

INTERNATIONAL CRIMINAL COURT

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MAKING THE RIGHT CHOICES
AT THE REVIEW CONFERENCE



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SUMMARY OF RECOMMENDATIONS

GENERAL

Amnesty International recommends that states should participate in the Review Conference at the highest level, to show their strongest support for the Rome Statute system.

PROPOSED AMENDMENTS TO THE ROME STATUTE

Amnesty International recommends that at the Review Conference states should:

- support the deletion of Article 124 of the Rome Statute.
- support the Belgian proposal to harmonize the rules applicable to international and non-international armed conflicts by making war crimes defined under Article 8 (2) (b) (xvii), (xviii) and (xix) also criminal under Article 8 (2) (e) of the Rome Statute.

In the event that the Review Conference decides to incorporate the crime of aggression into the Rome Statute, Amnesty International recommends that states should:

- adopt the proposal that does not require any jurisdictional filter to determine whether an act of aggression has been committed before the ICC Prosecutor can proceed with an investigation.
- if the Review Conference decides that a jurisdictional filter must be established, require that a determination of whether an act of aggression has been committed is conducted by the relevant Chamber in the course of legal proceedings already set out in the Rome Statute.
- oppose any proposal for a body external to the Court to determine whether an act of aggression has been committed, before the ICC Prosecutor can proceed with an investigation.
- incorporate the crime of aggression into the Rome Statute in a manner equal to the other crimes, to preserve the integrity of the Statute.
- decide that acceptance by either the alleged victim state or the alleged aggressor state would be sufficient for the Court to exercise jurisdiction over the crime.

AN EFFECTIVE STOCKTAKING PROCESS

COMPLEMENTARITY

Amnesty International recommends that states should support the adoption of a Review Conference resolution on complementarity:

- calling on all state parties to enact or amend national legislation ensuring their authorities can investigate and prosecute genocide, crimes against humanity, war crimes and other crimes under international law, in accordance with the strictest requirements of international law and without obstacles.
- reminding states of their duty to exercise their criminal jurisdiction over those suspected to be responsible for crimes under international law found in any territory under their jurisdiction - or to extradite them to other states or to surrender them to the Court.
- considering the role that both the Court and the Assembly can play in promoting national justice in situations where the national authorities are unable or unwilling to act.
- requesting the Secretariat of the Assembly of States Parties to facilitate the exchange of information between the Court, state parties and other stakeholders; and providing the Secretariat with a clear mandate and resources to promote the enactment of legislation implementing the Rome Statute.
- establishing follow-up mechanisms to focus future efforts by the Assembly of States Parties to promote complementarity.

CO-OPERATION

Amnesty International recommends that states should support the adoption of a Review Conference resolution on co-operation:

- calling on all states to enact national legislation ensuring that they can co-operate fully with the International Criminal Court.
- calling on all states to ratify the Agreement on Privileges and Immunities of the International Criminal Court.
- calling on all states to enter into a victim and witness relocation agreement with the Court.
- calling on all state parties to enter into agreements with the Court for the enforcement of sentences.
- calling on all states parties to designate national focal points on co-operation.

Amnesty International recommends that states should support the draft resolution prepared by Norway on strengthening the enforcement of sentences.

THE IMPACT OF THE ROME STATUTE SYSTEM ON VICTIMS AND AFFECTED COMMUNITIES

Amnesty International recommends that states should ensure that victims and victims' organizations are given a voice during the Review Conference debate on the impact of the Rome Statute system on victims and affected communities.

Amnesty International recommends that at the Review Conference states should support the adoption of a Review Conference resolution on the impact of the Rome Statute system on victims and affected communities:

- acknowledging the serious problems facing the Court in relocating victims and witnesses and calling on states to enact legislation and enter into victim relocation agreements with the Court.
- recognizing the need to invest in the support and protection of intermediaries and the need for the Court to establish a comprehensive policy on the issues.
- calling on states to put in place legislation and procedures to enforce reparations orders of the Court.
- calling on states parties, international organizations, individuals, corporations and other entities to make annual voluntary contributions to the Trust Fund for Victims.
- calling on states where crimes under the jurisdiction of the Court have been committed to ensure national reparations for victims, taking into account the Court's principles on reparations.

PEACE AND JUSTICE

Amnesty International recommends that at the Review Conference states should:

- reject the claim that justice must be sacrificed to ensure peace and reconciliation.
- recognize that, as certain crimes under international law threaten the peace, security and well-being of the world, justice for these crimes helps to protect and promote peace and security.
- recognize that "retributive" justice and "restorative" justice (i.e. criminal justice and truth-seeking mechanisms) do not exclude, but supplement each other.
- strongly reaffirm that victims of crimes under international law have a right to justice, in addition to the right to truth and the right to full reparations.

ACTION BY STATE PARTIES IN ADVANCE OF THE CONFERENCE/PLEDGES

Amnesty International calls on all state parties to take the follow steps in advance of the Review Conference - or to make a formal pledge to the Review Conference to do so:

- enact or amend national legislation ensuring their authorities can investigate and prosecute genocide, crimes against humanity, war crimes, and other crimes under international law in accordance with the strictest requirements of international law.
- enact national legislation ensuring that they can co-operate fully with the International Criminal Court.
- ratify the Agreement on Privileges and Immunities of the International Criminal Court.
- enter into a victim and witness relocation agreement with the Court.
- enter into enforcement of sentences agreements with the Court.
- designate national contact points on co-operation.
- designate national contact points for the Assembly's Plan of Action for Universal Ratification and Full Implementation of the Rome Statute and respond to the annual survey of states activities.
- make annual voluntary contributions to the International Criminal Court's Trust Fund for Victims.
- withdraw declarations amounting to prohibited reservations to the Rome Statute, if a state has made such a declaration.

INTRODUCTION

“This first Review Conference is a significant milestone for the International Criminal Court. It constitutes a unique opportunity for States to reflect on the achievements of the Court since the entry into force of its Statute and to reaffirm their commitment to combat impunity for the most serious crimes of concern to the international community.”

Christian Wenaweser, President of the Assembly of States Parties to the Rome Statute of the International Criminal Court, letter to the state parties, 15 September 2009, Doc. ASP/2009/139.

The first Review Conference of the Rome Statute of the International Criminal Court (Review Conference) will take place in Kampala, Uganda, from 31 May to 11 June 2010.

Amnesty International recommends that states should participate in the Review Conference at the highest level, to show their strongest support for the Rome Statute system.

Article 123 (1) of the Rome Statute provides that:

“Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.”

Following detailed preparatory discussions, three proposed amendments will be considered by the Review Conference:

- First, the Review Conference will consider whether to delete transitional Article 124 of the Rome Statute, which allows states to make a declaration upon ratification that the Court will not have jurisdiction over war crimes committed in that country or by its nationals for the first seven years.

- Second, the Review Conference will consider proposals concerning the crime of aggression. Although the crime is listed as a crime under the jurisdiction of the Court in Article 5, the Court cannot exercise jurisdiction over the crime until state parties define it and set out the conditions under which the Court may exercise jurisdiction.
- Third, the Review Conference will consider a proposal by Belgium to amend Article 8 of the Rome Statute, which defines war crimes, to apply to non-international armed conflict the prohibition of the use of weapons listed in relation to international armed conflict, including poison or poisoned weapons, asphyxiating gases and bullets that expand or flatten easily in the human body.

Amnesty International considers each proposed amendment in **Part One** of this paper.

