



***MEMO ON THE SIXTH SESSION OF THE ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE ICC
NOVEMBER 30-DECEMBER 14, 2007, UNITED NATIONS HEADQUARTERS, NEW YORK***

The Assembly of States Parties (ASP) of the International Criminal Court (ICC) will hold its sixth session from November 30 to December 14, 2007 in New York. The ASP is the governing body and primary oversight mechanism of the ICC. It is composed of 105 State Parties. The forthcoming meeting of the ASP will deal with several important issues regarding the functioning of the Court. The sessions of the ASP are particularly important for civil society representatives as an opportunity to develop mutual dialogues with the Court and States Parties and to present to the ICC and to the governments their opinions and views regarding the Court's work.

For the American NGO Coalition for the ICC (AMICC), the following items in the provisional agenda of the ASP and discussions that may take place during the meeting are important as a part of its advocacy:

- Election (free from politics) of highly qualified judges;
- The work of the Special Working Group on the Crime of Aggression;
- The venue and organization of the Review Conference;
- Actions to strengthen an important role of the oversight mechanisms of the Court, including standing committees of the ASP; and
- The assistance and support of the ICC for the defendants and victims and ensuring equality of arms between the defense and the prosecution.

AMICC believes that these issues could have a meaningful long-term effect on the work of the Court and on the willingness of the United States to deepen its cooperation with the Court.

Election of Judges

One of the most important items of the agenda of the sixth ASP, scheduled to be addressed on November 30, will be the election of judges to fill three judicial vacancies. The American NGO Coalition for the ICC has been closely observing and analyzing the nominees' candidacies and has been participating in conference calls and in person interviews organized by the international Coalition for the ICC (CICC).

According to article 36(4) of the Rome Statute, the nomination of candidates to the Court may be made by any State Party to the Statute and shall be accompanied by a detailed statement specifying how the candidate fulfills the requirements. In addition, election rules in resolution ICC-ASP/3/Res.6, paragraph 13 (September 10, 2004), required a 12 week nomination period from June 1, 2007 to August 24, 2007. By this closing date, the Secretariat of the ASP received six judicial nominations.

Article 36(3 and 5) sets out the qualifications for candidates. They should be chosen from among "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices". The candidates also should have established competence either in List A: criminal law and procedure and the necessary relevant experience performing their responsibilities





whenever as a judge, prosecutor, advocate or similar capacity, in criminal proceedings; or List B: in international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court. Excellent knowledge and fluency in at least one of the working languages of the Court is another requirement for any candidate.

Further provisions of article 36 set out the procedure for the election. The judges are elected by a secret ballot at a meeting of the ASP. To be elected, each of the candidates must obtain the highest number of votes and a two-thirds majority of the State Parties present and voting. Also, no two judges may be nationals of the same State. There are no regional or gender voting requirements for this election.

Article 37 of the Statute defines the vacancies' terms. It states that a judge will serve for the remainder of his or her predecessor's term – and if the period is three years or less, will be eligible for re-election under article 26 for a full nine-year term.

Three vacancies will be filled as a result of the resignation of: Judge Maureen Harding Clark (Ireland), Judge Karl T. Hudson-Phillips (Trinidad and Tobago) and Judge Claude Jorda (France). After the election one of the judges will be selected to serve the remaining two years of Judge Jorda's term (until 2009) and will be eligible for reelection for an additional nine-year term; two other judges will serve five-year terms until 2012.

As of today, there are five candidates: (in the order of nomination): Mr. Daniel David Ntanda Nsereko from Uganda (List A), Ms. Jean Angela Permanand from Trinidad and Tobago (List A), Ms. Fumiko Saiga from Japan (List B), Mr. Bruno Cotte from France (List A), and Ms. Graciela Dixon from Panama (List A). The nomination of Mr. Sunday Akinola Akintan from Nigeria was withdrawn on September 20, 2007.

Two of the five above-mentioned candidates have been the subject of controversy. Doubts concerning Ms. Dixon's and Ms. Saiga's nominations may influence the election process and its results. They may also give rise to American criticism of the Court.

