

May 2006  
salzburg retreat

**the future of the**

**international  
criminal  
court**



# THE FUTURE OF THE INTERNATIONAL CRIMINAL COURT

## Salzburg Retreat

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## PREFACE

### Ferdinand Trauttmansdorff

From 25 to 27 May 2006 the Austrian EU-Presidency, in cooperation with the Salzburg Law School on International Criminal Law organized an International Retreat on “The Future of the International Criminal Court.” In my capacity as Legal Adviser to the Austrian Federal Minister for Foreign Affairs I wish to express my appreciation that the panelists have submitted written summaries of their contributions to this event. The Retreat can indeed be seen as a timely starting point to discuss issues of importance for the 2009 Review Conference of the Rome Statute.

Austria is a strong supporter of the International Criminal Court. It was amongst the first that signed and ratified the Agreement on the Privileges and Immunities of the Court and the first State Party that entered into an agreement with the Court on the enforcement of sentences. It was under the Austrian EU-Presidency that the EU and the International Criminal Court signed a Cooperation and Assistance Agreement. It was also in the spirit that Austria, during its EU-Presidency, decided to provide the occasion for common reflection on the challenges that lie ahead of us. By organizing, on 29 May 2006, a Regional Conference for CIS-countries we hoped to make a contribution to bringing these States closer to the goal of ratifying and implementing the Rome Statute.

With the Salzburg Law School on International Criminal Law, Humanitarian Law and Human Rights Law the Austrian Foreign Ministry found an ideal partner for planning and carrying out the Retreat. This institution, established in the aftermath of the Rome Conference, focuses on international criminal law, international justice and the organization of international judicial bodies, in particular the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda as well as the International Criminal Court. Salzburg Law School disseminates knowledge of international criminal law and follows closely ongoing developments within international judicial organs as well as in the academic community, thus paying special attention to the interrelationship between concurring fields of law as well as enforcement on the national and the international level.

In the First Session of the International Retreat on “The Future of the International Criminal Court,” the heads of the organs of the Court, President Philippe Kirsch, Prosecutor Luis Moreno-Ocampo and Registrar Bruno Cathala, presented their views on the practice of the Court today and its activities in the context of the strategic plan that should help in guiding the functioning of the Court in the medium and long term. They provided valuable insights on lessons learned and on how the Court plans to handle future challenges.

The Second Session offered a comprehensive analysis of possibilities and perspectives to review the Rome Statute in order to improve its capacity to face present and future challenges. The analysis included ideas on specifying existing definitions contained in the Statute, on extending the number of crimes within the jurisdiction of the Court and on granting more procedural rights.

The Third Session focused on scenarios and options for the Review Conference and the role the Assembly of States Parties should play within the review process. Participants underlined the significant role the academic community may assume in motivating interest in the Review Conference process by providing legal commentaries and by assisting with venues for meetings with government officials.

My special thanks go to the Academic Director of Salzburg Law School on International Criminal Law, Professor Otto Triffterer, and to his team. Their personal input was instrumental to the success of the Salzburg Retreat. Furthermore, I wish to express my gratitude to Astrid Reisinger-Coracini for her invaluable assistance in editing the summaries of the Salzburg Retreat. Finally, I would like to thank the Liechtenstein Institute on Self-Determination at Princeton University (LISD) and its Director, Professor Wolfgang Danspeckgruber, for the generous support of the Retreat and for having contributed considerably to enhancing a sustainable effect of the Retreat by printing this publication. LISD has a longstanding tradition in cooperating closely with the Court and the Assembly of States Parties to the Rome Statute. It is an excellent example of how academia can effectively enhance intergovernmental diplomacy.

Finally, I would like to stress that the Retreat would not have been such a success were it not for the outstanding contributions from the participants, many of which have been involved with the ICC for many years. I am grateful that the initiative to bring together governmental and non-governmental experts from so many countries and institutions in an informal context and to devote three days exclusively to the future of the Court was taken up with such positive spirit and active engagement. I am confident that, if this spirit of Salzburg prevails in the review process, the International Criminal Court will emerge stronger, more efficient and confident to effectively address the challenges of the future.

## First Session: The Court in Practice – Challenges Ahead

### THE COURT IN 2006 AND BEYOND

Philippe Kirsch

The ICC is still a young institution. In the three years since the judges, Prosecutor and Registrar took office, much work went into the preparation of the judicial activities of the Court as well as the building up of its internal administration. An entire institution had to be built from scratch. That work is now largely completed.

The Court is now well into the exercise of its judicial activities at the pre-trial and appeals levels. The first trial proceedings are expected to begin early next year. The pace of judicial activity can be expected to continually increase through the foreseeable future. At the same time, there is considerable uncertainty in forecasting exactly what will happen when. Much depends on factors outside of the Court's control, such as arrest and surrender. For this reason, the Court must be flexible in responding to developments.

The cooperation of States in the arrest of persons is of crucial importance to the Court. Without arrests, there will be no trials. The Court relies on cooperation in many other areas as well, for example relocating witnesses, communicating with victims or enforcing sentences. Cooperation agreements, such as the recently concluded agreement with Austria on the enforcement of sentences, facilitate the work of the Court. The Court relies on support from States and international organizations such as the United Nations as well as regional organizations. A cooperation agreement with the European Union was concluded in April, and we hope to conclude a similar agreement with the African Union soon. All these actors have an important role to play in supporting the activities of the Court and thereby contributing to its success.

Interest in and awareness of the ICC is continuing to grow. It is widely recognized today that the ICC is part of a broader system composed of different actors working towards the same goal of international justice. To be effective the different parts of the system must understand each other's roles and mandates and seek to work together in a complementary fashion. The recent agreement to allow the Special Court for Sierra Leone to use the ICC's facilities for the trial of Charles Taylor is one example of the growing interdependence of international courts. We can expect more cooperation with international or hybrid courts in the future. Over time it is in the nature of the ICC that it will become the reference institution in the field of international criminal law.

The Court is committed to sound planning for the future. In 2004, we began to develop a strategic plan. The first version of the plan was presented to the Committee on Budget and Finance in April. The Court is now discussing the plan internally with staff and externally with States and non-governmental organizations. A finalized version of the plan will be presented to the Assembly of States Parties in November. The strategic plan sets out three interrelated goals for the Court: to ensure the quality of justice, to be a well-understood and well-supported institution and to become a model for public administration. As part of the strategic planning process, the Court is also developing a Court Capacity Model to aid in forecasting resource needs.

In conclusion, considerable progress has been achieved since the Rome Statute entered into force in 2002. At the same time, the Court is still a very young institution. We can expect to learn significantly from our experience as we conduct the first trials.

## LESSONS FROM THE FIRST CASES

### Luis Moreno-Ocampo

#### **Introduction**

The Office of the Prosecutor (OTP) currently has three cases under investigation and five situations under analysis. This abstract provides a brief description of the cases under investigation, how they have progressed and a description of a key challenge that will shape the OTP going forward.

In the first three years of the ICC, the OTP has received three referrals from States Parties – Uganda, the Democratic Republic of the Congo (DRC) and the Central African Republic (CAR) – each referring situations in their own territories. The Prosecutor also received one referral from the United Nations Security Council regarding the situation in Darfur, the Sudan and a declaration of acceptance of jurisdiction from Cote d'Ivoire, a non-State Party.

In addition, the OTP received 1902 communications from individuals or groups in at least 107 different countries. Sixty-three percent of the communications originated in just three countries: Germany, USA and France. The communications include reports on alleged crimes in 153 countries in all regions of the world.

#### **The DCR Investigation**

In September 2003, the Prosecutor noted his willingness to seek authorization to use his *proprio motu* powers to initiate an investigation in the DRC if necessary, but publicly welcomed a referral from the DRC due to the likelihood of better cooperation in such circumstances. After receiving a referral from President Kabila on 3 March 2004, the OTP undertook the statutorily required analysis of jurisdiction, admissibility and the interests of justice, and opened an investigation in June 2004.

Consistent with its policy, the OTP assembled a joint team to carry out this investigation, combining staff members from different disciplines and belonging to each of the OTP's three Divisions (Prosecutions Division, Investigations Division and Jurisdiction Cooperation and Complementarity Division). Members of the joint team for the DRC investigation have been deployed to Ituri since July 2004 and have conducted more than 70 missions inside and outside of the DRC, compiling more than 140 statements.

The investigative work has not been done without the help of others: a Judicial Cooperation Agreement was signed between the OTP and the DRC in October 2004 and cooperation mechanisms were progressively established on the DRC territory with MONUC and other relevant organizations. Together with the ICC Registry and with the support of the DRC authorities the OTP established witness protection mechanisms, including immediate response systems, in Kinshasa and Bunia that have already been used effectively.

On 12 January 2006, the OTP submitted an application for an arrest warrant against Thomas Lubanga Dyilo, a Congolese national and the alleged founder and leader of the Union des Patriotes Congolais (UPC). After months of intensive investigation, the Prosecutor sought Lubanga's arrest, charging him with the crimes of enlisting, conscripting and using children under the age of 15 years to participate actively in hostilities. The UPC was one of the principal militia groups operating in Ituri from 2002 to 2004. Some

members of the UPC still represent a threat to stability in Ituri, either on account of their continued membership in the UPC or as a result of having joined other armed groups. On 10 February 2006 Pre-Trial Chamber I issued a sealed warrant of arrest against Lubanga.

On 17 March 2006, Lubanga was surrendered to the Court as a result of the first ever arrest warrant executed for the Court. Prior to his transfer, Lubanga had been in jail for almost a year in the DRC. While the UPC investigation team continues preparation for trial, a second investigation team is pursuing crimes committed by another Ituri armed group. In the DRC we will take a sequenced approach, as is part of our policy. Lubanga will be the first case, not the last case and the OTP will request arrest warrants for others as sufficient evidence becomes available.

In addition to the situation in Ituri, where violence recently re-erupted, the OTP continues to assess the situation in the DRC's other provinces. The OTP is developing further cooperation strategies in order to prepare additional investigations. Such strategies might include a further division of labor and/or assistance given to rehabilitate the DRC judiciary.

## **The Uganda Investigation**

The Uganda joint team was formed in early 2004. The team had a total of 15 professional staff drawn from the three Divisions of the OTP. The team analyzed the gravity of crimes committed by different groups in Northern Uganda and it was clear from their analysis and investigation that the crimes of the Lord's Resistance Army (LRA) were the most severe. We are currently analyzing crimes committed by other groups, taking into consideration the gravity threshold and complementarity.

