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Review Conference of the Rome Statute

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Stocktaking of International Criminal Justice

Cooperation

Summary of the roundtable discussion

A. Introduction

1. At its eighth plenary meeting, held on 3 June 2010, the Review Conference conducted a stocktaking exercise on the issue of cooperation on the basis of the template that had been adopted by the Assembly of States Parties at its resumed eighth session[1] and further elaborated in preparation of the Review Conference.[2]

2. The following five panellists had been invited to address five specific questions, grouped in two clusters, related to the issue of cooperation:

a) Cluster I

i) Ms. Amina Mohamed, Permanent Secretary in the Ministry of Justice, National Cohesion and Constitutional Affairs, Kenya;

ii) Mr. Adama Dieng, Registrar of the United Nations International Criminal Tribunal for Rwanda; and

iii) Mr. Akbar Khan, Director of the Legal and Constitutional Affairs Division, Commonwealth Secretariat.

b) Cluster II

i) Ms. Patricia O´Brien, United Nations Under-Secretary-General for Legal Affairs; and

ii) Judge Sang-Hyun Song, President of the International Criminal Court.

[1] *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed eighth session, New York, 22-25 March 2010* (International Criminal Court publication ICC-ASP/8/20/Add.1), part II, resolution ICC-ASP/8/Res.9, annex III.
[2] RC/ST/CP/INF.1.

3. Judge Philippe Kirsch, former President of the International Criminal Court and Ad-Hoc Judge at the International Court of Justice, served as moderator.

B. Statements by the panellists

1. Implementing legislation: specific issues which individual States Parties have encountered and good practices in this area (Ms. Amina Mohamed)

4. In her presentation, Ms. Mohamed referred to Kenya's recent experience in establishing mechanisms for the punishment of genocide, crimes against humanity and war crimes, and to Kenya's cooperation with the Court.

5. One such mechanism was the International Crimes Act, which entered into force in 2009. The Act recognized international crimes under the Rome Statute and made provisions for their prosecution under the national legal system. It also provided for a legal basis for cooperation with the Court by, inter alia, obligating the Government of Kenya to comply with any requests by the Court for assistance.

6. In this connection, Ms. Mohamed indicated that as a best practice, the Government of Kenya had involved government departments, civil society organizations and human rights institutions in the development of the legislation, which had contributed to its broad acceptance by the public. One of the challenges Ms. Mohamed referred to however related to the variance of the sentences allowed under the Rome Statute and the existing penalties under Kenya's penal legislation.

7. Ms. Mohamed further observed that Kenya had become a situation country in 2010 when the Court's Pre-Trial Chamber had authorised the Prosecutor to initiate a *proprio motu* investigation into the post-election violence that had occurred in 2007-2008 after the attempts of the Government to establish a local tribunal had failed. Nonetheless, the Government of Kenya was undertaking reforms in various sectors, including the legal and justice sector, to enhance its national capacity to investigate and prosecute international crimes. Moreover, a Constitutional review process would provide a stronger policy, legal and institutional framework for the promotion of the rule of law, respect for human rights and the elimination of social injustice.

8. In conclusion, Ms. Mohamed observed that no State was immune from violence without strong institutions and an effective legal system with the necessary checks and balances. She reiterated the full support of the Kenyan Government to the Court and encouraged other States Parties, in particular from the Group of African States, to do the same.

2. Supplementary agreements and arrangements and other forms of cooperation and assistance: experiences in relation to the Court and other international judicial bodies - a consideration of the challenges and how these might be overcome (Mr. Adama Dieng)

9. At the outset, Mr. Dieng observed that the International Criminal Tribunal for Rwanda, being established by the United Nations Security Council, could demand State compliance which, under article 28 of its Statute, entailed cooperation without undue delay in the investigation and prosecution of accused persons.

