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International Criminal Court: Concerns at the sixth session of the Assembly of States Parties

Introduction

The sixth session of the Assembly of States Parties (Assembly) will take place at the United Nations Headquarters in New York from 30 November to 14 December 2007. Nine years after the adoption of the Rome Statute of the International Criminal Court (Rome Statute), over half of all states have ratified it and the sixth session of the Assembly takes place in the context of a functioning International Criminal Court (Court), which is about to start its first trial.

At this stage in the Court's history, the support of the Assembly is vital. Amnesty International, therefore, welcomes the Assembly's decision to allocate 11 days to the sixth session to ensure that it has adequate time to perform its oversight functions. It is important that the time is used effectively to give proper attention to the many issues on the Assembly's provisional agenda and other important issues.

Amnesty International welcomes the Assembly's decisions at its fifth session to request the Bureau of the Assembly to continue to undertake work on a number of key issues which it will report on to the Assembly at this session. Bureau members in consultation with other states parties, observers and non-governmental organizations in The Hague and New York have examined a number of issues, including the implementation of the Assembly's Plan of Action for Universality and Full Implementation of the Rome Statute, the role of the Assembly in ensuring cooperation with the Court and the budget. Amnesty International, however, continues to have concerns about the lack of transparency of some of the mechanisms established to discuss these issues. In particular, many meetings were not open to non-governmental organizations. Our organization hopes that sufficient time will be allocated during the Assembly to review the work of the Bureau allowing for open discussion, including all states parties, observers and non-governmental organizations.

In this paper, Amnesty International presents its concerns and recommendations on a number of issues on the agenda of the Assembly and other issues, which the organization believes should be considered by the Assembly this year. In particular, Amnesty International:

- expresses its serious concern at the refusal of the government of Sudan to cooperate with the Court's investigation in Darfur and to execute arrest warrants for Ahmad Harun and Ali Kushayb, who have been charged with committing crimes against humanity and war crimes in the region. The organization makes recommendations for the Assembly to respond to this deliberate obstruction of the Court's work.
- urges the Assembly to start a process to work with the Court to develop an effective system of positive complementarity, which is an essential element of the Rome Statute, to ensure that the Court has a broad impact in the fight against impunity.

- welcomes the efforts of the Bureau's Working Group on Universality and Full Implementation of the Rome Statute and the Secretariat of the Assembly which have both sought to promote the implementation of the Plan of Action adopted by the Assembly at its fifth session. Amnesty International encourages all states parties to take concrete steps to contribute to the implementation of the Plan of Action.
- welcomes the work of the Court and the Committee on Budget and Finance to improve the budget document and process. The organization further welcomes the Committee's report on its ninth session to the Assembly on the proposed budget for 2008. Amnesty International is, however, concerned by one recommendation not to approve additional resources for legal aid in 2008.
- welcomes the Bureau's report on cooperation. The organization urges the Assembly to approve the report which contains important recommendations for states parties and the Court, and to establish effective mechanisms to ensure that the recommendations are implemented.
- welcomes continuing discussions this year to advance the organization of the Review Conference and makes recommendations on key decisions that should be made by the Assembly at its sixth session.
- sets out a number of important principles which must be applied in considering the definition of the crime of aggression and procedures that would enable the Court to exercise jurisdiction over the crime.
- calls on states parties to make voluntary contributions to the Trust Fund for Victims, following the establishment of its Secretariat in 2007.
- calls on the Assembly to examine declarations made by a number of states upon ratification which amount to reservations and to call on states which made such declarations to promptly denounce them.

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

I. Non-cooperation by Sudan

Amnesty International is seriously concerned that in the last year, the government of Sudan has withdrawn cooperation with the Court's investigations of crimes in Darfur. Furthermore, in response to the Court's decision on 27 April 2007 to issue two arrest warrants for government minister Ahmad Harun and Janjawid leader Ali Kushayb, who are charged with crimes against humanity and war crimes committed in Darfur, the Sudanese government has repeatedly stated publicly that it will not arrest the men and surrender them to the Court. The government is, therefore, in violation of Security Council Resolution 1593 (2005) which:

Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

As recognized in the report of the Bureau's Working Group on Cooperation, the Assembly has a vital role to play in ensuring the arrest and surrender of persons charged by the Court:

Political support for arrest and surrender is important in relation to all cases. States Parties can support arrest and surrender in both bilateral contacts and activities and through regional and international organizations. In order to generate the necessary political support and pressure, all States Parties should, where relevant, stress the importance of this issue. The Court's judicial mandate is non-negotiable.¹

In this first case of a refusal to cooperate, Amnesty International is calling on the Assembly to demonstrate its full support for the Court by responding strongly and collectively to condemn the inaction by the Sudanese government and to call for it to arrest and surrender Ahmad Harun and Ali Kushayb to the Court immediately, as well as to take other measures to cooperate with investigations. As the situation in Darfur was referred by the Security Council, it is important that the Assembly communicates its concerns to the Security Council requesting its action. Furthermore, states parties that are members of the Security Council should propose and support strong political action to ensure Sudan's cooperation.² Amnesty International is calling on the Security Council to:

- condemn Sudan's refusal to cooperate with the Court's investigation as a direct violation of Resolution 1593.
- reiterate its decision in Resolution 1593 (quoted above) for Sudan to cooperate fully with the Court and urging all States and concerned regional and other international organizations to cooperate fully;

¹ Report on Cooperation, adopted by the Bureau of the Assembly on 3 October 2007, para.43.