Between the launch of the investigation on 28 July 2004 and the application for arrest warrants on 6 May 2005, the OTP's joint team conducted more than 50 missions to the field and collected sufficient information to successfully apply for five warrants of arrest of the top LRA commanders. The OTP took several steps to facilitate safe and rapid investigations, including regular consultations with local and international stakeholders to develop cooperation frameworks. The development of cooperation arrangements with the widest variety of actors, including the Government, NGOs, and community organizations, was important to the success of the investigation.

The interplay between justice and ongoing attempts to forge peace agreements is an important aspect of the Uganda investigation. Accordingly, the OTP maintains close contacts with representatives of the affected communities in Uganda and representatives of the international community in order to understand and appreciate the complexities of the situation. In addition, the OTP has conducted over 20 missions to develop local relations and gather information. While we are not a party to peace talks, we continue to coordinate with the Government of Uganda and other relevant actors in order to achieve a comprehensive solution that will secure both peace and justice for those affected by the conflict. In an effort to address concerns of the local communities by respecting ongoing peace talks and avoiding negatively impacting those efforts, the OTP maintained a low-profile investigation strategy in Northern Uganda.

One of the most important services established during the Uganda investigation was Uganda's first witness protection system. This system was created in collaboration with the Victims and Witnesses Unit of the Registry and with the assistance of national authorities and local actors as a prerequisite for interviewing witnesses.

In addition to the cooperation received from the people and the authorities of Uganda, the success and efficiency of the Uganda investigation resulted also from the OTP's policy of focused investigations. The joint team selected six incident sites on which to focus the investigation, out of the approximately 850 incidents that occurred between July 2002 and June 2004. Investigators maintained this selective approach throughout the investigation, and were therefore able to focus their efforts on collecting the information necessary to link the crimes under investigation to those most responsible. Selecting six sites also reduced security risks by limiting the number of witnesses that needed to be contacted.

Based on the investigation, on 6 May 2005 the OTP requested warrants of arrest for Joseph Kony and four senior leaders of the LRA. Kony and the other LRA leaders are accused of having committed crimes against humanity, including enslavement and rape, and war crimes, including intentionally directing an attack against the civilian population and pillaging. On 8 July 2005, Pre-Trial Chamber II issued the warrants of arrest and requests for arrest and surrender, but kept the warrants under seal until 13 October 2005 out of concerns for the safety of victims and witnesses.

The OTP has and continues to work to support arrest efforts by monitoring supply and support to the LRA with a view to deterring that support and galvanizing international cooperation towards an arrest. Among the initiatives that the OTP concluded is an agreement with the Government of Sudan wherein the Government agreed to execute the warrants against the LRA. Such efforts have and will continue to contribute to furthering arrest efforts and limiting the ability of the LRA to commit further crimes.

## **The Darfur Investigation**

On 31 March 2005, under Resolution 1593, the United Nations Security Council referred the situation in Darfur to the Prosecutor, and in doing so recognized that the pursuit of justice is required to address the threat to peace and security in Darfur. The referral aroused strong reactions from within the Sudan, and the Government has pledged to investigate and prosecute all relevant matters itself.

Cooperation between the OTP and the United Nations proved critical for the next stages of the judicial process. Immediately following the referral, members of the OTP traveled to Geneva, Switzerland, and received more than 2,500 items, including documentation, video footage and interview transcripts that had been gathered by the International Commission of Inquiry for Darfur (Commission). On the same day the Prosecutor collected a sealed envelope from the United Nations Secretary General containing the conclusions reached by the Commission as to persons potentially bearing criminal responsibility for the crimes in Darfur. The Prosecutor read the list and resealed it. The Prosecutor did not consider the Commission's conclusions to be binding. Rather, the OTP proceeds on the basis of its own investigations, carried out independently and autonomously.

The Prosecutor has reiterated that the principle of complementarity applies in relation to the Darfur referral. The Office is obliged to respect any genuine criminal proceedings of relevance to the Court that take place before the national authorities. After two months of thorough analysis of the judicial activities in the Sudan, the OTP concluded that no relevant proceedings appeared yet to have taken place and opened an investigation into Darfur on 6 June 2005.

The ongoing conflict has prevented the OTP from investigating on the ground in Darfur, as the necessary

security conditions are not present for victims, witnesses and staff members. The OTP has therefore focused its investigative activities outside Darfur. Since the investigation's start just about one year ago, the OTP has conducted more than 50 missions to 15 countries, screened close to 500 potential witnesses, taken 61 formal witness statements, and collected and reviewed more than 8,800 documents. The OTP has consulted with scores of expert organizations and individuals, and has retained a number of expert consultants to build in-house knowledge of areas of particular importance, such as the incidence of sexual violence and assessment of mortality rates.

As of May 2006 there have been two missions to Khartoum. The first, in November 2005, was largely preparatory. The second, in February 2006, focused entirely on the issue of admissibility and had as its objective the assessment of national proceedings. Towards this objective, during the second mission the OTP delegation met extensively with judges, prosecutors, representatives of the police force and other government departments. During this mission the OTP gathered significant amounts of information to determine whether the Government of the Sudan has dealt with, or is dealing with, the cases that the OTP is likely to select for prosecution.

The OTP has concluded eight cooperation agreements with international organizations and bodies, with additional cooperation agreements pending. Approximately 40 requests for assistance have been, or are in the process of being fulfilled.

### **Situations Under Analysis**

The five situations currently under analysis include the situation in the CAR, following the referral by the CAR Government, and the situation in Cote d'Ivoire, pursuant to the declaration from the Ivorian Government. A mission to CAR has taken place to develop analysis of jurisdiction, admissibility and the interests of justice and one is planned for Cote d'Ivoire. The Office has at times acknowledged that a situation is under analysis, where senders have made the information public, or where analysis is in relation to a referral or public declaration of acceptance. However, the policy of the Office is to maintain the confidentiality of the analysis process. Where a decision is taken not to initiate an investigation on the basis of communications received, the Office will submit reasons for its decision only to senders of communications. This policy helps prevent any danger to the safety, well-being and privacy of senders and helps to protect the integrity of the analysis process.

### **Looking Forward: A Key Challenge Facing the OTP**

One of the biggest challenges faced by the OTP as it moves forward is how it should ensure that arrest warrants are executed. This is perhaps the most critical and difficult part of the system created by the Rome Statute. The ICC does not have its own state apparatus or enforcement capacity. Under the Rome Statute, it is the States Parties that bear the responsibility for arresting suspects and delivering them to the ICC for prosecution. Although territorial states have the mandate and possibility to control their own territory, in ICC cases they are often unable or unwilling to do so, making it difficult to execute arrest warrants. The ICC was able to effectively address this challenge in the Lubanga case, but more assistance will be needed to enforce the outstanding arrest warrants that have been issued in the Northern Uganda case. The OTP anticipates that this will be a key challenge in the next phase of its operations and that it must engage in a continuous dialogue with State Parties about their participation in executing arrest warrants.

# ADMINISTRATIVE ISSUES AND PRACTICAL CHALLENGES IN THE FIELD

Bruno Cathala

## Challenges for the Registry

The organization is still under construction. The establishment of the organization is ongoing. Meanwhile, three situations are under investigation. Pre-trial hearings are being scheduled more frequently. This means that the Registry has to put in place solid, long-term structures and systems, while simultaneously responding to *ad hoc* needs.

## Establishment of the Organization

The long-term systems that are being implemented relate to both the management of the organization and its judicial activities. They encompass systems such as an Enterprise Resource Planning system, Court Management systems for disclosure, handling evidence, transcripts, translation, databases for witnesses, victims and counsel, and systems for document storage, archiving, the library and so on.

The long-term structures the Registry is working on have two dimensions: an internal one and an external one. As regards internal structures, the Registry is further defining its decision-making processes, setting up the proper internal communication methods and establishing its regulatory framework, such as the Regulations of the Registry.

External structures include formal agreements that have to be drawn up, and also setting up regular contacts and dialogues with a view to ensuring the necessary cooperation with key players, that is:

- a) States and groups of states for matters such as relocation agreements, enforcement of sentences, information exchange and developments at the Court;
- b) The Host State with regard to interim premises, detention matters, the Headquarters Agreement;
- c) Other international organizations (United Nations, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, International Committee of the Red Cross, United Nations Mission in the Democratic Republic of Congo);
- d) Non-Governmental Organizations, in particular in relation to the operations in the field;
- e) The legal profession, academia, and so on.

The cooperation of all these actors is crucial for the work of the Court as a whole.

## What Are the *Ad Hoc* Needs that the Registry Has to Address?

The Court currently has approximately 560 employees, with a further 120 positions under recruitment. About 1000 applications are received each month and these have to be processed (we had 1400 in April). The Registry's administration provides day-to-day services to all staff. Furthermore, the Registry is busy

preparing a staff relocation to another building due to a shortage of space, and is involved in acquiring additional office space for 2007. (The plan is to construct prefabs on the site of the current car park in Saturnusstraat). In addition, we have to look into the matter of premises beyond 2007, in other words, the permanent seat of the Court. We are also working on the budget for 2007.

Furthermore, the Registry's current focus areas can be summarized in the following seven points:

### ***Field Operations***

Logistical and technical support has to be provided in the field. We have four field offices in three different countries; we have recruited local staff and missions are being conducted in the field on an ongoing basis by the Office of the Prosecutor and by the Registry (witness protection and support, defense counsel, teams for victims, outreach and so on). All of these activities have to be adequately supported.

We were able to organize the first transport of a suspect from the Democratic Republic of the Congo to The Hague; this involved many detailed and technical arrangements in cooperation with various parties (such as the French military and the Dutch police).

### ***Security***

Security is another factor that requires immediate action in the field to guarantee the safety of staff and also of people with whom the Court is in contact. Likewise, security at the Headquarters poses challenges that have to be overcome.

Information security is an issue for the proper conduct of proceedings (e.g. names of witnesses) but also for cooperation with states (e.g. exchange of information). A variety of measures are about to be implemented.

### ***Public Information / Outreach***

Outreach is conducted in both the Democratic Republic of the Congo and Uganda. We strive to actively engage in dialogue with the communities on the ground. Meetings are being held with the local communities, traditional leaders, NGOs and journalists. A strategic plan for outreach is being prepared and will be submitted to the Assembly of States Parties at its next session. The information provided to those who are affected most by the conflict is of paramount importance. It is essential for the mandate of the Court to be understood properly in order to pave the way for information on the actual proceedings. Information on the proceedings is necessary to ensure a fair and public trial.

