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Review Conference: Scenarios and Options

Progress report by the focal point, Mr. Rolf Einar Fife*

Introduction

1. At its third, fourth and fifth sessions, the Assembly of States Parties to the Rome Statute of the International Criminal Court appointed a focal point on the issue of the Review Conference under article 123 of the Rome Statute. The role entails acting as a point of reference for delegations having thoughts on the Conference. Reference is made to the focal point's preliminary paper of 21 November 2006 (ICC-ASP/5/INF.2) on scenarios and options.

2. This progress report is submitted to the sixth session of the Assembly on the basis of further intersessional contacts concerning the preparations for the Conference.

3. It should be noted at the outset that significant advances have been made by the New York Working Group in 2007, under the able guidance of Mr. Sivu Maqungo (South Africa), notably with regard to the finalization of the proposed draft rules of procedure of the Review Conferences. The Working Group has made proposals to the Bureau in this regard.

Contacts made since the fifth session of the Assembly of States Parties

4. States have been encouraged to present proposals and to provide input as to the scope, timing, duration and venue of the Conference, so as to enable certain decisions to be made at the sixth session of the Assembly.

5. To this end, open-ended consultation meetings were held in New York on 15 June and in The Hague on 4 July 2007. Furthermore, the focal point sent a letter dated 8 June 2007 to the heads of the legal departments of the foreign ministries of all States Parties to the Rome Statute,

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inviting comments by 1 October 2007. He asked for the letter to be transmitted, as appropriate, to other colleagues or authorities, to the extent that the issue is dealt with by the latter.

6. In most cases, observations have been conveyed orally and informally. Few States have conveyed written comments. A number of States provided general views, without attribution. Against this background and after careful consideration, the focal point has chosen to reflect general views, rather than identifying the views of any particular States. The focal point is most grateful for expressions of support and for all input received in the course of the consultations.

7. It should be added that a number of States and members of civil society, including the Coalition for the International Criminal Court (CICC), have devoted resources to contributing in a constructive way to preparatory discussions on the future priorities of the Review Conference. Particular reference should also be made to the international conferences organized by the Italian Government in Torino in May 2007 and by the Canadian and Mexican Governments in Mexico City in August 2007. Such initiatives have contributed to enhanced analysis of and dialogue on issues relevant to the Review Conference.

8. It is essential that preparations move forward on a transparent basis and in a spirit of consensus. Various briefings have therefore also been held in relevant international bodies, including before the Legal Advisers' Meeting in New York, during the ordinary session of the General Assembly of the United Nations, in October 2007.

General impressions – broad agreement on fundamental aims

9. The approaches made to the focal point confirm a deep commitment by States Parties to the aims and integrity of the Rome Statute. There is broad support for the proposed goals of the Review Conference of strengthening the Court and protecting the integrity of the Statute.

10. At the same time, it is acknowledged that the Court has been in existence for only a few years. Key procedures have not yet been implemented. This has limited the empirical basis for any discussion of amendments in important areas. A key focus should therefore be on what the Review Conference could usefully do in order to enhance the principles and purposes of the Statute and support for the Court.

Timing of the Review Conference

11. Article 123 of the Statute provides that “the Secretary-General of the United Nations shall convene” the first Review Conference seven years after the entry into force of the Statute. A large number of States favour a pragmatic approach as to the exact timing of the Conference, on the basis of invitations to be sent by the Secretary-General in July 2009. There is a broad wish to schedule the Conference in such a way as to avoid overlapping with regular sessions of the United Nations General Assembly and of the Assembly of States Parties. Holding the Conference in the first half of 2010 may also permit the new Bureau of the Assembly, which is to be elected for a three-year term at the end of 2008, to finalize preparations in 2009. Moreover, there is broad support for allowing time for focused preparatory work to be carried out in connection with the session of the Assembly of States Parties in late 2009.

12. The focal point therefore recommends that the Assembly of States Parties decide at its sixth session that the Review Conference be held during the first half of 2010, on the basis of invitations to be issued by the Secretary-General of the United Nations in July 2009.

13. The exact timing of the Conference will have to be established in consultation with the host country or international organization, taking into account availability of conference facilities. This has a bearing on the need to clarify as soon as possible the venue for the Conference.