In addition to considering proposed amendments, state parties have also decided to use the occasion of the Review Conference to take stock of the work and impact of the Rome Statute system since its establishment, almost eight years ago. Four issues will be considered:

- Complementarity;
- Co-operation;
- The impact of the Rome Statute system on victims and affected communities; and
- Peace and justice.

In **Part Two** of this paper, Amnesty International sets out recommendations it encourages states to consider in preparing for the debates and in drafting resolutions or other outcome documents.

Finally, the Review Conference will provide important opportunities for state parties, either individually or jointly, to take concrete steps or to make pledges to ensure that they can fulfill all their obligations set out in the Rome Statute and fully support the operation of the Court. In March 2010, Amnesty International issued a statement to the resumed eighth session of the Assembly of States Parties calling on states parties to achieve key benchmarks before the Review Conference - or to make pledges to achieve them. This statement is included in the **Annex** to this paper. Amnesty International is also writing to ministers of foreign affairs of all states parties urging them to take steps to achieve the benchmarks.

See:

Amnesty International, *Open letter to states parties to the Rome Statute of the International Criminal Court*, Index: IOR 40/007/2010, April 2010.

Amnesty International will have a delegation present throughout the Review Conference. Members of the delegation will be available to discuss any of these issues with government delegations. Some of the issues considered by the Review Conference and not discussed in this paper may be the subject of separate papers issued by Amnesty International. Amnesty International is also actively involved in Teams organized by the Coalition for the International Criminal Court (Coalition) on a range of Review Conference issues. The Coalition's Teams will also issue papers reflecting the organization's position on specific issues before or during the Review Conference.

PART ONE: PROPOSED AMENDMENTS TO THE ROME STATUTE

GENERAL PRINCIPLES ON AMENDMENTS TO THE ROME STATUTE

In considering each of the proposals for amendments to the Rome Statute, Amnesty International urges the Review Conference to:

1. Protect and promote the integrity of the Rome Statute and safeguard the existing mandate of the International Criminal Court.

Amendments must not scale back on the important achievements in the Rome Statute. In particular:

- The same procedures for referring crimes to the Court should be available for all the crimes.
- The existing provisions governing the right to a fair trial, including the presumption of innocence, must be applied to all crimes.

The principles of criminal responsibility and defences applicable to all crimes must be consistent with the strictest requirements of international law.

2. Protect and promote the credibility of the Court as an institution of international justice which is fair, effective, independent, impartial and free from political interference.

The United Nations Security Council or other bodies must not be allowed to infringe the independence and impartiality of the Court. In particular:

- The Security Council or other body must not pre-empt the judicial determinations of the Court on any aspect of crimes.
- The Security Council must not be given any additional powers to preclude the Court from acting in relation to any crimes.

3. Promote universal support for the Court's work in prosecuting genocide, crimes against humanity and war crimes.

Amendments must not weaken support for international justice or result in withdrawals from the Rome Statute. In particular, amendments should only be considered if they enjoy overwhelming support of state parties from all regions.

ARTICLE 124 OF THE ROME STATUTE

States parties should support the deletion of Article 124 of the Rome Statute.

Amnesty International strongly opposed the inclusion of Article 124 in the Rome Statute, which it termed the “licence to kill” provision. Amnesty International notes that only two state parties ultimately made declarations under Article 124, France and Colombia. France revoked its declaration before the seven-year period expired.¹ Colombia’s declaration expired in 2009.²

There is no justifiable basis to maintain Article 124 in the Rome Statute. The provision has not been necessary to encourage states to ratify the Statute. In fact, there have been numerous states engaged in international or national armed conflict which have nevertheless ratified the Statute without making such a declaration.

THE CRIME OF AGGRESSION

The Review Conference will have to consider proposals concerning the crime of aggression, including its definition and the circumstances under which the Court will exercise jurisdiction over it.

The crime of aggression seeks to hold individual military or civilian leaders responsible for the unlawful use of force against other states. Amnesty International recognizes that aggression is a crime under international law that invariably will result in subsequent crimes within the jurisdiction of the Court. However, Amnesty International does not take a position on whether any international armed conflict is just or legal -- a judgment which will be seen as political. Instead, Amnesty International focuses on protecting civilians and exposing violations of human rights and humanitarian law in situations of armed conflict. By remaining neutral on the question of the legality of the conflict, the organization can better address violations by all parties to the conflict. Therefore, Amnesty International neither supports nor opposes the adoption of amendments that would lead to the Court exercising jurisdiction over the crime. For the same reasons, Amnesty International does not take a position on the definition and the elements of the crime of aggression.

Nonetheless, Amnesty International notes that, in addition to defining the crime of aggression and its elements, the Review Conference will also consider other aspects, which relate to the overall integrity of the Rome Statute and could have an impact on the Court's ability to investigate and prosecute genocide, crimes against humanity and war crimes. In the light of Amnesty International's general principles on amendments to the Rome Statute, the organization offers the following observations on the "jurisdictional filters" (i.e. the conditions upon which the Court can exercise jurisdiction over the crime of aggression) and the entry into force of the amendments to the Rome Statute on the crime of aggression.

'JURISDICTIONAL FILTERS'

As part of the discussions to determine the conditions under which the Court may exercise jurisdiction over the crime of aggression, the Review Conference will consider a number of proposals requiring external or internal bodies to the Court to make a determination that an act of aggression was committed, before the ICC Prosecutor could proceed with an investigation. This is known as the issue of the "jurisdictional filters".

Current proposals require one of the following external bodies to make such a determination:

- the United Nations Security Council;
- the United Nations General Assembly;
- the International Court of Justice.

Alternative proposals would establish internal mechanisms within the Court (such as a prior determination by the Pre-Trial Chamber that an act of aggression has been committed) before the Prosecutor can act. There also is a proposal not to require any body at all to make the determination that an act of aggression was committed.

In the event that the Review Conference decides to incorporate the crime of aggression into the Rome Statute, states should adopt the proposal that does not require any jurisdictional filter to determine whether an act of aggression has been committed before the ICC Prosecutor can proceed with an investigation.

The "no jurisdictional filter" proposal is the option that appears to best respect the independence of the Court. "Jurisdictional filters" are unnecessary and could undermine the independence of the Court. Additionally, they could undermine the rights of the accused by pre-judging elements of the crime of aggression without appeal.

If the Review Conference decides that a jurisdictional filter must be established, then states should require that a determination of whether an act of aggression has been committed is conducted by the relevant Chamber in the course of legal proceedings already set out in the Rome Statute.

Proposals for establishing an internal mechanism within the Court to consider whether an act of aggression has been committed before the Prosecutor can act need to be considered carefully. Any solution involving a determination by an internal body to the Court would deviate from the existing procedures for other crimes under the Rome Statute, adding an additional procedural step. Additionally, it would involve issues beyond the jurisdiction of the Court, as any internal determination that an act of aggression was committed is likely to pre-judge one of the possible elements of the crime of aggression, having an impact on the right of appeal.

Tasking the **Pre-Trial Chamber** with making the determination could be an effective solution, provided that the procedure:

1. would be essentially the same as the Pre-Trial Chamber acting pursuant to Article 15 in determining that the Prosecutor can open an investigation after he or she has conducted a preliminary examination;
2. would only apply to the crime of aggression - not state referrals of other crimes; and
3. would permit an accused person to challenge the determination.

