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The Assembly of States Parties of the Rome Statute: Perspectives on the Years Ahead, 2009 – 2011

**Discussion Paper By
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The Assembly of States Parties is the intergovernmental organ overseeing the work of the International Criminal Court, and at the same time its legislative branch, competent to discuss and adopt amendments to the Rome Statute. The Bureau of the Assembly of States Parties (composed of one President, two Vice-Presidents and 18 members) as currently constituted will be steering the work of the Assembly until November 2011 and also serve in this function during the Review Conference in May/June 2010. The Review Conference of the Rome Statute will certainly be the highlight of the tenure of this Bureau.

While the Court has intensified its judicial work in The Hague, it has also entered a more political phase over the past few months, triggered in particular by the controversy over the arrest warrant issued against the President of the Sudan, Omar al-Bashir. This new phase also affects the role of the Assembly and increases its role in the political arena and in particular in the field of cooperation - and non-cooperation. More than ever, the Court must rely on the political support from States Parties in order to continue exercising its functions in the most effective manner possible.

The more political dimension of the work of the ASP will likely affect the more technical aspects of its work, in particular the budget. While some of the functions assigned to the ASP² under the Rome Statute have become less relevant or even obsolete (e.g., 112.2

¹ The views expressed in this paper are entirely personal and do not indicate endorsement by the Assembly of States Parties or its Bureau.

² For the mandate of the ASP, vid. Art. 112.2 RS

(a)), others are likely to play a more important role than has been the case in the past (in particular the ASP's oversight functions).

Management Oversight

According to article 112.2(b), the Assembly shall “provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court.” This function of the ASP is likely to become more important over the coming months. An example from the recent past is the much-discussed decision of the plenary of judges regarding the composition of its divisions and in particular the decision to assign two judges who had previously served on the pre-trial chamber to serve the rest of their terms on appeals. This decision was reason for concern for States Parties because it seemed difficult to reconcile with Article 39, governing the assignment of judges to chambers, and not to allow for the optimal use of resources, as the two judges would have to recuse themselves frequently. The Bureau therefore mandated the President of the ASP to convey those concerns to the President of the Court. The plenary of the judges revisited the issue and decided, by a 9-7 vote, to uphold its previous decision. The Bureau of the ASP thereafter took note of this decision. It was understood from the beginning that the decision on the composition of the chambers was the judges' competence and also that the concerns expressed by the Bureau were in accordance with the letter and spirit of Article 112.2(b). The example is given here merely to indicate the type of interaction that may be deemed necessary by States Parties in the future.

The following criteria should be of key importance in any consideration of the oversight functions of the ASP:

- *Establishing a dialogue and open channels of communication:* Concerns on oversight matters should be expressed as part of a dialogue between the ASP and the Court. On the side of the ASP, it should be carried out by the Presidency, with support from the Bureau, on the side of the Court by its principal organs.
- *Avoiding micromanagement:* Management oversight should be limited to issues that have an impact on the effective functioning of the Court and in particular that have budgetary consequences.
- *Respecting the independence and the judicial nature of the Courts work:* It must be understood that oversight functions on the part of the ASP are limited to the non-judicial aspects of the work of the Court and that the independence of the Court is to be respected at all times.
- *Creating a culture of mutual accountability:* A culture of mutual accountability will be essential to maintaining a strong and positive relationship between the Court and the ASP. Past experience has made it clear that there can be areas where States Parties and the Court do not automatically agree on their respective competencies

(family visits, composition of Chambers). The Rome Statue does not regulate all these issues, and there are grey areas and areas of shared competence. It is thus to be expected that conflicts will arise, but they should be addressed jointly between the Court and the ASP and with a view to finding a common understanding. Neither can simply insist on its respective authority. The oversight functions of the ASP will therefore play a more significant role in the future than has been the case so far.

In this context, it will be essential to find the right balance in this respect from the very beginning, in order to ensure a continued constructive relationship between the ASP and the Court – which is indispensable to make this Court prosper and function. On its part, the Court has to show both an ongoing willingness to provide the most efficient management possible and to continuously seek cost-saving measures. Such a proactive manner of showing awareness for budgetary concerns on the part of States Parties and an openness to address controversial areas is the necessary contribution by the Court to maintaining a strong and positive relationship with the ASP.

