



## ***REPORT ON THE ELEVENTH SESSION OF THE ASSEMBLY OF STATES PARTIES, THE HAGUE, NOVEMBER 2012***

The AMICC secretariat participated in the eleventh session of the Assembly of States Parties (ASP) at the World Forum in The Hague, November 14-22. The annual meeting of States Parties to the Rome Statute of the International Criminal Court (ICC) adopted a program budget for the Court for 2013, elected a Deputy Prosecutor and other officials, and held substantive meetings on the issues of cooperation and complementarity. The Kingdom of the Netherlands also organized a tenth anniversary celebration of the Court in the presence of Queen Beatrix. Representatives from about 90 of the 121 States Parties, as well as observer states, including the United States, participated in the meetings.

AMICC was one of many NGOs participating in the ASP, and it worked closely with the international NGO Coalition for the ICC (CICC), of which AMICC is the US national network. The CICC represents over 2,500 member organizations internationally, and facilitates the participation of NGOs in ASP meetings as well as strategy sessions at them. AMICC contributed extensively to the CICC's thematic team papers on issues relevant to AMICC's advocacy. As part of its participation in the ASP, AMICC attended the CICC's annual Global Strategy Meeting and its Deputy Convener co-facilitated a session on campaign strategies for dealing with major powers such as the US. This included an extensive briefing on the US approach to the ICC as well as prospects and advocacy for a closer US-ICC relationship. AMICC also held bilateral consultations with NGO representatives, including AMICC members participating in the session, as well as relevant government delegations. AMICC attended official ASP meetings and relevant side events organized by NGOs, and disseminated live updates to its constituents and the public through social media outlets. These updates remain archived and available on AMICC's Twitter feed and blog.

### Participation of the United States

Representatives of the US government participated extensively in the eleventh session of the ASP, as they had at ASP sessions beginning in November 2009 and at the 2010 Review Conference in Kampala, Uganda. The US participates as an observer as of right, with many of the privileges of States Parties except voting and making proposals. The large delegation was co-led by Ambassador-at-Large Stephen J. Rapp, who heads the Office of Global Criminal Justice in the Department of State, and State Department Legal Adviser Harold H. Koh. It included representatives from important elements of the US government, including the Department of Defense.

The most high-profile participation of the US was during the General Debate segment which occupied the second day of the session. Governments, international organizations and NGOs were invited to make short statements on the theme of the challenges ahead for the ICC in the context of celebrating the tenth anniversary of the entry into force of the Rome Statute. Ambassador Rapp made a statement on behalf of the US in its capacity as an ASP Observer.<sup>1</sup> He reiterated US support for all of the ICC cases

<sup>1</sup> [http://icc-cpi.int/iccdocs/asp\\_docs/ASP11/GenDeba/ICC-ASP11-GenDeba-USA-ENG.pdf](http://icc-cpi.int/iccdocs/asp_docs/ASP11/GenDeba/ICC-ASP11-GenDeba-USA-ENG.pdf)

and outlined the ways in which the US has supported the Court and the cause of international justice. In addressing how to measure the ICC's success in ensuring justice for victims and how the US has contributed to the cause of international justice, he highlighted the importance of:

- Apprehending and bringing to trial the fugitives who currently remain at large in the ICC's cases, and adequately protecting victims and witnesses.
- Reinforcing the legal norms and prohibitions that led to the creation of institutions such as the ICC. The US government, for its part, is working to prevent and address the commission of atrocities through its recently-established inter-agency Atrocities Prevention Board (APB).
- Improving the system of international criminal justice, including building solid jurisprudence, cooperation and legitimacy.
- Recognizing that the ICC cannot and must not operate alone as well as building of national judicial capacity to deal with serious atrocity crimes.

Ambassador Rapp also made an intervention on behalf of the US, described below, at the plenary session on complementarity.

Coinciding with the ASP, State Department Legal Adviser Koh's speech at Leiden University's Grotius Centre in The Hague was a particularly important element in the presentation at the session by the US of its current relationship with the Court.<sup>2</sup> Koh had given two previous versions of it. This one was especially authoritative since as a part of the US presence at the ASP it had to have been cleared widely in the Obama administration including by the Department of Defense. The theme of the speech was the development of international criminal justice and the participation of the US in it since Nuremberg.