Ms. Dixon, the president of the Panama Supreme Court of Justice, enjoys widespread endorsement among Panamanians. Due to her "high moral standards" and "a history in favor of human rights", her nomination has been recommended by, among others, by the Panamanian National Bar Association. Her nomination has had some opponents as well. The Alianza Ciudadana Pro Justicia, a network of NGOs that seeks reforms in the Panamanian judicial system, has expressed doubts about Ms. Dixon's nomination. The organization questioned the Panamanian government for not consulting in advance on her nomination with political groups, law experts and judicial bars/associations, human rights activists and civil society. Also, its members expressed their opposition to the rulings of her court that barred claims of crimes against humanity and enforced disappearances. In addition, it has been said that "she has not defended the non-prescription of crimes against humanity and crimes committed by the dictatorship or under the military regime". Although Ms. Dixon obtained an agreement with the Alianza not to issue an official statement rejecting her candidacy, the Alianza's voice may have had an impact on her nomination amongst the international community.

Ms. Saiga, a Japanese candidate for List B, is perceived as the other controversial nominee in the elections to the ICC. According to article 36(3), List B candidates must have qualifications to serve on their countries'





highest courts and possess an “extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court”. Ms. Saiga as a diplomat would be qualified to serve on her country’s highest court because the Japanese Supreme Court does not require all of its judges to be formally trained in law. However, on the basis of the limited information available about Ms. Saiga’s professional experience, she does not appear to be a qualified candidate. Based on her knowledge and experiences, it appears that Ms. Saiga is an accomplished diplomat and an expert on women’s rights and gender issues. However, her biography shows a lack of legal education and no extensive experience in a professional legal capacity relevant to the work of the Court. As this was written, there was insufficient information about Ms. Saiga’s candidacy to affirm her qualifications. She is the only nominee who has not been interviewed by the CICC to date.

Also, there is an anxiety that Japan’s political power and influence may win election for Ms. Saiga despite her limited qualifications. However, the secret ballot voting may result in some State Parties to vote against her.

AMICC’s concern is that the claim that rich and powerful countries will be able to place whatever candidate they choose on the Court’s bench. AMICC will coordinate with other prominent and internationally recognized non-governmental organizations about this concern.

The Crime of Aggression

Another important matter on the ASP’s agenda will be the work and report on the issue of the crime of aggression. AMICC is greatly interested in the progress that is being made on this matter since it is one of the most controversial issues in US attitudes towards the Court.

The Court has not been able to exercise jurisdiction over the crime of aggression since it began its work in 2002. Under the Rome Statute and its article 5(2), the ICC can only exercise jurisdiction over the crime of aggression when the ASP amends the Rome Statute to include the definition of this crime and the conditions for the exercise of jurisdiction. The definition must be in keeping with the relevant provisions of the Charter of the United Nations, which means the powers the Charter gives to the Security Council.

There have been many challenges regarding the definition. Some suggest that the Court should use at least part of the General Assembly’s definition of acts of aggression in Resolution 3314 (XXIX), adopted in 1974. There have been questions whether the amendment to the Rome Statute should refer to the resolution as a whole or only to certain articles of the document.

To work on a definition, in 2002 the ASP established the Special Working Group on the Crime of Aggression (SWGCA). Its meetings and consultations are open to all states, including non-State Parties. The last meeting of the Group was held from 11-14 June 2007 in Princeton, New Jersey.

Formal and informal meetings of the SWGCA have resulted in identifying two aspects of the crime of aggression: (1) the conditions for the Court to exercise its jurisdiction; and (2) elements of the definition of the crime of aggression.