### ***Translation and Interpretation***

The Court has two working languages, English and French. Various decisions have to be published in all six official languages. And that is not all. The languages we are faced with – the languages in which witnesses give their testimonies, which is the native language of the accused, or in which the evidence is presented – are Lendu, Swahili, Lingala or Hema in the Democratic Republic of the Congo; Acholi, Ateso, Lango, Massalit or Zaghawa. Translation and interpretation into and out of local languages remain challenging.

The Translation and Interpretation Section is currently training para-professional interpreters in Acholi in anticipation of forthcoming hearings.

### ***Witness Support and Protection***

The Victims and Witnesses Unit is fully operational. This unit provides in-house training for staff who have contact with witnesses so as to ensure the protection and well-being of both witnesses and staff. The Unit is already implementing support and protection programs in the field. It also provides round-the-clock support services to witnesses who appear before the Court, psychological and medical services, and situation-related threat and protection assessment in the field.

### ***Victims***

The Victims' Participation and Reparation Section jointly holds seminars, conferences, meetings and so on with the Public Information and Documentation Section so as to ensure outreach to victims. They explain to victims the mandate and the functioning of the Court as well as their rights under the Statute. We already have victims participating in the situation in the Democratic Republic of the Congo. We have trained our intermediaries in the field to assist victims in applying to participate in the proceedings by filling in forms.

### ***Defense***

Pre-trial hearings are being held in the presence of a suspect. His rights have been guaranteed since the beginning through the assistance of a duty counsel. The Office of Public Counsel is also providing support to this first case.

The suspect is detained in the ICC's own detention facilities.

We are continuing our efforts to establish an appropriate list of counsel (representing the different legal systems, taking into account geographical representation and gender balance). We will shortly be having a seminar with all the counsels on the list.

## Second Session: The Statute

### INTRODUCTORY REMARKS

Otto Triffterer

During our First Session, “The Court in Practice – Challenges Ahead,” the three organs of the Court informed us about their present activities, concerning in particular situations referred to the Court according to article 13 Rome Statute.<sup>1</sup> The discussion focused on predictable tasks ahead, in particular as far as they may amount to challenging the Court, because of a disputed factual, legal or political issue.<sup>2</sup>

Our Second Session will not deal primarily with actual situations or cases, but will examine the Rome Statute from the outside and consider *in abstracto*, whether the Statute can and needs to be reviewed in order to manage properly present and challenges to international criminal law. We shall also analyze whether tasks are already assigned to the Court, for which the statutory basis is not yet (completely) established; like for the prosecution of aggression or certain means and methods of warfare described in article 8 paragraph 2 *litera b* (xx).

Such an investigation might reveal inconsistencies, or lacunae which require a review of the Statute. Whatever aspects may appear, a comprehensive international document, like the Rome Statute, makes, after four years in operation, general considerations advisable or at least desirable. Is the Statute capable of fulfilling the functions, expectations and hopes, to guarantee the most effective protection of “the peace, security and well-being of the world,” as referred to in the Preamble paragraph 3? This includes not only the maintenance of sovereignty and independence of States. It further demands, in the interest of humanity, justice and the rule of law, to promote reconciliation between belligerent groups, fighting each other for various reasons, quite often for political and religious motives.<sup>3</sup>

Our task is not to analyze the Statute in order to support the Court when interpreting and applying the Statute. The Court itself is well enough equipped to face and deal with such problems, as can be seen, in particular, by articles 9, 21 and 119. Like the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, the ICC should have ample time to find its own way to handle the Statute with its material and procedural provisions, including the Rules of Procedure Evidence, whenever such problems arise.

A critical analysis of the Statute for a review has to deal with article 5 paragraph 2 and the above mentioned war crimes. But there are, in addition, other relevant documents adopted by the Rome Conference, in particular the Final Act, which could require a review of the Statute. Such a review may be expressly demanded or may appear as a legal or logical consequence from present regulations (especially if they become obsolete); or which need clarification not only for the Court, but primarily for properly defining

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<sup>1</sup> All further articles without an additional nomination are those of the Rome Statute.

<sup>2</sup> See for the three presentations Philippe Kirsch, “The Court in 2006 and Beyond,” Luis Moreno-Ocampo, “Lessons from the First Cases” and Bruno Cathala, “Administrative Issues and Practical Challenges in the Field.”

<sup>3</sup> See, for instance, for one of the armed conflicts in the Middle East, O. Triffterer, “Ius in bello: Eskalation durch „Kollateralschäden“ wie durch Kriegsverbrechen?,” in Moos, *et al.*, eds., “Strafprozessrecht im Wandel, Festschrift für Roland Miklau,” Studienverlag Innsbruck (2006), 557 *et seq.*

the law to ensure its efficiency as a deterrent, e.g. by clarifying, what is “of a nature to cause superfluous injury or unnecessary suffering” or an “inherently indiscriminate violation,” article 8 paragraph 2 *litera b* (xx), and “thus . . . contribute to the prevention of such crimes,” Preamble paragraph 5.

We may need clarity on whether article 8 describes war crimes which are in general punishable and “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes” as provided in its paragraph 1, or whether such crimes are only punishable or can only be investigated and prosecuted by the Court, when committed in such a broader context. The Prosecutor at this Conference tends to the latter narrow interpretation while I hold the opinion, that individual persons even without such a context can commit war crimes, “in particular” refers only to a typical way of committing war crimes or be prosecuted for such crimes, while in article 7 with regard to crimes against humanity such a context is an indispensable material element, limiting all alternatives mentioned there and requiring a corresponding mental element.<sup>4</sup>

Another question, is whether article 124, the narrow exception from article 120, is an example for a provision to be deleted in 2009 or at the latest when the State Parties come close to the number of members of the UN, thus confirming as clear evidence *ius cogens* with an *obligatio erga omnes*?<sup>5</sup> We should also examine the possibility of a perhaps politically desirable transfer of national criminal jurisdiction in “delicate” cases, such as abuse of power by State officials, to an international “neutral” body, and *vice versa*, like the establishment of “special conditions” to get the Lockerbie case on trial?<sup>6</sup>

Such aspects should be kept in mind when listening to our first speaker, Ambassador Christian Wenaweser on “Crimes within the Jurisdiction of the Court: Going Beyond the Core Crimes?.” He has represented Liechtenstein since the drafting process for the Rome Statute and is now chairing the Special Working Group of the Assembly of States Parties on the Crime of Aggression and the related Intersessional Meetings at the Liechtenstein Institute on Self-Determination at Princeton University. He will give us, in particular, an opinion on reviewing crimes already within the jurisdiction of the Court, whether they should be amended in the sense of more specification, like demanding a qualification for perpetrators of aggression (leadership-crime), and whether the list should go beyond the four groups of core crimes already enumerated in article 5 of the Statute.

Professor Roger Clark, our second speaker, who also participated in the preparatory work including the

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<sup>4</sup> See for detailed considerations on this question, though in a different context, O. Triffterer, „Kriminal- politische und dogmatische Überlegungen zum Entwurf gleichlautender „Elements of Crimes“ für alle Tatbestände des Völkermordes,“ in Schünemann *et al.*, eds. Roxin-FS (2001), 1416/1417, in particular 1.c; *idem*, „Ist Österreich, mit dem Vollzug des Völkerstrafrechts in Verzug? - Theorie und Praxis,“ in Pilgermair, ed., Steininger-FS (2003), 413, in particular 2.a; *idem*, “Article 28 Rome Statute extending Individual Criminal Responsibility for Crimes Within the Jurisdiction of the Court - a Violation of Article 22, *nullum crimen sine lege*,” in Triffterer, ed., Vogler-GS (2004), 257 before note 70 there; *idem*, “Genocide, its particular Intent to destroy in whole or in part the Group as such,” 14 *Leiden Journal of International Criminal Law* (2001), 406-408, section 3. See also my Concluding Remarks below, bullet two, the third double bullet. See for the opinion of the Prosecutor [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf), Admissibility page 8.

<sup>5</sup> See for details W. Karl, „Menschenrechtliches *ius cogens* - Eine Analyse von “Barcelona Traction” und nachfolgender Entwicklungen,“ in Eckart Klein, ed., Menschenrechtsschutz durch Gewohnheitsrecht (Kolloquium 26-28 September in Potsdam), Berlin 2003, pages 102 *et seq.*

<sup>6</sup> See for further details to the Scottish Court sitting on Trial at a small piece of Scottish territory in the city of Utrecht, the Netherlands, Aust, “Lockerbie: The other case,” 49 *Oxford Journal* (2000), 278-296.

Rome Conference and who has represented Samoa, is Governor Professor at Rutgers University in New Jersey. He will investigate the Statute and other relevant international documents to collect “Possible Issues for the 2009 Review Conference.” His list of issues to be dealt with includes possible changes, alternatives and amendments of substantial law as well as procedural aspects for their realization.

Finally, our panel challenges us to find and rank by substantial gravity, issues which may claim priority within the review process. Such aspects should be considered by competent persons and institutions on whether they should be presented already at the first Review Conference; or should we first have a preparatory discussion by all interested States and Coalition members as well as the Court, to find a common opinion on further actions in whatever direction? Our speakers will help us to make the right choices and decisions.<sup>7</sup>

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<sup>7</sup> The footnotes will be counted off under the “Closing Remarks” below.

## CRIMES WITHIN THE JURISDICTION OF THE COURT: GOING BEYOND THE CORE CRIMES

Christian Wenaweser

In considering the possible inclusion of new crimes in the jurisdiction of the ICC, certain criteria should be applied, and the following are suggested.

