “grave crimes threaten the peace, security, and well-being of the world” and affirming that States Parties are “determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes.”
- Since the Statute’s adoption, there has been increasing recognition of this important link between peace and justice. In September 2009, United Nations Secretary-General Ban Ki-moon acknowledged that “the debate is no longer between peace and justice, but between peace and what kind of justice.” Also, the Secretary-General has often said that “peace and justice go hand in hand.” Indeed, amnesties, once viewed as a necessary price for peace, are no longer considered acceptable for the most serious international crimes.
- But the pursuit of peace and justice, together, has also presented challenges. Even as they complement each other in the long term, in the short term tensions have arisen between efforts to secure peace and efforts to ensure accountability for international crimes. These require careful management, drawing on past experience.
- Individuals suspected of involvement in international crimes may at times play an unavoidable role in peace negotiations and in peace-building contexts. In some cases, obtaining their consent to end a conflict may be difficult if they are facing criminal charges, while in other cases, an end to a conflict may actually be facilitated by their facing criminal charges. Questions may arise about when – and what other kinds of – accountability is appropriate in different situations. It may also prove complicated to coordinate the efforts of independent political and judicial actors with the interests of victims and the strategies of international peacemakers and peacekeepers.

- There is no simple or formulaic answer for meeting these challenges. At the “Peace and Justice” stocktaking session, we hope to draw lessons from past experience about what can be done to manage tensions that may arise between these two important and complementary objectives.

Sub-topics

- The importance of justice in securing peace: the role that international justice mechanisms can play in facilitating peace processes and transitions.
- Managing the challenges of integrating justice efforts and peace processes: ways in which accountability and peace efforts can be integrated, and challenges involved.
- Truth and reconciliation processes as a complement to criminal justice: role that truth-telling and reconciliation processes can play in complementing formal criminal justice mechanisms and helping to secure peace.
- Safeguarding the interests of victims: challenges involved in safeguarding the interests of victims in any post-conflict situation.

Follow up

- A publication of the background papers, the presentations of the keynote speaker and the panelists as well as the summary of the moderator is foreseen.
- In order to leave open the possibility for further discussion on the topic in the framework of appropriate fora, a factual reference should be made to the event in the report adopted by the Review Conference.

Annex III

Stocktaking of International Criminal Justice

Cooperation

Template¹

1. Format of the debate

2 consecutive round table discussions on each of the 2 proposed clusters (see 6 below).

2 keynote speakers to introduce each cluster. Ten minutes allocated to each speaker.

The format should provide for an interactive debate between all relevant stakeholders. A single moderator is proposed for the full session on cooperation.

Secretariat to open speakers' list for those delegations and stakeholders wishing to participate in the Round Table discussion.

2. Tentative names of keynote speakers, panelists and moderators

Moderator: H.E. Philippe Kirsch, former President of the International Criminal Court; Ad Hoc Judge at the International Court of Justice (to be confirmed)

Keynote Speakers:

Mr. Bruno Stagno Ugarte, former President of the Assembly of States Parties of the International Criminal Court; Foreign Minister of Costa Rica (to be confirmed)

Mr. Adama Dieng, Assistant Secretary-General, Registrar of the United Nations International Criminal Tribunal for Rwanda

Two other speakers to include a senior representative of a State Party and an international organization/body.

3. Tentative programme of work

Moderator to introduce

Cluster I: 90 minutes

Cluster II: 80 minutes

Moderator to sum up discussions.

¹ An updated version of this template may be found at <http://www.icc-cpi.int/Menus/ASP/ReviewConference>.

4. Expected outcomes

A report/summary of discussions identifying the main themes and conclusions.

The elements proposed in paragraph 22 of document ICC-ASP/8/50 could be included in the proposed declaration, pledges and/or separate outcome.

5. Background material

- a) 2007 Report of the Bureau on Cooperation as set out in document ICC-ASP/6/21;
- b) 2009 Report of the Court on Cooperation as set out in annex I to document ICC-ASP/8/44. Resolution ICC-ASP/8/Res.2, para.17 requested the Court to submit an updated report to the Bureau; this will be available in April 2010;
- c) ICC-ASP/8/50;
- d) Questionnaire as set out in note verbale ICC-ASP/8/S/PA/19 – to be reissued to States Parties which have not yet responded.

6. Additional information

Cluster I

- a) Implementing legislation: specific issues which individual States Parties have encountered and good practices in this area.
- b) 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.
- c) Challenges encountered by States Parties in relation to requests for cooperation: how these might be overcome.

Cluster II

- d) 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.
- e) Enhancing knowledge, awareness and support for the Court: including through mainstreaming and galvanizing public support to and cooperation with the Court within States including for the enforcement of Court decisions and arrest warrant.