The first aspect tries to determine when the Court may try to address the crime of aggression. Also, under discussion is which body should decide if the act has been committed – the Security Council (SC), the General Assembly (GA), the International Court of Justice (ICJ) or an expanded Pre-Trial Chamber of the ICC. The most difficult question concerns the relationship between the Security Council and the Court. There is a view that the SC has an exclusive competence to determine that the crime of aggression has occurred. Other opinions claim that the Council has a primary but not exclusive authority to do so. Finally, there is the view that the SC may already refer a situation to the Court and defer an investigation (articles 13 and 16 of the Statute) and that no additional provision on a prior determination of an act of aggression is necessary. More generally, many states have expressed an opinion that the conditions for the exercise of jurisdiction must reflect a balance between the independence and neutrality of the Court and the fundamental role of the Security Council in maintaining peace and security under the UN Charter.

To discuss the definition of the crime of aggression, it is important to make a distinction between the collective “act of aggression” and the individual “crime of aggression”. An act of aggression is attributed to a collective entity, such as a state. It is essential to link the act and the crime. Under the most recent proposals considered by the SWGCA, this link would be made by proving that an individual was responsible for the planning, preparation, initiation or execution of an act of aggression.

The definition of the crime of aggression has been controversial. The SWGCA has focused on some elements of the definition. The first aspect is the leadership requirement. The SWGCA has agreed that the perpetrator of the crime of aggression must be “in a position effectively to exercise control over or to direct the political or military action of a State”. The second element focuses on defining the individual’s commission of the crime. The other crimes in the Statute, under article 25, include different kinds of participation leading to individual criminal responsibility. The states have to decide if this differentiated approach applies to the crime of aggression as well. The crime of aggression would be treated in this regard like other crimes under the jurisdiction of the Court. The other option would be that an identified act of aggression established the existence of the crime. Recent SWGCA meetings more strongly supported the differentiated approach. However, the SWGCA agreed that the approach of the definition by the act still needs to be retained in the discussions.

The SWGCA is mandated to submit a proposal on the crime of aggression to the ASP. It is highly likely that its proposal will be widely discussed during the Review Conference in 2010. The Group must submit its proposal to the State Parties at least 12 months prior to the start of the Conference.

In addition to general concerns and doubts regarding the Court, the US has particular reservations about the crime of aggression. The US claims that the Security Council has the sole responsibility to determine the occurrence and existence of state acts of aggression. The US also fears that as a major military power, its nationals are likely to be exposed to prosecution and judgment more often than other nations. In addition, the US has stated that the Court would question a legitimate use of force by the country.

AMICC will follow the SWGCA consultations and negotiations during the first week of the ASP and will monitor aspects of the meetings that may be troubling to the US. Following the ASP, AMICC will update its advocacy materials regarding the crime of aggression to reflect the latest developments.





The Review Conference

The Assembly of States Parties has started preparations for the Review Conference that will take place in 2010. Following a decision made during the fifth session in 2006, the discussions currently are focusing on issues relating to rules of procedure, financial matters, timing, venue and scope of the Conference.

Article 123 of the Statute states that: “Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute”. Many expected that the Conference would take place in 2009. The New York Working Group of the Bureau of the ASP recently decided that the Review Conference will be held in the first semester of 2010 in order to avoid overlapping with regular sessions of the UN General Assembly and the Assembly of State Parties of the ICC. Also, holding the meeting in 2010 will allow the new Bureau of the ASP to finalize preparations by the end of 2009.

Civil society representatives have suggested that the Conference should include a high level segment (a political general debate) that can enable the participants to have an impact on a system created by the Rome Statute.

Before 2010, the constructive preparation for the Conference should take place and the following issues need to be decided: (1) the purposes and focus of the meeting, (2) the organization of the Conference, (3) possible framework, and (4) the message the Conference could send to the international community.

One purpose of the Conference is to consider any amendments to the Rome Statute. Article 123 states that “such review may include, but is not limited to, the list of crimes contained in article 5”, namely the crime of aggression. The other matters could be any other provisions the State Parties wish to review. The only mandatory review is mentioned in article 124 about the deferral of an acceptance of jurisdiction of the Court for war crimes. In addition, some recommendations from resolutions E and F of the Final Act of the Rome Diplomatic Conference relating to crimes of terrorism and drug crimes could be subjects of the Review Conference as well.