On the US relationship with the ICC, Koh noted continuing US concerns about politicized prosecutions, the broad worldwide deployment of the American military and the frequent calls on it to ensure global peace and security. This does not, however, conflict with the US drive to hold accountable the perpetrators of specific atrocity crimes. He noted that US hostility to the ICC is long gone. The US now sees that the ICC can play a key role in achieving accountability. This is in American national security as well as humanitarian interests. All ICC cases so far have served those interests. Participation in the ASP and close support to the Office of the Prosecutor (OTP) in specific cases thus serve the "smart power" basic theme of American foreign policy. Koh urged the Court to be prudent in selecting cases. There are US concerns that the amendments about the crime of aggression might permit prosecution without Security Council action first. He argued that States Parties should not ratify these before the final decision on them in 2017. He stated that the US will judge the Court's future performance according to standards of legitimacy, legality, cooperation and professionalism.

The US was again well received in the ASP and its presence was positive and appreciated by other governments as well as civil society. It did not co-sponsor any side events, as it has done at previous sessions, though it participated in them extensively.

#### Statements by ICC and UN Officials

For the third year in a row, the ASP opened its meeting with a speech by a head of state of an ICC State Party. Senegalese President Macky Sall reiterated his country's unwavering support for the Court. He

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<sup>2</sup> <http://www.state.gov/s/l/releases/remarks/200957.htm>

honored and expressed his confidence in Fatou Bensouda as the new Prosecutor, and made clear that there is no choice between justice and peace but rather a need to reconcile justice and peace. Following President Sall's address, the ASP in plenary heard reports from the Court's President,<sup>3</sup> Prosecutor<sup>4</sup> and Registrar<sup>5</sup> as well as the Chair of the Board of Directors of the Trust Fund for Victims.<sup>6</sup> The UN Legal Counsel Patricia O'Brien also made a statement on behalf of UN Secretary-General Ban Ki-moon.<sup>7</sup>

### Elections

The ASP held three different elections at this session, only one of which was contested. It required two separate days and five rounds of voting to elect James Stewart of Canada as Deputy Prosecutor (Prosecutions) to succeed Fatou Bensouda who became Prosecutor in June 2012. Under the Rome Statute procedure, the Prosecutor had nominated three candidates, one of which would be elected by the ASP for the position. The other candidates were Paul Rutledge of Australia and Raija Toiviainen of Finland. Stewart has extensive domestic and international experience in international criminal prosecutions, including eight years at the UN International Criminal Tribunals for the former Yugoslavia and Rwanda.<sup>8</sup>

The ASP elected by consensus five members of the ICC's Board of Directors of the Trust Fund for Victims (TFV) and nine members of the newly-established Advisory Committee on Nominations (ACN). The practice for TFV elections is for governments to nominate one candidate from each regional group in order to have an uncontested "clean slate" election. In the case of the ACN, there were 12 candidates for nine vacancies. Instead of holding a contested election, the ASP's executive Bureau appointed five regional representatives in New York to recommend nine out of the 12 candidates.<sup>9</sup> These recommendations were ratified by the ASP without any ballots being cast. Italy and the Netherlands - both of which nominated candidates who were not selected by the regional representatives - complained about the lack of transparency of this procedure. The ACN, which was established by the ASP in 2011<sup>10</sup> after the successful NGO-sponsored Independent Panel on ICC Judicial Elections in which AMICC played a major role, is expected to "prepare information and analysis, of a technical character, strictly on the suitability of [ICC judicial] candidates."<sup>11</sup>

### Independent Oversight Mechanism for the ICC

Although the ASP established an Independent Oversight Mechanism (IOM) in November 2009,<sup>12</sup> it once again did not take the necessary action to fully operationalize it. The IOM reports to the ASP and is one of the major ways for the ASP to carry out its oversight responsibilities under the Rome Statute. The

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<sup>3</sup> <http://icc-cpi.int/NR/rdonlyres/0EEEE0E-5BA8-4894-8AB5-3C2C90CD301B/0/ASP11OpeningPICCSongENG.pdf>

<sup>4</sup> <http://icc-cpi.int/NR/rdonlyres/3A2E6029-40FB-4BA8-B2D5-D1489953050C/0/ASP11OpeningOTPBensoudaENGFRA.pdf>