Annex IV

Stocktaking of International Criminal Justice

Complementarity

Template¹

1. Format of the debate

Panel discussion on Taking Stock of the Principle of Complementarity: bridging the impunity gap

2. Tentative names of keynote speaker, panelists and moderator

Opening remarks: Focal Points

Panelists

High Commissioner for Human Rights, Ms. Navanethem Pillay (to be confirmed)

Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo

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

Others to be decided

3. Tentative programme of work

Thursday, 3 June 2010

15:00-15:15 Opening Remarks by focal point

15:15-16:45 Panel Discussion

Elaboration of the principle of complementarity

Practical application of complementarity and the Rome Statute system

Positive complementarity, what it is and why it is necessary

Practical implementation of positive complementarity/enabling national jurisdictions

16:45-17:45 Open Discussion

17:45-18:00 Summary and concluding remarks

4. Expected Outcome

Resolution²

¹ An updated version of this template may be found at <http://www.icc-cpi.int/Menus/ASP/ReviewConference>.

5. Background material

Report of the Bureau on complementarity entitled, “Taking Stock of the principle of complementarity: bridging the impunity gap” (see appendix).

6. Additional information

- Side events on Complementarity in Practice
- Participation in pledging activities

² *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 VII.

Appendix

Report of the Bureau on stocktaking: Complementarity

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

“Affirming that the most serious crimes of concern to the International Community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”, Rome Statute.¹

“Impunity for serious crimes and atrocities, including sexual and gender-based violence, which may have occurred before, during and after the conflict can seriously jeopardize peacebuilding efforts during this early phase”, UN Secretary General.²

“We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crisis and conflicts break out”, UN General Assembly.³

A. Introduction

1. Remarkable developments in international criminal law have taken place since the adoption of the Rome Statute. The International Criminal Court (“the Court”) has come into being and has matured into a fully functional and operational court. The first cases are pending before the judges. The jurisprudence of the Court is rapidly developing. Persons bearing the greatest responsibility for the most serious crimes are being brought to justice. The culture of impunity is receding.

2. These developments give reason for reflection on and evaluation of the evolution of international criminal justice over the past decade and discussion of where the international community can do more to further the fight against impunity.

3. The Court is a court of last resort. As such the Rome Statute system of international criminal justice relies heavily on actions and activities at the national level. Under the Rome Statute, the Court will only step in when national authorities are unable or unwilling to investigate and prosecute massive atrocities. The principle of complementarity is integral to the functioning of the Rome Statute system and its long term efficacy. The Assembly of States Parties (The Assembly) has agreed to focus on the issue of complementarity at the Review Conference as it is imperative to further the fight against impunity both at the international and at the national level to ensure that any impunity gaps are closed. At the same time the judicial and prosecutorial independence of the Court must be underlined as well as the fact that any issues relating to the admissibility of cases are for the Judges of the Court to decide.

4. The aim of this paper is to provide a background for discussions of complementarity at the Review Conference. The paper will first examine the experience with the principle of complementarity so far and then look at ways in which the Rome Statute system may be strengthened even further. It is in this context important to note the Court’s core mandate and function which is a judicial one and to emphasize that the Court is not a development agency. None

¹ Preamble to the Rome Statute, paragraph 4.

² Peacebuilding in the immediate aftermath of conflict, report of the Secretary General, S/2009/304.

³ 2005 United Nations World Summit Outcome, A/RES/60/1.

of the proposals in this paper are in any way intended to add to the functions of the Court or fundamentally change the way in which it interacts with domestic jurisdictions. Activities aimed at strengthening national jurisdictions as set out in this paper should be carried forward by States themselves, together with international and regional organizations and civil society, exploring interfaces and synergies with the Rome Statute system. In this way, the paper attempts to create a platform for further discussions on how such synergies could be identified and utilised within existing development cooperation structures and agencies. As such, enhancing the readiness of national jurisdictions is not foreseen to have any budgetary implications for the Court.

5. It should be emphasized that each State has the responsibility to fulfil its obligations under the Rome Statute. Any proposal and suggestion in this paper shall not detract from these obligations nor make the fulfilment of obligations under the Rome Statute contingent on complementarity initiatives. Furthermore, all activities aimed at strengthening the Rome Statute system are not obligatory but would, rather, seek to engage States in voluntary assistance.

B. Taking stock of the complementarity and the Court

1. The principle of complementarity

6. The Rome Statute system is based on the principle of complementarity. The preamble of Statute as well as article 17 provides that the Court shall be complementary to national criminal jurisdictions. Therefore the Court does not replace national proceedings and is a court of last resort.

