

REPORT ON THE EIGHTH SESSION OF THE ASSEMBLY OF STATES PARTIES, THE HAGUE, NOVEMBER 2009

The AMICC secretariat participated in the eighth session of the Assembly of States Parties (ASP) meeting in The Hague, The Netherlands, November 18-26, 2009. In addition to following, advocating and reporting on the below issues, the AMICC delegation held discussions and answered questions about the United States' participation as an observer at the ASP. It was the first time that the US had attended ICC meetings since September 2001.

The US delegation was led by Ambassador-at-Large for War Crimes Issues Stephen Rapp and State Department Legal Adviser Harold Koh, along with about ten other delegation members representing most parts of the US Government involved in the making of the formal policy on the ICC. The delegation listened and learned, and was particularly interested in the crime of aggression which was only discussed briefly in formal meetings of the Working Group on the Review Conference. Ambassador Rapp made a statement on behalf of the US.¹

The US delegation had extensive meetings with governments and NGOs, especially on the crime of aggression. Since the US has been absent from the negotiations on the crime of aggression, the US has questions about the negotiations that produced the text of the draft proposed amendment for the Review Conference. These achieved agreement on the definition of the crime, but not about the role of the Security Council in the Court's taking of jurisdiction over it.

Election of Judges

On November 18, 2009 the ASP held elections to fill judicial vacancies left by the passing of Judge Fumiko Saiga of Japan while in office and the resignation of Mr. Mohamed Shahabuddeen before taking office. Both were elected on January 19, 2009 at the first resumption of the seventh session of the ASP.

Five States Parties nominated individuals to fill the two judicial vacancies. In order to be elected, candidates must meet the requirements set out in the Rome Statute and obtain a two-thirds majority of all States Parties present and voting. Ms. Kuniko Ozaki of Japan was elected in the first round. Ms. Silvia Fernández de Gurmendi of Argentina was elected in the sixth round. They will take office in the coming months.

The next regular elections of judges are expected to take place in early 2012.

Preparations for the 2010 Review Conference

The ASP dedicated a major portion of this session to preparations for the Review Conference of the Rome Statute of the ICC, to be held in Kampala, Uganda in May and June, 2010. It made important decisions about the duration of the conference, now fixed at ten working days, and its scope, including which proposed amendments it will consider, and how it will take up the process of stocktaking which will evaluate and assess the system of international justice at which the ICC is the center.

¹ http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf



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The Working Group on the Review Conference held one or more meetings on most days of the ASP to decide which amendments to forward to the Review Conference and how to approach stocktaking. It began its work by reviewing the substantive preparations thus far for the Review Conference, referring to the work of the Special Working Group on the Crime of Aggression and of the intersessional meeting held at the Princeton Club in New York in June 2009 on the crime of aggression. It also considered the informal consultations held at UN Headquarters by the New York Working Group of the ASP Bureau (the officials of the ASP) from March to November 2009 to deal with proposed amendments other than on the crime of aggression, as well as stocktaking.

Amendments

In connection with the crime of aggression, the facilitators announced that aggression would be dealt with as the other amendments forwarded to the Review Conference but that Ambassador Zeid Ra'ad Zeid Al-Hussein, former ASP president and currently Jordan's envoy to the US, would continue his facilitation of negotiations on aggression. Ambassador Zeid chaired the June 2009 intersessional meeting on aggression. In the part of the November 2009 ASP Working Group session dealing with aggression chaired by Ambassador Zeid, he stated that countries will have to take a position on the proposed amendment forwarded to the Review Conference. He also emphasized that the views of non-States Parties would be included as part of the deliberations. It is expected that aggression will be dealt with more substantively at the resumed ASP session, which will finalize Review Conference preparations, to be held March 22-25, 2010 at UN Headquarters in New York.