- **Mandate from the Rome Conference:** The provisions of the Rome Statute and, where applicable, the resolutions contained in the Final Act should be taken in to account.
- **Impact on goal of universal ratification:** It should be considered, whether the inclusion of a specific new crime will have a positive (or negative) impact on promoting the goal of universal ratification of the Rome Statute.
- **Best Interest of the Court:** Last, but not least, the best interest of the Court has to be taken into account when the inclusion of new crimes in the jurisdiction of the Court is considered. Key considerations in this respect should be:
  - 1) **Effectiveness and credibility of the Court.** It should be considered whether the work of the Court in operational terms is affected by the inclusion of new crimes.
  - 2) **Political standing of the Court, perception.** It should be considered if and how the inclusion of new crimes might affect public opinion and the perception of the Court
  - 3) **Creation of different legal regimes.** In considering the inclusion of new crimes, it should be taken in to account whether or not such inclusion might create different legal regimes and whether or not this is desirable (application of article 121 of the Rome Statute).
- Resolutions E and F form the point of departure for the consideration of expansion of the jurisdiction of the ICC.
- Resolution E deals with terrorism and drug trafficking together. Both are recognized as “scourges which pose serious threats to international peace and security.”
- Resolution E also expresses regret that no generally acceptable definition could be agreed upon for the inclusion of the crimes within the jurisdiction of the Court.
- It is thus stated rather clearly – and somewhat surprisingly – that the seriousness of the two crimes in principle warrants their inclusion in the jurisdiction of the Court.
- The Review Conference is therefore mandated to consider the two crimes with a view to arriving at an acceptable definition and their inclusion within the list of crimes. It is also worth emphasizing that the resolution calls for the consideration of the two crimes by “a Review Conference” rather than “the Review Conference” (contrary to the language in article 124). It can thus be argued that the Review Conference of 2009 will not necessarily have to come to an agreement on the two crimes.
- Both crimes are mandated to be considered only by the Review Conference itself and no separate process for preparing their inclusion in the Rome Statute is set up in the Final Act (which is the case for the crime of aggression).

- Resolution F and in particular its paragraph 7 address the question of the inclusion of the crime of aggression. The resolution mandates the Preparatory Commission to forward proposals to the Review Conference (even though it was already clear in Rome that the Preparatory Commission would not exist until seven years after entry into force). After the termination of the Preparatory Commission, this mandate was transferred to the Special Working Group on the Crime of Aggression of the Assembly of States Parties.
- As Resolution E, Resolution F also speaks of “a Review Conference” which leaves open the possibility of having the crime of aggression dealt with at a Review Conference to take place later than 2009. However, it is very clear that there is a general expectation that the 2009 Review Conference will take up the issue and postponing it to a later Review Conference is therefore not a politically viable option.

## **Aggression**

- While Resolution F speaks of “a Review Conference,” there is a political consensus that aggression must be considered at the 2009 Review Conference. It would be counterproductive to question this consensus.
- Resolution F speaks of “proposals.” It is unlikely that the Special Working Group on the Crime of Aggression can find agreement on one proposal to be forwarded to the Review Conference.
- Failure to agree would be perceived as contradictory to the Rome mandate and the spirit in which the Statute was drafted. It must be recalled that States agreed to include the crime of aggression in the Statute. A political fallout of a possible lack of agreement or decision must there be analyzed carefully.
- If no agreement on the crime of aggression is reached at the Review Conference, the Court is likely never to exercise jurisdiction over this crime.
- Impact on universality needs to be assessed. This would likely lead to some increase in ratifications, while a rather modest one.
- It is also possible that some States will not ratify because they do not agree with the provisions on definition and – perhaps even more so – on exercise of jurisdiction. There might also be States which decided to withdraw from the Statute because of the decision taken on the crime of aggression.
- The consideration of the crime of aggression should be one core element of the Review Conference.

## **Terrorism**

- Resolution E comments specifically on the absence of an acceptable definition. This situation persists as the ongoing discussions on a Comprehensive Convention make clear. No successful conclusion of those discussions is in sight, quite to the contrary – at least at the time of writing there is no political will for compromise.
- It is to be expected that the political pressure for the inclusion of terrorism in the jurisdiction of the Court will not be less than it was in Rome. It is to be recalled, in this context, that the Rome Conference took place way before 11 September 2001.
- The inclusion of terrorism was a demand that was made in Rome by a number of States that were numerically not very significant, but felt very strongly about the subject matter.

- It can be asked, whether or not terrorism with a generic definition covering all acts of terrorism makes sense for the inclusion in the Rome Statute. While terrorism as an international phenomenon is a threat to international peace and security, some acts of terrorism will certainly not reach the threshold of crime of serious concern to the international community as a whole. A “threshold” solution such as the one agreed on for crimes against humanity could therefore be considered, possibly taking into account the language offered by the High Level Panel on UN reform on attacks against civilians.
- An interesting development could be the possible establishment of a Lebanon/Hariri tribunal, if its statute was to include the crime of terrorism.
- It is clear that the definition of terrorism cannot be solved at the Review Conference itself, as was foreseen in Resolution E. Either an outside solution such as from the Comprehensive Convention can be adopted or else a separate process in the lead-up to the Review Conference is necessary. The latter seems all but excluded.
- Ratification: Not clear how many States would become States Parties solely because of the inclusion of terrorism. Some states felt very strongly about it in Rome, but it would appear that none of them have not ratified because of the absence of terrorism. The impact on ratification is therefore likely to be very modest.

### **Drug Trafficking**

- No progress on definition since Rome. International attention has decreased rather than increased since Rome.
- Drug trafficking is not a lesser problem than before, but criminal prosecution is perhaps more forthcoming and successful than on some other crimes.
- Drug trafficking per definition has pretty much always been a transnational crime. It might in some cases be difficult or controversial to establish on whose territory a crime was actually committed and therefore lead to difficulties in establishing jurisdiction of the Court.
- As is the case with terrorism, definition cannot be found at Review Conference proper. Unlike on terrorism, there are no outside parallel efforts underway to find a definition which could then possibly be inserted into the Rome Statute.
- Drug trafficking would in most cases be accompanied by very complex investigations, possibly involving the authorities of several States. In that sense, drug trafficking would likely lead to further budget increases.

### **Other Possible Crimes**

- Not much recognizable, not much in the discourse.
- Possibilities are trafficking in human beings and other forms of transnational organized crime, which would pose similar problems as drug trafficking.
- It seems advisable to limit the discussions at the Review Conference to Resolutions E and F.

## POSSIBLE ISSUES FOR THE 2009 REVIEW CONFERENCE

### Roger Clark

Article 123 of the Rome Statute says that the seven-year Review Conference is “to consider any amendments” to the Statute. The paper summarizes the results of an examination of the Statute, the Final Act of Rome and all the relevant literature the author could find discussing potential amendments that might be on the agenda of the Review Conference. It also discusses the vexed question of what amendment procedure applies to certain potential amendments, notably the “provision” on aggression that is contemplated in article 5 (2) of the Statute.

The only article in the Statute with a mandatory instruction to the Review Conference is article 124. That “transitional provision” enables States to opt out of the war crimes obligations of article 8 for seven years. It states that “The provisions of this article shall be reviewed at the [first] Review Conference.” “Reviewed” is open to interpretation. Deletion of article 124 or doing nothing seem the most likely potential results of the review.

The Final Act addresses two other matters. Resolution F of the Final Act says that the provision on aggression will be submitted to “a” Review Conference. Bear in mind the subsequent attention given to drafting on aggression by the Preparatory Commission and the Special Working Group on Aggression of the Assembly of States Parties. In that light, it is inconceivable that aggression will not be on the agenda of the first Review, along with article 124, in spite of the word “a.” Resolution E of the Final Act also speaks to consideration by “a” Review Conference of including terrorism and drug crimes within the jurisdiction of the Court. Unlike aggression, there has been no post-Rome consideration; there are no current proposals.

The most likely matters noted in the literature for consideration at a Review Conference (not all of them advocated by the author) are: adding a specific structure concerning defense counsel to the Statute; putting items such as anti-personnel mines, chemical and biological weapons and nuclear weapons in the Annex referred to in article 8 (2) (xx) of the Statute; correction of anomalies in article 17 where States act in bad faith in *convicting* rather than shielding people from conviction; adding the inchoate offence of “conspiracy to commit genocide” to article 25; adding jurisdiction over (some) legal persons; and expanding or contracting article 12’s preconditions to the exercise of jurisdiction.

Three different kinds of amendments to the Statute enter into force in three different ways. Which way applies to the provision on aggression is debated vigorously.

Some amendments, such as those of an “institutional nature” under article 122, merely require adoption at an Assembly of States Parties or a Review Conference by a two-thirds majority of the States Parties. They then bind all. Most amendments, however, require adoption by the two-thirds, followed by ratification or acceptance by seven-eighths of the Parties. They then bind all Parties. (See article 121, paragraphs (3) and (4)). A limited number, namely amendments “to articles 5, 6, 7 and 8,” apply only to States that ratify them (no minimum number required). (See article 121, paragraph (5)). How this works when read with article 5 (2) – added late in the Rome Conference – is the problem. Article 5 (2) speaks of “a provision [on aggression] adopted in accordance with articles 121 and 123.”

In the author's view, the most coherent interpretation of the Statute as a whole, in light of its preparatory work, is that "adoption" means the same thing in articles 5 (2) and 121 (3). All that is required is a two-thirds majority for the expectation of the Rome participants to be complete. Aggression is in the Court's jurisdiction in the Statute (article 5 (1)) and the definition provision will allow its exercise (article 5 (2)). Most emphatically, he is convinced that the provision of aggression will not be an "*amendment to article 5*" such as to bring article 121 (5) into play. It is a "completion" or "fulfillment" of article 5. It is an action taken to carry it out – not an amendment changing it. If some form of ratification is required, it is the seven-eighths procedure, which makes the crime applicable to all or none, rather than article 121 (5)'s opt-in language.

Adding (in particular) weapons of mass destruction to the Annex contemplated by article 8 (2) (b) (xx) raises analogous problems but the language is different. It probably supports the application of article 121 (3) and (4). Again, this is a fulfillment of article 8, contemplated by the Parties, rather than an amendment. The modality of adoption is plainly a highly charged one politically.

## CONCLUDING REMARKS

Otto Triffterer

Our two speakers have offered us quite a broad spectrum of possibilities and necessities for reviewing the Statute. These proposals reach, as far as material law is concerned, from specifying the existing definitions and extending the number of crimes within the jurisdiction of the Court, up to granting more procedural rights, for instance, to the defense on issues dealt with in article 17; the latter proposal however, may perhaps better be taken care of by the Court within its power to interpret the law when the wording does not clearly enough express the scope and notion of a regulation.