Assigning the role to **another Chamber or body internal to the ICC** would infringe the right of appeal, if it reduced the number of opportunities to appeal or permitted judges involved in the initial determination to hear the appeal of that determination.

In the event that the Review Conference decides to incorporate the crime of aggression into the Rome Statute, states should oppose any proposal for a body external to the Court to determine whether an act of aggression has been committed, before the ICC Prosecutor can proceed with an investigation.

Amnesty International is strongly opposed to any proposal which would require an external political body to make the determination. The organization therefore opposes the proposal which requires a determination by the **United Nations Security Council**, a political body, that an act of aggression has been committed for the Prosecutor to proceed with the investigation of a crime of aggression. Amnesty International is equally opposed to the proposal that such a determination be carried out by the **United Nations General Assembly**, also a political body. The requirement for any political body to make a prior determination (or request) for the International Criminal Court to investigate and prosecute crimes under its jurisdiction was rejected by the Rome Conference, recognizing that such a process would seriously undermine the Court's independence and threaten its credibility. Creating such a requirement for the crime of aggression would politicize the International Criminal Court and undermine the efforts to ensure universal support for its work, which could ultimately affect its ability to prosecute other crimes under its jurisdiction. There is, of course, nothing to stop the Security Council or the General Assembly from making a determination that an act of aggression has not been committed regarding any situation before the Court. No doubt the Court would consider such a resolution, as well as other information available to it, in making its determination on the issue.

Amnesty International also opposes proposals which would require an external judicial body to make the determination. The organization therefore opposes the proposal for the **International Court of Justice (ICJ)** to make a prior determination on whether an act of aggression has been committed. Although the ICJ is not a political body, any involvement of an external body in the judicial determinations of the International Criminal Court would infringe on its independence and impartiality. Additionally, there does not appear to be any reasonable justification for allocating the initial determination that an act of aggression has been committed to the ICJ. The judges of the International Criminal Court include those elected on the basis of their expertise in international law - judges of the ICJ have no additional relevant expertise.

ENTRY INTO FORCE

Provided that all existing “trigger mechanisms” would apply to the crime of aggression, and that state consent would not be necessary in case of UN Security Council referrals, the Review Conference is called to clarify whether, in the other cases (state referrals and *proprio motu* investigations), the entry into force of the amendments on aggression would be regulated by paragraph 4 or 5 of Article 121 of the Rome Statute.

Article 121: Amendments

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

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

Rome Statute of the International Criminal Court

The Review Conference is also called to clarify the scope of the Court’s jurisdiction with respect to states that do not accept amendments. As the crime of aggression is typically committed on the territory of both the aggressor state and the victim state, the second sentence of Article 121 (5) can be interpreted in two ways:

- “Positive understanding”: The ICC **can** exercise jurisdiction over a crime of aggression committed **against** a state party that has accepted the amendment;
- “Negative understanding”: The ICC **cannot** exercise jurisdiction over a crime of aggression committed **by** a state party that has **not** accepted the amendment.³

A correct interpretation of the second sentence of Article 121 (5) of the Rome Statute is far from a technical problem. In fact, it touches at a fundamental issue of jurisdiction. A “positive understanding” of the provision would mean that the consent of the alleged victim state is sufficient for the Court to exercise its jurisdiction over the crime of aggression; a “negative understanding”, on the other hand, would require the consent of the alleged aggressor state.

In the event that the Review Conference decides to incorporate the crime of aggression into the Rome Statute, states should do so in a manner equal to the other crimes, to preserve the integrity of the Statute.

In the event that the Review Conference decides to incorporate the crime of aggression into the Rome Statute, states should decide that acceptance by either the alleged victim state or the alleged aggressor state would be sufficient for the Court to exercise jurisdiction over the crime.

This result could be achieved using either Article 121 (4) or Article 121 (5) with a positive understanding of its second sentence.

Amnesty International opposes the proposal that would require that the alleged aggressor state has accepted the Court's jurisdiction over the crime of aggression (i.e. applying a negative understanding of the second sentence of Article 121 (5) to the amendment on aggression, or using other mechanisms, such as opt-in or opt-out declarations). Such a requirement would *de facto* amount to allowing reservations, which are prohibited under Article 120 of the Statute.

Deciding that acceptance by either the alleged victim state or the alleged aggressor state would be sufficient for the Court to exercise jurisdiction over the crime of aggression would help preserve the integrity of the Rome Statute and the identity of the Court as an institution of international criminal justice.

EXPANDING THE USE OF PROHIBITED WEAPONS AS WAR CRIMES

States should support the Belgian proposal to harmonize the rules applicable to international and non-international armed conflicts by making war crimes defined under Article 8 (2) (b) (xvii), (xviii) and (xix) also criminal under Article 8 (2) (e) of the Rome Statute.

The Review Conference will consider a proposal by the government of Belgium to add the following war crimes to Article 8 (2) (e) of the Rome Statute:

“xvii) Employing poison or poisoned weapons;

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

xix) 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.”

These crimes are already included in Article 8 (2) (b) of the Rome Statute as war crimes in international armed conflict, but currently excluded from the list of war crimes in non-international armed conflict.

Amnesty International supports the aims of the proposal to harmonize the rules applicable to international and non-international armed conflicts. Under rules of customary international humanitarian law, the use of poison or poisoned weapons – which cause superfluous injury and unnecessary suffering and/or are inherently discriminatory - is prohibited in non-international armed conflicts.⁴ The use of

chemical weapons, including the use of asphyxiating, poisonous or other gases, in non-international armed conflict is prohibited under customary international law.⁵ Similarly, under rules of customary international humanitarian law, the use of bullets which expand or flatten easily in the human body - causing superfluous injury and unnecessary suffering - is prohibited in non-international armed conflicts.⁶

Amnesty International opposes the use of these weapons as a method of warfare in non-international armed conflicts and can see no reason why their use should not be incorporated as war crimes in the Rome Statute. The organization thus joins the call made by the International Committee of the Red Cross (ICRC) in its oral intervention at the Eight Session of the Assembly of States Parties:

“The ICRC urges States to bring particular attention to those proposals aiming at extending the protection currently granted to victims in international armed conflict to those suffering in non-international armed conflict, since what is inhumane, and consequently proscribed in international armed conflict, cannot but be inhumane and inadmissible in a non-international armed conflict. The first amendment proposed by Belgium should be read under this light.”

PART TWO: AN EFFECTIVE STOCKTAKING PROCESS

The Review Conference is a timely opportunity for states to take stock what has been achieved and to reflect on the Court's future course.

Letter from United Nations Secretary-General Ban Ki-Moon, 7 August 2009

Amnesty International strongly supports the stocktaking debate in the Review Conference, not only to review the work of the Court, but also to review the contribution that state parties can make to the achievement of the goals of the Rome Statute. At the eighth session of the Assembly of States Parties, state parties to the Rome Statute decided

"[t]o forward the topics contained in annex IV [a) Complementarity; b) Cooperation; c) The impact of the Rome Statute system on victims and affected communities; and d) Peace and justice] to this resolution to the Review Conference for its consideration in the context of stocktaking of international criminal justice, taking into account the need to include aspects regarding universality, implementation, and lessons learned, in order to enhance the work of the Court".⁷

The stocktaking process at the Review Conference is an essential component of the Conference - equally as important as the consideration of the amendments. Below, Amnesty International sets out the organization's views and recommendations on each of the four agenda items.

The Review Conference should ensure that all meetings regarding the stocktaking process are public and open to participation by non-governmental organizations.