At the same time, accountability should not be a one-way street. States Parties also have to “deliver” to the Court, not only by providing the necessary resources and by refraining from interference in judicial decisions, but most importantly by extending full cooperation in accordance with their obligations under the Rome Statute and by giving political support in the relevant political bodies (Security Council, General Assembly, Human Rights Council). Such a system of mutual accountability will over the long term be crucial for the effective functioning of the Court as an independent judicial institution and to forestall any attempts to control the judicial activities of the Court by budgetary or other means.

Budget

According to article 112.2.(d), the Assembly shall “consider and decide the budget of the Court.” This competence is one of the most important means for the ASP to also exercise its oversight function. Budgetary discipline on the part of the Court will be essential to its future credibility. The main challenges for the years to come are:

- *Enhancing efficiency / managerial improvements:* An ongoing effort to look for cost-saving measures is an indispensable part of the future budget process. Effective cost-saving measures by the different organs of the Court will greatly contribute to maintaining the necessary flexibility in the decisions on the budget itself.
- *Effective dialogue on oversight issues:* The dialogue between the ASP and the Court on managerial issues and aspects that generate costs should not be limited to the budget process itself. Rather, it should take place on an ad-hoc basis whenever issues arise that ultimately have budgetary consequences. Such a dialogue should take place between the President of the ASP (with the backing of the Bureau) and the relevant parts of the Court itself, with a view to finding the solutions that are in

the best interests of the Court, and with full respect for the competencies and independence of the stakeholders involved.

- *Maintaining flexibility on the budget:* At a given moment, many States will come to the conclusion that the Court has been fully established and that budgetary growth in the future should be minimal.³ It is essential, however, that the budget is not subject to ideology or rigidity and that it is always understood that the Court must be able to fully carry out its functions under the Rome Statute.
- *Addressing the issue of arrears:* While the current situation in the area of arrears has not had a negative impact on the Court carrying out its functions in full, it is nevertheless a source of concern that a significant number of States are in arrears with their payments to the regular budget of the Court. Budgetary discipline on the part of the States Parties is an indispensable element of a fully functioning Court and the flipside of budgetary discipline on the part of the Court itself.

Questions of Non-Cooperation

Art.112.2(f) gives the ASP the competence to consider “any question relating to non-cooperation.” While the ASP has not become active in this respect in the past, there may certainly be more discussion of this provision in the future, as the work of the Court advances and as its dependence on co-operation from States becomes more and more obvious. Public statements both from the President and the Prosecutor of the Court have increasingly emphasized the need for co-operation by States, in particular with respect to the execution of arrest warrants, and the discussions concerning the arrest warrant against the President of Sudan have given the topic additional prominence.

While the ASP has in the past not become active pursuant to article 87 Rome Statute (governing cooperation with the Court), it has certainly taken up the area of cooperation between States Parties and the Court and elaborated a set of predominantly technical measures aimed at enhancing such cooperation.⁴ While there is an important overlap between these measures and questions relating to non-cooperation, it is quite clear that the non-cooperation the drafters of the Rome Statute had in mind is more political in nature. Article 87.7 speaks of a “[failure] to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers” and provides that “the Court may ... refer the matter to the Assembly ... or, where the Security Council referred the matter to the Court, to the Security Council.”⁵

³ The growth rates of the budget over the past couple of years have already been very modest.

⁴ Cf. in particular ICC-ASP/6/21 “Report of the Bureau on Cooperation”.

⁵ Art. 87.5 (and in particular its sub-para (b)) which is also referred to in 112. 2.(f) deals with the question of non-cooperation by a State that is not a State Party, but has entered into and ad hoc arrangement or agreement with the Court

The Assembly therefore has the competence to consider the findings of the Court that a State Party has failed to fulfill its obligations to cooperate. While the Rome Statute does not go any further, it is clear that the Assembly may take measures to help ensure cooperation by States Parties. Such measures can only be political and exhortatory in nature and extend from a call on the State in question to extend full cooperation to the Court to possibly other measures.