The different procedural modalities for the realization of issues by reviewing the Statute are basically regulated in articles 121-124. Whether an accepted amendment is applicable equally for all States Parties, or whether the coming into force is different for consenting Parties (depending on the date of their ratification) and for disagreeing States, with the option to “drop out,” for instance, is expressed in article 121 paragraph 5. It may depend on and is shaped by the scope and notion of the issue to be reviewed, in particular by its position and function within the judicial regime installed by the Statute.

Those alternatives concerning crimes punishable directly under international law are shaped by the inherent character of this new field of law and the specificities of the international jurisdiction of the Court. Those crimes falling within this jurisdiction are, however, not created by the States Parties, but only defined in the Statute. The wordings there merely describe, what is already anyhow punishable directly under international law, for instance by the Geneva Convention, of 12 August 1949, or “the laws and customs of armed conflicts,” as expressly mentioned in article 8 paragraph 2 *litera* a, b and e. In addition, these definitions serve the purpose, to assign and to limit the jurisdiction of the Court.<sup>8</sup>

However, there are proposals in the Final Act which concern crimes not directly punishable under international law. The task assigned there to the Assembly of States Parties may, at first sight, lead to the conclusion that reviewing aggression and war crimes is situated and structured on the same level as reviewing the exclusivity of the list of crimes contained in article 5. In reality, however, both issues, though partly overlapping, have to be dealt with in substance on a separate level; because structure, scope and notion of these two groups of crimes may be too different to be dealt with in the same manner.

Instead of commenting on what has been presented by our two speakers, I, therefore, will summarize on how the character of a proposal dealing with an issue inherent to international criminal law or (merely) to national law, may shape, limit or even exclude the possibility for review. Suitable to demonstrate this difference and dependence on basic pillars of the Statute, is to compare the review of crimes already listed in article 5 paragraph 1 with those merely recommended in the Final Act to be included into the Statute.

The crime of aggression is expressly provided for “review” in the Final Act by assigning the task to the Preparatory Commission to present proposals to define the different alternatives of this group and the

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<sup>8</sup> The footnotes are counted off from the “Introductory Remarks.” For details see O.Triffterer, „Preliminary Remarks,“ in O.Triffterer, ed., “Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article” (1<sup>st</sup> ed. 1999, 2<sup>nd</sup> ed. 2007), in particular margin nos. 22 *et seq.*, 37 *et seq.* and 59 *et seq.*

conditions under which the Court may exercise its jurisdiction over such crimes.<sup>9</sup> This regulation is based on the underlying position according to which aggression, in principle, is universally accepted as a crime directly punishable under international law. Therefore, aggression, whatever its final definition may be, is already within the jurisdiction of the Court.

Before such an agreement is achieved, aggression, however, is not “strictly construed” in the sense of article 22 paragraph 2; therefore, at present, investigations and prosecutions through organs of the Court would violate the principle *nullum crimen, nulla poena sine lege*. Such activities are, in addition, not admissible, because they would be *contra legem*, violating article 5 paragraph 2: “The Court shall exercise jurisdiction over the crime of aggression [only] once a provision is adopted . . . .”<sup>10</sup> An investigation of a crime of aggression by the Court is, therefore, not permissible, before such a definition and the conditions under which it can be applied, are adopted.

This position has been formally confirmed by the State Parties, when accepting the Statute. But since “[n]o reservations may be made to this Statute,” article 120, there are no reservations either possible with regard to amendments to the Statute. Article 121, therefore, provides, that a State may withdraw from the Statute “with immediate effect” if it does not accept the definition of aggression as a whole or in part.<sup>11</sup>

A similar situation exists with regard to article 8 paragraph 2 *litera* b (xx). This definition contains, in particular, in its first alternative, “weapons . . . which are of a nature to cause superfluous injury or unnecessary suffering,” but also with regard to its second alternative, “inherently indiscriminate violations,” war crimes, which are already more defined as aggression. But they are not yet sufficiently described in the sense of “strictly construed” as postulated by article 22 paragraph 2. This rule, therefore, also needs a review before such crimes can be investigated or prosecuted.

However, obviously, as for aggression, there is a general agreement about the punishability as such, because both groups belong to the so-called “core crimes.” In addition, an equally undisputed agreement requires more specification in detail.

There was no agreement to be achieved in Rome on which “weapons . . .” may have a certain specifically dangerous character. Therefore, these crimes should only be punishable within the jurisdiction of the Court, “provided that such” a specification is “included into an annex to the Statute . . . .” This requirement is based on the general demand to have only “strictly construed” definitions in the sense of article 22 paragraph 2; and since each substantive specification of the Statute concerning crimes shapes their definition, and, thereby, their scope and notion in such a way, that investigation or prosecution may be extended or narrowed, dissenting States must have the possibility to withdraw from the Statute, in case of an overwhelming majority of seven-eighths, or, otherwise, the amendment is not valid with regard to this State Party.

<sup>9</sup> Final Act, Annex I Resolution F paragraph 7. See also article 5 paragraph 2.

<sup>10</sup> Brackets added.

<sup>11</sup> Article 123 refers in paragraph 1 only to article 5 though in paragraph 3 it refers also to article 121 paragraph 6, 7 and 8. For aggression, however, only article 5 is relevant. But when the definitions for the different crimes put together in the group of “aggression,” are drafted and agreed upon, they may be included into a new version of article 9, while old article 9 can be combined with article 10, which anyhow (on purpose) has no heading. See for instance for this possibility O.Triffterer, in Roxin-FS, *supra* note 2.

With regard to the question already mentioned in my Introductory Remarks (before footnote 4), whether war crimes, similar to crimes against humanity, require as an independent element which can be summarized as being “part of a plan or policy or as part of a large-scale commission of such crimes,” the situation is comparable. Such a far reaching interpretation, would narrow the scope and notion of such crimes tremendously and thus limit already relevant investigations and prosecutions. It is true, cases without such a greater context can and should be left to national jurisdictions anyhow, because they show no or lesser “involvement” of State representatives. But, by all means, it must be prevented that potential individual perpetrators of war crimes believe in a possible defense, that they cannot be held responsible for such crimes because their belligerent activities have no relation to a greater context or at least had not the required mental element with regard to such circumstances. Whoever out of her or his own initiative kills one or more civilians, non-combatants, must be aware, that whatever the motivation may be, he or she may be prosecuted before the ICC. Its competence should not right from the beginning and in principle be excluded in such cases. On the opposite, such a competence must at least be left open, perhaps only for the purpose of establishing an example, when an individual perpetrator is in a responsible position or even a commander and when the national judicial system because of his or her military, political or personnel connections seems to be “unwilling or unable genuinely” to prosecute such persons properly.

In case the interpretation of paragraph 1 of article 8 is seen as an open question – what the author of these remarks does not believe – the issue should be presented at the latest to the first Review Conference. This demand is backed by the fact that nobody can force the Prosecutor to initiate an investigation or prosecution when he holds the opinion, that a connection to a greater context is a required material element, which does not exist in the specific situation or case. The same is true, when he would hold the opinion that such a criteria is a requirement for the admissibility of proceedings. The Prosecutor is under an obligation to investigate impartially, but he is not obliged to give up his legal opinion, whether it may be right or wrong. This is, in particular true, when his opinion is more favorable to the perpetrator than the opposite point of view.

In such cases of ambiguity an agreement should be reached by negotiations, as provided for in article 119. But it is more desirable to avoid such an uncertainty right from the beginning. It should be excluded that potential perpetrators can claim as defense that they believed at the time of the commission of the crime that such an element was necessary and therefore were lacking the mental element with regard to this material element. Similar defenses with regard to the admissibility of the case should equally be prevented as has been mentioned in my Introductory Remarks before and in footnote 4.

Highly disputed and, therefore, not generally accepted at the Rome Conference was the inclusion of additional crimes into the enumeration in article 5. But with regard to the crimes of terrorism as well as drug offences, the situation is different from the examples already mentioned above. No agreement could be achieved in Rome about what terrorism means, which acts of terrorism are already punishable and which should fall within the jurisdiction of the Court. This opinion was later supported by the aspect that attacks like on September 11, 2001 on the USA may anyhow fall under the notion of crimes against humanity or even war crimes. In addition, such and other terrorist acts could be sufficiently prosecuted on the national level. The “recommendation” in the Final Act, correspondingly, only proposes to “consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion into the list of crimes within the jurisdiction of the Court.”<sup>12</sup>

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<sup>12</sup> Final Act Annex I Resolution E.

The situation has not changed since then, as can be seen by the reactions to September 11, 2001. No successful attempts have been made within the United Nations and the Assembly of States Parties to start or accelerate relevant drafting proceedings. Obviously the opposite opinion prevails, that the two crimes differ by their structure too much from the “core crimes.”

With regard to aggression and the above mentioned war crimes, for instance, the punishability directly under international law is confirmed by the Statute which all States Parties have accepted, and many more at the end of Rome Conference. Both crimes now only need a specific definition. For crimes of terrorism and drug crimes, however, the Review Conference will first have to decide, whether and by which modalities such crimes are at all of a nature which directly endangers the international community as a whole. If this is answered in the affirmative, it has to be decided, whether such crimes are already or should be made punishable directly under international law, and perhaps, should fall within the jurisdiction of the Court.<sup>13</sup>

In addition, the four groups of crimes listed in article 5 are already generally accepted and acknowledged as punishable directly under international law, because endangering the highest values of the international community, namely “the peace, security and well-being of the world.” They mirror the “core crimes,” which, in particular, since Nuremberg and Tokyo, are considered to be “the most serious crimes of concern to the international community as a whole,” for the prevention of which national law is quite often not sufficient. Article 5, therefore, establishes the jurisdiction of the Court for these crimes and, at the same time, limits it to the four groups.<sup>14</sup>

This limitation does, however, not mean that there are not “serious crimes” or perhaps even other “most serious crimes” of concern to the international community. The Statute by mentioning only the latter, in particular in the Preamble paragraph 4, as well as in articles 1 and 5, leaves this question open. It only states by *argumentum e contrario* that, in case there are, such crimes do not fall (now) within the jurisdiction of the Court. Because “the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole,” article 5 paragraph 1 sentence 1; and, according to the second sentence there “the Court has jurisdiction in accordance with this Statute with respect to the following crimes,” listed under a-d only.<sup>15</sup>

In addition, the Preamble in paragraph 6 recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” The expression “international crimes” is in this context comprehensive. It includes not only the most serious crimes of concern to the international community but also all others with a transnational character, which by whatever relations cross state borders.<sup>16</sup>

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<sup>13</sup> See for this aspect, for instance O.Triffterer, Steininger-FS, *supra* note 4.