COMPLEMENTARITY

In practical terms, **complementarity** means that the International Criminal Court may only step in, as a "court of last resort", when state parties to the Rome Statute – and, sometimes, non-state parties – do not comply genuinely with their obligation under international law to investigate and prosecute genocide, crimes against humanity and war crimes.⁸

As part of the grand bargain at the Rome Diplomatic Conference, states established a permanent International Criminal Court that could only work if each state acted in good faith to define these crimes as crimes under its national law and then vigorously enforced that law through investigations and, where there was sufficient admissible evidence, prosecutions. Indeed, states expressly recognized in the Preamble to the Rome Statute that they had a pre-existing duty to exercise their jurisdiction over these crimes.⁹ A state which failed to bring perpetrators to justice would risk being considered unable or unwilling genuinely to investigate and prosecute crimes within the Court's jurisdiction.

Amnesty International supports the proposal for the Review Conference to adopt a Resolution on Complementarity and welcomes the preparatory work of the Bureau of the Assembly of States Parties through The Hague Working Group in drafting the resolution.

The latest draft of the resolution reaffirms the determination by state parties to the Rome Statute to combat impunity for the most serious crimes of concern to the international community as a whole and that those crimes must not go unpunished; notes the importance of state parties taking effective domestic measures to implement the Rome Statute; and requests the Secretariat of the Assembly of States Parties to facilitate the exchange of information between the Court, state parties and other stakeholders, including civil society, aimed at strengthening domestic jurisdictions, among other targets.¹⁰

The Review Conference could however improve the draft resolution, in the following ways:

States should support the adoption of a Review Conference resolution on complementarity calling on all state parties to enact or amend national legislation ensuring their authorities can investigate and prosecute genocide, crimes against humanity, war crimes and other crimes under international law, in accordance with the strictest requirements of international law and without obstacles.

Each state party recognizes that under the principle of complementarity it has the primary obligation to investigate and prosecute genuinely these crimes before their national court. To ensure the success of the complementarity system and to avoid over-burdening the Court with cases, a full review of existing national laws must be conducted, effective new legislation must be enacted or existing legislation amended. To date, less than half of the 111 state parties have done so. Additionally, much of that legislation has serious flaws. Many state parties are, therefore, incapable of fully meeting their complementarity responsibilities.

National implementing legislation must be consistent with customary and conventional international law. This principle means that, in certain circumstances, national implementing legislation should: include war crimes which have been omitted from the Rome Statute; define the crimes and principles of criminal responsibility more broadly than in the Rome Statute; and define the defences more narrowly.

See:

Amnesty International, *International Criminal Court: Checklist for effective implementation* (2nd ed.), Index: IOR 40/005/2010, publication forthcoming, expected May 2010.

Amnesty International, *International Criminal Court: Rome Statute Implementation Report Card*, Index: IOR 40/006/2010, publication forthcoming, expected May 2010.

States should support the adoption of a Review Conference resolution on complementarity reminding states of their duty to exercise their criminal jurisdiction over those suspected to be responsible for crimes under international law found in any territory under their jurisdiction - or to extradite them to other states or to surrender them to the Court.

Although the draft resolution 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 under international law”, it fails to set out concrete steps that states should take.

Under customary and conventional international law, a state is permitted to investigate and prosecute crimes under international law even when committed outside its territory and not linked to the state by the nationality of the suspect or the victims or by harm to the state’s own national interests. Almost every single state party which has drafted or enacted legislation implementing its complementarity obligations under the Rome Statute has strengthened or added such universal jurisdiction provisions.¹¹ It is essential for each state party to include effective universal jurisdiction provisions in its national law to ensure that its territory does not become a safe haven for crimes against the entire international community.

For a report concerning state practice at the international and national level regarding universal jurisdiction in 125 states, see:

Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, Index: IOR 53/002 – 018/2001, September 2001.

Amnesty International is updating this study in a series of papers on universal criminal and civil jurisdiction in each of the 192 UN member states. Six have been published so far:

- 1) Bulgaria (<http://www.amnesty.org/es/library/info/EUR15/002/2009/en>);
- 2) Germany (www.amnesty.org/en/library/info/EUR23/003/2008/en);
- 3) Spain (www.amnesty.org/es/library/info/EUR41/017/2008/es) (Spanish only);
- 4) Sweden (www.amnesty.org/en/library/info/EUR42/001/2009/en);
- 5) Solomon Islands (<http://www.amnesty.org/en/library/info/ASA43/002/2009/en>);
- 6) Venezuela (<http://www.amnesty.org/en/library/info/AMR53/006/2009/en>) (Spanish).

Amnesty International, *International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicare)*, Index: IOR 40/001/2009, February 2009.

States should support the adoption of a Review Conference resolution on complementarity considering the role that both the Court and the Assembly can play in promoting national justice in situations where the national authorities are unable or unwilling to act.

For the Court to have a real impact in the fight against impunity, it is vital that it goes beyond prosecuting its own cases and that it acts as a catalyst for national justice. The Court and the Assembly of States Parties can play a key role in working with states that are genuinely unable to investigate and prosecute cases to build their capacity through a wide variety of activities, including legislative and technical assistance, training and development of physical infrastructure. Many of these ideas have been put forward in the preparatory discussions on complementarity for the Review Conference.

However, the discussion must also consider what measures can be taken by the Court and the Assembly of States Parties to promote positive complementarity in situations where the national authorities are unwilling to act. With the political support of the Assembly of States Parties, the Court should also be a catalyst in these situations, to pressure national authorities to investigate and prosecute genuinely.

States should support the adoption of a Review Conference resolution on complementarity requesting the Secretariat of the Assembly of States Parties to facilitate the exchange of information between the Court, state parties and other stakeholders; and providing the Secretariat with a clear mandate and resources to promote the enactment of legislation implementing the Rome Statute.

Amnesty International welcomes the inclusion in the draft resolution of a request for the Secretariat of the Assembly of States Parties to facilitate the exchange of information with a view to strengthening domestic jurisdictions. The Secretariat could play a significant role in coordinating and providing capacity building assistance. Amnesty International is, however, concerned that the resolution currently states that the function should be established “within existing resources,” indicating an unwillingness of state parties to fund this task. If the Secretariat is to be effective, it is vital that it has the necessary staff and resources to undertake its work.

States should support the adoption of a the Review Conference resolution on complementarity establishing follow-up mechanisms to focus future efforts by the Assembly of States Parties to promote complementarity.

Efforts to promote complementarity must not stop at the conclusion of the Review Conference. It will be important for the Assembly of States Parties to continue this work, building upon the outcomes of the Review Conference. Although the draft resolution tasks the Bureau with continuing the dialogue with the Court and other stakeholders on the issue of complementarity, no mechanism is established to achieve this. Amnesty International urges the Review Conference to consider the most effective mechanism to keep the Assembly, the Court and civil society actively engaged in dialogue and action on complementarity.

CO-OPERATION

Amnesty International recognizes that, despite the Court making significant progress in the last eight years, its work is under threat – not from opponents of international justice – but by the inaction of its supporters. The Court cannot function effectively without the fullest co-operation from state parties. Regrettably, most states are failing to take measures to implement their commitments to co-operate fully with the Court. Amnesty International therefore welcomes the inclusion of the issue of co-operation on the agenda of the Review Conference as an important opportunity to address the current concerns.