7. The Court determines the admissibility of a case through a judicial assessment. Only where States are unable or unwilling to genuinely investigate and prosecute crimes in their own jurisdictions would the Court be in a position to act. Consequently, even where serious international crimes have been committed, a case would not be admissible if the State concerned was conducting genuine domestic proceedings. Any determination of admissibility, however, can ultimately only be made by the judges of the Court.⁴

2. Complementarity in practice

8. The Court currently has four situations, the Democratic Republic of the Congo, Central African Republic, Uganda and Darfur/Sudan. Three of the four situations were self-referrals and the Court has determined in all cases that there were no relevant proceedings.

9. The reasons for inactivity in conducting genuine domestic prosecutions are manifold and may be linked to an **inability** to do so. Of particular interest here is technical or capacity issues in connection with absent or ineffective legislative framework for implementation, limited expertise in and experience with investigations, failure to prioritize serious cases, lack of resources in the judicial system, absence of an effective national witness protection program or safety for judges and prosecutors and enforcement of sentences or a general lack of capacity and means.

10. These challenges may be felt particularly by a number of States that have the will and intent to end impunity but lack the resources, expertise and capacity as well as a well-functioning, independent judiciary.

11. A special challenge is **unwillingness** to conduct genuine national proceedings. This situation could occur due to political interference in the judiciary and governmental complicity in the commission of crimes and can manifest itself in an unwillingness to secure the arrest of suspects. While unwillingness is not addressed in detail in this paper, it is important to keep in mind that assistance and cooperation alone will not solve all issues relating to impunity.

⁴ It is worth noting the two-step approach utilized in decision ICC-01/04-01/07 OA 8 of 25 September 2009.

12. The Court will never be able to prosecute all those responsible for crimes under its jurisdiction in a given situation. Whilst not prescribed by the Statute, the Prosecutor has taken a policy decision to focus prosecutions on those bearing the greatest responsibility for the most serious crimes. Furthermore, the Prosecutor on an ongoing basis sets out the strategy and criteria of which cases would be afforded focus. However, this should not mean that lesser perpetrators enjoy impunity. Likewise, crimes that do not meet the gravity threshold should not go unpunished. As established by the Rome Statute, the end-goal of no impunity is efficiently achieved by States themselves assuming as much responsibility and ownership of the process as possible, in partnership with the Court and other stakeholders. Consequently, stakeholders, in particular States and international and regional organizations, as well as civil society, can play a role in proactively strengthening national jurisdictions and advance domestic investigations and prosecutions of the most serious crimes of international concern. It is worth recalling that the preamble of the Rome Statute states that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.

3. The impunity gap

13. As indicated, States have the primary responsibility to investigate and prosecute massive crimes. The Court does not have primacy over the national system and will only act where there is inability or unwillingness on the part of the domestic jurisdiction, as determined by the Court. Furthermore, where there is inactivity linked either to inability or unwillingness, the Prosecutor has chosen a policy of focusing prosecutions on those bearing the greatest responsibility for the most serious crimes. Consequently, the Court does not replace the national jurisdiction in the prosecution of other offenders. Furthermore, as explored above, States in a number of situations either lack the capacity or the will to prosecute these serious crimes for a variety of reasons.

14. The consequences of these problems are manifold, but first and foremost an impunity gap may develop **horizontally** between situations that are investigated by the Court and situations that for legal and jurisdictional reasons are not, or **vertically** between those most responsible brought before the Court and other perpetrators who are not.⁵

15. It should also be emphasized that since the Court has limited resources and capacity and proceeding from the strategy of the Prosecutor, the Court currently only focuses on those bearing the greatest responsibility. Consequently, it is necessary for measures to be taken by States Parties to ensure that all perpetrators of war crimes, crimes against humanity and genocide are brought to justice and that crimes that do not meet the gravity threshold do not go unpunished. Through domestic efforts and mutual international assistance on a voluntary basis the fight against impunity could be further advanced in national jurisdictions.

C. Enhancing the readiness of national jurisdictions through positive complementarity

1. Positive Complementarity

16. While positive complementarity could take many forms, for the purposes of this paper, positive complementarity refers to all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.

⁵ Some sources suggest that the number of direct perpetrators in Bosnia alone is 15,000 to 20,000, while the ICTY has only indicted 161 in all States of FRY. Such numbers are not available for Court situations, but it seems likely that there would be some parallels.