According to the Director General of the Legal Department of the Royal Norwegian Ministry of Foreign Affairs, Rolf Einar Fife, appointed to be a focal point at the ASP for the preparations to the Review Conference, consideration may be given to establishing a working group of the ASP for conducting the preparatory work. Additionally, it has been suggested that the Conference should appoint its own Bureau, with its own President, and the State Parties should attend the Conference pursuant to article 112(1) of the Statute.

The organization of the Conference should include the precise rules of procedure applicable to the meeting as well as the Conference’s agenda. Such an agenda should contain several items: (1) so called “stocktaking of the Court activities”, (2) the recommendations of the Special Working Group on the Crime of Aggression, (3) review of the work of the Committee on Budget and Finance, (4) discussion of possible amendments to the Statute, and (5) other matters related to financial and administrative needs.





The Conference will be a chance for the ICC to project the present stage of development of the Court as a proof of its continuous effectiveness and advisability. It will be an occasion for a “stocktaking” of the Court’s performance in international criminal justice at a time when the mandates of the International Criminal Tribunals for Rwanda and the Former Yugoslavia may have expired.

The adoption of an acceptable amendment on the crime of aggression for inclusion in the Statute is given particular priority among other agenda items. However, it is difficult to predict if the SWGCA will reach an agreement in time which provides any definition.

Another important matter that may be reviewed during the Conference is the role of the Committee on Budget and Finance (CBF). The CBF is the ASP’s only standing subsidiary body. Some observers have stated that there should be a consideration given regarding establishment of a new standing committee of the ASP. Despite the establishment and functioning of the working groups at the ASP sessions, there also appears to be a strong need for creating an independent oversight body that would serve the ASP.

Finally, civil society, including non-governmental organizations, will play a vital role in contributing to the success of the Conference. Through their expertise and experience they will be able to promote the development and consolidation of international criminal justice and to advocate for justice for mass atrocities. In addition, national prosecution authorities specialized in international criminal law as well as other regional organizations may make also very valuable contributions to the Conference.

In addition to all these issues, civil society representatives point out growing problems relating to the personnel and recruitment mechanism within the Court’s structure. Under the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (October 4, 2004), the ICC and the UN agreed to consult and cooperate regarding personnel standards, methods and arrangements. Also, the parties agreed to consult on matters relating to the employment of their officers and staff, including conditions of service, the duration of appointments, classification, salary scale and allowances, retirement and pension rights, and staff regulations and rules. In practice, the Court adopted the UN recruitment and personnel grade system. Opponents of this decision state that the Court as a single purpose organization should have more flexibility in recruiting staff. They point to the personnel weaknesses of the ICTY and ICTR which demonstrate the unsuitability of the UN personnel system to the specialized needs of international courts. They claim also that there is a need to create opportunities for advancement within the Court’s structure and to establish a career development plan for its staff members. Also, NGO representatives believe that the CBF should not reduce the established permanent posts in favor of GTA staff (General Temporary Assistance) appointment for reasons of transparency and quality.

The Review Conference will be an important opportunity to project a positive image of the Court to the outside world and to present a continuous consensus among the State Parties in relation to international criminal justice. The success of the Conference may not lie in amending and revising the Statute but in projecting an overall message to the world about international criminal justice.

AMICC’s special interest in the Review Conference is that it will enable a new United States administration not to be hostile to the Court to participate as an observer in the Conference’s discussions with all privileges except



the right to vote. The US would be able to present its concerns regarding the Court, to have influence on its outcome within the limits the Statute imposes, and to become better informed and more comfortable about the ICC. This could lead a new administration to closer cooperation and support to the Court and thus to the first steps towards ratification of the Rome Statute.

AMICC will monitor discussions on the Review Conference during this session of the ASP and, as a part of its advocacy, will report to its constituents.