<sup>5</sup> <http://icc-cpi.int/NR/rdonlyres/F1E2BCA9-4F55-4C1C-938B-2107233D0A98/0/ASP11OpeningREGSA1ENG.pdf>

<sup>6</sup> <http://icc-cpi.int/NR/rdonlyres/53233336-8944-455C-8BBE-C5D9F80CACC7/0/ASP11OpeningTFVLNENG.pdf>

<sup>7</sup> <http://icc-cpi.int/NR/rdonlyres/97846842-FFCE-43D6-9273-9993A8BBED5F/0/ASP11StatementUNLCEng.pdf>

<sup>8</sup> [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-17-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-17-ENG.pdf)

<sup>9</sup> [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-47-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-47-ENG.pdf)

<sup>10</sup> Resolution ICC-ASP/10/Res.5, para. 19, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/Resolutions/ICC-ASP-10-Res.5-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.5-ENG.pdf)

<sup>11</sup> Terms of reference for the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, para. 11, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-36-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-36-ENG.pdf)

<sup>12</sup> Resolution ICC-ASP/8/Res.1, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-8-Res.1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.1-ENG.pdf)

primary issue preventing full operation of the IOM is a concern by the Office of the Prosecutor that an IOM could undermine the independence of the OTP by initiating investigations without the permission of the Prosecutor. This dispute began under then-Prosecutor Luis Moreno-Ocampo who argued that governments and others could attempt to undercut his office by asking an IOM to investigate it. However, an IOM is important to ensure that the Court is not undermined by a scandal involving the waste, fraud or abuse that is inevitable in any international organization lacking an adequate inspector-general mechanism. A fully operational IOM would help counter US critics who say that the Court has no such independent mechanism. As it did last year,<sup>13</sup> the ASP recognized the importance of a fully operational IOM<sup>14</sup> and once again vowed to finally take action on the IOM at its twelfth session, in 2013.<sup>15</sup> This is expected to give the new Prosecutor, Fatou Bensouda, time to consider the issue in detail. In her address to the ASP, she stated that for now and pending a review of the Court's structure in 2013, "there shall be no structural changes in the Office, neither shall there be a departure from established policies and methods of operation."<sup>16</sup>

#### Amendment to the Rules of Procedure and Evidence

For the second time in its history, the ASP amended the Court's Rules of Procedure in an effort to achieve judicial efficiency without having to amend the Rome Statute of the ICC. While Rome Statute amendments require ratification by States Parties in order to take effect, amendments to the Rules of Procedure take effect as soon as they are approved by the ASP. This year's amendment, the new Rule 132 *bis*, will permit a single judge to perform the functions of a Trial Chamber for the purposes of trial preparation. The amendment was agreed by consensus and is expected to expedite ICC trial preparation.<sup>17</sup> It was proposed by the judges of the ICC. The Working Group on Amendments - the ASP's standing body established to deal with proposed amendments to the Rome Statute and its supporting Rule of Procedure and Evidence - then considered it and recommended that the ASP adopt it.

#### Approval of the ICC's Annual Budget

One of the primary functions carried out by the ASP as the management oversight and legislative body of the ICC is to approve its annual budget. Agreement on the ICC's annual budget was expected to be the most contentious issue of this session, as it was at last year's. However, the ASP avoided a confrontation and achieved a compromise under the leadership of Ambassador Hakan Emsgard of Sweden who was appointed the day before to the start of the ASP to coordinate the budget negotiations. He effectively prevented a repeat of an effort on the part of several of the ICC's largest contributors to severely cut the Court's budget by presenting a take-it-or-leave-it package. He proposed a package that would adopt the recommendations of the ASP's Committee on Budget and Finance (CBF) while requiring the Court to achieve efficiencies to offset costs associated with the Court's interim premises. Ambassador Emsgard used a so-called "silence procedure" whereby a state would have to object to the compromise agreement. It was understood that if the silence had been broken by those

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<sup>13</sup> Resolution ICC-ASP/10/Res.5, paras. 64, 66,

[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/Resolutions/ICC-ASP-10-Res.5-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.5-ENG.pdf)