Particular role of the eighth session of the Assembly of States Parties (2009)

14. Preparations during the eighth session of the Assembly late in 2009 will be important. Pursuant to article 121, States will for the first time have the right to propose amendments to the Statute as of July 2009. A prior consideration for 2009 is that it would be useful to identify proposals that enjoy broad support and could usefully be considered at the Review Conference. While respecting the terms of the finalized draft rules of procedure, several States favour confining consideration of amendments at the Conference itself to proposals with a broad majority of support among States Parties. A preliminary discussion in 2009 would, in any case, be useful in gauging whether underlying proposals are well founded and in assessing to what extent consensus may emerge at the Conference.

15. Prior consideration of any proposals for amendments may also be particularly useful with a view to refining or streamlining proposals. Further drafting may be particularly useful where different proposals are made on the same subject.

16. There is broad support for devoting time as described late in 2009 to ensuring that the Review Conference is as well prepared as possible.

17. There is no provision in the finalized draft rules of procedure of the Review Conferences (rule 49) for a cut-off date for submission of proposed amendments to the Conference. Nor is there any provision obliging States to submit any proposals for amendments for prior consideration by the Assembly. However, the focal point is confident that States have fully understood the need to ensure that proposals enjoy the broadest possible support in order to be usefully considered at the Conference. It may therefore be asked whether certain guidelines should be issued, recommending prior consideration of any proposed amendments at the eighth session of the Assembly of States Parties, in 2009.

18. Against this background, the focal point recommends that the Assembly indicate at its sixth session that proposals for amendments to be considered at the Review Conference should be discussed at the eighth session of the Assembly of States Parties, with a view to promoting consensus and a well prepared Review Conference. Consideration may be given to issuing appropriate guidelines to this effect.

Duration of the Conference

19. Consultations have shown broad support for making a recommendation on the duration of the Conference, not least for planning and budgetary purposes.

20. There is broad support for a duration of 5 to 10 working days. Some States have indicated that they believe that five days should be sufficient, but understand the need to maintain some flexibility at this stage in the planning – and can consequently support maintaining a window of 5 to 10 working days. Other States have indicated that they would support a number of working days closer to 10 than 5, also taking into account the need for general statements. The exact duration will necessarily depend on final decisions on scope and contents. But for a number of

practical purposes it will be necessary to plan for a realistic period of time, while allowing for some flexibility.

21. Against the above background, the focal point recommends that the Assembly decide at its sixth session that the duration of the Conference will be 5 – 10 working days.

Scope of the Conference

22. Article 123 of the Statute provides that the Review Conference shall “consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5”. Moreover, the Conference may include amendments to provisions of an institutional nature in accordance with article 122 of the Statute. It should be noted that there is only one legally mandatory review to be carried out at the first Review Conference. This concerns the transitional provision in article 124 on deferred acceptance of jurisdiction of the Court for war crimes. With this sole exception, it is entirely up to the States Parties to decide whether other provisions will be reviewed at the Conference.

23. Although Court officials could propose amendments, the Court has yet to complete a full cycle of a trial, and at this stage there is therefore no basis for assuming that such proposals might be forthcoming.

24. Resolution E of the Final Act of the Rome Diplomatic Conference recommended that a Review Conference should consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition thereof and their inclusion in the list of crimes within the jurisdiction of the Court. Paragraph 7 of resolution F provided that proposals should be submitted to the Assembly of States Parties “at a Review Conference”, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in the Statute. It should be noted that the crime of aggression is given particular priority, as may be gathered from its inclusion in article 5 of the Statute and from the work currently being carried out by the Special Working Group on the Crime of Aggression, both in the course of various sessions of the Assembly of States Parties and during intersessional discussions. Several delegations have indicated to the focal point that the outcome of this ongoing work will prove to be very important when setting out the agenda for the Review Conference.

25. In general, the criteria set out in article 121, paragraphs 3 to 7, of the Statute are decisive with regard to the assessment of what amendments may be adopted – as confirmed in the draft rules of procedure of the Review Conferences. For all practical purposes, only proposals that command very broad support and which are considered almost by consensus as being “ripe for inclusion” can be included in the Statute.

26. In order to ensure genuine discussion, especially with regard to the crime of aggression, several delegations have indicated the need to avoid setting artificial deadlines for their consideration. At the same time, those delegations have indicated that States should do their utmost to ensure that proposals concerning the crime of aggression enjoy the broadest possible support.

27. Consultations have shown broad agreement that various other topics besides article 124 and the crime of aggression should be discussed at the Review Conference but only if they have broad support among States. With this in mind several States have indicated that the scope of the

Conference with regard to amendments should be limited. Preserving the integrity of the Statute is deemed primordial.