² Although Article 87 (7) of the Rome Statute requires the Court to refer instances of non-compliance with a request for cooperation to the Security Council, the provision expressly mentions only non-cooperation by a "State Party." The omission of provisions governing non-compliance of non-states parties from Article 87 (7) means that the Assembly is free to refer Sudan's refusal to comply with Court requests for arrest and surrender to the Security Council without waiting for the Court to refer this matter to the Assembly.

- directly call on Sudan to arrest and surrender to the Court Ahmad Harun and Ali Kushayb immediately and to arrest and surrender any other persons who may be charged by the Court without delay;
- call on all other states to arrest and surrender to the Court Ahmad Harun and Ali Kushayb and any other persons who may be named in arrest warrants issued by the Court, if they travel outside of Sudan;
- in accordance with Security Council Resolution 1591, the Security Council should consider designating Ahmad Harun and Ali Kushayb as individuals whose funds, financial assets and economic resources must be frozen by states;³
- take other effective measures to ensure that any person subject to an arrest warrant issued by the Court is promptly located, arrested and surrendered to it.

Recognizing that the Security Council's next scheduled meeting with the Court's Prosecutor on Darfur will likely take place during or shortly after the Assembly's sixth session, Amnesty International urges the Assembly to allocate time in the first days of its session to develop and adopt a strong resolution on Sudan's refusal to cooperate. Amnesty International notes that the Assembly's actions in this first instance of a refusal to cooperate, will establish an important precedent on how it responds to what is one of the greatest challenges to the success of the Court.

II. Establishing an effective system of complementarity

As part of the grand bargain at Rome, all states voting for the adoption of the Rome Statute, and those ratifying it, agreed that they had a duty to investigate and prosecute genocide, crimes against humanity and war crimes. Concurrent jurisdiction of the Court over these crimes was designed to be complementary to that of national courts.

Since the Court's establishment, Amnesty International has urged the Court to take effective measures to promote positive complementarity, recognizing that the extent to which the Court goes beyond prosecuting a small proportion of crimes in a situation, to become a catalyst for national justice, will be a key indicator of its success (a summary of Amnesty International's recommendations is included in annex 1). The organization is seriously

³ Security Council 1591 (2005), Reports of the UN Secretary-General on Sudan, states in paragraph 3 (e):

that all States shall freeze all funds, financial assets and economic resources that are on their territories on the date of adoption of this resolution or at any time thereafter, that are owned or controlled, directly or indirectly, by the persons designated by the Committee pursuant to subparagraph (c) above, or that are held by entities owned or controlled, directly or indirectly, by such persons or by persons acting on their behalf or at their direction, and decides further that all States shall ensure that no funds, financial assets or economic resources are made available by their nationals or by any persons within their territories to or for the benefit of such persons or entities;

concerned that, despite promising commitments in the original and innovative policy paper of the Office of the Prosecutor, inadequate measures have been taken so far to promote positive complementarity and the Court has had little impact in promoting national justice in situations under investigation or in other states parties. Furthermore, the Assembly has not yet considered measures that it can take to promote complementarity by states parties or other states.

Amnesty International is calling on the Assembly to act on this vital issue by organizing a public meeting during its sixth session for the Court, states parties, observers and non-governmental organizations to discuss the challenges facing the Court on this issue. Furthermore, building on these initial discussions, the Assembly should request the Bureau to establish a working group on complementarity to examine efforts that the Assembly itself could be taking to support the Court's work to promote complementarity.

III. Implementing the Assembly's Plan of Action for universality and full implementation of the Rome Statute

Amnesty International strongly welcomed the decision by the Assembly at its fifth session to adopt a Plan of Action for Universality and Full Implementation of the Rome Statute. Following this important decision, Amnesty International has endeavored to contribute to the Bureau's Working Group on Universality and Full Implementation efforts to ensure that the new Plan of Action is fully implemented. In particular, Amnesty International submitted to the Working Group its paper: *International Criminal Court: Implementing the Assembly's Plan of Action for Universal Ratification and Full Implementation of the Rome Statute*⁴ setting out specific recommendations. Amnesty International presented these recommendations to a meeting of the Working Group on 3 July 2007 organized specifically to consult with non-governmental organizations.

Amnesty International commends the Working Group on its work this year and welcomes the report it has submitted to the Assembly setting out recommendations for implementing the Plan of Action.⁵ The organization also welcomes the activities of the Secretariat of the Assembly to fulfill its role set out in the Plan of Action by sending a written request to states parties on 25 July 2007 for information listed in the Plan of Action.⁶ It urges

⁴ AI Index: IOR 40/009/2007, available at: <http://web.amnesty.org/library/index/engior400092007>

⁵ Report adopted by the Bureau of the Assembly on 3 October 2007.