Amnesty International notes that, in preparation for the Review Conference, an initial draft resolution on cooperation has been circulated to states for comments. The organization also welcomes plans to hold round-table discussions on the issue during the Conference.

Amnesty International provides the following general recommendations to state on the content of the draft resolution. Since most recommendations relate to steps that states can take to ensure their full co-operation with the Court, they should also be considered by states in making pledges to the Review Conference (see **Annex** to this paper).

States should support the adoption of a Review Conference resolution on co-operation calling on all states to enact national legislation ensuring that they can co-operate fully with the International Criminal Court.

The Rome Statute expressly requires state parties to co-operate with the investigation and prosecution of crimes under the jurisdiction of the Court (Article 86) and identifies some specific forms of co-operation that may be required (Article 93). In 2007 the Assembly of States Parties issued a detailed Report on Cooperation setting out 66 recommendations for state parties.¹² Regrettably, less than half of the 111 state parties have enacted co-operation legislation and much of that legislation has serious flaws. Most state parties are therefore unable to fulfil their obligations to the Court.

States should support the adoption of a Review Conference resolution on co-operation calling on all states to ratify the Agreement on Privileges and Immunities of the International Criminal Court.

The Agreement, which was adopted by the Assembly at its first session in 2002, sets out privileges and immunities which are vital to the operation of the Court and essential to guarantee a state party's full co-operation. To date, only 62 of the 111 state parties and one non-state party (Ukraine) have ratified the Agreement.

States should support the adoption of a Review Conference resolution on co-operation calling on all states to enter into a victim and witness relocation agreement with the Court.

Even when strict precautions are taken, victims and witnesses may become at such serious risk because of their interaction with the Court that they need to be relocated to another country. State parties must, therefore, assist the Court with resettling victims and witnesses at serious risk to their countries and providing them with essential services to ensure their integration. Effective victim and witness protection is a key element of the Court's investigation and prosecution of crimes

under its jurisdiction – it is not optional. Amnesty International is seriously concerned that, in its Report on Co-operation issued to the Assembly of States Parties at its eighth session, the Court states that the total rate of successful relocations currently stands at only 40%.¹³ This is unacceptable. Urgent measures are required of state parties to make their countries available for relocations.

States should support the adoption of a Review Conference resolution on co-operation calling on all state parties to enter into agreements with the Court for the enforcement of sentences.

Part 10 of the Rome Statute provides that convicted persons will serve their sentences in the prison facilities of states willing to accept convicted persons. Such facilities must meet international standards. Amnesty International is concerned that only two states – Austria and the United Kingdom - have committed themselves so far to accept convicted persons by entering into an enforcement of sentences agreement with the Court. With the first trials now taking place, it is important that all state parties whose prison conditions meet international standards enter into an agreement to provide the Court with a range of venues in all regions and the others bring their prisons into conformity with these standards so that they can enter into such an agreement.

States should support the draft resolution prepared by Norway on strengthening the enforcement of sentences.

Amnesty International welcomes the draft resolution developed by the Norwegian government on strengthening the enforcement of sentences and urges state parties to support its adoption.

States should support the adoption of a Review Conference resolution on cooperation calling on all states parties to designate national focal points on co-operation.

Communications between state parties and the Court are vital to guarantee effective co-operation. Without clear communication channels the Court's requests for co-operation risk going unanswered. Amnesty International notes that, in its Report on Cooperation to the Assembly of States Parties, the Court states that, in April 2009, "more than 40 State parties had not yet designated a permanent contact point responsible for co-operation with their diplomatic missions."¹⁴

THE IMPACT OF THE ROME STATUTE SYSTEM ON VICTIMS AND AFFECTED COMMUNITIES

Amnesty International strongly supported the inclusion of this issue on the agenda of the stocktaking debate during the Review Conference. The Preamble of the Rome Statute states that the drafters were

"mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."

It is, therefore, appropriate that the issue should be a major focus of the Conference's review of the work and impact of the Rome Statute system to date.

States should ensure that victims and victims' organizations are given a voice during the Review Conference debate on the impact of the Rome Statute system on victims and affected communities.

In particular, the Review Conference should give its fullest consideration to a report that will be issued shortly by the Victims Rights Working Group (of which Amnesty International is an active member) setting out responses to a questionnaire answered by victims and victims' organizations in situations where crimes have been committed. In order to assess the impact of the system on victims and affected communities, it is vital that the Review Conference hears their views directly. Amnesty International will not seek to speak for victims who are best placed to voice their own views. The organization, therefore, welcomes the clearly stated intention of the focal points from Chile and Finland to adopt "an inclusive approach, to engage victims and affected communities in the Review Conference."

Beyond hearing the views of victims and affected communities, Amnesty International welcomes the intention, reported by the focal points for the stocktaking exercise, to contribute to identifying areas in which the Court's positive impact can be strengthened. Amnesty International believes there are a number of important operational issues that should be addressed in the proposed resolution or other outcome document.

Amnesty International supports the proposal for the Review Conference to adopt a Resolution on the impact on victims and affected communities and welcomes the preparatory work of the focal points in drafting the resolution. The organization also welcomes plans to hold a panel discussion on the issue during the Review Conference.

The draft resolution identifies a number of important issues, including underlining the need to continue optimizing and adapting outreach activities; encouraging the Court to continue to improve the strategic planning process, including the Court's strategy in relation to victims; and encouraging efforts to sensitize communities on the rights of victims in accordance with the Rome Statute. The text could however be further strengthened in a number of areas, set out below.

States should support the adoption of a Review Conference resolution on the impact of the Rome Statute system on victims and affected communities acknowledging the serious problems facing the Court in relocating victims and witnesses and calling on states to enact legislation and enter into victim relocation agreements with the Court.

As already stated, Amnesty International is seriously concerned that the Court recently reported that the total rate of successful relocations of victims and witnesses was 40%.¹⁵ The inability of the Court to provide full and effective protection to victims and witnesses is a significant threat to the credibility of the Court and could have a negative impact on the work of the Court and how it is perceived by local communities. The Review Conference should seek to address this potential crisis. The Court must be able to relocate victims and witnesses who are at serious risk because of their interaction with the Court. The Review Conference should, therefore, call for states to come forward: not only to accept persons who need to be relocated, but also to put in place the programs and support to integrate them into their societies so that relocation can be successful. This is not optional

for state parties. It is a mandatory requirement under the general obligation to cooperate with the investigation and prosecution of crimes under the Court's jurisdiction (Article 86 of the Rome Statute).

States should support the adoption of a Review Conference resolution on the impact of the Rome Statute system on victims and affected communities recognizing the need to invest in the support and protection of intermediaries and the need for the Court to establish a comprehensive policy on the issues.

Intermediaries (which are in most cases national civil society organizations) provide essential services without which the Court would struggle to operate - including cooperating with investigations, supporting victims and witnesses and supporting outreach.

The demands of the Court may overwhelm intermediaries and obstruct their work within their communities. Amnesty International has repeatedly raised concerns, since the Court's establishment, that there is no specific policy in place within the Court to: coordinate interaction with intermediaries; provide them with funding and other support to perform their functions; and provide them with effective protection when, in some situations, they become at risk because of their work with the Court. In a number of cases brought to the attention of Amnesty International, intermediaries who become at risk because of their work with the Court have been forced to flee their communities or their countries, with little or no assistance from the Court.

The failure to adopt effective policies for intermediaries threatens to have a very negative impact on how the Court is perceived – it must be resolved. Although Amnesty International is informed that an internal process to develop a policy is currently taking place within the Court, the Review Conference should endorse a comprehensive approach and commit to providing necessary resources.