The Working Group on the Review Conference also took up the question of Article 124. This provision permits a state upon becoming party to the Rome Statute to declare that it does not accept the Court's jurisdiction over war crimes for a period of seven years. The text of this provision requires that it be reviewed at the Review Conference. The facilitators noted the differing views of states in the New York Working Group consultations and requested further input from states. Some countries favored deletion of the provision, noting that it is a "transitional provision" which runs counter to the principles of the Rome Statute. Other states did not have strong views on the matter or argued that the provision should be retained in order to make it easier for non-States Parties to join the Court. Overall, there was limited interest in this issue. Since there was no consensus on it, the Working Group decided to include in the annex to the resolution on the Review Conference that the deletion of Article 124 had been suggested and to forward this matter along to the Review Conference for consideration. There was a generally held view that the Review Conference should not spend too much time on this question.

The facilitators invited states to make general comments on the amendment proposals before they were considered individually, and then to make specific comments on each amendment proposal as it was considered. In the general comments, delegations stated that the Kampala Review Conference would be the first opportunity to amend the Rome Statute, that amendments could be considered at any following meeting of the ASP, that the conference should not be overburdened by too many amendments, and that only those amendments enjoying consensus support should be forwarded to it. Some delegations favored limiting the conference to the mandatory review of Article 124 and consideration of the proposed amendment on the crime of aggression, while others expressed their views that each amendment should be considered by the Working Group on its merits. One delegation proposed setting up a working group at the next ASP after the Review Conference to consider amendments which it had not addressed.



Each amendment proposal was discussed in the order considered by the New York Working Group earlier this year. A sixth amendment proposal by South Africa on behalf of the African Union was also discussed. One element of the Belgian proposal on expanding the list of war crimes in international armed conflicts to apply to other conflicts was broadly accepted, while the two other elements which would make the use of some biological, chemical and conventional weapons automatically war crimes did not receive consensus support. In negotiations for the Rome Statute the US supported including in the Rome Statute the war crimes contained in the Belgian proposal that will be considered by the Review Conference.

The Working Group also considered separate amendments by Mexico, which would make the use of nuclear weapons an automatic war crime, the proposal of the Netherlands on the crime of terrorism, and the proposal of Trinidad and Tobago and Belize on drug crimes. All three crimes had been considered for the Court's jurisdiction and rejected by the Rome Conference in 1998. Resolution E of the Rome Conference recommended that a Review Conference consider the crimes of terrorism and drug crimes for possible inclusion in the Rome Statute. While many delegations supported the three proposals on their merits, there was little support in the Working Group to forward them to the Review Conference. The Mexico proposal for its part was considered by some states to raise a number of legal and political issues, and seen to be too complex to deal with at the Review Conference. Regarding the Netherlands proposal, some states did not approve of the amendment approach which would bring the crime into the Court's jurisdiction without activating it, and setting up a process for activating it similar to the crime of aggression. Many thought that the ASP should not attempt to try to arrive at a definition of terrorism before the UN General Assembly had done so. Regarding the drug crimes proposal, some states did not wish to overburden the Review Conference, while others were not satisfied that the necessarily legal questions had been resolved to forward the proposal to Kampala.

The Norwegian proposal to amend Article 103 to facilitate agreements on the enforcement of sentences of imprisonment was generally accepted as a good initiative but there were several concerns about whether an amendment to the Rome Statute would be necessary to achieve the proposal's objective and whether the amendment would achieve the necessary seven-eighths ratification in order to enter into force. States were also divided on whether it would be desirable for the Review Conference to issue an interpretive declaration on Article 103 to affirm that an amendment would not be required. While the proposal will not be considered as an amendment at the Review Conference, it will discuss the issue.

The last proposal to be considered was a new proposal submitted by South Africa on behalf of the African Union. It had not been considered by the New York Working Group because it was only presented in November 2009 at an African Union meeting. It was part of a response to the African Union's frustration at the unwillingness of the Security Council to consider a request to defer under Article 16 the ICC's case against Omar Al-Bashir, president of Sudan. The proposed amendment would extend Article 16 of the Rome Statute, which requires the Court to accept UN Security Council requests to defer of investigations or prosecutions of a particular case, to permit states with jurisdiction over a situation to request a deferral by the Security Council. If the Security Council failed to take action within six months, the proposed amendment would permit that state to request a deferral by the General Assembly acting under General Assembly Resolution 377. Delegations raised several concerns about this proposal, one of which was that the ASP should not try to decide matters reserved for the UN. Some states also reiterated their general opposition to Article 16 from the Rome Conference and the undesirability of further extending its exceptional character. Some also pointed out legal



issues raised by the proposal, including that more than one state may have jurisdiction over a situation. Very few states spoke in favor of the amendment, and thus it will not be forwarded to the Review Conference.