<sup>14</sup> O.Triffterer, “Command Responsibility” - *crimen sui generis* or participation as “otherwise provided?” in Lagodny *et al.*, eds., Festschrift für Albin Eser (2005), 907, *et seq.*; *idem*, “Security Interests of the Community of States, Basis and Justification of an International Criminal Jurisdiction, *versus* “Protection of national Security Information,” Article 72 Rome Statute in H.Roggemann and R.Sarcevic, eds., *National Security and International Criminal Justice* (2002), 53 *et seq.*

<sup>15</sup> To the exclusiveness of the jurisdiction over only the four groups see O.Triffterer, Eser-FS, *supra* note 14.

<sup>16</sup> O.Triffterer, “Preamble,” margin nos. 16 *et seq.*, in Commentary, *supra* note 8.

Therefore, with regard to the recommendation in the Final Act, it has to be assessed, whether crimes of terrorism and drug crimes, at Rome not accepted to be included, are of the same gravity and structure as the core crimes listed in article 5 and, therefore, should be defined for being included within the jurisdiction of the Court by a decision of the Assembly of States Parties at the first Review Conference 2009.<sup>17</sup>

In principle, and formally, the Assembly of States Parties is free to include any crime “strictly construed” into the Rome Statute. But reservations arise from the fact, that the Court is established according to the Preamble and further regulations for the purpose to prevent and prosecute (only) those crimes which are violating legal values inherent to the international community as such and for the protection of which national law and jurisdiction may not offer sufficient guarantees, in particular, when the State or one of its representatives is involved in the commission of such crimes.

Since each legal system has the right and is obliged to protect its own values and interests, the Charter of the UN emphasizes “international peace and security of mankind” as especially important legal values of the community of nations as a whole, by mentioning it more than thirty times.<sup>18</sup> This independence of national values is based on the fact that international law as the legal order of the community of nations is an independent comprehensive legal system by itself. It, therefore, carries criminal law as *ultima ratio* in it to protect its inherent values and interests. Each legislator can make use of this possibility to sanction grave violations directly under its penal law and to make use of its corresponding inherent *ius puniendi*.

But the “Rome Statute of the International Criminal Court” is not a convention which has “created” the punishability of certain crimes under international law. It merely has as already mentioned above, defined what is anyhow universally accepted as being already established as crimes to be prosecuted on the international level.<sup>19</sup> Terrorism was not included under this category at Rome; and also not when the Statutes for the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda were adopted by the Security Council in 1993 and 1994. There was confirmed as crimes under international law, “what was beyond any doubt” already punishable directly under international law, without including special acts of terrorism (or drug offences).

Independent of this theoretical point of view it is, in addition, questionable whether it is advisable or helpful for fighting core crimes to put also crimes of terrorism and/or drug offences under the same international jurisdiction. To extend the jurisdiction of the Court to these crimes may diminish the respect for this newly established institution and endanger its independence and impartiality. These crimes are not punishable directly under international law because they do not concern values, inherent to the international community as a whole, in particular “the peace, security and well-being of the world,” which include, sovereignty and independence of each individual State. Crimes of terrorism and drug offences do attack in principle only legally protected values, inherent to the national legal order of the States. In case terrorist acts endanger exceptionally one of these values, they may be investigated and prosecuted on the international level most probably anyhow

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<sup>17</sup> See *supra* note 15.

<sup>18</sup> See O.Triffterer, “Preliminary Remarks,” *supra* note 8, margin nos. 21 *et seq.* and there note 44.

<sup>19</sup> See for instance O.Triffterer, “Preliminary Remarks,” *supra* note 8.

as crimes against humanity or even war crimes.<sup>20</sup> But generally, even if such acts have an international character, because committed by an internationally organized group or by transgressing national legal borders, such crimes do not violate the above mentioned values of the international community as a whole.

The fact that a transnational commission of such crimes and a corresponding criminal organization require more international cooperation than ordinary crimes (the commission of which is limited to a violation of internal national values), does not require nor create responsibility directly under international law. The need for cooperation between States to effectively fight such crimes does not change the national character of these crimes. It is the need for cooperation on the horizontal level between States, each equally interested to protect its legal values, which makes States willing to mutually assist each other to prevent or prosecute such crimes. Such cooperation should make national jurisdiction more effective and, therefore reciprocity, for instance, is in the interest of each State, one of the basic guiding principles. That this category of crimes exists is demonstrated in preambular paragraph 6, whereby the wording “international crimes” those mentioned in article 5 and others of an international character what’s however are equally included.<sup>21</sup>

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<sup>20</sup> For these aspects see O.Triffterer, “New Dimensions of International Terrorism: A Challenge for International Criminal Law and its Enforcement Mechanism?.” The following contents have been presented and discussed at an International Conference, The Hague 18.06.2002 and *idem*, “International Criminal Law and its Enforcement - General Aspects Established as ‘Principles’ (A 15-hours lecture)” at Teramo University, Master on International Co-operation against International and Trans-national Crimes, Teramo, March 2003.

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    - cc) Summary
  - b) Enforcement on the national level
    - aa) New dimensions of terrorism justifying special limitations of civil rights and of the rule of law?
    - bb) Suitability of ordinary jurisdictions and military courts - no need for special military commissions dealing with criminal investigations and prosecutions
    - cc) Mutual assistance in criminal matters, horizontal cooperation
    - dd) Application of international law by domestic courts, indirect enforcement model
  - c) International enforcement, different models
    - aa) Ad hoc tribunals, the permanent International Criminal Court besides truth and reconciliation commissions, substituting punishment?
    - bb) Dependence on national legal assistance, vertical cooperation
3. Suitability of the ICC to contribute to the prevention of terrorism?
  - a) Jurisdiction over core crimes only
  - b) “Complementarity,” a compromise based on practical needs, but limited by victimological particularities
  - c) Need to amend the Rome Statute?
    - aa) International terrorism and the variety of its appearances including genocide, crimes against humanity, war crimes and/or aggression
    - bb) Future perspectives, in particular with regard to treaty-based crimes
4. Conclusion

<sup>21</sup> Triffterer, *supra* note 16.

Cooperation between States and the ICC is, quite differently, a vertical support to protect legal values, inherent to the international community as a whole. States as members of this community have to help the Court which is lacking sufficient enforcement mechanism of its own or of the international community as a whole. The States, therefore, are the “prolonged arm” of “their” community, to which they belong as constituent members. They may substitute or represent it as well as exercise its rights with the consent of this community (indirect enforcement model). Therefore, they also may exercise on behalf of this community its inherent *ius puniendi*. And, because of this mode of subordination, they can be “called to order” if they are unable or unwilling to genuinely deal with situations or cases, falling within the competence of this community, *in concreto* of the ICC.

The “Complementarity Regime” of the Rome Statute gives priority to State jurisdiction for prosecution. Because, as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia have demonstrated, the load of cases to be dealt with would be too big for any international tribunal or court. In addition, many of the cases are not under the protection of the State concerned or “involved” and, therefore, the risk to lose independence and impartiality is not as extremely high as when the States or one of their representatives are “involved.” Such crimes, therefore, can be treated properly by national jurisdictions. But according to the “Complementarity Regime” of the Rome Statute, the International Criminal Court finally decides, if the State handling the case has fulfilled its task in the interest of the international community as a whole properly. If States are “unable or unwilling genuinely” to do so, or have conducted proceedings already, for “shielding the person concerned” or otherwise not “independently or impartially,” and, therefore, not in the interest of the international community as a whole, the final competence of the Court is triggered according to articles 17 or 20.

Therefore, the recommendation of the Rome Conference ought to be considered at the Review Conference, but should not lead to include crimes of terrorism or drug crimes into the list of crimes, falling within the jurisdiction of the Court. Time may – hopefully not – come when these criminological appearances are of global gravity and violate basic values of the international community as a whole to such a degree that they have to be made punishable directly under international law and should fall under the competence of the Court. So far, however, such a situation is not yet visible.<sup>22</sup> The attack of September 11, 2001, on the opposite, has documented that the present Statute with its four groups of core crimes is sufficiently equipped to investigate and prosecute those criminological appearances, which because of their scope, notion and organizations do fulfill all elements of a crime against humanity or a war crime.<sup>23</sup> It is, therefore, more important to abolish the causes for such national crimes, for instance by distributing the wealth on earth in a way that no longer millions of people, and in particular children, starve.<sup>24</sup>

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<sup>22</sup> See O.Triffterer, in Steininger-FS, *supra* note 4.

<sup>23</sup> See O.Triffterer, *supra* note 20.

<sup>24</sup> Lately, Antonio Cassese, however, has promoted to include terrorism into the list of crimes enumerated in article 5, without mentioning drug offences. See Antonio Cassese, “Is the ICC Still Having Teething Problems?” 4 *Journal of International Criminal Justice* (2006), 434-441.

## Third Session: The Way Ahead

# SCENARIOS AND OPTIONS FOR THE REVIEW

Rolf Fife\*

### **Current Mapping of Needs with Regard to the Preparation of the Review Conference**

The Assembly of States Parties to the Rome Statute for the International Criminal Court appointed a focal point for the issue of the Review Conference under article 123 of the Rome Statute. The mandate is to solicit and receive 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.

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 reflecting a deep commitment to the aims and integrity of the Statute, combined with an acknowledgement that the Court has been in existence only for few years. Key procedures have not yet been put into operation, thus limiting the empirical basis for discussion of need for any amendments in important areas. Such factors may impact on the scope for discussion of amendments at this stage, while giving instead priority to questions as to what the Review Conference should usefully focus on, in order to enhance the principles and purposes of the Statute and, in short, support the Court.

In the following, some reflections are offered to contribute to structuring a framework for further discussion in order to promote these broadly shared aims.

### **When is the Conference to Take Place?**

The Statute decides 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 even clearer e.g. from the French and Spanish versions, which use respectively the terms “convoquera” and “convocará”) that the convocations, or invitations, have to be issued in July 2009. This requires that the Conference be held within a reasonable deadline thereafter. Practical conditions, including the need to avoid conference scheduling which would *inter alia* collide with the ordinary session of the United Nations General Assembly, may thus be fully taken into consideration. Admittedly, this would allow holding the conference in December 2009 at the earliest, or at a suitable time in 2010. If deemed appropriate, holding the conference in 2010 would usefully allow for preparations by the new Bureau of the Assembly elected

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\* Director General of the Legal Department of the Royal Norwegian Ministry of Foreign Affairs, focal point at the Assembly of States Parties for the International Criminal Court for preparations for the Review Conference under article 123 of the Rome Statute. The opinions expressed in this paper are informal, tentative elements that do not represent any governmental views, but are intended to facilitate further exchanges.

in the fall of 2009 and use of that session of the Assembly of States parties to finalize the preparations for a successful Review Conference.