States should support the adoption of a Review Conference resolution on the impact of the Rome Statute system on victims and affected communities calling on states to put in place legislation and procedures to enforce reparations orders of the Court.

Victims awarded reparations may not receive them because states have failed to put in place legislation and procedures to implement the Court's orders for reparations. This could lead to over-reliance on the Trust Fund for Victims and, potentially, to the disappointment of victims. At this time when the Court has yet to make its first reparations order, the Review Conference should call on all states to put in place national legislation and procedures as soon as possible.

States should support the adoption of a Review Conference resolution on the impact of the Rome Statute system on victims and affected communities calling on states parties, international organizations, individuals, corporations and other entities to make annual voluntary contributions to the Trust Fund for Victims.

Amnesty International welcomes the inclusion in the draft resolution of a call for states parties, international organizations, individuals, corporations and other entities to make voluntary contributions to the Trust Fund for Victims. The organization recognizes the potential of the Trust Fund to ensure that the Court has

a positive impact on victims and affected communities. Now that the Trust Fund is operational and the Court will likely issue its first reparations orders in the next years, it is important that consistent funding is made available through regular voluntary contributions by states and other entities.

States should support the adoption of a Review Conference resolution on the impact of the Rome Statute system on victims and affected communities calling on states where crimes under the jurisdiction of the Court have been committed to ensure national reparations for victims, taking into account the Court's principles on reparations.

Amnesty International welcomes the current text in the draft resolution encouraging states "to consider implementing those provisions of the Rome Statute relevant to victims/witnesses, where applicable through national legislation or appropriate measures". It would be useful to expand on this recommendation in relation to specific aspects of the Rome Statute, including reparations.

The Court, which can order a convicted person to provide reparations to victims of the crimes they are found criminally responsible for, will not be able to award reparations to all victims of crimes under its jurisdiction. Nor should it. Under international law, it is the state that has an obligation to provide full and effective reparations to victims of genocide, crimes against humanity and war crimes.¹⁶ In the same way that the Court's activities should act as a catalyst for national prosecutions, its reparations orders should also act as a catalyst for national reparations, which could have a major positive impact for all victims and affected communities. The Review Conference should, therefore, use this unique opportunity to call on states where crimes have been committed to ensure national reparations for victims of crimes under the jurisdiction of the Court. It should also urge states to consider reparations principles which will be developed by the Court (in addition to other international standards on reparations) in awarding reparations to victims.

PEACE AND JUSTICE

Amnesty International welcomes the inclusion of the important issue of the relationship between peace and justice on the agenda of the Review Conference. Although a decision has been taken not to adopt a resolution on the issue, the debates planned offer an important opportunity for states to affirm that peace and justice are complementary, rather than mutually exclusive.

Amnesty international offers the following contributions to the debate.

THE IMPORTANCE OF JUSTICE IN SECURING PEACE

States should reject the claim that justice must be sacrificed to ensure peace and reconciliation.

Amnesty International rejects the claim that justice must be sacrificed to ensure peace and reconciliation.

Peace is not merely the absence of violence or conflict. Sustainable peace is based on rebuilding a society in which individuals can live their lives free from fear; in which perpetrators know that impunity will not be tolerated; in which victims are convinced that the state will fairly bring perpetrators to justice, take measures to protect them and their relatives, and provide full reparations. In short, a sustainable peace is founded on the principle that violations of human rights or humanitarian law will be neither tolerated nor rewarded and justice will be done.

MANAGING THE CHALLENGES OF INTEGRATING JUSTICE EFFORTS AND PEACE PROCESSES

States should recognize that, as certain crimes under international law threaten the peace, security and well-being of the world, justice for these crimes helps to protect and promote peace and security.

The Rome Statute is based on the recognition that certain “grave crimes threaten the peace, security and well-being of the world”.¹⁷ Investigations and prosecutions of genocide, crimes against humanity and war crimes by the International Criminal Court do not threaten international peace and security. Rather, it is the failure of states to ensure justice that does so. Indeed, the failure of states to investigate and prosecute such crimes for years in the Central African Republic, Côte d’Ivoire, Democratic Republic of the Congo, Sudan and Uganda, as well as in Afghanistan, Burundi, Colombia, the former Yugoslavia and Rwanda, has fuelled both the conflicts and the crimes under international law committed in those countries. As certain crimes under international law threaten the peace, security and well-being of the world, justice for these crimes helps to protect and promote peace and security. The organization thus welcomes the reference to the link between peace and justice in the *Report of the Bureau on stocktaking: Peace and Justice*, presented to the resumed eighth session of the Assembly of States Parties.¹⁸

Amnesty International strongly opposed the inclusion of Article 16 in the Rome Statute, both because it subjected the Court to impermissible political pressure, overriding the Court’s independence, and because it was based on a false premise:

that international justice would at times be incompatible with political negotiations to end armed conflicts. **Suspending the Court's investigations to facilitate political negotiations is not the way to integrate justice efforts and peace processes.** Any suspension of the Court's investigations pending the outcome of peace negotiations would expose not only the Court, but also the international community to permanent blackmail by warring parties implicated in crimes under international law. It would be impossible to establish neutral, non-political criteria to determine when negotiations were genuine and when they were unlikely ever to succeed. War leaders who face possible prosecution would have no interest in reaching a settlement and peace negotiations could drag on indefinitely. When the negotiations break down, it will always be possible for one or both parties to assert that just one more chance will be sufficient to bring them to fruition. Even if negotiations were successful, the parties could threaten to resume the conflict if the Court were to resume an investigation, thus leading to permanent impunity.

To be successful, negotiations need to focus on the central political issues between the warring parties, rather than on the individual fate of their leaders. Criminal justice should be taken completely off the negotiating table. In this sense, an international criminal court entirely outside the political process can facilitate negotiations, by eliminating an extremely contentious item from the agenda of peace negotiations. The United Nations correctly reflected international law by refusing to endorse amnesties for genocide, crimes against humanity and war crimes in peace agreements and Security Council resolutions and mandates.¹⁹

Arrest warrants by international criminal courts led to the internal and international isolation, marginalization and eventual removal from power of those indicted. This was the case of the successful Dayton peace negotiations and of the indictment of Slobodan Milosevic. Judge Richard Goldstone, former Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY), stated:

"There was also debate over whether the tribunal would make peace negotiations difficult. Around the time of the negotiations in Dayton, Ohio, I was criticised for indicting Karadzic. As it turned out, that indictment greatly facilitated an agreement at Dayton, by excluding him from the talks. If he had been free to represent Republika Srpska, the leadership of Bosnia and Herzegovina would not have been prepared to attend the meeting - it was, after all, barely three months after the terrible massacre Srebrenica. [...]"

A similar argument erupted over the Milosevic indictment which was issued during the NATO bombing of Serbia. Some critics argued that Milosevic would not compromise, and certainly never willingly stand down from office, in the face of the indictment. Both President Martti Ahtisaari of Finland and former Prime Minister Viktor Chernomyrdin, who negotiated an end of the bombing, informed me subsequently that Milosevic never mentioned the indictment to them."²⁰

Similarly, the Special Court for Sierra Leone publicly issued an arrest warrant for Charles Taylor when he was participating in negotiations in Accra, Ghana. The negotiations led nonetheless to a peace settlement. The arrest warrant led to

Charles Taylor's resignation and exile to Nigeria, and ultimately to his deportation to Liberia and surrender to the Special Court.