The resolution on the Review Conference also decided to establish a working group at the ninth session of the ASP to deal with and decide how to proceed on amendments that had not been forwarded to the Review Conference, namely the second and third Belgian proposal amendments, as well as the proposals of Mexico, the Netherlands and Trinidad and Belize.

Stocktaking

The Working Group on the Review Conference also dedicated several sessions to the discussion of stocktaking. This would allow the conference to assess the system of international justice at which the ICC is the center, including examining the Court's progress to date and its relationship with other international criminal tribunals. Stocktaking is intended to enrich the Review Conference by taking the opportunity to examine the Court in a way that is not ordinarily done at regular ASP sessions and to consider matters other amendments.

The discussions on stocktaking at the ASP built on consultations started earlier this year in the New York Working Group. In those consultations and at the ASP, the facilitators asked states to give their views on modalities, topics and outcomes. The facilitators and some delegations, including Denmark, South Africa and Japan, held informal consultations and side events at the ASP session on stocktaking or topics related to it. By the end of the ASP meeting, states reached consensus on dedicating four mornings of the ten day conference to stocktaking. The stocktaking sessions, which would likely be in the form of expert panels or another type of plenary meeting, would not overlap with any of the sessions on amendments so that smaller delegations would be able to participate in both the amendments process and stocktaking.

The ASP decided that stocktaking would include the following topics:

- Complementarity;
- Cooperation;
- The impact of the Rome Statute system on victims and affected communities; and
- Peace and justice.

Several States Parties, under the auspices of the ASP Bureau, will hold consultations on each of the stocktaking topics in New York, The Hague or in capitals. These consultations and stocktaking itself would provide an opportunity for the US to share its views and concerns about the ICC at the Review Conference outside of the amendments process.

Establishment of an Independent Oversight Mechanism for the ICC

Following informal consultations in The Hague over the past year and previously in New York, the ASP pursuant to Article 112(4) of the Rome Statute established an independent oversight mechanism with the capacity to investigate ICC staff and elected officials for misconduct. If it discovers misconduct, it will refer the matter to the appropriate disciplinary body or authority. The mechanism will help to prevent and counter waste,



fraud and abuse at the ICC. In carrying out its mandate, it will help to rebut critics of the Court in the US who claim that there are insufficient checks and balances on the Court.

The mechanism will become operational once the ASP adopts the rules and regulations which will govern it. It will consist of two staff members, one of whom will be seconded for the first year by the UN Office of Internal Oversight Services (OIOS), and it will report directly to the ASP through the Bureau. The Court will also enter into a memorandum of understanding with the UN so that OIOS can provide support services to the mechanism on a cost recovery basis. The mechanism will not, for the time being, have inspection or evaluation functions as envisaged by Article 112(4). The ASP will consider adding these functions at its next session.

Approval of the ICC's Annual Budget

The ASP approved the Court's annual budget of approximately 103 million Euro, or about \$150 million. As expected, the ASP approved the recommendations of its subsidiary body, the Committee on Budget and Finance (CBF), on the Court's requested budget. Among the recommendations, the ASP affirmed a 7% cut to legal aid endorsed by the CBF. The ASP also decided to establish an African Union liaison office in Addis Ababa, Ethiopia. It currently has a UN liaison office in New York.

The Selection of the Design for the Permanent Premises of the Court

One year after an international jury selected three prize winners for the design of the permanent premises of the Court, the Oversight Committee on the permanent premises decided to award the design contract to Schmidt Hammer Lassen Architects of Denmark, subject to final contract negotiations. The permanent premises of the Court will be built at a former military site known as the Alexanderkazerne in The Hague. The new premises are expected to be completed in 2015.

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