<sup>14</sup> Resolution ICC-ASP/11/Res.8, para. 74, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP11/ICC-ASP-11-Res8-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res8-ENG.pdf)

<sup>15</sup> Resolution ICC-ASP/11/Res.4, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP11/ICC-ASP-11-Res4-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res4-ENG.pdf)

<sup>16</sup> <http://icc-cpi.int/NR/rdonlyres/3A2E6029-40FB-4BA8-B2D5-D1489953050C/0/ASP11OpeningOTPBensoudaENGFRA.pdf>

<sup>17</sup> Resolution ICC-ASP/11/Res.2, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP11/ICC-ASP-11-Res2-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res2-ENG.pdf)

states seeking to further reduce the budget, other states would have sought funding above the CBF recommendations.

The compromise budget allocates 115.1 million Euros (\$149.2 million US) for 2013.<sup>18</sup> The Court had requested a budget of 118.4 million Euros, an increase of 9.6 million Euros from 2012, which reflected the ICC's increased activities and cases. The final budget number matches the CBF recommendation but requires the Court to absorb approximately half of the 6 million Euro annual cost of the rent of the interim premises; the other half is being covered by the governments of the Netherlands and Mexico. Previously the cost of the interim premises had been paid entirely by the Netherlands, the host country of the ICC, but this arrangement ended. Leading up to the ASP, there was no agreement on how the cost of the rent would be paid, and it was not included in the Court's budget request or the CBF recommendations. The last-minute agreement with the Netherlands thus helped to avert a confrontation over the budget.

### Plenary Sessions on Cooperation and Complementarity

For the first time at one of its regular meetings, the ASP held substantive sessions the issues of cooperation<sup>19</sup> - with a focus on enforcement of arrests as well as the identification, tracing, freezing and seizure of assets - and complementarity,<sup>20</sup> the preference for and deference to domestic criminal prosecutions for atrocity crimes when national courts are willing and able. It had convened four such sessions during the "stocktaking" part of the 2010 Kampala Review Conference. The special plenary sessions at this ASP session featured contributions from experts, Court officials, governments and representatives of NGOs.

Serge Brammertz, Prosecutor of the UN International Criminal Tribunal for the former Yugoslavia (ICTY), gave the keynote address at the cooperation session. He spoke about the cooperation challenges that the ICTY has faced and overcome in its almost two decades of operation, particularly in the area of arrests. He also discussed how in the future most justice for international crimes will be done at the domestic level, resulting in "horizontal" cooperation between states rather than "vertical" cooperation between states and international courts. The panelists at the session were Gerard Dive, Belgium's federal coordinator for cooperation with the International Criminal Court and tribunals, who discussed his country's experiences in cooperating with the ICC; Alexander Khodakov, external relations and cooperation senior adviser in the Registry of the ICC, who spoke about the Court's cooperation challenges; and Richard Dicker of AMICC member Human Rights Watch, who offered cooperation strategies.

Helen Clark, the former prime minister of New Zealand and current administrator of the UN Development Program (UNDP), delivered the keynote address at the complementarity session. She spoke about the role international development agencies, such as UNDP and others, can contribute to domestic capacity for dealing with ICC crimes.<sup>21</sup> She noted that the expectation that justice will be done in an atrocity situation has been raised by the existence of the ICC. Given its limited capacity, Clark urged governments to take responsibility to deliver justice. The panelists were Claudia Paz y Paz Bailey, the

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<sup>18</sup> Resolution ICC-ASP/11/Res.1, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP11/ICC-ASP-11-Res1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res1-ENG.pdf)

<sup>19</sup> [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ASP11-PD-ConceptNote-Cooperation-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ASP11-PD-ConceptNote-Cooperation-ENG.pdf)

<sup>20</sup> [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ASP11-PD-ConceptNote-Complementarity-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ASP11-PD-ConceptNote-Complementarity-ENG.pdf)

<sup>21</sup> [http://icc-cpi.int/NR/rdonlyres/E10A5253-DA2D-46CE-90B8-7497426E9C39/0/ICCASP11\\_COMPKeynote\\_Remarks\\_HCENG.pdf](http://icc-cpi.int/NR/rdonlyres/E10A5253-DA2D-46CE-90B8-7497426E9C39/0/ICCASP11_COMPKeynote_Remarks_HCENG.pdf)

attorney general of Guatemala, who spoke about her country's experience doing justice for serious atrocity crimes; Shireen Avis Fisher of the US, president and judge of the Special Court for Sierra Leone, who spoke about her previous work as an international judge in the Court of Bosnia and Herzegovina, a domestic counterpart for ICTY cases, and the need for international courts to respect national judiciaries; and David Tolbert, president of the International Center for Transitional Justice, who discussed how to support national justice efforts in challenging situations.