In responding to armed conflict, the international community must be driven by clear human rights objectives. As crimes against humanity and genocide can continue after a conflict has stopped, reaching a political agreement to end a conflict cannot be the international's community only purpose. The over-arching goals of the international community must be to stop crimes under international law that are in progress; to prevent future crimes; and to ensure truth, justice and reparations for the victims.

TRUTH AND RECONCILIATION PROCESSES AS A COMPLEMENT TO CRIMINAL JUSTICE

States should recognize that "retributive" justice and "restorative" justice (i.e. criminal justice and truth-seeking mechanisms) do not exclude, but supplement each other.

In recent years, a debate has flourished on the possibility to "deal with" crimes under international law using non-judicial mechanisms of accountability, such as truth commissions. Based on the distinction between "retributive" justice and "restorative" justice, some have argued that countries have a choice in deciding "what kind of justice" they may pursue: that they may decide not to conduct criminal investigations and prosecutions of crimes such as genocide, crimes against humanity and war crimes and rather concentrate on truth-seeking and community reconciliation processes. The establishment of truth commissions (commissions of inquiry tasked with the investigation of patterns of past crimes) has often been considered as an alternative to the investigation and prosecution of crimes under international law before national courts.

On the basis of its experience and assessment of the work of truth commissions in many countries around the world over the past decades, Amnesty International published

***Commissioning Justice: Truth commissions and criminal justice*, Index: POL 30/004/2010, April 2010.**

The paper analyses the practice with respect to criminal prosecutions and amnesties of 40 truth

commissions established around the world between 1974 and 2010. It concludes that:

- **The practice of the majority of truth commissions is firmly in favour of investigations and prosecutions of all crimes under international law:** the majority of the 40 truth commissions examined recommended and/or actively contributed to the prosecution of crimes under international law (by referring names of alleged perpetrators, evidence collected, etc. to prosecution or executive authorities).
- **The practice of the majority of truth commissions rejects the supposed legality of “conditional” amnesties, when such amnesties cover crimes under international law:** of the 40 truth commissions examined, only three were given the power to recommend or grant amnesties for crimes under international law.

Amnesty International’s research shows that “retributive” justice and “restorative” justice (i.e. criminal justice and truth-seeking mechanisms) do not exclude, but supplement each other. Although an effective truth commission can go a long way to satisfying a state’s obligation to respect, protect and promote the victims’ right to truth, there is no alternative to investigation and prosecution of crimes under international law.

Amnesty International is extremely concerned to notice that the expression “transitional justice” is sometimes abused, as it is used to indicate a minor and weaker kind of justice. Although there are unique challenges to be met in ensuring justice, truth and full reparation during transitional periods, the requirements of justice remain the same regardless when it is sought. To make clear that the requirements of justice are not different during a period of transition, it would be more accurate to speak of “justice in transition” rather than “transitional justice”. The expression “transitional justice” can in no circumstances be used to justify a violation of the right to an effective remedy of victims.

Although there may be different forms of accountability, there is only one kind of justice: the one based on the respect, protection and promotion of the right of victims to justice, truth and full reparations.

SAFEGUARDING THE INTERESTS OF VICTIMS

States should strongly reaffirm that victims of crimes under international law have a right to justice, in addition to the right to truth and the right to full reparations.

The interests of victims of crimes under international law in the investigation and prosecution of crimes under international law have been clearly defined in international law and standards developed and adopted after lengthy struggles by victims, their families and organizations working on their behalf.²¹

The *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* affirm that the right of victims to access to justice and redress mechanisms should be "fully respected".²² The Principles repeatedly emphasize that there is a duty to investigate and, without any qualification other than sufficiency of the evidence, to prosecute. Their Preamble states that

"international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs"

and that

"the duty to prosecute reinforces the international legal obligations... and supports the concept of complementarity".

Principle 3 (b) recognizes a duty to:

"Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law".

Principle 4 states, without exception:

"In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."

ANNEX

AMNESTY INTERNATIONAL PUBLIC STATEMENT

22 March 2010
Index: IOR 53/005/2010

AMNESTY INTERNATIONAL CALLS ON STATE PARTIES TO ACHIEVE KEY BENCHMARKS BEFORE THE REVIEW CONFERENCE OF THE ROME STATUTE

Amnesty International today called on all 110 states that have ratified the Rome Statute, in advance of their meeting in New York next week (22 to 26 March 2010), to take important steps to fulfil their commitments to international justice.

The Assembly of States Parties of the International Criminal Court will meet to continue preparations for the Review Conference of the Rome Statute of the International Criminal Court which will take place in Kampala, Uganda on 30 May to 11 June 2010. The Review Conference is the first opportunity for state parties to consider proposals to amend to the Rome Statute and to take stock of how the International Criminal Court and the Rome Statute system has worked since it was established on 1 July 2002.

Amnesty International recognizes that, despite the Court making significant progress in the last seven years, its work is under threat – not from opponents of international justice – but by the inaction of its supporters, who are failing to take sometimes even basic measures to implement their commitments to international justice and to the Court.

Amnesty International has, therefore, set nine benchmarks which it is calling on all states to achieve before the Review Conference. If states are not able to meet all these benchmarks in time for the Review Conference, the organization is urging governments to make formal pledges during the Review Conference to address the outstanding issues as soon as possible.

Benchmark 1: All state parties must enact or amend national legislation ensuring their authorities can investigate and prosecute genocide, crimes against humanity, war crimes, and other crimes under international law in accordance with the strictest requirements of international law and without obstacles.

Each state party recognizes that under the principle of complementarity it has the primary obligation to investigate and prosecute genuinely these crimes before their national court. The Court will only step in as a last resort when states are unable or unwilling genuinely to do so. To ensure the success of the complementarity system and to avoid over-burdening the Court with cases, a full review of existing national laws must be conducted and new legislation enacted or existing legislation amended. To date, less than half of the 110 state parties have done so and much of that legislation has serious flaws.

Benchmark 2: All state parties must enact national legislation ensuring that they can co-operate fully with the International Criminal Court. The Rome Statute expressly requires state parties to co-operate with the investigation and prosecution of crimes under the jurisdiction of the Court (Article 86) and identifies some

specific forms of co-operation that may be required (Article 93). In addition, the Assembly of States parties issued a detailed Report on Cooperation at its sixth session in 2007 setting out 66 recommendations for state parties. Regrettably, less than half of the 110 state parties have enacted co-operation legislation and much of that legislation has serious flaws.

Benchmark 3: All state parties must ratify the Agreement on Privileges and Immunities of the International Criminal Court. The Agreement, which was adopted by the Assembly at its first session in 2002, sets out privileges and immunities which are vital to the operation of the Court and essential to guarantee a state party's full co-operation. To date, only 62 of the 110 state parties have ratified the Agreement.

Benchmark 4: All state parties must enter into a victim and witness relocation agreement with the Court. The work of the Court dictates, that even when strict precautions are taken, victims and witnesses may become at such serious risk because of their interaction with the Court that they need to be relocated to another country. State parties must, therefore, assist the Court with resettling victims and witnesses at serious risk to their countries and providing them with essential services to ensure their integration. Effective victim and witness protection is a key element of the Court's investigation and prosecution of crimes under its jurisdiction and is, therefore, not optional. Amnesty International is seriously concerned that, in its Report on Cooperation issued to the Assembly at its last session, the Court states that the total rate of successful relocations currently stands at only 40%. This is unacceptable. Urgent measures are required of state parties to make their countries available for relocations.