⁶ The letter (ICC-ASP/6/S/20, available at: http://www.icc-cpi.int/library/asp/Plan_of_Action_and_Annex.English.generic.pdf) requested the following information set out in the Plan of Action:

- (i) information on obstacles to ratification or full implementation facing States;

the Secretariat to publish the responses on the Court's website as soon as it receives each response so that states parties and others can benefit as soon as possible from the experience of other states.

Amnesty International recognizes that the Plan of Action can only achieve its goals if states parties actively engage in implementing the activities they have committed to in the Plan of Action. As a first step, consistent with the recommendations in the Working Group's report, Amnesty International is calling on all states parties, in advance of the Assembly to:

- Establish a national contact point responsible for implementing the Plan of Action;
- Respond to the request of the Secretariat of the Assembly for information set out in the Plan of Action.
- Develop national strategies for how their state can contribute to universal ratification and full implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC) in the next years.

Activities by many states in 2007 to promote ratification and implementation of the Rome Statute demonstrate that the Plan of Action is already being implemented and may have inspired new initiatives. For example, the newest state party, Japan, has reportedly started promoting ratification with other states in the Asia region. The government of Australia organized a regional seminar on the International Criminal Court for the Asia Pacific states and has offered support and assistance to states in the region. The EU continued its significant activities promoting support for the Court. Many other activities by other supporting states and regional intergovernmental organizations have taken place. The organization hopes that in the next year, the Assembly will be able to establish an effective reporting mechanism so that the Assembly is informed of the full extent of the important activities undertaken by states parties and regional intergovernmental organizations to universalize international justice and strengthen national justice systems.

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- (ii) national or regional strategies or plans of action to promote ratification and/or full implementation;
 - (iii) technical and other assistance needs and delivery programmes;
 - (iv) planned events and activities;
 - (v) examples of implementing legislation for the Rome Statute;
 - (vi) bilateral cooperation agreements between the Court and States Parties;
 - (vii) solutions to constitutional issues arising from ratification;
 - (viii) national contact points for matters related to promotion of ratification and full implementation.

IV. Cooperation

At its fifth session, the Assembly requested “the Bureau to address the issue of cooperation and to report to the Assembly of States Parties at its next regular session.”⁷ In 2007, the Bureau established a New York Working Group and a Hague Working Group on the issue. Amnesty International welcomes the commitment of the Working Groups which met on numerous occasions during the year to consider a broad range of cooperation issues. The Working Groups’ report that has been adopted by the Bureau⁸ and submitted to the Assembly is a welcome detailed analysis of the cooperation needs of the Court and measures states should take to ensure that those needs are met. Amnesty International urges the Assembly to adopt the Working Groups’ report.

The Assembly should take steps to ensure that the recommendations contained in its report are implemented. The Working Group’s report contains 66 recommendations of steps that should be taken by the Court and states parties. The impact of the report on the work of the Court will depend on the extent that states parties and the Court seek to implement them. It is, therefore, important that the Assembly develops effective mechanisms to monitor the implementation of the report and promote action. Amnesty International recommends that:

- The Assembly request the Court to report to it at its seventh session on the measures that it has taken to implement recommendations assigned to it in the report.
- The Assembly encourages all states to use the existing reporting mechanism established in the Plan of Action for the universality and full implementation of the Rome Statute to report on their national status of ratification and implementation of the Rome Statute and the APIC and their efforts to assist other states on these issues.
- The appointment of a focal point as the follow-up mechanism, pending a review of the report in two to three years does not appear to be sufficient to ensure the full implementation of the detailed report. Instead, the organization supports the recommendation by the Coalition for the International Criminal Court that the Assembly establish a Working Group that will meet at each session of the Assembly (starting with the sixth session) and an appropriate intersessional mechanism to develop concrete steps that the Assembly should take to ensure that recommendations contained in the report are being implemented. The mandate of such mechanisms should focus on implementation, rather than reviewing the recommendations, which as the report recommends could be reviewed in two or three years. These mechanisms would also be best placed to identify and respond to serious instances of non-cooperation, when they occur.

⁷ ICC-ASP/5/Res.3, Strengthening the International Criminal Court and the Assembly of States Parties, para. 36.

⁸ Adopted by the Bureau on 3 October 2007.

V. 2008 Budget

Improvements in the budget process. Following an initial exchange of views by the Assembly at its fifth session, Amnesty International followed closely this year discussions to further develop the Court's budget document and the budget process. In May, the organization issued a paper *International Criminal Court: Recommendations for developing an effective budget process*⁹ which was submitted to the Court, the Committee on Budget and Finance and the Bureau's Working Group on the Budget setting out the views of our organization which has followed all budget processes of the Court. The Committee reported that during its eighth session, it had reached agreement with the Court on a number of improvements that would be made to the budget document.¹⁰ Amnesty International welcomed many of these improvements and the efforts of the Court to incorporate them to the Proposed Programme Budget for 2008. While major improvements have been made, the organization agrees with the Committee that further progress could still be made in setting performance indicators, so that the achievements of the Court can be fully examined each year. Amnesty International welcomes recommendations in the report of the Committee's ninth meetings for strengthening performance indicators in future years.