10. Mr. Dieng stressed that the ad hoc tribunals relied greatly on the cooperation of States in order to fulfil their mandates. Initially, such cooperation had been envisaged as a one-way street. Within a short period of time, however, the Tribunal was in a position to offer

assistance to States, inter alia, by providing access to its records. Mr. Dieng advised the Court to consider developing policies on this aspect of cooperation.

11. Mr. Dieng observed that requests for arrest and surrender were often mistakenly treated as requests for extradition, which could give rise to unwarranted, extensive domestic judicial reviews causing unnecessary delays. These challenges could possibly be overcome by clarifying more systematically the differences between extradition and surrender. Similarly, entering into supplementary agreements establishing administrative transfers of indictees could be considered.

12. With regard to implementing legislation, Mr. Dieng observed that the Tribunal had faced a major challenge in the exchange of information and collection of evidence, arising from the incompatibility between domestic laws, especially from civil law systems, and the procedure followed by international jurisdictions, which was mainly based on common law systems. Mr. Dieng recommended that the Court enter into a dialogue with States Parties that had enacted implementing legislation to address this issue.

13. Mr. Dieng noted that cooperation on matters related to witnesses had been secured by, inter alia, the appointment of focal points in relevant States and by seeking the cooperation of national law enforcement agencies. In some instances, the ad hoc tribunals had been able to relocate witnesses and their families without entering into any formal agreements, but on the basis of individual requests for cooperation. The enforcement of sentences and relocation of acquitted persons however had been problematic due to it being a non-mandatory element of cooperation.

3. Challenges encountered by States Parties in relation to requests for cooperation: how these might be overcome (Mr. Akbar Khan)

14. In his statement, Mr. Khan stressed that without State cooperation the Court would fail in its mandate. Effective cooperation did not only relate to mandatory forms of cooperation referred to in the Statute, but also to other areas in which there was no specific obligation to cooperate.

15. Mr. Khan observed that although the current status of State cooperation was promising, a high number of requests from the Registry remained outstanding, particularly regarding witness relocation. Furthermore, no agreements had been concluded on interim release. As regards the defence teams, Mr. Khan stressed the need for obtaining timely support from States Parties so as to ensure that the principles of equality of arms and fair trial were upheld.

16. On the issue of implementing legislation, Mr. Khan invited States Parties to reflect on the challenges they had faced in order for innovative solutions to be developed through dialogues and sharing best practice. Mr. Khan noted that implementing legislation was the best way forward to securing timely cooperation. In the absence thereof, he recommended that States Parties consider entering into ad hoc arrangements and framework agreements with the Court so as to ensure timely cooperation until implementing legislation was in place. Mr. Khan recalled that the establishment of national focal points or domestic task forces to mainstream the Court would also be useful in securing State cooperation.

17. Mr. Khan stressed that the absence of cooperation could have financial consequences. The failure to identify and freeze assets could, for example, result in the accused being deemed indigent, which in turn would put a strain on the Court’s budget for legal aid.

18. Mr. Khan reiterated that the Commonwealth Secretariat would stand ready to assist its States with ratifying and implementing the Rome Statute and that, looking ahead, the issue

of cooperation would need to remain on the agenda of the Assembly of States Parties in order to discern and share best practice and to help identify possible sources of assistance.

4. Cooperation with the United Nations and other intergovernmental bodies, including regional bodies: consideration of the present situation and ways in which it can be developed (Ms. Patricia O'Brien)

19. In her statement, Ms. O'Brien focused on the principles governing cooperation between the United Nations and the Court. While noting the special relationship between the two institutions, Ms. O'Brien stressed that the United Nations was only a secondary source on which the Court could rely; the primary source for cooperation were the States Parties to the Statute.

20. Ms. O'Brien referred to the UN-ICC Relationship Agreement which had been signed in 2004 and was based on the fundamental principle that the United Nations would cooperate with the Court, whether in the administrative, logistical or legal field, whenever feasible, with due regard to the United Nations Charter and applicable rules as defined by international law. The Relationship Agreement further served as a legal basis for the conclusion of further arrangements, including the Memorandum of Understanding between the United Nations and the Court concerning cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the Court. Other arrangements allowed for the provision of telecommunication facilities for the Court's field presence and transportation services.

