



## ***REPORT ON THE SECOND RESUMPTION OF THE SEVENTH SESSION OF THE ASSEMBLY OF STATES PARTIES, NEW YORK, FEBRUARY 2009***

The AMICC secretariat participated in the second resumption of the seventh session of the Assembly of States Parties (ASP) meeting at UN Headquarters in New York, February 9-13, 2009, which included work on preparing amendments to the Rome Statute on the crime of aggression, the 2010 Review Conference and the establishment of an Independent Oversight Mechanism. All three of these issues are highly relevant to AMICC's work given the US interest in the relationship between the ICC and the Security Council as it relates to the crime of aggression; the possible participation of the US in the 2010 Review Conference; and the importance of meaningful independent oversight in order to rebut critics of the Court in the US who claim that there are insufficient means to detect and prevent waste, fraud and abuse at the ICC. The US did not attend any meetings of this session.

### Conclusion of the Work of the Special Working Group on the Crime of Aggression

During the second resumption, which continued sessions held in The Hague November 14-22, 2008 and in New York January 19-23, 2009, the Special Working Group on the Crime of Aggression (SWGCA) completed its mandate. The SWGCA was established in September 2002 to elaborate and submit proposals for a provision on the crime of aggression to be considered as Rome Statute amendments at a Review Conference. It was open on an equal footing to participation by member states of the UN and other international organizations, and many non-States Parties including Russia, China and Israel participated actively in its work. The Group, required to conclude its work at least 12 months prior to the Review Conference, finished its work at the second resumption. Its report will be finalized and considered at the 2010 Review Conference along with any subsequent informal work on aggression. The ASP has designated Prince Zeid Ra'ad Zeid Al-Husseini, Jordan's Ambassador to the US and a former ASP president, to coordinate this work over the next year. The Chairman of the SWGCA, Ambassador Christian Wenaweser, announced that informal discussions will be held June 8-10 in New York, including on drafting the elements of the crime of aggression.

In its substantive discussions on the crime of aggression, the SWGCA considered the 2009 Chairman's paper, including proposed draft amendments to the Rome Statute. In order to activate the ICC's jurisdiction over the crime of aggression, the Rome Statute requires that the Review Conference or the ASP amend the Statute to include a definition of the crime and the conditions for the exercise of the Court's jurisdiction. Regarding the definition of the crime, the delegates discussed and generally agreed on a draft Article 8 bis which adapts General Assembly Resolution 3314 (1974) for the purposes of individual criminal responsibility. The draft article includes seven examples of acts of aggression, though the definition leaves open the possibility that other acts which fall within the generic definition could qualify as acts of aggression.

The debate over the conditions for the exercise of jurisdiction over the crime of aggression is more contentious. Some countries, especially the permanent members of the Security Council, believe that under the UN Charter only the Security Council has the authority to determine acts of aggression. The most controversial questions were not resolved at this session but were reflected in a draft Article 15 bis of the Rome Statute. The 2009 Chairman's paper took into account the differences in the debate and set up a framework for capturing these differences to forward to the Review Conference. Most delegations agreed that the Prosecutor should be able to





proceed with an investigation if the Security Council has made a determination that an act of aggression has been committed. Some delegations believe that the Court could not act without a determination by the Security Council. Others have argued that the Court should be able to act if the Security Council, having been notified by the Secretary-General, has not made a determination within six months. Some of the delegations which support this approach have suggested that a determination by the International Court of Justice, the General Assembly or an ICC Pre-Trial Chamber should be sufficient to authorize an investigation if no Security Council determination is made within six months. In this context, Belgium also proposed an additional amendment which would deal with situations in which the Security Council makes a determination within the six-month period that an act of aggression did not occur. This proposal did not gain much support.

The delegates seemed to reach consensus on several other draft amendments. Under the first, Article 5(2) of the Rome Statute, which describes the process for activating the Court's jurisdiction, would be deleted upon entry into force of the amendment. A new Article 25(3) bis would specifically limit individual criminal responsibility to those persons in a position to effectively exercise control over or to direct the political or military action of a state. In addition, Article 9(1) referring to the elements of the crimes and Article 20(3) relating to double jeopardy would add the proposed Article 8 bis to existing lists referring to Articles 6, 7 and 8.