Oversight by the Assembly of States Parties

A comprehensive report on oversight, prepared by the Court, will be submitted at the sixth session of the ASP. The ASP manages, oversees and legislates for the ICC. The ASP generally oversees the Court: in particular it oversees the Presidency, the Prosecutor and the Registrar in their management and administration of the Court. In addition, the ASP oversees the finances and funds of the Court: it considers and decides on the budget of the ICC and evaluates its performance in carrying out the budget.

The Assembly monitors and directs the performance of the Court through its powers over the ICC's most senior officials: it elects the Prosecutor and Judges and makes recommendations on the selection of the Registrar. It can decide whether to alter the number of judges. Also, it can remove or discipline such officials. It influences staff performance through its coordination of the staff regulations.

The ASP implements the rights and obligations of States Parties as well. It oversees the creation and application of Privileges and Immunities of staff of States Parties. It also manages the administration of the Victims Trust Fund and considers the reports and activities of the Bureau of the ASP. The Assembly has also fulfilled the authority over providing temporary premises and building the permanent premises of the Court. The ASP has responsibilities for relations to the host country and the United Nations.

In relation to the organization of the Assembly, article 112(4) of the Rome Statute states that it “may establish (1) such subsidiary bodies as may be necessary, including (2) an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.”

Subsidiary bodies of the ASP

So far, the Committee on Budget and Finance, as the sole standing committee of the ASP, is the only permanent subsidiary organ in the ASP. It is responsible for “the technical examination of any document submitted to the ASP that contains financial or budgetary implications...” The CBF is composed of 12 experts of recognized standing and experience in financial matters at the international level. Its reports often make ultimate and far-reaching recommendations to the ASP about substantive matters whose importance and substance go far beyond their financing, such as proper treatment of victims, assistance for defense counsel, and funds for prosecutorial investigations.

Some concerns have been raised about the CBF and its recent decisions to cut off some funds for legal aid for both defense and victims' representation. The decision was made because the Division of Victims and Counsel had not been able to use all of previously appropriated funds because of delays in the case of Thomas Lubanga





Dyilo. The Committee did not approve the requested increase in contractual services for legal aid and a GTA (General Temporary Assistance) P-4 Counsel in the Office of Public Counsel for the Defense. That may be a proof of narrow views in the CBF and a lack of its members' relevant experience about assistance and support for defense counsel.

The Bureau of the ASP under resolution ICC-ASP/3/Res.8 (December 1, 2004) established two Working Groups of equal standing, one based in New York and one in The Hague. The mandate of the NY WG is to consult on proposals for an independent oversight mechanism and preparations for the Review Conference, in particular to determine the applicable rules of procedure and practical and organizational issues. The mandate of The Hague group is to consider the budget of the Court, while respecting the special role of the Committee on Budget and Finance. These Groups report to the Bureau of the ASP, but they are not permanent bodies. The Bureau decides about the length of the mandates of the Working Groups. The findings and the resolutions of the Groups do not have the same level of importance as the reports of the CBF. Also, they do not report to the full ASP as the CBF does.

The ASP needs other standing committees which could perform other important activities and tasks, for example: managing the recruitment and personnel regulations, including monitoring the implementation of the gender mandates in the Rome Statute and assisting the Court in ensuring gender-inclusive justice. Creating a financial body (similar to the UN Committee on Contracts and Property) for advising on major contracts, such as leases for premises and equipment should be considered as well. It would protect the independence and impartiality of the Court by securing transparent and legitimate commitments on its behalf. The continuing problems about the permanent premises of the Court suggest that such a body for this issue might be needed also.

Independent oversight mechanism

(2) Non-governmental organizations have been encouraging the ASP and the Registry of the ICC to take steps to create an independent oversight mechanism within the Court structure pursuant to article 112(4) of the Rome Statute. Such a mechanism would review the effectiveness and efficiency of the operations of the Court, evaluate compliance with its financial rules and regulations, and conduct investigations into allegations of misconduct. An independent oversight body of the ASP would report to the President of the ASP and to the ASP itself.