21. While referring to the relationship between the United Nations and the Court as being solid, Ms. O'Brien observed that a number of challenges had to be overcome, the most important of which concerned the sharing of confidential information in the case against Mr. Thomas Lubanga Dyilo. Such challenges arose because both the United Nations and the Prosecutor were struggling to balance competing obligations. Ms. O'Brien indicated in this regard, that the United Nations had to reconcile its will to cooperate with the Court with the need to ensure the safety of its personnel and the continuation of its activities and operations in the field. Ms. O'Brien indicated that the Court and the United Nations had put in place a procedure that allowed for these tensions to be resolved in an appropriate manner and to the satisfaction of the judges of the Court.

5. Enhancing knowledge, awareness and support for the Court: including through mainstreaming and galvanizing public support for and cooperation with the Court within States, including for the enforcement of Court decisions and arrest warrant (Judge Sang-Hyun Song)

22. In his presentation, President Song focused on the connection between enhancing knowledge, awareness and support for the Court and cooperation. As such, he identified four areas in which this link proved to be vital.

23. First, President Song recalled that the Court relied heavily on diplomatic and public support and observed in this regard that, in the past, diplomatic pressure had led to the arrest and surrender of accused persons to the ad hoc tribunals. With regard to the International Criminal Court, President Song observed that, while cooperation generally had been forthcoming, a number of States Parties had indicated that they were not in a position to comply with cooperation requests as they had not yet met their obligations under article 88 of the Rome Statute. Moreover, despite the fact that cooperation was a legal obligation, the Court did not have the means to enforce it except for referring a case on non-cooperation to the Assembly of States Parties or to the Security Council under article 87 of the Statute. In addition, President Song noted that it would be inappropriate for a judicial institution to urge States Parties to take particular actions or recommend ways to exert pressure on other States

Parties to execute arrest warrants or enforce other decisions. Consequently, it would be for the Assembly to consider how to best use the political and diplomatic tools at its disposal to foster and enhance cooperation with the Court.

24. Secondly, President Song indicated that increasing knowledge and awareness of the Court's activities could contribute to securing voluntary cooperation by both States Parties and non-States Parties, for example with regard to the enforcement of sentences and the relocation of witnesses. Moreover, as the Court may not be able to carry out its core functions without the voluntary assistance of States, it would be in the interest of the Assembly of States Parties to raise awareness about its necessity and to encourage States to provide such assistance.

25. Thirdly, President Song observed that mainstreaming issues related to the Court and increased awareness of the importance of cooperation within national and international systems would allow States Parties and international organizations to provide effective and timely cooperation. Finally, increasing knowledge, awareness and support would, in the long term, contribute to building a culture of respect for the Court and its decisions and requests.

26. In conclusion, President Song invited States Parties to issue general reminders about the Court's importance, in addition to advocating for particular forms of cooperation.

C. Observations of States and other stakeholders

1. Cooperation in general

27. States Parties agreed that effective cooperation with the Court would define how successful the Court would be in the fight against impunity. Consequently, the point was made that States Parties should aim at fully complying with the mandatory obligations contained in the Rome Statute, in particular with regard to the execution of arrest warrants. It was also noted that it was increasingly crucial for States Parties to support the enforcement of the decisions of the Court and to ratify without delay the Agreement on Privileges and Immunities. The important role of other stakeholders, including intergovernmental and non-governmental organizations, in contributing to the success of the Court was emphasized. A regional organization referred to its legal and political framework in support of the Court, which included an agreement on cooperation and assistance with the Court, and encouraged other organizations to enter into similar agreements.

28. Reference was further made to the need for strong diplomatic support for the Court, which was essential for it to carry out its mandate. In this regard, States Parties welcomed the voluntary cooperation provided by a number of non-States Parties and invited other States to follow the same approach where it was consistent with their domestic law. Other States observed that, in pursuing efficient cooperation with the Court, States Parties should not impose obligations on third parties. The view was also held that indicting a Head of State could jeopardize effective cooperation with the Court.

