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Review Conference: scenarios and options

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I. The role of the focal point and preliminary contacts made so far

1. At its third and fourth 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, for the purpose of acting as a point of reference for delegations having any preliminary thoughts on any aspects of the Conference. In the fulfilment of his role, the focal point has solicited and received views on how to constructively prepare for such a Conference. On that basis, a progress report will be submitted by the focal point to the Assembly on what has transpired in contacts with States Parties, including any suggestions received on working methods and substantial issues to be discussed in the forthcoming sessions of the Assembly.

2. So far, approaches made to the focal point have been few. They have also been limited in scope and of a purely exploratory nature. From informal soundings, it would nevertheless appear that this does not reflect any lack of interest in the International Criminal Court or in the Review Conference. Quite on the contrary, this reluctance appears in large part to be based on caution that reflects a deep commitment to the aims and integrity of the Statute combined with an acknowledgement that the Court has been in existence for only a few years. Key procedures have not yet been put into operation, thus limiting the empirical basis for discussion of the need for any amendments in important areas. Such factors may impact on the scope for discussion of amendments at this stage, while giving priority instead to questions as to what the Review Conference should usefully focus on in order to enhance the principles and purposes of the Statute and support for the Court.

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II. Some reflections on the preparation of the Review Conference

3. Some reflections are offered in the following paragraphs as a contribution towards the structuring of a framework for further discussion aimed to achieving the above-mentioned broadly shared objectives.

A. Timing of the Review Conference

4. 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. It follows from this provision (and maybe in even clearer terms from the French and Spanish versions, which use respectively the terms “*convoquera*” and “*convocar*”) that the convocations, or invitations, have to be issued in July 2009. This requires that the Conference be held within a reasonable deadline thereafter, which could mean in 2010, if deemed practical.

5. There may be a 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 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.

6. While there is no legal obligation to convene further Review Conferences afterwards, and although amendments may be adopted later without holding such Conferences, it should 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”.

B. Nature and purpose of the Review Conference

7. Article 123 of the Statute also 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, it 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.

8. This is also confirmed by guidance taken from resolutions E and F of the Final Act of the Rome Diplomatic Conference. Thus, resolution E recommends that a “Review Conference” 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.

9. Moreover, paragraph 7 of resolution F provides that proposals shall 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.

10. In general, the criteria set out in article 121, paragraphs 3 to 7 of the Statute, are decisive with regard to the assessment as to what amendments may be adopted. 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.

11. This brief description of provisions relevant to the subject matter of the first Review Conference can provide only a normative “skeleton”. It says little of what is required to achieve a successful Conference. It is submitted that the real question here is what States Parties, based on prior consultations and broad agreement through cross-regional support, believe would be helpful for the Court and for the interests of international criminal justice.

12. The Review Conference will also (and 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 the continued existence of a consensus among States Parties with regard to international criminal justice. In practice, this will also, and not least, be an occasion for a “stock taking” of international criminal justice at a time where the completion strategies of the International Criminal Tribunals for Rwanda and the Former Yugoslavia are well under way.

13. 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.

C. Possible inspiration from other review conferences and processes

14. Several treaties have review mechanisms. Various treaty regimes have experienced different kinds of review conferences. Allowing for a broad variety of individual variations and recognizing that differences may derive from the exact terms of each treaty, certain common perspectives may nevertheless be interesting. In certain cases, inspiration or lessons may even be drawn from past experience.

15. Treaties concerning prohibited weapons frequently have review mechanisms, reflecting the possibility of further additions in light of technological and other developments. Such treaty regimes may be particularly relevant here if they provide for such a stock taking mechanism. Under the circumstances, if agreement has been reached on expanding the list of weapons that are subject to a comprehensive prohibition, this may be relevant for the States Parties to the International Criminal Court.

16. The experience of the 1979 Convention on the Physical Protection of Nuclear Material is also interesting. It illustrates the evolution of circumstances that led to substantive amendments to the original Convention. The latter entered into force in 1987, with reviews to be carried out every five years. The first reviews did not reveal any broadly shared perceptions of the need for amendments. However, substantive changes were introduced at a Review Conference in 2005, as a consequence of the emergence of a consensus for substantive revision.

17. The first Review Conference on the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks was held in May 2006, five years after the entry into force of the Agreement. In the course of preparations, consensus had emerged on the need to put an emphasis on such key issues as:

- The extent to which relevant rules have been incorporated into national laws;
- The extent to which relevant provisions are being applied in practice;
- The extent to which States are taking action to remedy instances of failure to apply those provisions in practice.

18. In the case of the 1995 Agreement, limited time had passed since its entry into force. It was perceived to be useful to share views and to garner broader knowledge about implementation of the treaty norms on a national and regional level and about compliance issues and related challenges. Such a stock taking was meant not to monitor States but to provide an important overall cross-fertilization between States and other important actors, including civil society. It was viewed as an important contribution to increased effectiveness and participation in the Agreement. The possibility for consideration of amendments was deferred to a later stage and on the basis of a needs assessment.

19. Before deciding on the duration and agenda of a Review Conference, hard-nosed questions should be asked about what would be useful for the treaty and the implementation of its aims.

D. Possible institutional framework for further preparatory work

20. The limited approaches that have been made to the focal point up to now might indicate that so far there seems to be little sense of urgent needs with regard to amendments to the Statute, without prejudice to the ongoing work on the crime of aggression.

21. Nevertheless, preparations need to start in 2006 with a view to utilising the remaining time before the Conference (in practical terms the next two years) to effectively ensure success.

22. As a first step, consideration may be given to establishing a working group of the Assembly of States Parties for this purpose. Informal intersessional meetings may take place on particular issues.

23. Such a working group may consider the following three broad clusters of issues and prepare relevant documents thereon:

- (a) Clarification of the precise rules of procedure applicable to the Review Conference (see articles 2 (2) et al. of the Rules of Procedure of the Assembly of States Parties).
- (b) Ways of structuring the following items for inclusion in the Conference's agenda:
 - (i) Stock taking of Court activities and highlighting of issues, which will be useful for the Court;
 - (ii) Consideration of progress made in various existing fora which have a bearing on the possibility of amendments to the Statute;
 - (iii) Consideration of the outcome of the work of the Special Working Group on the Crime of Aggression (with special emphasis on this item);
 - (iv) Consideration of any issues which could give rise to amendments and which should be discussed in the working group. This would be done on the clear understanding that the working group would not duplicate work that is being carried out in other fora. Moreover, consideration of

amendments would fully take into account the need for very broad support in order for proposals to succeed.

(c) Practical and organizational issues related to financial, administrative and other arrangements, including consideration of particular Secretariat needs.

24. Consideration may be given by the Bureau of the Assembly of States Parties to the choice of venue for the Conference and other matters which may usefully be dealt with by means other than deliberations of the working group.

25. General prerequisites for further discussions are transparency and broad-based participation so that assessments made provide an accurate basis for decisions as to what may be supportive of the International Criminal Court.

26. Needless to say, civil society, including non-governmental organizations, 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.

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