The Proposed Programme Budget for 2008. Amnesty International is an active member of the Coalition for the International Criminal Court's Budget and Finance Team. In advance of the ninth meeting of the Committee on Budget and Finance, the Team examined the Proposed Programme Budget for 2008 and issued comments to the Court, the Committee (in advance of its ninth session) and states parties.¹¹ Amnesty International has reviewed the report of the Committee on its ninth session which examines and makes recommendations on the Proposed Programme Budget. The organization welcomes almost all aspects of the report, in particular, it notes the important attention focused on the challenges facing the Court in recruitment and hopes the Committee and states parties will work with the Court, as a priority, to address the issue.

Amnesty International welcomes the recommendations by the Committee to approve increased investment in: victims' protection and support which is one of the most important and challenging tasks of the Court; the Trust Fund for Victims following the establishment of its Secretariat in 2007; and outreach.

⁹ AI Index: IOR 40/008/2007, available at:
<http://web.amnesty.org/library/index/engior400082007>

¹⁰ *See*: Report of the Committee on Budget and Finance on the work of its eighth session, para. 26.

¹¹ Comments on the Proposed Programme Budget for 2008 of the International Criminal Court August, 2007, available at:
http://www.iccnw.org/documents/CICC_Submission9thSessionofCBF_eng.pdf

Amnesty International has only one concern regarding the Committee's report. The report contains a recommendation that additional resources for legal aid for both defence and victims' representation¹² and one P-4 Counsel in the Office of Public Counsel for the Defence should not be approved on the basis of a significant under-spend anticipated in the Division of Victims and Counsel in 2007. The Committee stated: "there should be sufficient resources in the existing budget level for the Court to meet these requirements for 2008." The Court has subsequently clarified two issues that we encourage states parties to take into account when they consider this recommendation:

- The additional resources arise from amendments to the legal aid system, which had been considered and approved by the Committee at its eighth session.
- The current under-spending in legal aid for 2007 originates from the delay in the commencement of the first trial. If, as expected, the case commences shortly, the Court anticipates that all resources would be required plus the additional request. There is, therefore, no flexibility within the Division to absorb the significant additional costs anticipated in the budget document.

Taking into account this additional information and recognizing the importance of ensuring fair trials and fulfilling the victims mandate set out in the Rome Statute, Amnesty International urges the Assembly to review this recommendation and approve the additional resources requested for the Division by the Court.

VI. Translations and interpretation

Amnesty International is concerned that both the Assembly and the Court are failing to fully implement provisions in the Rome Statute and the Rules of Procedure and Evidence (Rules) governing their working languages.

Numerous meetings during the Assembly continue to be conducted only in English without interpretation. In recent years, Amnesty International has raised concern that many meetings during the Assembly are being conducted only in English, without interpretation into its other working languages (Arabic, Chinese, French, Spanish and Russian).¹³ As a result, delegations that are unable to work in English have been unable to engage fully in discussions, particularly in informal meetings, when important decisions are discussed. Despite continued calls for the Assembly to take effective measures to address this problem,

¹² The Court has clarified that additional legal aid request relates to both defence and victims representation (not just victims representation as printed in the English version of the proposed budget document).

¹³ Article 112 (10) of the Rome Statute states: "The official and working languages of the Assembly shall be those of the General Assembly of the United Nations."

Amnesty International notes that little improvement had been made at its last session. The organization calls upon the Assembly to take immediate steps to ensure that this problem is addressed for the sixth and future sessions to comply with the Rome Statute and ensure participation by all states parties in the decision-making process.

The Court is not translating key documents into the official languages of the Court and many documents into both working languages of the Court. Amnesty International has two basic concerns about the failure of the Court to translate important documents. First, the organization is seriously concerned that none of the most important decisions of the Pre-Trial and Appeals Chambers appear to have been translated into Arabic, Chinese, Spanish and Russian (four official languages of the Court), despite a clear statutory requirement to do so. Article 51 (1) expressly requires the Court to ensure that important documents are translated into these four languages and requires the Presidency to establish clear criteria for determining which documents will be translated into these four languages. That provision states:

The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of that paragraph.

Rule 40 (Publication of decisions in official languages of the Court), which implements Article 50 (1), expressly states which decisions *must* be translated and which *should* be translated into the official languages.¹⁴ None of the important decisions appear to have been translated into any of these four official languages and posted onto the Court's website.

¹⁴ 1. For the purposes of article 50, paragraph 1, the following decisions shall be considered as resolving fundamental issues:

- (a) All decisions of the Appeals Division;
- (b) All decisions of the Court on its jurisdiction or on the admissibility of a case pursuant to articles 17, 18, 19 and 20;
- (c) All decisions of a Trial Chamber on guilt or innocence, sentencing and reparations to victims pursuant to articles 74, 75 and 76;
- (d) All decisions of a Pre-Trial Chamber pursuant to article 57, paragraph 3 (d).