29. Several States Parties referred to cooperation as a two-way street, governing, on the one hand, the relationship between the Court and States Parties and, on the other hand, the relationship between States Parties. It was considered important for States Parties to continue to focus on the fulfilment of their own obligations under the Statute by ensuring that procedures were being implemented at the national level for all forms of cooperation. The point was further made that such cooperation of States Parties should include support for defence teams and respect for the independence and functional immunity of defense counsel.

30. States Parties agreed that the universality of the Rome Statute would have a positive impact on cooperation and welcomed, in this regard, that one State had sought assistance from others in its efforts to ratify the Statute.

2. Implementing legislation and supplementary agreements

31. A number of States Parties had referred to the steps they had taken in domesticating the Rome Statute and in meeting their obligations under the Statute. These included the designation of national focal points to address cooperation requests from the Court, specific procedures on cooperation involving all national stakeholders and provisions for the arrest and surrender of accused persons. A number of States Parties indicated their willingness to support others in their efforts to enact implementing legislation, inter alia, through information sharing, assisting in drafting and by providing financial support. In this connection, States Parties were encouraged to conclude bilateral or regional agreements so as to provide funding for support to other States Parties. As an example, reference was made to the Justice Rapid Response mechanism.

32. Others indicated that their existing national legislation already provided a solid basis for cooperation with the Court and therefore did not require any amendment. It was observed in this regard that the ways in which States Parties cooperated with the Court could vary, which called for a flexible approach by the Court. In this connection, the question was raised whether comprehensive implementing legislation was required, as piecemeal legislation could be more manageable for some States Parties.

33. Several States Parties referred to the specific challenges they were facing in the process of developing implementing legislation. These related, inter alia, to the lack of resources and political, structural and legal obstacles. Several States Parties expressed an interest in receiving assistance from other States Parties or regional bodies. As regards the latter, the need was expressed for regional bodies to ensure the high quality of implementing legislation enacted by its member States and to engage in the sharing of best practices in this regard. In general, the point was made that any implementing legislation should meet certain quality standards so as to allow for effective cooperation with the Court.

34. The Plan of Action questionnaire on implementing legislation, issued by the Secretariat of the Assembly of States Parties on two occasions, was welcomed as a useful tool in assessing the current status and in identifying the challenges that States Parties had faced in drafting implementing legislation. Moreover, it was observed that identifying the main obstacles encountered by States Parties could assist other States in overcoming similar difficulties in the domestication of the Rome Statute.

35. Several States Parties also stressed the importance of entering into supplementary agreements with the Court on, inter alia, the relocation of witnesses, the enforcement of sentences and on interim release. A flexible approach from the Court in the conclusion of such agreements, however, would be required to take into account the diversity of national systems.

D. Conclusions of the moderator

36. The moderator expressed his appreciation to the panellists, States and civil society for their interventions, which had contributed to a rich and constructive debate and had provided several useful suggestions for the future.

1. Sharing experiences and assistance to others

37. The moderator took from the debate that several States Parties had a wealth of experience in cooperating with the Court and were willing to share these experiences, including by providing technical and other assistance in certain areas. He recalled in this regard, the important role of regional bodies and other organizations in providing support in terms of drafting implementing legislation, information sharing and best practice. The moderator further observed that the problem did not seem to be that possibilities of assistance were lacking but that States Parties were often unaware of where to go to receive appropriate assistance. The Assembly of States Parties and the Court, with due regard to its judicial mandate, could have a role in identifying where assistance could be obtained.

2. Implementing legislation and other national procedures

38. The fact that a number of States Parties had indicated that they were not in a position to cooperate with the Court as they had not met their obligations under article 88 of the Statute,[3] signalled the need for further action. The moderator stressed the importance of ensuring that States Parties were in a position to comply with their obligations under international law, which remained binding regardless of the situation in domestic law.