Following the discussion of the draft amendments, the delegations discussed other sub-issues which will be addressed at the Review Conference, likely through a resolution enacting the amendment. The main area of debate was how the aggression amendments would enter into force. This debate was the most animated of the session and it elicited diverse views from delegations of all regions. Some argued for using Article 121(4) which would mean that amendment would enter into force for all States Parties once seven-eighths of States Parties agreed to be bound by it. Proponents argue that this would maintain the integrity of the Rome Statute and apply the law equally to all, although it may be difficult to reach the required seven-eighths acceptance of the amendment. Others argued that Article 121(5) should apply, meaning that the amendment would only apply specifically to nations that have agreed to them. This would mean that the provision would not apply to all nations but would also not alienate those that may not agree with the amendment. Several delegations explored the possibility of using 121(5) followed by 121(4) once seven-eighths acceptance was achieved but there was little support for this suggestion.

The delegates also discussed how the amendments would apply to situations in which one nation agreed to the amendment and another did not. They also addressed the question of the treatment of non-States Parties following the amendment, either before or after joining the Court. The delegates did not reach consensus on any of these questions, though there was general agreement that the amended Rome Statute not discriminate between non-States Parties and States Parties that have not accepted the aggression amendment. Under some readings of Article 121(5), the language of the Statute could require the Court to treat differently non-States Parties, and States Parties depending on whether they have accepted the amendment on aggression. There were also brief discussions about the Court's jurisdiction over the place of the crime's result and about whether the Security Council could refer alleged crimes of aggression to the ICC as soon as the amendment was adopted by the Review Conference or only after the amendment's entry into force.





## Informal Consultations on the Review Conference

In preparation for the 2010 Review Conference, the focal point, Ambassador Rolf Fife of Norway, held informal consultations during the second resumption. The date of the conference, to be held in the second quarter of 2010 in Kampala, Uganda, has not yet been set by the ASP's Bureau. In addition to addressing possible amendments to the Rome Statute, Ambassador Fife stated that the Review Conference would be an opportunity for a stocktaking of the achievements of international criminal justice, including a three day high-level segment. This would suggest that the previous projection of 5-10 working days for Review Conference may turn out to be closer to ten days, depending on the number of proposed amendments and the time dedicated to them.

The focal point identified areas that the Review Conference is required to address – Article 124, which allows States Parties to delay the Court's jurisdiction over them with respect to war crimes for seven years – and which it may address – aggression, terrorism, drug crimes and other possible proposals. In this regard, Belgium circulated an early draft of an amendment to Article 8 expanding the list of prohibited weapons in the category of war crimes. Ambassador Fife suggested that all possible amendments be channeled through the New York Working Group, preferably prior to the next ASP meeting in The Hague in November. While there will be no formal cut-off date for amendment proposals, he stated that any items proposed after November may be channeled to a post-Review Conference process. He also announced that the Bureau's New York Working Group would informally discuss the modalities for the stocktaking exercise and consider any draft proposals. He identified representatives from Brazil and Nigeria who will co-facilitate this work.

## Informal Consultations on an Independent Oversight Mechanism

During the second resumption, Mr. Akbar Khan of the United Kingdom held informal consultations with governments and NGOs regarding the establishment of an Independent Oversight Mechanism. He is the facilitator on this issue in The Hague Working Group. His efforts continue the work of the New York Working Group which submitted its report to the Bureau in 2008. AMICC participated in NGO consultations with the facilitator and contributed to a Coalition for the ICC (CICC) team paper in response to his interim report. He also indicated that he would be consulting with NGOs in The Hague in March and invited NGOs to provide papers on establishing an Independent Oversight Mechanism.

Article 112(4) of the Rome Statute encourages the ASP to establish an Independent Oversight Mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy. This is especially relevant in countering critics of the ICC in the US who claim that there are insufficient checks and balances on the Court. It would also help to detect and prevent waste, fraud and abuse at the Court and help it deal quickly and effectively with major misconduct by ICC staff and officials. The facilitator's paper focused on expanding the Court's professional investigative capacity with sufficient safeguards. It also stated that any mechanism should respond proportionately to the Court's needs with the possibility of being expanded. In terms of specifics, the facilitator indicated that the investigative function has to be independent and that it cannot be part of the Court, though it could be co-located in the ASP Secretariat or the Court's Office of Internal Audit. The mechanism could also likely initiate its own investigations, have a whistleblowing capacity and report directly to the ASP or the Bureau.





After consultations with NGOs in March, the facilitator will ask the Committee on Budget and Finance (CBF) to assess the budgetary implications of the proposed mechanism with the aim of establishing an Independent Oversight Mechanism at the ASP's next session in November 2009. On the final day of the second resumption the ASP passed a resolution to advance action by the facilitator and the CBF.

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