2. Decisions on confirmation of charges under article 61, paragraph 7, and on offences against the administration of justice under article 70, paragraph 3, shall be published in all the official languages of the Court when the Presidency determines that they resolve fundamental issues.”

Although it is to be welcomed that the website has begun to include some information in Arabic about the Court, there are only a small number of Arabic translations and no translations into other three official languages that are not working languages in the section of the website concerning situations. If the Presidency has established such criteria, it has not published them on either the section of the website concerning the Presidency or in the Official Journal.¹⁵

A second concern is that many of the documents relating to the situations and cases before the Court, including applications by parties and Court decisions are not being translated into English and French, the two official languages of the Court which are also designated as working languages of the Court.¹⁶ A review of the documents on the “situations and cases” section of the Court’s website demonstrates that a significant number of documents are only available in English or French, not both.

Rule 42 (Translation and interpretation services) expressly directs the Court to comply with these statutory translation obligations: “The Court shall arrange for the translation and interpretation services necessary to ensure the implementation of its obligations under the Statute and the Rules.”

Amnesty International is concerned that these omissions are not only inconsistent with the provisions of the Rome Statute and Rules, but that they could also raise fair trial concerns, limit the ability of victims to be informed about proceedings and obstruct the public understanding of the Court and thereby undermine its effectiveness or even its perceived legitimacy.

In particular, Amnesty International is concerned that the shortfall in translations may originate from a deliberate decision of the Court not to request the necessary resources for translations. For example, in the Proposed Budget for 2008, the workload indicators for the Court Interpretation and Translation Section sets out that the anticipated workload in 2008 for translations into French is 5,500,000 words. However, the indicators set out that, even if the Court receives all the resources it has requested, it will still have an estimated shortfall of 2,050,000 words (approximately 37% of French translations). No indication is given on the impact of the shortfall in French translations on the work of the Court.

¹⁵ Two Regulations, Regulation 39 (Language requirements) and Regulation 40 (Language services of the Registry) of the Regulations of the Court deal with translation requirements but they do not implement Article 50 (1).

¹⁶ Article 50(2) of the Rome Statute states: “The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.”

Amnesty International believes that there needs to be an urgent review of the Court's current translation policy and an explanation of why all working documents are not being translated into both working languages. The organization calls on the Assembly to review this issue at its sixth session and to call on the Court to prepare a detailed budgetary proposal for the Assembly's consideration to ensure that all translations required by the Rome Statute and Rules can be completed promptly in 2008 and future years.

VII. Crime of aggression

During the process of drafting the Rome Statute, there was substantial debate on whether to include the crime of aggression as a crime under the jurisdiction of the Court, a crime which Robert Jackson, the Chief Prosecutor of the International Military Tribunal at Nuremberg described as "the greatest menace of our times."¹⁷ Delegations at Rome were unable to reach agreement on the definition of the crime or a procedure under which the Court would exercise jurisdiction of the crime. A compromise was agreed to list the crime of aggression in article 5 of the Rome Statute, subject to the following provision:

"The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

Article 5, therefore, contemplates that states parties will seek in good faith to agree on a definition of this crime under international law and the conditions under which the Court shall exercise jurisdiction with respect to this crime.

Following the Rome Conference, work to reach agreement on the definition and procedure has continued during the Preparatory Commission, the Assembly and intersessional meetings of the Special Working Group on the Crime of Aggression at Princeton University. The Special Working Group has stated its intention to conclude its work 12 months prior to the Review Conference,¹⁸ the earliest point that a definition could be adopted to be incorporated into the Rome Statute.

During the Rome Conference, Amnesty International campaigned for the adoption of effective definitions of genocide, crimes against humanity and war crimes, since these crimes

¹⁷ Second Day, Wednesday, 11/21/1945, Part 04, in Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings: 11/14/1945-11/30/1945. [Official text in the English language.] Nuremberg: IMT, 1947. pp. 98-102
<http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/Jackson.html>

¹⁸ Report of the Special Working Group on the Crime of Aggression, ICC-ASP/5/35.

amount to the most serious violations of international human rights law and international humanitarian law. The organization did not take a position on the definition of the crime of aggression because its mandate - to campaign for every person to enjoy all of the human rights (civil and political and economic, social and cultural rights) enshrined in the Universal Declaration of Human Rights and other international human rights standards¹⁹ - does not extend to the lawfulness of the use of force.

Amnesty International has, however, consistently taken the position that efforts to develop a definition of the crime and conditions under which the Court will exercise jurisdiction over the crime must fully respect the integrity of the Rome Statute and the independence of the Court.

