Dear AMCC national and local members:

The ICC could well have emerged from this session truncated, damaged and in danger of futility. Instead, the meeting approved a budget which will, although only just, keep the Court running adequately and preserve due process in its trials and prosecutions. On the other issues in the meeting which are especially important to our advocacy for the Court, the ASP finally approved an effective Independent Oversight Mechanism (IOM), thoughtfully supported the Court's efforts to work out the logistics and standards for victims' participation in its work, did its limited best for better enforcement of the ICC's arrest warrants and other orders and defined the Court's deference and help to national courts in a way that urged on the practice and principle ("complementarity") while recognizing the limitations on the Court's resources and the other priorities in its mandate.The most uncertain and potentially troubling outcome was amendments to the Rules of Procedure and Evidence which authorized requests to the judges to approve defendants' absences from their trials in particular but broad circumstances.These included special accommodation for heads of state or government.

ASP sessions customarily produce a number of "stand-alone" resolutions on individual subjects and also a general ("omnibus") resolution covering most of the items on the agenda. The omnibus resolution usually takes note of and endorses the topics in the stand-alone resolutions. This occurred with all of the issues most important to us.The

Assembly also gave special attention to particular issues by devoting individual meetings to enforcement

("cooperation"), victims and the budget, together with a special five-hour segment at the request of the African Union on "The indictment of sitting heads of state or government..." Side events sponsored by NGOs also discussed each of these subjects.

The AMICC delegation was composed of Enid Adler, lawyer in Philadelphia, founder of the Philadelphia Global Initiative on the Rule of Law, organizer of a major celebration in Philadelphia of the Court's 10th anniversary and an

NGO veteran of the negotiations to create the Rome Statute; Jennifer Trahan, Assistant Clinical Professor of Global

Affairs at New York University,observer for the Association of the Bar of the City of New York of negotiations on an

ICC crime of aggression and chair of the International Law Association's ICC committee; Elizabeth A. Wilson, Assistant Professor of Human Rights Law, School of Diplomacy and International Relations, Seton Hall University, has written and taught on atrocity victims, torture and transitional justice; and your convener. We are especially grateful to Enid and Elizabeth for doing our blogging and tweeting at a high standard.

The United States delegation was led by Stephen J. Rapp, Ambassador-at-large for Global C4riminal Justice and included representatives from the departments of justice and defense and the Office of the Legal Adviser in he State Department. The delegation was active behind the scenes on the issues of complementarity and victims. The delegation's statement cited its :robust engagement with the ICC' and support for the Court's work in "each of its situations." It said that further U.S. support would depend on: the Court's achievements in "institutional legitimacy," " a jurisprudence of legality with detailed reasoning and steeped in precedent," " a spirit of international cooperation," and "an institutional reputation for professionalism and fairness." Most of the rest of the speech covered actions by the United States in the cases of Joseph Kony and Bosco Ntaganda and its interests in witness protection,victims' issues, and complementarity. The speech ended on a discordant note with a call for no further ratifications of the Kampala amendments on the crime of aggression until they have been further considered. This directly confronted a consensus among States Parties which resulted in passages in the omnibus resolution noting recent ratifications and asking all States Parties to ratify the amendments.

An article of the Rome Statute about subordinate bodies of the ASP specifically refers to an independent oversight mechanism empowered to undertake investigations, inspections and evaluation. The IOM will report both to the ASP's officers and also directly to the Assembly itself. Claims by heads of major departments that an IOM action threatens their independence will be resolved by the President of the ICC. The power of this instrument of oversight by the ASP will give us a strong answer to claims by our opponents in the United States that the ICC is uncontrolled and unsupervised.

Complementarity did not have a special ASP session devoted to it, but was considered in plenary and had been discussed in a working group of States Parties before the meeting. The resolution called for greater consideration to how the Court upon completing its work in a crime scene country can help it to continue to have national proceedings about the same situation the Court was investigating.The resolution otherwise strongly suggests that support to development of domestic efforts to improve legal and court systems is a responsibility of the international community. in which the ICC "has a limited role." This approach will support our advocacy against claims that the Court is turning into a development institution or that the concept of complementarity is becoming so broadened that it is no longer be a significant safeguard.

The session on victims was the first one in an ASP session. It was particularly concerned with affirming the rights of victims, improving the means and substance of their participation in the ICC's hearings and trials and with development and funding of the Trust Fund for Victims. Victims issues are important as such for many AMICC members and are also a central part of our advocacy strategy. Discussions about victims, sensitively conducted, remind audiences of the atrocities which the Court was created to attack and see the it through the eyes of victims.

The Court has developed a Revised Strategy for its responsibility to victims, based on lessons learned from its first round of investigations,hearings, and trials.The Assembly's debate about victims examined the Revised Strategy . The resolution welcomed the Court's work on the strategy while stressing protection of the rights of victims, improvement of the system for their applications to participate in the ICC's activities and better ways to inform victims of this system and of their rights at the Court.