Although there is no legal obligation to convene further Review Conferences afterwards, and although amendments may be adopted later without holding such conferences, it should also 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 will “be the last opportunity to address a particular issue.”

### **What is the Review Conference? What Can a Review Conference Be?**

Article 123 of the Statute provides that such a conference shall “consider any amendments to this Statute.” Such a 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. 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 only exception, it is entirely up to the States Parties whether reviews of other provisions will take place at the Conference.

This is confirmed also by guidance in the resolutions E and F of the Final Act of the Rome Diplomatic Conference. A consideration of 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 is recommended at “a Review Conference” (Resolution E). In a similar vein, proposals shall be submitted “at a Review Conference,” with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute (Resolution F, paragraph 7).

The criteria contained in article 121, paragraphs 3 to 7, are decisive with regard to the assessment as to what amendments may be adopted. For all practical purposes, only proposals that command a very broad support, and that are considered almost by consensus as being “ripe for inclusion,” can be included in the Statute.

This description, in a nutshell, of obligations with regard to the subject-matter of the first Review Conference, can only provide 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 the interests of international criminal justice.

The Review Conference will also, and not least, play an important role with regard to projecting to the outside world a status of the development of the Court and of States Parties’ consensus with regard to international criminal justice. This will in practice 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 underway.

Key success criteria for the conference will therefore probably have less to do with amendments to the Statute, than with what kind of overall message is conveyed through the holding of the Review Conference to the international community at large about international criminal justice.

## **Possible Inspiration from Other Review Conferences and Processes**

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.

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 achieved on enlarging the list of weapons subject to a comprehensive prohibition, this may be relevant for the States Parties to the ICC.

The experience related to the 1979 Convention on the Physical Protection of Nuclear Material is also interesting. It illustrates the evolution of circumstances that led to substantive amendments of the original convention. The latter entered into force in 1987, with reviews to be held 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.

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

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

In the case of the 1995 Agreement, limited time had passed since the entry into force. It was perceived useful to share views and garner broader knowledge about implementation of the treaty norms on a national and regional level, as well as compliance issues and challenges related to the latter. Such a stock-taking was viewed as important to contribute to increased effectiveness and participation in the agreement. The possibility for consideration of amendments was deferred to a later stage, on the basis of a need assessment.

Before deciding on the length 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.

## **Some Food for Thought**

Limited approaches to the focal point up to now, might indicate that there hitherto is little sense of urgent needs with regard to amendments to the Statute. Nevertheless, preparations need to start in 2006 with a view to utilizing the remaining time before the conference, in practice the next two years, to effectively ensure success.

As a first step, consideration may be given to establishing a Working Group under the Assembly of States Parties to this effect. Informal intersessional meetings may take place on particular issues.

Such a Working Group may consider, and prepare relevant documents, three broad clusters of issues:

- Any clarification with regard to the precise rules of procedure applicable to the Review Conference, *cf.* article 2 (2) *et al.* of the Rules of Procedure of the Assembly of States Parties.
- With regard to the subject-matter of the Conference, how to structure (i) a stock-taking of Court activities and highlighting of issues, which will be useful for the ICC, (ii) consideration of progress made in various existing *fora* which have a bearing on the possibility of amendments of the Statute, notably in the Special Working Group on the Crime of Aggression, and (iii) consideration of any issues which could give rise to amendments and which should be discussed in the Working Group. This should be done on the clear understanding that the Working Group cannot duplicate the work carried out in other *fora*. Moreover, consideration of amendments should fully take into account the need for very broad support for proposals to succeed.
- Practical and organizational issues related to financial, administrative and other practical arrangements, including consideration of particular Secretariat needs.

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 through other means than Working Group deliberations.

A general prerequisite for further discussions is transparency and broad based participation, so that assessments made give an accurate basis for decisions as to what may be supportive of the ICC.

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 and other international institutions may also provide important input to the Conference.

## REFORM/REVIEW: THE ROLE OF THE ASSEMBLY OF STATES PARTIES

Renan Villacis\*

### Dates, Venue and Budget

The Secretariat suggested that States Parties give a tentative indication, if possible during the fifth session of the Assembly of States Parties (ASP), of the dates and venue for a Review Conference, so as to be in a position to reserve conference facilities at possible venues (New York/The Hague/3<sup>rd</sup> venue).

As regards the dates, the Review Conference could only take place sometime in the final third of 2009, at the earliest. The Review Conference could also take place in 2010.

A final decision on the venue would have to be taken one year before the Review Conference, bearing in mind the respective advantages and disadvantages (such as possible visa restrictions).

As regards the budget for a Review Conference there would be two possibilities: a) Assembly financed, or b) Third State financed. If option “a” was preferred, then the tentative date of the Review Conference would determine the respective timeline:

Review Conference Date	ASP Decision	ASP Budget Preparation	ASP Adopts Budget
2009	end 2007	spring 2008	end 2008
2010	end 2008	spring 2009	end 2009

### Rules of Procedure

Well in advance of the Review Conference, it would be necessary to develop the respective Rules of Procedure, which could be based on the Rules of Procedure of the Assembly, subject to an analysis of the role of observer States and invited States. Another issue to be discussed is the possible inclusion of a deadline for submitting proposals for consideration by the Review Conference.

### Bureau

It was noted that if the Review Conference takes place in 2010 the Bureau directing the planning process would be different from the current Bureau.

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\* Director A.I. of the Secretariat of the Assembly of States Parties. Due to the unavailability of Mr. Bruno Stagno Ugarte, President of the Assembly of States Parties, who was originally foreseen for this topic, Mr. Villacis was invited to address the seminar.

## THE COMPLEMENTARY ROLE OF ACADEMIA

Wolfgang Danspeckgruber

Since its creation, the International Criminal Court has been at the center of extensive scholarly scrutiny and academic interest. Certainly, there had been much interest on the part of academia in a system of international penal law even before the establishment of the Court but this is not the place to list the vast amount of scholarly contributions to the field of international penal law and to the establishment of the ICC. Suffice it to say, academia has offered its contribution and will continue to provide input for the work of the ICC in the future – both by offering critical analysis or helpful commentary.

Since 2003, the Liechtenstein Institute on Self-Determination at Princeton University (LISD) as well as other academic institutions, notably in Europe, have had close relations with the Court and its officials and have contributed to its work in many ways. Specifically LISD has organized and hosted the intersessional meetings of the Assembly of States Parties' Special Working Group on the Crime of Aggression at Princeton University. Furthermore LISD and its associated faculty has been engaged in increasing teaching about legal and political ramifications of the ICC and its role in the emerging international system in courses offered at Princeton's Woodrow Wilson School of Public and International Affairs.

The upcoming review process will certainly attract great attention in academia, particularly in America. In what way this contribution can unfold and to which degree it will be beneficial to the overall process, will depend also on the Member States. I am grateful, therefore, for the opportunity to briefly delineate what academia could do and also suggest anticipatory strategies to ascertain that academia's role will remain to be of advisory nature and hence beneficial to the process as such.

- 1) *Research*: In view of the many substantial theoretical questions that could be addressed at the Review Conference, the concern has been expressed whether Governments would have the necessary time and personnel resources to reflect in depth on the various issues. I propose that the analysis of some of the more theoretical questions could be "outsourced" to academic institutions. These could examine a problem and propose different solutions so that Governments would have substantive materials on which to base their decisions. A special publication devoted to the upcoming review could be envisaged, which would need to be published at the latest at the beginning of the year 2008.
- 2) *Organization of preparatory meetings*: If specific issues are known well in advance, a series of workshops or seminars could be organized to give governmental experts, representatives of Non-Governmental Organizations, officials from the Court and academics the possibility to interact and explore possible scenarios. The academic institutions would serve as neutral and independent meeting places with no other incentive but the greatest success of the ICC. I could envisage special meetings with ICC experts, political key people and possibly philanthropic contributors about the future of the ICC and its challenges, or to devise possible anticipatory strategies, or to identify what issues deserve the in-depth analysis mentioned above.
- 3) *Academic accompaniment of the conference*: Obviously, the Review Conference will be closely observed by legal and political scholars. This can also produce unfortunate results: the frustration of some that their views and opinions are not considered could bring about the publication of the results of the conference in sarcastically or cynically written articles or books. My proposal: why not

draw academia in more closely during the conference? This could be achieved by including scholars in national delegations (as was done to a large extent at the Rome conference but not continued since at the meetings of the Assembly of State Parties) or creating an open ended academic advisory council in preparation of and during the conference that has access to the meetings in a specific formula (e.g. “Arria”-style meetings of the United Nations Security Council, etc.) or that benefits simply by its presence and the possibility to lobby delegations at the Conference – just like NGOs.

- 4) *Selling the results*: Obviously, any result of the Conference – even its complete failure – would subsequently be covered by the media. In view of the need of the ICC to attract new Member States, this will be a particularly crucial moment for the future of the Court. I thus propose that we should plan right from the beginning to involve internationally known, independent scholars in the analysis of the results of the review to ensure that the ICC *really* receives at least a fair and balanced evaluation. These academics and experts could also be asked to pursue an active but non-polemical role in “outreach” to the media and interested public and possibly create a “catalogue” of arguments to explain the result to the public. This would, in time, also benefit the principle function of academia as the key actors for education of the next generation.

I am thus convinced that the advantages of involving academia closely in the preparations, during and in the aftermath of the Review Conference would have far-reaching benefits. I furthermore believe that such a policy of inclusion could abet fears of government experts about “too much theory” or “too much abstract talk” that academics are often associated with. It is however clear that the role for scholars at the Review Conference should be a limited one and of advisory nature. Any politically motivated meddling would not be acceptable. However academic participation could offer a constructive and positive contribution; particularly, if such a role is clearly defined and the State Parties enable and encourage it. The result could be a better and a stronger ICC; indeed a Court that is better understood and appreciated by the international community and in the emerging international system.

