

REPORT ON THE RESUMED EIGHTH SESSION OF THE ASSEMBLY OF STATES PARTIES, NEW YORK, MARCH 2010

The Assembly of States Parties (ASP) of the International Criminal Court met for its resumed eighth session at UN Headquarters in New York, March 22-25, 2010, to make final preparations for the ICC Review Conference to be held in Kampala, Uganda, May 31-June 11, 2010. The AMICC secretariat participated in the session in order to follow, advocate and report on the below issues. The AMICC delegation also held discussions and answered questions about the United States' participation as an observer at the ASP. It was the second time the US participated in the ASP; its first appearance was at the eighth session in The Hague in November 2009.

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 of the ICC stakeholders in the US Government. The US delegation closely followed all of the meetings. In addition, Ambassador Rapp made a statement on behalf of the US with respect to the stocktaking element of the Review Conference and future US cooperation with the Court.¹ Legal Adviser Koh described US views on a possible amendment on the crime of aggression in one of several informal meetings on that issue.²

The resumed ASP was opened with a statement by UN Deputy Secretary-General Asha-Rose Migiro. The session dedicated most of its agenda to final preparations for the upcoming Review Conference. After deciding at the November 2009 session to hold a ten-day conference and the proposed amendments it will consider, the resumed session turned to how the conference will take up the process of stocktaking which will evaluate and assess the system of international justice of which the ICC is at the center. The Working Group on the Review Conference held one or more meetings on each day of the ASP to deal with stocktaking and other Review Conference matters.

Consultations on Stocktaking

The ASP decided in November 2009 that stocktaking would include the following topics: complementarity (the ICC's deference to national justice proceedings and support for them); cooperation (nations' compliance with the Rome Statute and Court decisions); the impact of the Rome Statute system on victims and affected communities; and peace and justice. It appointed several countries as "focal points" to coordinate each of the stocktaking topics and to prepare background papers for adoption by the ASP Bureau, including for the stocktaking events which will occupy two days of the Review Conference's agenda. Consultations on the four stocktaking topics were held in the New York Working Group and The Hague Working Group of the ASP Bureau, and were addressed separately at the resumed session.

The co-facilitators for informal Review Conference preparations in New York, Ms. Stella Orina of the Kenyan Mission to the UN and Mr. Marcelo Bohlke of the Brazilian Mission to the UN, presided over the consultations on stocktaking before and at the resumed session. The co-facilitators asked the focal points to organize information from their background papers for the stocktaking events and discussions at the Review Conference into "templates" for adoption by the resumed session. The completed templates include information on: 1) the

¹ <http://usun.state.gov/briefing/statements/2010/138999.htm>

² <http://usun.state.gov/briefing/statements/2010/139000.htm>





format of the debate; 2) the names of speakers and panelists; 3) the tentative program; 4) the expected outcome; 5) background materials; and 6) additional information. These templates and proposed outcomes such as draft resolutions were annexed to the resolution on the Review Conference adopted by the resumed session.

The stocktaking events will be panel and roundtable discussions, and include a range of speakers and panelists with diverse expertise. While the formal outcomes of the events on victims and cooperation will include resolutions, the peace and justice event will have a summary as its only outcome. Delegations believed that the issue is too sensitive and diffuse to have a formal outcome such as a resolution. However, background papers, reports and questionnaires on topics and subtopics will provide a basis for discussion at all of the stocktaking events and thus contribute to their outcomes. Each of the events also set aside time for questions, comments and discussion. Some of the focal points are also organizing or coordinating with other Review Conference events on related topics.

There was a general sense among states in the consultations that their role in the stocktaking events as planned would be too limited as compared to the time allotted for panelists. Some delegations said that states and civil society should have a voice in the events, along with the panelists. In response to these views, the relevant focal points modified the peace and justice template to reflect that the first half of the 90 minutes for questions, comments and discussions would be reserved for states participating in the event.

Regarding the stocktaking topic of cooperation, the Democratic Republic of the Congo suggested, on behalf of the African States Parties to the ICC, that there be a discussion on the interaction and possible conflict between Articles 27 and 98 of the Rome Statute on the issue of immunity for heads of state of non-States Parties. In introducing the suggestion, the DRC representative indicated that it arose out of African states' discontent about the unwillingness of the UN Security Council and the ASP itself to take up proposals in relation to head of state immunity, and especially to the arrest warrant issued by the ICC for Omar Al-Bashir, president of Sudan. The representative stated that African States Parties would like views on this subtopic to be collected and debated during the stocktaking discussions on cooperation at the Review Conference, though they did not necessarily expect the question to be resolved. Some states expressed doubts about whether the ASP should examine such questions and maintained that any possible conflicts between Rome Statute provisions should be interpreted by ICC judges in the course of proceedings. It was unclear whether this subtopic would be part of the stocktaking discussions since was not incorporated into the focal points' template on cooperation.