39. The moderator also indicated that, when certain States Parties had clear obligations to execute arrest warrants but were unable to do so, cooperation would become diluted. The problem, however, would remain intact and could have significant consequences for the Rome Statute system. He stressed the importance of considering efficient ways to give effect to the decisions of the Court. The moderator further stressed the importance of increasing the number of ratifications of the Agreement on Privileges and Immunities.

40. The moderator further observed that having procedures available under national law was not synonymous with implementing legislation. Great diversity in national practices existed and national systems and processes took many different forms, which in some instances allowed for cooperation without legislation. The situation thus varied from State to State.

41. In this connection, the moderator observed that several States Parties had taken a number of additional measures, aside from legislation, to streamline internal processes so as to allow for more effective cooperation with the Court. Such measures could include for example appointing national focal points or establishing task forces.

3. Voluntary agreements and cooperation

42. With regard to voluntary agreements, the moderator stressed that, although agreements on the relocation of witnesses, the enforcement of sentences and interim releases were concluded with States Parties on a voluntary basis, they were of considerable importance. It was therefore in the interests of the entire Assembly of States Parties to raise awareness and to encourage States Parties to conclude such agreements. In this connection, the moderator stressed the need for creativity in creating voluntary agreements, inter alia, by allowing flexibility and by entering into ad hoc arrangements and framework agreements so as to ensure timely cooperation.

43. The moderator further recalled, that during the discussion among States Parties, some delegations had stressed the distinction between mandatory and non-mandatory cooperation. In noting the legitimacy of that distinction, the moderator observed that the distinction should

[3] States Parties shall ensure that there are procedures available under their national law for all the forms of cooperation which are specified in Part 9 of the Statute.

not become a dividing line between cooperation and non-cooperation. Of crucial importance was the use of the necessary means in order to achieve the objectives set by States in Rome.

44. The moderator reiterated that public and diplomatic support was of considerable importance in the achievement of successful cooperation between States Parties and the Court. States Parties could contribute to this by regularly reminding others of the Court's importance, in particular when circumstances were difficult. Moreover, the cooperation by non-States Parties could be of crucial importance to the Court.

5. Cooperation with the United Nations

45. On the topic of cooperation between the Court and the United Nations, the moderator noted that the Court was generally satisfied with this relationship and the cooperation provided. The moderator acknowledged that States Parties held the principal responsibility for cooperation with the Court. However, as a secondary source, cooperation by the United Nations was of primary importance due to its global reach and operational capacities.

46. In order to maintain a stable relationship, the Court's presence could be enhanced at periodic meetings of various United Nations humanitarian agencies and other relevant agencies, which would, inter alia, contribute to the mainstreaming of the Court.

6. Way forward

47. As regards the way forward, the moderator observed that States Parties and other stakeholders had expressed a keen interest in sharing experiences and in providing or receiving assistance. Also, the need for enhancement of public information, of understanding of the mandate and operations of the Court permeated all other topics.

48. Irrespective of the achievements of the Review Conference, the moderator considered it important to continue the work on cooperation, inter alia, by having a standing discussion on cooperation to review and keep the issue alive, to help understand where the challenges lie for States Parties in providing cooperation and to discern and share best practice and to help identify where assistance might be found. Continuation of the consideration of the functioning of the system and following-up on the implementation of previous resolutions of the Assembly could be part of this exercise.

49. The moderator observed that continued consideration of the issue of cooperation had already led to some results. As at 3 June 2010, 30 additional States Parties had replied to the Plan of Action questionnaire on implementing legislation, bringing the total to 42.

50. The moderator recommended that the issue of communication between the Court and States Parties be reviewed. Formal meetings were useful to convey information but did not always allow for a full understanding of positions or the underlying reasons for those positions. Although the Court had its specific judicial mandate, the question how it could assist in facilitating cooperation could be considered.

51. In sum, the moderator stressed the importance of pursuing more targeted interaction. Tackling specific challenges might be achieved through informal channels instead of large meetings.

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