17. The actual assistance should thus as far as possible be delivered through cooperative programmes between States themselves, as well as through international and regional organizations and civil society. Such assistance rendered under positive complementarity can broadly be divided into three categories:

- a) Firstly, there is **legislative assistance**, which includes the drafting of the appropriate legislative framework and assistance in overcoming domestic hurdles for passing such legislation. In addition, assistance may be provided for ratification of an Agreement of Privileges and Immunities and other legal instruments pertaining to investigating and prosecuting the most serious crimes. Annex A gives an example of such assistance.
- b) Secondly there is **technical assistance and capacity building** with regard to domestic judicial systems. Such assistance includes, but is not limited to, training of police, investigators and prosecutors, capacity building with regard to protection of witnesses and victims, forensic expertise, training of judges and training of defence counsel, security for and independence of officials. Such assistance could take the form of supplying judges and prosecutors to assist national courts or other forms of support to special war crimes divisions of domestic institutions and hybrid tribunals, as appropriate. Furthermore, assistance could be rendered for capacity building with regard to mutual legal assistance in criminal matters, to underpin cooperation in actual prosecutions. Annexes B to D provide examples of technical assistance and capacity building in the context of the Rome Statute.
- c) Thirdly, assistance with construction of **physical infrastructure**, such as courthouses and prison facilities, and the sustainable operation of such institutions. Capacity building would, however, be needed to ensure that the functioning of such institutions comply with internationally accepted standards and that adding an element of training to the operation of the institutions may be beneficial. Annexes E and F provide examples of this type of assistance.

18. In general, experience shows the importance of a holistic approach to enhancing national capacity, taking into account the entire judicial cycle from initiating investigations to enforcing sentences. If one part of the judicial sector is not working, assistance to other parts will not achieve the desired result. More mundane issues, such as provision of electricity and office stationary or food in the case of prisons, must also be taken into account, to ensure sustainability. In addition, many areas of assistance cut across the three categories. For instance witness protection may require both legislative assistance and capacity building.

2. Scenarios

19. Cooperation between stakeholders in the international community may take different forms and have different approaches depending on situations and areas of need. As indicated above, the role of the Court is quite limited and in most scenarios primary activities will rest with states, international organisations and civil society. The following situations could be envisaged:

- a) **Situations where no crimes under the jurisdiction of the Court have been committed.**

20. This is the situation experienced by most State Parties. This situation does not, however, detract from the obligations to investigate and prosecute any future crimes, and commitments undertaken to protect civilian populations from such crimes.

21. These situations generally provide for a very limited role of the Court, but there may be significant scope for bilateral cooperation between States Parties themselves and between States

Parties and relevant regional and international organizations with a view to enhancing the readiness and preventive effect of the domestic jurisdiction across the different areas mentioned above. This will be a purely preventive endeavour to ensure impunity gaps will not develop in the future and deter the commission of future crimes. However, such assistance may, in addition, enable the State in question to combat illegal activities undertaken on its territory or by its nationals that are linked to the commission of the most serious crimes abroad. Synergies with existing development cooperation programmes – notably in the area of rule-of-law – could be explored.

b) Situations where crimes under the jurisdiction of the Court may have been committed.

22. These situations, often where the Court has initiated a preliminary examination, can be in States that are experiencing ongoing conflict or emerging from conflict, or have witnessed some other form of violence. No determination has yet been made to initiate an investigation.

23. Such situations offer early opportunities to catalyze domestic proceedings. They call for immediate action by the international community in cooperation with the State in question and the Court. Avoiding impunity by ensuring that the judicial system is capable of dealing with war crimes, crimes against humanity and genocide, crimes that may have occurred during the conflict is vital in underpinning peacebuilding efforts. Cooperation should focus on promoting the immediate ability of the national judicial system to deal with the most serious crimes, regardless of any future admissibility determination. This can and should be done as part of any ongoing peacebuilding and stabilization efforts aimed at early recovery.

c) Situations where the Court is investigating and prosecuting crimes under its jurisdiction.

24. These situations are similar to sub-paragraph (b), except that the Court has determined prima facie the admissibility of cases within the situation, and thereby also that crimes have been committed. These situations include cases where the Court has issued arrest warrants which may or may not have been executed, and are therefore more complicated from a complementarity point of view as no initiative should infringe on the judges' determinations. There are, however, opportunities for burden-sharing between the Court and national courts.

25. In these situations, where the Court is investigating and prosecuting those bearing the greatest responsibility for the most serious crimes, there will be a need for support to national jurisdictions to enable them to deal with other perpetrators and victims through enhancing the capacity of the domestic judicial system, examining options for giving support also to hybrid tribunals and truth and reconciliation commissions, as well as forms of traditional justice, where and as appropriate. The need to preserve the judicial and prosecutorial independence of the Court must, in particular, be taken into consideration in all situations. Actions under positive complementarity must not be misused to avoid justice. In addition, activities undertaken should also take into account leaving a lasting legacy of the Court. Again, synergies should be explored with regard to on-going peacebuilding and stabilization efforts aimed at early recovery.

d) Situations where the Court has concluded investigations and prosecution of those most responsible.