Any definition and procedure must not scale back on the important achievements in the Rome Statute. Ensuring the integrity of the Rome Statute must remain the number one priority for states parties. The political process of determining whether to add this crime should focus on tailoring the definition and the procedure to the established system set out in the Rome Statute. The process should not allow for the reopening of other aspects of the Rome Statute for revision. In particular:

- ***The same procedures for referring crimes to the Court should be available for the crime of aggression.*** Article 13 of the Rome Statute was drafted to ensure that the jurisdiction of the Court could be triggered in a number of ways, including providing for the Prosecutor to act *proprio motu*. Article 13 was one of the key successes of the Rome Statute which guarantees to independence of the Court. Substantial safeguards and procedures have been incorporated into the Rome Statute to ensure that the Court operates justly, fairly and effectively without risk of politically motivated prosecutions. There is no reason why this established system should not be applied to all crimes under the jurisdiction of the Court.
- ***The provisions governing the right to a fair trial must be applied to the crime of aggression.*** Articles 55, 66 and 67 of the Rome Statute ensure that the Court shall fully respect the rights of the accused in investigating and prosecuting crimes. These must be applied equally to the crime of aggression. Any definition and procedure adopted must be fully consistent with these rights.
- ***The principles of criminal responsibility and defences applicable to this crime must be consistent with international law.*** The principles of criminal responsibility in the Rome Statute and defences are generally consistent with other international law.²⁰

¹⁹ Statute of Amnesty International (available at: <http://web.amnesty.org/pages/aboutai-statute-eng>), para. 1.

The United Nations Security Council or other bodies must not be allowed to infringe the independence and impartiality of the Court. Defining the procedure by which the Court exercises jurisdiction over the crime of aggression, in the context of the existing role for the Security Council set out in the United Nations Charter remains a significant challenge for the Special Working Group. Amnesty International believes that procedures established must guarantee the independence and impartiality of judicial work of the Court from the political work of the Security Council. Indeed, this was a key principle applied in drafting the Rome Statute which must not be compromised in this process. In particular:

- ***The Security Council or other body must not pre-empt the judicial determinations of the Court on any aspect of the crime.*** Article 66 of the Rome Statute provides that the Court must fully respect the presumption of innocence of any person charged with crimes under the Rome Statute. It is essential that any process to allow the Court to exercise jurisdiction over the crime of aggression does not undermine this fundamental fair trial principle by allowing inappropriate determinations by the United Nations Security Council, the United Nations General Assembly, the International Court of Justice or any other body on matters that must be established by the Court.
- ***The Security Council must not be given any additional powers to preclude the Court from acting.*** The drafters of the Rome Statute insisted that, with the exception of Article 16, which allows the Security Council to defer cases for 12 months pursuant to Chapter VII of the United Nations Charter, the Court must be independent of the Security Council's interference in deciding which cases it would investigate and prosecute. This article was intended to be used only in exceptional cases and only as a temporary measure.²¹ It is a general principle of law, both at the national and international level, that the independence of the judiciary be fully respected.²² It is, therefore, essential for the future independence of the Court that

²⁰ In some respects, such as the weak standard of superior responsibility in comparison with the standard of command responsibility in Article 28, the inclusion of duress in Article 31 (1) (d) as a defence instead of a factor to be taken into account in mitigation of punishment and the defence of superior orders to war crimes in Article 33 are all contrary to other, stricter rules of conventional or customary international law or would undermine the effectiveness of international justice. Amnesty International is not calling for a review of these provisions in the Review Conference, but is urging that the Court be given adequate time to address these issues in its jurisprudence (see Review Conference section below).

²¹ See: Amnesty International, *International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice* (AI Index: IOR 40/006/2003), 45-49, 1 May 2003.

no further powers should be granted to the Security Council in relation to any crime under the jurisdiction of the Court.

The issue must not overshadow other important work to be undertaken by the Assembly and the Review Conference. With so much political attention being focussed on the crime of aggression, it is vital that the issue does not dominate the work of the Assembly and the Review Conference to the extent that it undermines or interferes with other important tasks that the Assembly and the Review Conference will need to work on to ensure the continuing success of the Court.

VIII. Preparations for the Review Conference

At its fifth session, the Assembly requested the Bureau to:

to start preparation of the Review Conference, in particular on the issues of the rules of procedure applicable to the Review Conference and on practical and organizational issues, especially as regards dates and venue of the Review Conference, and to report to the next regular session of the Assembly of States Parties on the status of such preparations.²³

The Bureau therefore established a Working Group on the Review Conference. During 2007, the Working Group held a number of meetings and informal consultations, including with the focal point of the Assembly for the issue of the Review Conference to discuss these issues. The Bureau has submitted a report prepared by the Working Group to the Assembly, which contains two sets of recommendations.²⁴ First, it recommended that the decision on the dates, duration and venue of the Review Conference be taken at the sixth session of the Assembly. Second, it recommended that the Review Conference be held in the first semester of 2010 with a duration of between five and ten days. The Bureau has also submitted the Draft Rules of Procedure for Review Conference.

Amnesty International urges states parties to make decisions on all these issues during the sixth session of the Assembly.