There have been some proposals from civil society representatives that the Court could use experiences of the Office of Internal Oversight Services (OIOS) that serves the United Nations. The OIOS was established in 1994, under General Assembly resolution 48/218 B. Many say though, that the mandate of the OIOS required by the numerous purposes and activities of the UN is too broad for the ICC and the ASP should consider an appointment of an inspector general for a single-purpose Court. The Inspector would be responsible for investigations that may be criminal, civil and/or administrative in nature and may concern abuses involving Court's operations and personnel. Also, the Inspector would review the effectiveness, efficiency, and integrity of all Court's organs and their activities. In addition, he or she would determine if the Court's resources are efficiently and economically utilized.





The latest decision of the Bureau of the ASP, adopted during the 9th ICC-ASP Bureau meeting (October 15, 2007), deferred the matter of oversight for two reasons: (1) No delegation had volunteered to assume the role of facilitator called by for 1 February decision of the Bureau and (2) the Registrar had indicated that it would be preferable for the Court to await the outcome of ongoing consultations on a similar mechanism being considered by the United Nations.

AMICC will continue to encourage, through lobbying and information, the creation of standing committees of the ASP, with the same status as the CBF, as well as the creation of the independent oversight mechanism of the Court.

Defense Counsel at the ICC

Advocating for adequate measures for defense counsel at the ICC is one of AMICC's important activities. AMICC cooperates closely with its member bar associations and lawyers' groups. AMICC faces regular claims in the US that the ICC will not be fair to defendants. AMICC believes that professional defense counsel play a crucial role in the functioning of the Court and thereby enhances its credibility as an effective instrument in the international justice.

In January 2004, the Registry of the ICC invited applications from interested persons in order to establish a list of counsel as required under rule 21(2) of the Rules of Procedure and Evidence (RPE). The rule states that "the Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list." In September 2006, 169 persons who submitted application materials were admitted and eligible to act as counsel at the Court.

The appointment and qualifications of counsel for the defense have been made by the Registrar of the Court in accordance with provisions of the Rules of Procedure and Evidence. The document ensures that the rights of the defense are fully respected. In addition, rule 22 (1) imposes on the counsel certain requirements regarding their qualifications. Counsel should have established competence in international or criminal law and procedure, as well as necessary relevant experience, whether as a judge, prosecutor, advocate or in another similar capacity, in criminal proceedings. Apart from that, counsel should possess an excellent knowledge and fluency in at least one of the working languages of the Court.

The ASP has also adopted the Code of Professional Conduct for Counsel (ICC-ASP/4/32) during the fourth session of the ASP, relating to the defense duties and responsibilities and its conduct before the Court.

One of the most important principles that have been introduced to the defense system within the Court's proceedings is "equality of arms". The phrase in legal terms means that the prosecution and defense in a criminal trial should have equal status before the Court, should have equal access to its resources and equal support facilities. For a fair trial, it is critical for "equality of arms" to exist between the prosecution and the defense.



AMICC



The International Criminal Bar (ICB) was established to ensure the quality of defense counsel and to give an independent and united voice as well as to guarantee the independence of the legal profession before the Court. It advocates for adequate defense counsel and equality between the defense and the prosecution in resources, access, and legal assistance to victims. The ICB includes national and regional bars, the largest international organizations of counsel, as well as counsel who are deeply involved in the development of international criminal law. From the moment of its commencement in 2002, the members of the ICB have been trying to be acknowledged by the ASP as an “independent representative body of counsel or legal associations” (rule 20(3) of the RPE) to serve the Court in its activities. Establishment of such bodies may be facilitated by the ASP. The ICB has drafted a resolution acknowledging the role of the International Criminal Bar. This is likely to be presented during the Sixth Session of the Assembly of the States Parties.

AMICC will help to lobby on the ICB draft resolution during the ASP. Together with the ICB, AMICC will lobby the ASP on important defense issues as well. AMICC will report back to its constituents about the results of these efforts.

*Researched and drafted by Agata Porter
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