26. The Court has concluded its investigation and possibly prosecutions or may be in the process thereof. Those bearing the greatest responsibility have been brought to justice. However, there is still a need for dealing with other perpetrators and ensure that the judicial system is capable of handling future crimes. There is a role to be played by both the Court and the international community with regard to actual proceedings and preventing future crimes. Where the situation has stabilized, this could be part of regular development cooperation efforts, or otherwise as support to transitional justice activities and stabilization efforts

3. Actors

27. States, the Court, the international community and civil society have different roles to play in the different situations, and may be active through different mechanisms.

a) Role of States

28. Whilst the activities that can be carried out by the Court will contribute significantly to furthering national proceedings and strengthening the rule of law, there are a number of obvious constraints. In this context, much more can be done by the international community through **State-to-State cooperation**, with involvement, as appropriate, of the Court.

29. States Parties have an obligation to cooperate with the Court under the Rome Statute. However, as the preamble of the Rome Statute emphasizes, serious crimes of concern to the international community should not go unpunished and prosecutions must be ensured by taking measures at the national level. Increased cooperation between States themselves to this end would be desirable.

30. Many of the activities described above are already, to some extent, being undertaken by donor States in cooperation with partners. Many development cooperation organizations are operating extensive rule-of-law programmes, and synergies between the Rome Statute system and these activities should be explored further. Benefits could accrue, moreover, from mainstreaming and integrating issues of international and domestic rule of law and criminal justice across governmental sectors, as well as in the work of other relevant organizations.

31. Also, in situations where States are emerging from conflict there is a need to ensure that impunity does not prevail. Efforts aimed at peacebuilding and stabilization could include efforts aimed at enabling the national judicial system to combat the most serious crimes in order to avoid an impunity gap that may impact negatively on the recovery of the State in question.

32. In general, mainstreaming of the Rome Statute system with existing development cooperation and assistance efforts could strengthen the impact of the Statute and of the Court. In addition, this could avoid situations where various actors in the field work at cross-purposes.

33. The need for assistance will vary from State to State depending on the type of scenario and other circumstances. More often than not, however, many of the activities mentioned above will be needed in different situations. Donor States as well as partner States should pay due attention to the specific needs of the judicial system created by the specific situation and attempt to address them.

34. Support for implementing legislation is already available for some States and could be expanded. Efforts with regard to establishing tri-partite relationships between States willing to undertake witness protection and States with the ability to provide financial support are underway. Such relationships could be explored in relation to other aspects of support to national jurisdictions, as the Court seeks agreements to obtain the necessary cooperation.

35. Generally, much may be achieved by States examining their existing activities and development programmes with a view to identifying areas where synergies could be explored and additional efforts undertaken with a view to reinforcing the Rome Statute system. The same applies to existing partnerships between States on the one hand and international organizations and civil society on the other.

36. To advance, as appropriate, such voluntary assistance, the Assembly should task the Secretariat of the Assembly of States Parties (“the Secretariat”) with facilitating the exchange of information between the Court, States Parties, signatory States, international organizations, civil society and other stakeholders aimed at strengthening domestic jurisdictions. This function would

be established within existing resources and be limited in its role. It should be emphasized that this function would not in any way engage in the actual provision of assistance or capacity building. The modalities of this function, if established, should be discussed further. The Secretariat should report on progress in this regard to the tenth session of the Assembly of States Parties. Overall, such aspects of complementarity merits further discussions in the Assembly and its subsidiary bodies on an on-going basis.

b) International organisations and civil society

37. Experience has shown that progress in the fight against impunity can only be achieved through collaboration of the entire international community. There are certain practical limitations in the role that States can play, including not being present in the field or not having sufficient practical capacity to implement activities. The need to minimize administration and bureaucracy is a guiding principle for many States. In addition, different States have different areas of expertise and ability.

38. Also against this background, partnerships and implementation of positive complementarity through international organizations and NGOs have proven invaluable in the fight against impunity. These organizations possess both the necessary technical expertise and the implementing capacity.

39. Many specialised international and regional organisations undertake a range of rule-of-law activities. Some of them have independent financing for these activities, other rely on voluntary funding and a programme or project basis. The organisations could – together with States – explore ways in which The Rome Statute system could be further strengthened through positive complementarity. Annex A to F provide examples of how this can be done.