Venue of the Review Conference. As a general rule Amnesty International does not take position on the venue of inter-governmental organizations meetings based on the level of

²² United Nations Basic Principles on the Independence of the Judiciary; Universal Declaration of Human Rights, Art. 10; International Covenant on Civil and Political Rights, Art. 14 (1).

²³ Resolution ICC-ASP/5/Res.3, para. 47.

²⁴ Report on the Bureau on the Review Conference, ICC-ASP/6/17.

human rights violations in the country concerned. However, since the Court is an independent and impartial body, it would not be advisable to hold the Review Conference in a state where the Prosecutor is conducting an investigation or prosecution or in a state which has made an Article 12 (3) declaration. In addition, it might be useful for the Assembly to take into account other desirable factors when determining the venue of the Review Conference, including, whether the state of the proposed location has:

- Ratified APIC without any prohibited reservation or declaration amounting to a prohibited reservation;
- Enacted legislation implementing both complementarity and cooperation obligations under the Rome Statute;
- Not established any amnesty for crimes within the Court's jurisdiction;
- Cooperated fully with the arrest and surrender of all persons subject to an arrest warrant;
- Cooperated fully with other requests for assistance by the Court;
- Not entered into an illegal impunity agreement in contravention to article 98 of the Rome Statute;
- Fully paid its assessed contributions to the Court.

The agenda of the Review Conference. Article 123 (1) of the Rome Statute provides:

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.

There are four items which the Review Conference must consider or which it has been recommended to consider. First, transitional Article 124 expressly requires that "[t]he provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1." Second, the Review Conference will have before it proposals concerning the crime of aggression, including its definition and the circumstances under which the Court will exercise its jurisdiction over this crime, and a report on the subject prepared pursuant to paragraph 7 of Resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Final Act). Third and fourth, Resolution E of the Final Act recommends that a Review Conference "consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court".

In addition, since it will be a Review Conference, it will present an excellent opportunity for states parties to conduct a broad review of the work of the Court since the entry into force of the Rome Statute on 1 July 2002. That review should also examine the

extent to which states parties and states that have made declarations pursuant to Article 12 (3) recognizing the Court's jurisdiction have implemented their complementarity and cooperation obligations under the Rome Statute and APIC.

States may also use the opportunity to consider whether other aspects of the Rome Statute might warrant amendment at a future Review Conference. In that review, proponents of amendments would need to bear in mind that amendments require super-majorities for adoption and entry into force. Amnesty International believes that the current political environment would suggest that proponents of changes in the Rome Statute should agree to push for adoption of amendments at the first Review Conference only if there is overwhelming support for them. Instead of seeking major changes at the first Review Conference, states parties should use the opportunity for a comprehensive review as a way to initiate discussion to lay the groundwork for successful action at a future review conference or Assembly session. Absent a significant change in current circumstances, it would appear that the only amendments that might be adopted at the first Review Conference, other than the four items mentioned above, would be amendments that involved only minor, technical corrections where there was a consensus that they were necessary and would not risk unravelling the compromise reached at Rome.

The appropriate scope of the Review Conference. The Court will still be in its infancy when the Review Conference is convened in 2010. It will have been fully operational for only a few years and, under the current prosecution strategy, it is likely that it will have completed only a few trials and possibly appeals. Thus, it will have had only a limited amount of time in its jurisprudence and practice to address the numerous areas of ambiguity in the Rome Statute regarding definitions of crimes and offences against the administration of justice, principles of criminal responsibility and defences, the application of the principle of complementarity, relationships between organs of the Court and the scope of state cooperation obligations. The Court should be given a chance to address these issues before any attempt is made to address any problems by amendment.

The Rome Statute is not perfect. It represents a delicate and not always happy compromise, balancing many unrelated articles and provisions. Although it may well have been almost the best that could have been achieved in the circumstances, Amnesty International made clear on the eve of the adoption of the Rome Statute that it was dismayed by many important provisions. Indeed, it continues to believe that many of the articles could be significantly improved. However, the organization recognized from the moment the Rome Statute was adopted that any attempt to make major changes at the early stages of the new permanent court's existence in one area could lead immediately to calls for changes in other areas that are completely unconnected, but which are in their current form as part of the general political bargain reached at Rome. For that reason, when the Court was under intense attack by one state, Amnesty International joined the international consensus shared by other members of civil society and the Like-Minded Countries that it was essential to protect the integrity of the Rome Statute. Although the threat to the Court's existence has receded

somewhat, it has not yet gone away. The state which has campaigned against the Court can participate as an observer at the Review Conference and, if it decides to participate, it might well press for amendments in return for ending its campaign and agreeing to cooperate with the Court. For these reasons, Amnesty International continues to believe that until the Court is firmly on its feet and the campaign against it has been decisively defeated that it would be very risky to seek substantive changes other than the four envisaged under the Rome Statute or the Final Act mentioned above.