Benchmark 5: All state parties should enter into enforcement of sentences agreements with the Court. Part 10 of the Rome Statute provides that convicted persons will serve their sentences in the prison facilities of states willing to accept convicted persons. Such facilities must meet international standards. Amnesty International is concerned that only two states so far (both European state parties) have committed themselves to accept convicted persons by entering into an enforcement of sentences agreement with the Court. With the first trials now taking place, it is important that all state parties whose prison conditions meet international standards enter into an agreement to provide the Court with a range of venues in all regions and the others bring their prisons into conformity with these standards so that they can enter into such an agreement.

Benchmark 6: All state parties should designate national contact points on co-operation. Communications between state parties and the Court are vital to guarantee effective co-operation. Without clear communication channels the Court's requests for co-operation risk going unanswered. Amnesty International notes that in its Report on Cooperation to the Assembly, the Court states "more than 40 states had not yet designated a permanent contact point responsible for co-operation."

Benchmark 7: All state parties should designate national contact points for the Assembly's Plan of Action for Universal Ratification and Full Implementation of the Rome Statute and respond to the annual survey of states activities. Amnesty International strongly supports the Assembly's Plan of Action to achieve universality of the Rome Statute. Since its adoption in 2006, however, there are worrying signs that in practice most state parties are not taking any steps to implement it. In particular, responses to an annual survey submitted to state parties by the Secretariat of the Assembly on steps they have taken to implement the Plan have been limited. Only 22 of the 110 state parties have responded so far to the 2009 questionnaire.

Benchmark 8: All state parties should make annual voluntary contributions to the International Criminal Court's Trust Fund for Victims. The Trust Fund established in accordance with Article 79 of the Rome Statute

is mandated to provide essential assistance to victims and to fulfil the Court's reparations awards (where a convicted person is unable to do so). Now that the Trust Fund is operational, it is important that state parties provide it with regular voluntary contributions to fulfil these important tasks.

Benchmark 9: States that have made declarations amounting to prohibited reservations to the Rome Statute must withdraw them. Amnesty International notes that a number of states, including Australia, Colombia, France, Malta and the United Kingdom have made declarations to the Rome Statute which according to Amnesty International's legal analysis International Criminal Court: Declarations amounting to prohibited reservations to the Rome Statute (Index: IOR 40/032/2005) amount to reservations and are therefore prohibited by Article 120 of the Rome Statute. These reservations must be withdrawn with immediate effect.

Amnesty International plans to publish one or more documents to be distributed before the Review Conference indicating whether state parties have met these benchmarks.

Amnesty International is currently developing a detailed position paper to be issued in May on the amendments before the Review Conference and the items on the stock-taking agenda.

ENDS/

¹ On 13 August 2008, the Government of France informed the Secretary-General that it had decided to withdraw the declaration under Article 124 made upon ratification.

² Colombia deposited the instrument of ratification of the Rome Statute on 5 August 2002. Therefore, the declaration made under Article 124 expired on 31 October 2009.

³ Informal inter-sessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 to 10 June 2009, ICC-ASP/8/INF.2, 10 July 2009, Annex III.

⁴ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Geneva, International Committee of the Red Cross and Cambridge University Press, 2005, Rule 72 (The use of poison or poisoned weapons is prohibited).

⁵ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Geneva, International Committee of the Red Cross and Cambridge University Press, 2005, Rule 74 (The use of chemical weapons is prohibited).

⁶ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Geneva, International Committee of the Red Cross and Cambridge University Press, 2005, Rule 77 (The use of bullets which expand or flatten easily in the human body is prohibited).

⁷ Resolution ICC-ASP/8/Res.6, para5, adopted on 26 November 2009, by consensus.

⁸ Rome Statute of the International Criminal Court, Preamble (tenth paragraph) and Articles 1 and 17.

⁹ In the Preamble of the Rome Statute, states parties affirm 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”, determine “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes” and recall that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.

¹⁰ See: ICC-ASP/8/L.17/Rev.1.

¹¹ States which have done so include: Argentina, Armenia, Australia, Azerbaijan, Belgium, Bosnia and Herzegovina, Burkina Faso, Burundi, Cape Verde, Canada, Colombia, Costa Rica, Croatia, Cyprus, Ecuador, El Salvador, Ethiopia, Finland, Germany, Guatemala, Indonesia, Iraq, Ireland, Kenya, Korea (Republic of), Latvia, Lithuania, Macedonia, Mali, Malta, Mexico, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Panama, Portugal, Republic of Congo, Samoa, Serbia, South Africa, Spain, Timor-Leste, Trinidad and Tobago, Uruguay and United Kingdom.

¹² Assembly of States Parties, Report of the Bureau on cooperation, Doc. ICC-ASP/6/21, 19 October 2007.

¹³ International Criminal Court, Report of the Court on international cooperation and assistance, Annex I to: Assembly of States Parties, Report of the Bureau on cooperation, Doc. ICC-ASP/8/44, 15 November 2009, para92.

¹⁴ International Criminal Court, Report of the Court on international cooperation and assistance, Annex I to: Assembly of States Parties, Report of the Bureau on cooperation, Doc. ICC-ASP/8/44, 15 November

2009, para6.

¹⁵ International Criminal Court, Report of the Court on international cooperation and assistance, Annex I to: Assembly of States Parties, Report of the Bureau on cooperation, Doc. ICC-ASP/8/44, 15 November 2009, para92.

¹⁶ See: United Nations Basic Principles and Guideline on the Right to a Remedy and Reparations for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

¹⁷ Rome Statute of the International Criminal Court, Preamble, para3.

¹⁸ *Report of the Bureau on stocktaking: Peace and Justice*, Doc. ICC-ASP/8/52, 20 March 2010, para3.

¹⁹ UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc. S/2004/616, 23 August 2004, p21.

²⁰ Richard Goldstone, 'The Tribunal's Progress', *IWPR's Tribunal Update*, No. 220, 7-12 May 2001, <http://groups.yahoo.com/group/balkanhr/message/2220>, accessed April 2010.

²¹ See for example: 1984 UN Declaration on Victims of Crime and Abuse of Power.

²² 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 (Van Boven/Bassiouni Principles), adopted by the Commission on Human Rights on 19 April 2005 in Resolution 2005/35, Preamble.



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INTERNATIONAL CRIMINAL COURT MAKING THE RIGHT CHOICES AT THE REVIEW CONFERENCE

The Review Conference of the Rome Statute of the International Criminal Court will take place in Kampala, Uganda, from 31 May to 11 June 2010. This major international meeting will bring together states that have ratified the Rome Statute, observer states, and intergovernmental and non-governmental organizations. The meeting will, for the first time, consider amending the Rome Statute and take stock of the work and impact of the international justice system since it was established almost eight years ago.

The Conference is also an opportunity for states parties to review and strengthen the systems they have put in place to co-operate fully with the International Criminal Court and to fulfil their obligations to investigate and prosecute genocide, crimes against humanity and war crimes in their national courts.

This report makes detailed recommendations to states in advance of the Review Conference on the proposed amendments being considered in Kampala and sets out Amnesty International's views and recommendations on issues listed on the meeting's agenda. The report also sets out benchmarks to ensure full co-operation with the Court and effective national investigations and prosecutions. All states that have ratified the Rome Statute should have these in place to ensure that they meet their obligations.

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