40. In addition, civil society and NGOs also have a wealth of experience of being in the field and understanding the needs of domestic jurisdictions. They already implement projects in a range of sectors and can play a vital role in bridging the impunity gap through positive complementarity.

41. Furthermore, with regard to universality, NGOs play a vital role vis-à-vis non-States Parties by building awareness of the benefits of the Rome Statute and promoting ratifications.

c) The role of the Court

42. The role of the organs of the Court is limited. It is not envisaged that the activities described here would entail additional resource for the Court, nor should the Court become a development organization or an implementing agency. The Court is seen as a catalyst of direct State-to-State assistance and indirect assistance through relevant international and regional organizations and civil society, with a view to strengthening national jurisdictions. Annex H sets out some of the activities undertaken by the Court within the existing setup.

43. The Court and its different organs currently engage in activities which enhance the effectiveness of national jurisdiction capacity to prosecute serious crimes. Each has different roles to play in different situations. Responding to national authorities and cooperating with them is increasingly becoming part of the strategy of the Prosecutor. These efforts can also contribute to decreasing the overall financial and capacity burden placed on the Court in the long term, as assistance to national authorities can have an impact on the case load of the Court.

44. While the types of practical assistance that can appropriately be provided by the Court is limited by the Court's core judicial mandate, there may be scope for the Office of the Prosecutor to engage in certain capacity building activities within existing resources and without compromising its judicial mandate. The Prosecutorial Strategy entails that the Office of the Prosecutor involves as much as possible national law enforcement experts in its activities. There may be scope for exchanging information with national authorities and efforts would need to be undertaken by

stakeholders involved to ensure that this would not jeopardize the security of witnesses and victims and the on-going activities of the Court. In addition, in-situ proceedings, if and when possible, could provide opportunities for strengthening the national jurisdiction and build interest in complementary national investigations and prosecutions. The Registry could assist States Parties by helping to identify areas that could be the subject of their activities aimed at strengthening domestic judicial systems. Such efforts would also not impact on the independent judicial mandate of the Court.

45. The relevant organs of the Court could, within the limits of their respective mandates, also act as a catalyst for assistance, helping to bridge the divide between donors and potential partner countries. In this way, the justice system envisaged by the Rome Statute – involving States Parties and the Court in partnership – can give effect to the principle of complementarity.

D. Broader implications – universality and rule of law

46. The Rome Statute was created to ensure that those bearing the greatest responsibility for the most serious crimes of concern to humanity do not go unpunished. This system can only fully realise its potential when the Statute is universally adhered to.

47. The decision on whether or not to sign and ratify the Statute rests solely with sovereign States. However, the prospect of assistance under the heading of positive complementarity may alleviate some concern over whether States are ready to assume the obligations and commitments that the Statute entails. The prospect of strengthening the domestic jurisdictions may also provide added incentives for ratification

48. In addition, experience with assistance to national jurisdictions in combating impunity for war crimes, crimes against humanity and genocide shows that such assistance can have significant and substantial spill-over effects on the entire judicial system of the State receiving assistance. Furthermore, international cooperation in combating the most serious international crimes can lead to cooperation with regard to other forms of transnational criminal activity.

E. Conclusion

49. It is of paramount importance that the complementary justice system of the Rome Statute is strengthened and sustained and that the Court and States Parties support and enhance mutual efforts to combat impunity.

50. The possibilities for enhancing the fight against impunity through positive complementarity are many and diverse. As the preamble of the Rome Statute states, this includes further measures at the national level. Positive complementarity seems to be one tool by which such measures can be taken. Sharpening this tool could help bridge the impunity gap and dissuade and deter the commission of future crimes.

51. Considering the many facets of the issue, closing the impunity gap through positive complementarity seems to merit further discussions among States Parties and within the Assembly. The aim is not to create new roles for the Court. Neither is it to create new structures of assistance or additional obligations for States Parties, financial or otherwise. The aim is to identify ways in which States Parties, in a dialogue with the Court, may even better, more targeted and more efficiently assist one another in strengthening national jurisdictions in order that these may conduct national investigations and prosecutions.

52. The basis for this already exists, namely the current activities of States Parties, international and regional organizations and civil society. The aim would be to strengthen national jurisdictions through increased donor awareness and improved coordination with a specific view to the Rome Statute System of international criminal justice. To this end, the Secretariat should be tasked with facilitating the exchange of information between the Court, States Parties, signatory States,

international organizations, civil society and other stakeholders aimed at strengthening domestic jurisdictions. It should be noted that it is neither desirable nor appropriate that the Secretariat should take upon itself any major role with regard to coordination and implementation of activities.