U.S. opponents of the Court especially enjoy asserting that it is useless because it cannot enforce its warrants, judgments and orders. Our response to this has to be carefully constructed since it is true that the ICC, like all international organizations, has no powers of physical compulsion or enforcement and must depend for enforcement on the cooperation of states. The Court must also depend on governments for witness protection. The subornation of witnesses in the Kenya cases and the Prosecutor's vigorous response to it was a current hot issue at this meeting. The ASP devoted much of the enforcement debate to it. The ensuing resolution stressed concern that too few States Parties were offering witness protection. It also recommended steps to improve enforcement such as developing standard procedures, improving requests from the Court, support to the campaign by the presidents of the Court and Assembly,

Failure by the UN Security Council to finance its referrals to the Court is the result of US laws banning cash support by the government to the ICC. It has become a sore point in relations between the United States and the Court. Removal of this ban is one of AMICC's strategic objectives. Both the resolution on cooperation and the section on the subject in the omnibus resolution called for this financing by the Security Council as required by a provision of the Rome Statute.

The special attention of the ASP to the demand of the African Union and Kenya for postponing the trial of heads of state or government or excusing them from attending and for a special segment of the meeting to discuss this, grew in one part from recognizing the angry feelings of some African leaders and elites that the ICC has been discriminating against Africa by failing to take cases from elsewhere. In another part , this attention was stimulated by a fear that African countries, which make up the single largest regional group in the membership of the Court, might withdraw from it. These concerns intersected with the anxiety of many States Parties as the ASP began that the Court was facing a dangerous time of maturation and transition in its life to which the Assembly and its members might not be able to respond adequately. We cover this issue at length in this report because its details have been little reported in the United States but may well become a new ground of attack by the Court's American opponents.

The AU and Kenya came to The Hague enraged by having just been rebuffed for the second time in their efforts to get the Security Council to order the Court to defer action on these cases. The leadership of the ASP concluded that the segment should give Kenya and its AU associates a chance to vent and feel that they have been sympathetically heard, but not to dominate the discussion.It therefor appointed the Permanent Representative of Jordan to the UN as the moderator of a panel whose members he would choose.He had been the first president of the ASP and a central figure in the negotiations for the Rome Statute. The eventual panelists were the chair of the Drafting Committee at the conference that adopted the Rome Statute, an academic suggested by African officers of the ASP, the Legal Counsel of the AU, a Norwegian senior diplomat who had been a major player in the negotiations to create the Rome Statute, and the Attorney-General of Kenya.

The general tenor of the presentations of the panelists,except for the attorney-general, was that a way to amend the Rules of Procedure and Evidence should be found that responded to the Kenya and AU concerns without violating provisions of the RS that it "shall apply to all persons without any distinction based on official capacity as a Head of

State or Government..." and "The accused shall be present during the trial." There was general agreement that the

Kenya/AU first objective of postponing the trial until the defendants had left office was out of the question ( the

Security Council refusal to defer almost certainly stiffened many spines on this). The panelist then turned to the possibility of giving "shall be present" a broad interpretation in the Rules.The panelists also recalled that the Kenya accuseds have all voluntarily come to the court in response to summonses.

Following the panel, a working group on amendments continued to negotiate strenuously on new or amended Rules on this issue. It eventually produced three such changes which the ASP adopted. All of the changes are additions to a Rule about motions by any party to the Trial Chamber about the conduct of a trial. All three apply only where an accused has appeared voluntarily in response to a summons. The first two permit the accused to make a written request to be present through video technology or representation by counsel during parts or parts of his or her trial. They require the Trial Chamber to rule "on a case-by-case basis."

The third and most problematic change permits an accused "mandated to fulfill extraordinary public duties at the highest national level" to request the Trial Chamber to be excused and be represented by counsel. The Trial Chamber must consider expeditiously and whether alternative measures are inadequate, the interests of justice are served and the rights of the accused are protected. The Chamber's ruling would be subject to review at any time.

Kenya Vice President and accused Ruto has already on December 16 filed a motion under the third amendment asking that he be excused for all of his trial.The motion specifically says that this amendment is a compromise between two competing "legitimate" norms of the conduct of trials and the needs of the State. It claims that the request meets all of the conditions of the amendment. We will keep you informed on the outcome of this motion.

The third amendment seems to fly in the face of the RS provision that heads of state or government shall not be given any distinction in their treatment by the Court. . Much of the argument for it during the session appeared to claim priority for peace over justice. The omnibus resolution, as in the past, affirmed that '...there can be no lasting peace without justice and that peace and justice are thus complementary requirements."

The ASP president in her closing remarks praised the negotiations on the rule amendments about presence of the accused at trials. She also observed that this debate indicated that substantive changes to the Statute are unlikely and also had reaffirmed the principle that no one is above the law.

This development will give Americans opposed to the Court a chance to claim that the ICC is diluting itself, that States Parties are turning against it as its effect on State interests are felt, and that true trials of sitting heads of state or government are impossible. We can respond that even the third amendment leaves the final decision with the judges of the Court and that it applies only to accuseds who have voluntarily responded to summons.

It was a privilege to represent you at what was in many ways an historic session of the Assembly of States Parties. Many aspects of its aftermath will be important to our work and we will advise you about them

With warm best wishes,

John

John Washburn

Convener

American Non-Governmental Organizations Coalition for the International Criminal Court

A Program of the Columbia University Institute for the Study of Human Rights www.amicc.org | www.hrcolumbia.org

jwashburn@amicc.org Tel +1 (212) 851-2106