IX. Trust Fund for Victims

As the report of the Board of Directors shows, as of 31 December 2006, the Trust Fund for Victims (Trust Fund) has already received €2,450,708 in voluntary contributions. This is an important start to the Trust Fund. It is hoped that this amount will increase significantly in the next years as, following the appointment of the Executive Director in 2007, the Secretariat of the Trust Fund is now functioning and a fundraising strategy is being developed to promote voluntary contributions from all possible sources; these being "[g]overnments, international organizations, individuals, corporations and other entities."²⁵

At a time when the Court is starting its first case and conducting investigations into four situations where there are a large numbers of victims, it is essential to ensure that the greatest numbers of possible voluntary contributions are deposited in the Trust Fund in its first years. Indeed, Amnesty International reminds states that the UN Security Council expressly encouraged states to contribute to the Trust Fund in its resolution referring the situation of Darfur to the Court.²⁶

Amnesty International, therefore, urges all governments to make voluntary contributions to the Trust Fund before or during the sixth session of the Assembly and for their governments to commit to making regular voluntary contributions. The organization also recommends that the Assembly reiterates its call for governments, international organizations, individuals, corporations and other entities to make voluntary contributions to the Trust Fund.

X. Declarations to the Rome Statute

Amnesty International is seriously concerned that some declarations made upon ratification by some states amount to disguised reservations. Although Article 120 of the Rome Statute provides that no reservations may be made to the Statute, unilateral declarations which specify or clarify the meaning of certain provisions are not expressly prohibited. In its report: *International Criminal Court: Declarations amounting to prohibited reservations to the Rome Statute*²⁷ the organization examines declarations made by states parties to date and concludes

²⁵ Resolution ICC-ASP/1/Res.6, Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims," paragraph 2.

²⁶ Preamble, UN Security Council Resolution 1593 (2005).

that a number of them amount to reservations, including unilateral declarations made by Australia, Colombia, France, Malta, United Kingdom and Uruguay. The legal analysis sets out in detail the organization's concern and calls on all states parties not to make any declaration that may amount to a reservation. Furthermore, Amnesty International calls on the Court not to take into account such declarations.

Amnesty International urges the Assembly to examine this issue and to call on states which made such declarations promptly to withdraw them.

²⁷ AI Index: IOR 40/32/2005, November 2005, (also available in French), available at: <http://web.amnesty.org/library/index/engior400322005>

Annex 1:
Summary of Amnesty International's recommendations to the International Criminal Court to develop an effective strategy for positive complementarity.

The following is a summary of Amnesty International's recommendations to the Court on developing an effective strategy to ensure complementarity:

Measures that the Court should take in relation to situations being investigated by the Court. In the course of conducting its own investigations and cases, the Court should seek to take effective measures to promote national justice to deal with all the crimes that the Court does not have the resources to prosecute. Each situation will be unique and separate strategies will need to be developed, ensuring that they comply with international law and the letter and the spirit of the Rome Statute. In situations where the national authorities are unwilling to conduct national prosecutions, the Court will need to consider ways in which it generates support for justice over impunity. In instances where national courts are unable to prosecute cases, the Court will need to consider how it can contribute to removing obstacles to justice and empowering the national justice system. The following activities should be considered:

- The Court should ensure that it acts as a model for just, fair and effective justice, which will inspire national authorities to develop their own national impunity strategies. Amnesty International notes that the Court's strategy in some situations where it has failed to investigate and prosecute crimes committed by all sides to a conflict has not only lead to criticisms of its own impartiality, but is also undermining the belief and support of affected communities that impartial justice is concept that can be achieved.
- The Court should investigate and prosecute a range of suspects, not just high level suspects charged with superior responsibility. By focussing on superiors, the Court is unable to effectively highlight the need for lower ranking persons - who in most cases directly perpetrated the horrific crimes - to be brought to justice. A broader prosecution strategy could press or shame national authorities to fulfil their responsibilities by investigating and prosecuting all other cases before the national legal system.
- The Court should increase its efforts to call for law reform to ensure that the states define genocide, crimes against humanity and war crimes in accordance with international law, as well as defences and principles of criminal responsibility. This aspect of implementation of Rome Statute presents an enormous opportunity for

worldwide national law reform to correct weak legislation, which has contributed to impunity for countless crimes around the world.

- The Court should call on states to remove obstacles to national justice, including amnesties, statutes of limitations and immunities, which should never be applied to crimes under international law. To date, it has not taken any such measures in the existing situations.
- The Court should support rebuilding of national justice systems where they need repair and investment.
- The Court should argue against proposals for alternatives to justice which are designed to ensure impunity for the crimes.

Measures that the Court should take to promote complementarity in states parties.

Beyond the situations under investigation by the Court, the Court should endeavour to establish a much broader global anti-impunity complementarity strategy aimed at highlighting impunity, where it exists, and actively working with states parties to investigate and prosecute the crimes before national courts. The Court receives a significant amount of information about crimes committed around the world. When it receives information of crimes which fall within its jurisdiction, the Court should forward such information to states parties and ask them to report on measures that they are taking to investigate and prosecute the crimes. The Court should report to the Assembly annually on such efforts and the Assembly could promote national action by state parties and for them to report on their national efforts to address impunity.