The US made its first of two statements at the resumed session during the consultations on the stocktaking topic of cooperation. Ambassador Rapp noted that the US is pleased that the event on cooperation during the Review Conference will include experts on the ad hoc criminal tribunals on which the US has been a leader. He also offered US support and expertise in identifying ways to enhance cooperation with the Court, especially on arrests. Ambassador Rapp stated that representatives of the Obama administration intend to meet with Court officials to examine how the US may assist the Court in its current investigations and prosecutions. He noted the US interest in coordinating its Rule of Law and capacity-building programs in order to complement the work of the ICC. According to Ambassador Rapp, the US plans to contribute at the Review Conference to all areas of stocktaking cooperation, complementarity, peace and justice, and victims and affected communities. He expressed the hope that, as a non-State Party, the US could nonetheless be a valuable partner to the Court in the cause of advancing international justice.





Consultations on the Crime of Aggression

The chair of the informal consultations on aggression, former ASP president Ambassador Zeid Ra'ad Zeid Al-Hussein of Jordan, circulated an unofficial “non-paper” to delegations in advance of the session. He asked them to consider unresolved questions regarding the crime of aggression. These had to do with whether and which states’ consent should be required for the Court to exercise jurisdiction, and whether UN Security Council action should be required for the Court to proceed with an aggression investigation. In the second meeting, he asked each State Party present by way of a “roll call” to choose among four options related to the two issues under discussion, consent and the Security Council. Ambassador Zeid assured delegations that they would not be bound by these positions and that they would only be used to help guide his work in the time leading up to the Review Conference.

Delegations were generally responsive to the non-paper and a chart laying out the four options. There was no clear consensus among delegations about whether the consent of the aggressor state should be required in order for the Court to act with respect to a crime of aggression, and many expressed flexibility in order for the Review Conference to reach consensus agreement on a provision. Those in favor of a consent requirement argued that it was in line with applicable treaty law. While most delegations recognized the central role of the UN Security Council in determining acts of aggression, only a minority spoke in favor of an aggression provision which would require such a determination by the UN Security Council to permit the Court to take jurisdiction over an aggression situation. Several states also raised the possibility of “creative” solutions to reach a consensus on aggression which may be proposed at Kampala and which could appeal to the US. For example, Austria suggested that the Review Conference could adopt a provision on the crime of aggression which would require a Security Council determination but that there would be a mandatory review of the provision after seven years. Several states were open to the possibility of a “menu” approach to jurisdictional filters whereby the Court would only exercise jurisdiction if the states concerned agreed to the same jurisdictional “filter.”

US State Department Legal Adviser Harold Koh delivered a statement on behalf of the US regarding the proposed provision on the crime of aggression. In speaking to the ASP, he expressed appreciation for the work done to date and recognized that the US had not participated in the Special Working Group on the Crime of Aggression (SWGCA) which was open to all states and concluded its work in February 2009. He stated that the US continued to listen and learn, benefiting from other delegations’ views and insights. He expressed general concern, however, about amendments which would divert the ICC from its core mission. Regarding the questions posed by the chair, the Legal Adviser stated that the US would prefer a provision that requires the consent of the aggressor state as well as a determination of a state act of aggression by the UN Security Council. He said that the US was especially concerned that there would be confusion if another body (such as the International Court of Justice or the UN General Assembly) were also given a role in determining aggression in the Rome Statute. He also stated that the US has more general concerns, specifically that 1) the terms of the draft definition itself, including the degree to which the proposed amendments may depart from customary international law; 2) investigation and prosecution of the crime of aggression would over-burden the Court; 3) implementation of the crime within the Court’s jurisdiction could undermine complementarity, cooperation and universal membership of all countries in the ICC; and 4) there is not yet consensus on a provision.



The US intervention on aggression was generally well-received, though some delegations made the point in their statements that the report of the SWGCA had been the result of an open and transparent process open to all states on an equal footing. States welcomed contribution to the ongoing negotiations but not attempts to reopen questions, such as the definition of the crime of aggression, that have achieved consensus.

The questions raised by the US about the draft provision were also reflected in the report of Working Group on the Review Conference for the resumed session. Some delegations were concerned that the language as originally drafted in the report suggested that more than one delegation expressed the same view as the US. This resulted in a lengthy negotiation on how to improve this language. Later in the same session, the representative of Venezuela made several insistent suggestions to include that nation's views. These interventions by Venezuela significantly delayed agreement on the portion of the report on the aggression meetings and required careful negotiations by the chair. As a result, several delegations spoke about the need to examine the purpose and scope of such reports, which many stated are intended to be of a summary nature, not a document which included the views of individual states or of all states. As such, some delegations expressed discontent about how the views of the US had been included in the report and found it difficult to argue that Venezuela's views should be excluded from the report. Although states agreed on a final report in the end, in the closing plenary one state formally objected to the manner in which the aggression report was drafted and in particular did not wish to be associated with the section which reflected the US views.