## THE WAY AHEAD: A SUMMARY

### Prince Zeid Al-Hussein

There was general agreement among the participants during this portion of the meeting that, in establishing the scope and objectives of the Review Conference, the Assembly of States Parties (ASP) will probably opt for a restrictive, needs-based, treatment of any proposed amendments to the Rome Statute. Naturally, article 124 will have to be considered at the Review Conference, and there will be an expectation that the Crime of Aggression will, likewise, undergo its final scrutiny prior to the adoption of its definition and method of referral – with hopefully one text, or most probably two options, submitted to the conference for decision. But all other issues, it was felt, need to be considered prudently.

It was also generally maintained that the Review Conference should not focus exclusively on amendments, rather it should be an opportunity for stock-taking (reviewing cooperation issues and associated agreements) for making it an “occasion,” for genuine celebration, as well as for promoting greater ratifications – after all, it was noted, it could be the first and the last Review Conference. Moreover, there was general appreciation that a coherent view of the Court will hinge on the Court’s performance prior to 2009, and therefore on the image it has shaped for itself.

Where there seemed to be differences of opinion lay in the extent to which all potential amendments ought to be examined in the preparatory phase, with one group favoring a full examination of all of them – technical and otherwise – and other participants seeing danger in this and supporting a review, limited to addressing the cardinal issues only. Either way, virtually everyone believed, especially after having absorbed the broad range of possible, technical, amendments (not to mention the possibility of Trojan horses lying therein) that the end of the preparatory process should lead the ASP to favoring a limited review of amendments.

In terms of the practical arrangements, the way ahead, the participants believed that the ASP should in due course establish a Working Group for the Review Conference, with a group of experts possibly providing the Group with an analytical paper to serve as a basis for discussions. It would be expected that the ASP Rules of Procedure would apply. As in the past, international civil society should also contribute to the preparatory exercise. Furthermore, budgetary decisions will have to be initiated in 2007 in order to prepare the budget in 2008 for 2009. The first possibility of the Review Conference will be after July 2009 (a new Bureau will be elected in fall in 2009). The Review Conference could conceivably take place in 2010.

As to the venue of the Review Conference, rather than wait for a State Party to offer a location, it was believed the ASP should be strategic and deliberate in its determination of a suitable location, and should consider holding the conference somewhere in the developing world.

Finally, the participants believed that academia should be involved through “anticipatory outreach” activities, through meetings and specialized seminars, and by providing expertise to complement and support the review process.

## Fourth Session: Conclusions

### CHAIRMAN'S SUMMARY Ferdinand Trauttmansdorff

#### **Statement by Court Officials**

The heads of organs of the Court gave presentations summarizing the achievements that the Court has attained and the activities it was undertaking in the context of the strategic plan. In particular, Court officials stressed that the Court had yet to complete a full cycle of investigation, prosecution, trial and enforcement of sentences and that it was, therefore, not advisable to provide concrete proposals to improve the existing legal regime, in particular as regards the Rome Statute, already at this stage.

Afterwards, other participants considered different aspects concerning the first Review Conference.

#### **Scope of Review Conference**

Two options were raised on this crucial matter, thus highlighting the need to seek agreement on the purpose of holding a Review Conference.

- a) Restrictive approach to the Review Conference, limiting its mandate to the most essential amendments of the Rome Statute
- b) Broaden the scope to include:
  - Taking stock of the Court's achievements;
  - Assess needs;
  - Increase ratifications/accessions;
  - Consider the impact of ratifications in the adoption of implementing legislation;
  - Review implementation of Rome Statute provisions (i.e. unilateral declarations, article 98);
  - Review effectiveness of complementarity/cooperation;
  - Raising awareness of and support for the Court.

The scope would have to be addressed before deciding on date and venue. Some points of the broader approach might best be considered in the context of the Assembly.

#### **Review Conference**

It was noted that there is only one mandatory Review Conference under the Rome Statute; others are possible, but not strictly necessary since proposals for amendments can be made during regular sessions of the Assembly.

It was stressed that the preparatory process needed to have as wide a participation as possible among all States.

## Need for Amendments

- Onus to explain the need for amendments would be on those proposing the amendments;
- The success of the Review Conference will be determined by the image it conveys of the Court, not the amendments *per se*;
- No pressing need for amendments to Rome Statute, though the matter might merit revision in light of developments taking place before the date of the Review Conference.

## Issues for Possible Review

- A very limited number of States have contacted the focal point on Review Conference issues;
- Caution against having a series of amendment proposals put forward to the Review Conference that may weigh heavily on the success of the Conference;
- Particular caution on suggesting amendments to articles 6 to 8, which contain core crimes and are considered to reflect customary international law.

It was noted that the following issues would most likely merit consideration:

- Article 124: A review of this article is explicitly mentioned in the Statute; its deletion would most likely receive general support.
- A discussion of the crime of aggression must take place, in order to enable the Court to exercise its jurisdiction over this crime, which is in accordance with the compromise reached in Rome. While it can be argued, strictly legally, that such a discussion is not mandatory; there is a strong and widespread expectation that the crime of aggression will constitute the centrepiece of the Review Conference.
- Terrorism and drug trafficking may also be discussed, given that they are referred to in Resolution E of the Final Act of the Rome Conference.

In addition, proposals for amendments could be considered in relation to:

- Conspiracy to commit genocide;
- Annex on weapons, projectiles and material and methods of warfare referred to in article 8, paragraph 2 (b) (xx);
- The criminal responsibility of legal entities;
- Precise regulation of defence rights;
- Clarification of articles 17 and 20 in relation to national proceedings that might not comply with due process standards; the impact of national pardons/amnesties with regard to admissibility and the protection of *ne bis in idem*.

## Pre-Review Conference Discussions

The following *fora* were considered as options, possibly as complementary ones:

- a) A Working Group established at the fifth session of the Assembly of States Parties;
- b) Informal intersessional meetings with open-ended invitation to States;
- c) Informal meetings with more limited participation; and,
- d) A group of governmental experts, who prepare proposals that could serve as guidelines for consideration by States Parties.

## **Role of Academia**

Provide legal commentaries, assist with venues for discussions, encourage interest in Review Conference process.

Project proposal for academia:

- Prepare a catalogue of issues;
- Continue to contribute to the review process by preparing articles on general and specific issues timely for the Review Conference; the general issues could be published in first semester of 2008;
- Hold meetings/seminars of academic experts and government officials drawing attention to the Court and supporting the process leading up to the Review Conference.

## **Planning for Review Conference**

### ***Date and Venue***

Need for Assembly to give tentative indication, at fifth session in 2006, of date and venue (so as to reserve conference facilities at possible venues and allow for preparation and approval of respective budget):

- The date: sometime in the final trimester of 2009, at the earliest;
- Suggested duration would vary from a minimum of two days to one week;
- The venue: New York, The Hague or 3<sup>rd</sup> venue, possibly in the developing world where it would create greater visibility and thus have more immediate impact.

### ***Rules of Procedure for the Review Conference***

Possible need to adopt Rules of Procedure of the Review Conference, following the Rules of Procedure of the Assembly:

- a) Provisions on the role of observer States and invited States. (They have almost equal status as States Parties in the Assembly. The Special Working Group on the crime of aggression is open, on equal terms, to all States that have signed the Final Act); in particular the question as to whether or not observer States can submit proposals must be considered.
- b) The Question, if the provision on loss of voting rights for States in arrears remains applicable, should be dealt with.
- c) Possible inclusion of a deadline for proposals to be submitted a specified number of months before the Review Conference.

## **Challenges for the Court in the Coming Years**

- a) Obtaining greater cooperation from States, international and regional organizations, in particular as regards the arrest of indictees and their transfer to the Court, enforcement of sentences, security in the field;
- b) Management issues: enhancing the transparency and accountability, as well as embrace results-based budgeting; the Court will most likely need to accommodate additional needs with small budget increases, given States Parties' perception that the core structure of the Court is now in place;

- c) Addressing the possibility of holding trials “in the field” and/or in the relevant regions; a matter linked to the plans for permanent premises;
- d) Dealing with the queries and interdependencies of peace and justice;
- e) Enhancing its outreach activities, which can be defined in two manners:
  - i) General outreach: explaining what the Court can do in the field of international criminal law, focusing on managing expectations of different audiences.
  - ii) Specific outreach: directed at victims in the conflict region.

## PROGRAM\*

### The Future of the ICC

#### Friday, May 26, 2006

9:00 a.m. – 1:00 p.m.      First Session: The Court in Practice - Challenges Ahead  
Chair: Ferdinand Trauttmansdorff

1. "The Court in 2006 and Beyond," Philippe Kirsch
2. "Lessons from the First Cases," Luis Moreno-Ocampo
3. "Administrative Issues and Practical Challenges in the Field,"  
Bruno Cathala

1:00 p.m.                      Lunch at the adjacent Jeanne-Kahn Foyer

3:00 p.m. – 6:00 p.m.      Second Session: The Statute  
Chair: Otto Triffterer

1. "Crimes within the Jurisdiction of the Court: Going Beyond the Core Crimes?," Christian Wenaweser
2. "Possible Issues for the 2009 Review Conference," Roger Clark

Discussion

7:00 p.m.                      Conference Dinner  
Restaurant Sacher in the "Wintergarten" overlooking the Salzach River on invitation of the Liechtenstein Institute on Self-Determination at Princeton University (Hotel Sacher, Schwarzstraße 5-7).

#### Saturday, May 27, 2006

9:00 a.m. – 1:00 p.m.      Third Session: The Way Ahead  
Chair: Prince Zeid Al-Hussein

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\* Participants are cordially invited to attend the Welcome Concert and Reception of the International Conference on the ICC and the CIS-countries on Sunday at the Salzburg Residence and to participate at the Conference on Monday, May 29, 2006.

1. "Scenarios and Options for the Review," Rolf Fife
2. "Reform/Review: The Role of the ASP," Bruno Stagno Ugarte
3. "The Complementary Role of Academia," Wolfgang Danspeckgruber

Discussion

- 1:00 p.m. Lunch at the Hotel Elefant (Sigmund-Haffner-Gasse 4)
- 3:00 p.m. – 5:00 p.m. Fourth Session: Conclusions  
Chair: Ferdinand Trauttmansdorff
- 7:00 p.m. – 10:30 p.m. Opera: *Don Giovanni* by Wolfgang Amadeus Mozart

## PARTICIPANTS

### The Future of the ICC

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