These interactive sessions offered delegations the opportunity to make statements on the topic of each session. During the session on complementarity, US Ambassador-at-Large for Global Criminal Justice Stephen J. Rapp spoke about the ASP's crucial discussion on both the policy and practice of complementarity. In his remarks, he referred primarily to what is known as "positive complementarity" - initiatives which help to build domestic capacity and expertise for dealing with atrocity crimes in national courts - rather than complementarity in the context of the admissibility of a case. This is the obligation of the ICC to defer to national courts when a state that has jurisdiction so requests and proves that it is willing and able to investigate and prosecute. Ambassador Rapp argued that governments - States Parties and non-States Parties alike - should strengthen their domestic capacities in a both concerted and coordinated manner, along with development agencies, NGOs and the ASP. He said that promoting domestic prosecutions is part of establishing the rule of law, and the US assists them through forensic, witness protection and judicial training assistance. Using the Democratic Republic of the Congo (DRC) as an example, he emphasized that the US supports ICC prosecutions as well as national justice, in particular through:

- Funding support of national court, such as gender courts in eastern DRC;
- Using the tools of diplomacy in support of [positive] complementarity;
- Providing technical and legal assistance to national court systems; and
- Improving fugitive tracking efforts.

Ambassador Rapp also cited the establishment by the White House of the US government's inter-agency Atrocities Prevention Board which will ensure more accountability in US courts for atrocity crimes.

Following the positive reaction to the special plenary sessions on cooperation and complementarity, the ASP "expresse[d] its intention to have dedicated plenary sessions on these critical topics on the agenda for future sessions of the Assembly."<sup>22</sup>

#### ASP Structure and Working Methods

The ASP has started to equip itself with more standing bodies in order to deal with discrete issues requiring expertise, though more such bodies are still needed. In addition to the Committee on Budget and Finance, the ASP now has an Oversight Committee on the Permanent Premises and a semi-activated Independent Oversight Mechanism. These were established according to Article 112(4) of the Rome Statute under which the ASP "may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy." In addition, the ASP's executive Bureau has two subsidiary bodies - working groups in New York and The Hague. These carry out a number of "facilitations" on discrete issues, such as cooperation; a Study Group on Governance operates within The Hague Working Group.

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<sup>22</sup> Resolution ICC-ASP/11/Res.8, para. 91, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP11/ICC-ASP-11-Res8-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res8-ENG.pdf)

The ASP also has its Working Group on Amendments, based in New York. At the ASP, AMICC consulted with NGOs and relevant governments about the importance of further developing the ASP's structure, in particular establishing standing committees to deal with issues such as cooperation.

The ASP also appears to be establishing a practice of adopting more stand-alone resolutions on substantive issues, a sign that it is giving due attention to these issues. It has regularly adopted a budget resolution, others as needed, and an "omnibus" resolution on strengthening the ICC which included most of the substantive issues relevant to the Court. However, in some cases, those topics were only discussed in the long legislative negotiations on the resolution, leaving little opportunity to consider these topics on their merits. This year, in addition to a resolution on cooperation, the ASP also adopted by consensus new substantive resolutions on complementarity, victims and reparations, and the Independent Oversight Mechanism, which has been deferred again until the next session, as noted above.<sup>23</sup>

#### Twelfth Session of the ASP

The next session of the ASP, its twelfth, will be held in The Hague, November 20-28, 2013.

*Updated November 29, 2012*

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<sup>23</sup> [http://www.icc-cpi.int/en\\_menus/asp/resolutions/sessions/Pages/2012%20-%2011th%20session.aspx](http://www.icc-cpi.int/en_menus/asp/resolutions/sessions/Pages/2012%20-%2011th%20session.aspx)