53. Some activities elaborated in this paper are already routinely carried out. Furthering the issue of positive complementarity as set out in this paper could, however, strengthen the impact of the Rome Statute system through effective measures, both at national and international levels. Such measures may contribute to closing the impunity gap, enhancing the prevention of crimes and promoting the rule of law, with potential positive effects for international peace and security.

F. Recommendations

54. Based on the above, the following recommendations could be used to further the principle of complementarity through positive complementarity at the national level:

- a) States Parties should reaffirm that national jurisdictions have the primary responsibility for investigating and prosecuting the most serious crimes and acknowledge that the fight against impunity is dependent on the commitment of the international community as a whole.
- b) States, the Court and other actors should strengthen the principle of complementarity by encouraging national proceedings where relevant as a means to bridge the impunity gap, taking into consideration the prosecutorial and judicial independence of the Court.
- c) States Parties should consider the need for further measures at the national level in combating impunity and, as appropriate and in cooperation with the Court, examine ways in which domestic jurisdictions can be further enabled to deal with the most serious crimes. Such measures would in the first instance be part of ongoing development cooperation activities and other forms of assistance under the heading of positive complementarity.
- d) The Court should develop a report on positive complementarity and present this report to the Assembly of States Parties.
- e) The Assembly should establish a designated function within the Secretariat of the Assembly of States Parties, within existing resources, tasked with facilitating the exchange of information between the Court, States Parties, signatory States, international organizations, civil society and other stakeholders, aimed at strengthening domestic jurisdictions. The Secretariat should provide an update on progress in this regard to the Assembly of States Parties.
- f) The Assembly and the Bureau of the Assembly should continue the dialogue with the Court, States Parties, international organisations and civil society on how best to advance the fight against impunity at the national level through positive complementarity.

Annex V

Draft resolution on strengthening the enforcement of sentences

The Review Conference,

Recalling the Rome Statute of the International Criminal Court,

Conscious of the key role of States in the enforcement of the Court's sentences of imprisonment,

Recalling that the Court's sentences of imprisonment shall be served in prison facilities provided by States that have indicated their willingness to accept sentenced persons, in accordance with the Statute,

Mindful of the need for broader participation of States in the enforcement of sentences in order to allow for such enforcement in all relevant regions and sub regions and *taking note* of the unanimous view expressed by States Parties to this effect,

Emphasizing the need for enhanced international cooperation with a view to enabling more States to voluntarily accept sentenced persons on the basis of widely accepted international treaty standards governing the treatment of prisoners,

1. *Calls upon* States to indicate to the Court their willingness to accept sentenced persons in accordance with the Statute;
2. *Confirms* that a sentence of imprisonment may be served in a prison facility made available in the designated State through an international or regional organization, mechanism or agency;
3. *Urges* States Parties and States that have indicated their willingness to accept sentenced persons, directly or through competent international organizations, to promote actively international cooperation at all levels, particularly at the regional and sub regional levels;
4. *Requests* the Secretary-General of the United Nations to bring this resolution to the attention of all members of the United Nations, with a view to encouraging that the above objectives may be considered, as appropriate, in the relevant programmes of assistance of the World Bank, the regional banks, the United Nations Development Programme, and other relevant multilateral and national agencies.

Annex VI

Draft resolution on the impact of the Rome Statute system on victims and affected communities

The Review Conference,

Recalling the Preamble of the Rome Statute which reminds that millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Reaffirming the importance of the Rome Statute to the victims and affected communities in its determination to put an end to impunity for the perpetrators of the crime of genocide, crimes against humanity and war crimes, thus contributing to their prevention,

Recalling United Nations Security Council resolutions 1325, 1820, 1888 and 1889 on women, peace and security, as well as resolutions 1612 and 1882 on children in armed conflict, and in this context, underlining the need to address the specific needs of women and children as well as to put an end to impunity for sexual violence in conflict,

Further recalling, inter alia, the 1985 United Nations General Assembly Resolution 40/34 “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”, and the 2005 United Nations General Assembly Resolution 60/147 “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”,

Recognizing that victims’ right to equal and effective access to justice; protection and support; adequate and prompt reparation for harm suffered; and access to relevant information concerning violations and redress mechanisms are essential components of justice,

Emphasizing the importance of outreach to victims and affected communities in order to give effect to the unique mandate of the International Criminal Court towards victims,

1. *Encourages* States to consider implementing those provisions of the Rome Statute relevant to victims/witnesses, where applicable, through national legislation or appropriate measures;
2. *Further encourages* the Court, in dialogue with victims and affected communities, to continue to optimize the Court’s strategic planning process, including the Court’s Strategy in relation to victims, as well as its field presence in order to improve the way in which it addresses the concerns of victims and affected communities, paying special attention to the needs of women and children;
3. *Underlines* the need to continue to optimize and adapt outreach activities, in light of different phases of the judicial cycle, and to encourage further efforts to ensure that victims and affected communities have access to accurate information about the Court, its mandate and activities, as well as about victims’ rights under the Rome Statute, including their right to participate in judicial proceedings and claim for reparations;