Whether the Assembly becomes active in this respect, depends to some extent on the Court⁶ itself, because the Statute speaks explicitly of a “referral” of a matter of non-cooperation to the Assembly (or the Security Council), after a relevant finding by “the Court”. If such a referral were to be made, the Assembly would be challenged to craft an appropriate response -and this response would arguably have to be different in nature from the decisions it has so far adopted.

Review Conference / Amendments to the Rome Statute

In accordance with Articles 121 – 123 of the Rome Statute, the ASP also has the competence to adopt amendments to the Rome Statute, including in the course of a Review Conference. The Review Conference in Kampala/Uganda in May and June 2010 offers the first opportunity for States Parties to make amendments to the Statute. It is worth emphasizing that is merely the first opportunity to do so, because any other subsequent ASP meeting can equally adopt amendments to the Rome Statute. There is also general agreement that the Rome Statute as a whole is a treaty of very high quality and that amendments to it should be limited to what is at this time indispensable.

While the scope of the Review Conference was not clearly defined at the time of writing,⁷ it will certainly take up the crime of aggression⁸ as well as the review of article 124.⁹ It may also be seized with proposals to expand the list of prohibited weapons under Article 8 (war crimes).¹⁰ However wide or narrow the scope of the conference may be in the end, it is safe to say that the Review Conference will not merely be an “amendment conference.” The Assembly has decided to also use this opportunity to engage in an exercise of “stock-taking.” The Review Conference is thus meant to be a

⁶ A separate, but highly relevant question in this respect is what is mean by “the Court” in this context. The PTC decision in the case of al-Beshir makes it clear that the pre-trial chamber is of the view that the competence to make a finding and to inform (in this case) the Security Council falls on the PTC itself.

⁷ The Bureau has decided that 30 September 2009 is the deadline for the formal submission of proposals to be considered by the Review Conference.

⁸ In accordance with Resolution F adopted by the Rome Conference.

⁹ Article 124 itself requires the Review Conference to review the provision, which states in pertinent part, “a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time.”

¹⁰ Informal proposals by Belgium and Mexico were under consultation at the time of writing.

constructive and positive event which illustrates the role of international criminal justice in the wider framework of the international system.

Political Support For and Cooperation with the Court

In addition to its managerial and legislative functions, the ASP may “perform any other function consistent with [the Rome Statute].” Among these functions, the issue of political support for and cooperation with the Court is certainly of the highest order. Creating ownership among States Parties and galvanizing their stronger engagement in favor of the Court in the context of international organizations, in particular the United Nations, is essential to the political strengthening of the Court and must therefore also be subject to the consideration of the Assembly. Highly political discussions such as the ongoing “peace versus justice” debate or the possible application of Article 16 by the UN Security Council must be actively shaped by States Parties, in the best interest of the Court. These efforts must result in an effective mainstreaming of the work of the ICC into the activities of the United Nations and create a dynamic under which political support is given to the Court throughout the year in the relevant principal organs of the United Nations, in particular the Security Council and the General Assembly.

Election of Judges, the Prosecutor and Deputy Prosecutors

The Assembly of States Parties has the competence to elect the judges of the Court (Article 36) as well as the Prosecutor and Deputy Prosecutors (Article 42). Elections of judges are held in three-year intervals and whenever needed upon an unforeseen judicial vacancy. The election of the Prosecutor and the Deputy Prosecutors take place upon the expiration of the nine-year terms. The importance of electing only the most highly qualified candidates to these senior positions cannot be overstated, and the ASP should make its relevant decisions always with the best interests of the Court in mind. In this respect, the nomination period is as important as the elections themselves, and States have to focus solely on the criteria contained in the Statute for the selection of senior officials.

Conclusion

The ICC is, in many different ways, a unique institution. This is also true with respect to the role States play vis-à-vis the Court. The importance of the role of the States Parties goes far beyond the approval of the budget or the election of the senior Court officials – even though these are core elements of the work the ASP needs to carry out. The political support from States will be essential for the full integration of the ICC in the institutional landscape. While the ASP is certainly not the only vehicle to achieve this goal, it is the only body that brings together all States Parties and should therefore be critical in galvanizing the energy required to give the ICC the strongest political support possible.