Consultations on Other Review Conference Matters

Resolution on the Review Conference

Delegations negotiated and adopted a resolution on the Review Conference during the resumed ASP. It finalized outstanding Review Conference matters and forwarded them to Kampala. The resolution also annexed and forwarded to Kampala the documents decided on at this session. Some states, such as France and Japan, were concerned that the sections on "pledges," described below, would imply additional financial obligations of states. Venezuela sought to reaffirm again through this resolution the centrality of the crime of aggression to the Review Conference.

Draft amendment proposal by Belgium

Belgium presented draft elements of crimes related to its proposal which was forwarded to the Review Conference by the ASP in November. The proposal would expand the list of war crimes in domestic (non-international) conflicts to include three crimes now included in the Rome Statute if committed in international armed conflicts, specifically the use of poisons, certain gases or expanding or flattening bullets. The Belgian delegate stated that the draft elements would be exactly the same as those already adopted by the ASP for the same crimes when committed in "an international armed conflict," except that they would instead specify "an armed conflict not of an international character." The US after Rome Conference accepted the elements for the international versions of these crimes already in the Rome Statute, thus the proposed elements for the same non-international crimes, if identical, would likely be acceptable to the US.

Draft resolution proposal by Norway

This draft resolution was approved by the New York Working Group prior to the resumed session. It will be sent to the Review Conference by the ASP Bureau since the November resolution on the ASP mandated the



Bureau to consider the issue of the strengthening the enforcement of sentences and to submit a proposal for consideration in Kampala. This draft resolution is intended to encourage States Parties to enter into enforcement of sentences agreements with the Court and to encourage international and regional organizations to make facilities available to states that do not otherwise have adequate facilities. Elements of the draft had been opposed by a group of non-States Parties, led by Egypt, who argued that the resolution could impose obligations on non-States Parties. These states dropped their opposition before the resumed session since they felt that their concerns had been addressed through consultations and changes on the draft. The resolution will thus be presented at and considered by the Review Conference.

High-level declaration

Prior to the resumed session, the ASP Bureau appointed Mexico to coordinate a high-level declaration on stocktaking and the commitments of states to the Court for adoption at the Review Conference. It would be considered and adopted after the special “high-level segment” meeting at the start of the conference in which government ministers and possibly heads of state will participate. Mexico planned to distribute a first draft in the week following the resumed session, to hold informal consultations on it within the New York Working Group in April, and to send it to the ASP Bureau in May.

“Pledges”

On the Friday before the resumed session, Peru and the Netherlands distributed a paper with guidelines for states on making pledges, or commitments, that will be announced at the Review Conference. “Pledges” mean commitments by states to actions strengthening the ICC, such as ratifying the Rome Statute or the Agreement on Privileges and Immunities of the Court (APIC), and adopting legislation implementing the Rome Statute. Pledges may also include actions which are not treaty obligations, such as cooperation with the Court or assisting other States Parties in taking desired actions.

Other ASP Business

Permanent premises of the Court

Following the March 8 announcement that the Court had signed a contract with Schmidt Hammer Lassen Architects of Denmark to build the permanent premises of the Court, the ASP passed a resolution at this session extending the deadline for States Parties to inform the Court of their wish to provide a one-time payment contribution for the project. The new premises are expected to be completed in 2015.

Ratification of the Rome Statute by Bangladesh

During a meeting of the eighth resumed session, the ASP leadership announced that Bangladesh had deposited its instrument of ratification with the UN Secretary-General. A representative of the government addressed the session and was warmly welcomed by the ASP participants. It is the first south Asian nation and the largest Muslim country to join the Court. It will become a State Party on June 1, 2010, the second day of the Review Conference. It will therefore have all of the rights and privileges of an ICC State Party for the remaining nine days of the conference.





Prospects for the Review Conference

The resumed session of the ASP completed most of the preparations for the Review Conference, with work remaining to be done on the high-level declaration and pledges. There will also be further preparations on the stocktaking events. In addition, governments will assess the resumed session's work on the crime of aggression and determine their strategies for Kampala.

The US return to the ASP in November and again at the resumed session was welcomed by most states. The resumed session, however, revealed some of the limitations of the status of non-States Parties with which the US will have to cope in Kampala. The ASP leadership made clear in its coordination of meetings and in its comments to AMICC that States Parties are to be given priority in ASP meetings and that they will ultimately decide whether to adopt amendments, including a provision on the crime of aggression. This intention was strengthened by the earlier opposition of Egypt and other non-States Parties to Norway's draft resolution on the strengthening of enforcement of sentences which will be considered by the Review Conference.

The irritation of states in the session and its leadership at the insistence of Venezuela, a State Party, on having its individual views reflected in the outcome documents of the session focused states on possible similar efforts by non-States Parties and contributed to their determination to limit the actions of non-States Parties at the Review Conference. In particular, it drew their attention and aroused opposition to efforts to reflect US concerns in the session's report on aggression.

Updated March 31, 2010