28. Support has been expressed for not having an exclusive focus on amendments, the number of which should have no bearing in determining the success of the Conference. Other matters which have also been referred to include the objective of strengthening the Court, contributing to the universality of the Statute, conducting outreach, promoting international justice and enhancing cooperation with States and other international institutions.

29. The Review Conference will not least play an important role in projecting to the outside world an image of the present stage of development of the Court and of a broad consensus among States Parties with regard to international criminal justice. In practice, this will also, and not least, be an occasion for a “stocktaking” of international criminal justice at a time when the completion strategies of the International Criminal Tribunals for Rwanda and the Former Yugoslavia, as well as of the Special Court for Sierra Leone, are well under way.

30. The key success criteria for the Conference may therefore have less to do with amendments to the Statute than with what kind of overall message is conveyed to the international community at large about international criminal justice through the holding of the Review Conference.

31. The focal point agrees with those delegations that have indicated that by stocktaking one does not necessarily mean a general debate that could have taken place at a session of the Assembly of States Parties. On the contrary, there may, for instance, be scope for hearing authoritative speakers representing: (i) international criminal justice institutions, against the background of completion strategies well under way; (ii) national investigative and prosecution authorities with experience in transboundary cooperation consistent with the principles of the Statute; (iii) feedback from conflict areas that have benefited from the work of criminal justice institutions, with a view to identifying contributions and legacies of the latter, as well as any “lessons learned”; and (iv) considerations of the close relationship between sustainable peace and justice, for example as highlighted by social scientists and historians.

32. Needless to say, civil society - including, as appropriate, non-governmental organizations from conflict areas - will play no less a role in contributing to the success of the Review Conference than it has in promoting the development and consolidation of international criminal justice to end impunity for mass atrocities. It should be added that national prosecution authorities specialized in international criminal justice as well as other international institutions may also provide important input to the Conference.

33. Such stocktaking may benefit from a sustained focus on an outcome document, i.e. a concrete declaration or summary of conclusions. From indications from civil society and governments alike it appears that compliance, through adequate national legislation, prosecutorial resources and full cooperation with the Court could be key topics for consideration. Less important than the form of such an outcome document would be its concrete relevance in terms of key priorities and the state of international criminal justice in 2010.

34. The focal point recommends that the Assembly indicate at its sixth session that, in addition to a focus on amendments that may command very broad, preferably consensual, support, consideration should be given to a stocktaking as described above, allowing for a relevant and topical discussion, open for representatives of civil society to provide input.

Venue for the Conference

35. There are in principle three options as to the venue for the Review Conference: New York, The Hague or a third venue. The first location offers conference facilities where most States are represented. The second has been the venue for three sessions of the Assembly. Regarding a third venue, a kind offer has been made by the Government of Uganda to host the Conference.

36. Regarding this matter, States have in consultations welcomed the offer of Uganda since it could help to promote outreach in the region and could have a positive impact on the relationship of the Court with civil society and victims. However, Working Group members have requested additional and detailed information on the exact conditions of the offer by Uganda, especially in terms of security, accommodation, capacity for delegations, media and civil society, etc. Furthermore, it was noted that since not all States are represented in Kampala, or in any other third venue, travel costs would be high for many delegations and the number of delegates per State might thus be more limited than at other venues, especially for developing countries. In this connection, the possibility of creating a trust fund or other mechanism to assist in facilitating the attendance of delegations has also been raised.

37. Finally, the Working Groups have also been of the view that minimum criteria for a State to host the Review Conference should be prepared. States Parties might also wish to consider taking part in a visit to a possible third venue.

38. The focal point would like to highlight that civil society should be ensured possibilities of participation in any venue to be chosen by the Assembly. Moreover, States Parties will benefit from reflecting on how outreach can best be achieved to promote the objectives referred to above with regard to the scope of the Conference.

Final reflections

39. It is apparent that a lot of preparatory work remains to be carried out. However, all States have demonstrated a constructive approach by focusing on what may be both useful and realistic for planning purposes.

40. While there is no legal obligation to convene further Review Conferences afterwards, and although amendments may be adopted later without holding such Conferences, it may for the sake of good order be noted that article 123 of the Statute is unambiguous. Other Review Conferences may be convened at any time thereafter, on the basis of majority decisions by the States Parties. The first Review Conference must therefore not be prepared on the basis of any misperception that this “would be the last opportunity to address a particular issue”.