4. *Encourages* governments, communities and civil organizations at the national and local level to play an active role in sensitizing communities on the rights of victims in accordance with the Rome Statute in general and victims of sexual violence in particular: to speak against their marginalization and stigmatization, to assist them in their social reintegration process and in their participation in consultation, and to combat a culture of impunity for these crimes;
5. *Expresses its appreciation* to the Board of Directors of the Trust Fund for Victims for its continuing commitment towards easing the suffering of victims;
6. *Stresses* the importance of an ongoing dialogue between the Secretariat of the Trust Fund for Victims, the Court and States Parties, with a view to ensuring the transparency of the management of the Trust Fund and its Secretariat and *further stresses* the importance in this regard of regular exchanges with the international community, including donors and civil society, so as to promote the activities of the Trust Fund and contribute to its visibility;
7. *Calls upon* States Parties, international organizations, individuals, corporations and other entities to contribute to the Trust Fund for Victims to ensure that timely and adequate assistance and reparations can be provided to victims in accordance with the Rome Statute, and *expresses its gratitude* to those that have done so.

Annex VII

Draft resolution on complementarity

The Review Conference,

Reaffirming its commitment to the Rome Statute of the International Criminal Court,

Reaffirming its determination to combat impunity for the most serious crimes of international concern as referred to in the Rome Statute,

Reaffirming further that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Welcoming the efforts of the Court to investigate and prosecute those bearing responsibility for the most serious crimes of international concern,

Stressing the need to achieve universality of the Statute as a means to end impunity and *acknowledging* that assistance to strengthen domestic capacity may have positive effects in this regard,

1. *Recognizes* the primary responsibility of States to investigate and prosecute the most serious crimes of international concern;
2. *Emphasizes* the principle of complementarity as laid down in the Rome Statute and *stresses* the obligations of States Parties flowing from the Rome Statute;
3. *Recognizes* the need for additional measures at the national level as required and for the enhancement of international assistance to effectively prosecute perpetrators of the most serious crimes of concern to the international community;
4. *Notes* the importance of States Parties taking effective domestic measures to implement the Rome Statute;
5. *Recognizes* the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level;
6. *Takes note of* the report of the Bureau on complementarity and its recommendations as a background paper for discussions at the Review Conference;
7. *Welcomes* the fruitful discussions on the issue of complementarity held during the Review Conference;
8. *Encourages* the Court, States Parties and other stakeholders, including international organizations and civil society to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern as set out in the Report of the Bureau on complementarity, including its recommendations;

9. *Requests* the Secretariat of the Assembly of States Parties, in accordance with resolution ICC-ASP/2/Res.3, and, within existing resources, to facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions, and *requests* the Secretariat of the Assembly of States Parties to report to the tenth session of the Assembly on progress in this regard;

10. *Requests* the Bureau to continue the dialogue with the Court and other stakeholders on the issue of complementarity and *invites* the Court to present to the Assembly at its tenth session, as appropriate, a report in this regard.

Annex VIII

Elements of crimes corresponding to the proposed amendment contained in annex III to resolution ICC-ASP/8/Res.6

Belgium proposes, in order to enhance the degree of precision afforded to the definitions of crimes, to forward to the Review Conference for adoption the elements of crimes which correspond to the draft amendments of the war crimes that the Assembly already forwarded to the Conference at its eighth session, in November 2009 (Resolution ICC-ASP/8/Res.6 adopted on 26 November 2009, annex III).

These elements are exactly the same elements of crimes as those approved for the corresponding war crimes in the context of an international armed conflict, i.e. the elements of crimes set out in article 8, paragraph 2 (b) (xvii), (xviii) and (xix). However, one amendment has been made to these elements, in a logical fashion, to reflect that the crime is committed in the context of an armed conflict not of an international character. Thus, under the third element of the first two war crimes proposed, and the fourth element of the third war crime proposed, the terms “international armed conflict” contained in the corresponding elements of crimes in the context of an international armed conflict are replaced by the terms “armed conflict not of an international character”.

As a reminder – proposal of amendment forwarded to the Review Conference for adoption:

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

“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.”

Proposal

Elements of Crimes

Add the following elements to the Elements of Crimes:

Article 8, paragraph 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, paragraph 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.¹⁶

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, paragraph 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.

¹⁶ 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.