



REPORT ON THE RESUMED SIXTH SESSION OF THE ASSEMBLY OF STATES PARTIES, NEW YORK, JUNE 2008: UPDATE ON THE REVIEW CONFERENCE OF THE ROME STATUTE OF THE ICC

Under Article 123 of the Rome Statute (RS), the Review Conference (RC) is an obligatory special meeting of the States Parties to the International Criminal Court (ICC). The Secretary General of the United Nations will convene the RC, to take place in the first half of 2010.

The Conference will consider a number of issues. The subsequent account is not an exhaustive list of such issues. A key theme will be to achieve a final agreement on the definition of the Crime of Aggression. The RC will also decide whether to maintain, amend or remove Article 124. This is a provision which allows a country ratifying the RS not to subject its nationals to the jurisdiction of the Court with respect to war crimes for a period of seven years after the ratification takes effect. Also, the agenda will address the recommendations of Resolution E of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted alongside the RS. These are that the RC consider crimes of terrorism and drug crimes as a step towards reaching their definition and inclusion within the list of crimes of the RS. Furthermore, in general the RC will be an opportunity to assess the general performance of the Court and make relevant improvements without the need to amend the text of the treaty.

One of the preliminary matters that must be resolved, in addition to funding, timing and scope, is the location of the RC. Before the sixth session of the Assembly of States Parties (ASP), three venues were discussed: The Hague, UN headquarters in New York and Uganda. The last made an offer on June 8, 2007. In response to this offer, Norwegian Ambassador Rolf Einar Fife, the Focal Point of the ASP Working Group on the Review Conference, led a site visit to Uganda from May 13-15, 2008 to assess practical issues.

Review Conference Actions at the ASP's Fifth and Sixth Sessions

The ASP at its fifth session held in November/December 2006, adopted an omnibus resolution: 'Strengthening the International Criminal Court and the Assembly of States Parties', which dealt with several essential matters, including requesting the leadership of the ASP to start preparing for the Review Conference. It requested that the ASP Bureau focus in particular on the issues of the rules of procedure applicable to the RC and on practical and organizational issues, especially as regards dates and venue of the RC, and to report to the next regular session of the ASP on the status of such preparations.

At the sixth session held in November/December 2007, the ASP discussed the timing, scope and venue of the RC. Uganda made a formal proposal to host the RC and the ASP focused on it. Some delegations expressed concern about hosting the RC in a situation country, that is, a nation where a formal ICC investigation is in effect. They argued that this could compromise the work of the ICC. In addition, some delegations suggested a list of non-exhaustive objective criteria the ASP might wish to take into account when deciding on the venue for the RC.





Developments at the ASP's Resumed Sixth Session

The ASP met on June 5, 2008 to discuss the possible venue of the RC. Though some countries were willing to decide on this at the resumed sixth session, the majority preferred to come to a conclusion on the matter, at the latest, by the next session of the ASP in November 2008.

The Attorney General and Minister of Justice and Constitutional Affairs for Uganda, Mr. Makubuya, reiterated his country's offer of June 8, 2007 to host the RC and its strong commitment to international obligations as a State Party to the Rome Statute. In addition, the Report on the Uganda site visit concluded that Uganda has the logistical capacity and capabilities to host the RC and that it is equipped and capable to facilitate a comprehensive security plan in support of the RC. Further, the Report noted that the Ugandan authorities confirmed that they will provide the necessary funds for the RC.

Based on the discussions in the Working Group, a majority of countries favor hosting the RC in Uganda. The remaining criteria that countries at the ASP wish to see satisfied, before making a decision, are that Uganda expedite the enactment of legislation implementing the RS in its domestic law and that it ratify the Agreement on Privileges and Immunities of the Court before November 2008. According to Mr. Makubuya, these two criteria will be met very shortly.

State Parties supporting Uganda as host of the RC argued that to hold it in Uganda would benefit Africa. They further argued that it is important for the Court not to be seen as a eurocentric court if international cooperation is to be achieved. According to this view, to have it in Africa, the current location of all of the work of the Court, is fundamental. It would allow the ICC to better publicize the role of the Court, carry out outreach activities and pay tribute to the victims of atrocity crimes. The fact that Uganda is a situation country over which the Court has jurisdiction would provide an opportunity to explain the role of the Court to the affected people and share with them the message that there can be no peace without justice.

Unexpectedly, Argentina made a proposal at the session to host the RC. For a large number of State Parties, although they appreciated the proposal, it came as an obstacle for reaching a timely decision on the venue. Many countries, in particular African States, were ready to come to a conclusion at this resumed sixth session and wished to fix a time limit by which new proposals could be made.

Countries argued that any other offer would have to meet the same criteria that were applied to Uganda. Accordingly, the ASP required Argentina to provide additional information concerning the offer as soon as possible, and before the seventh session of the ASP. Although there is no deadline for States to make a proposal, it seems clear that the majority of delegations agree with Ambassador Fife that any additional proposals to host the RC would complicate matters and that time would not allow for their appropriate consideration. It was informally understood among the States Parties that Argentina will be considered along with New York and The Hague if the Uganda bid falls through or fails to attract a large enough majority.





NGO Activities and Positions on the Review Conference

The International NGO Coalition for the International Criminal Court (CICC) monitors a wide range of issues relating to the work of the ICC through issue-specific teams and working groups comprised of NGO representatives. Teams monitor key developments related to their particular area of focus and recommend strategies to be considered by the CICC as a whole or by individual members. AMICC as a CICC member participates actively in the Review Conference Team's work.

As Ambassador Fife stated in his preliminary paper on the RC at the fifth session of the ASP, the key criteria for the success of the Conference may have less to do with amendments to the Statute than with what kind of overall message is conveyed to the international community at large about international criminal justice. In line with this message, the CICC Review Conference Team, in its Comments and Recommendations on Criteria for the Review Conference Venue dated June 2, 2008, said that it is essential for the RC to reaffirm that the most serious crimes must not go unpunished and that the investigation and prosecution of such crimes is the duty of all States and, if they fail to meet them, of the international community. While most countries by and large agreed with these statements, there seems to be some disagreements as to whether having the RC in Uganda would in fact allow for such a message to be conveyed.

The CICC Review Conference Team in its paper expressed its concern that because Uganda is an ICC situation country, hosting the RC there would potentially undermine perceptions of the Court's independence and impartiality. Numerous cases of abuse by the Ugandan army, including rape, beatings, arbitrary detentions, and murder of civilians in displaced persons camps have been reported. Yet, according to Human Rights Watch, the Ugandan government rarely investigates or prosecutes military officers before national courts. The Rome Statute as well as the Rules of Procedures and Evidence demand that the ICC examine these crimes committed by the military just as much as those by the Lord's Resistance Army.

The Prosecutor has said that he is investigating these alleged crimes. It may be essential for the Prosecutor to raise these issues and make it clear that the fact that Uganda is hosting the RC will not compromise the ICC's ability to act independently and impartially in investigating and prosecuting crimes by the Ugandan military.

Separately, the international NGO No Peace Without Justice (NPWJ) supports Uganda hosting the RC if it enacts implementing legislation of the RS and ratifies the Agreement on Privileges and Immunities before the seventh session of the ASP in November 2008. NPWJ argues that holding the RC in Uganda will reinforce the fight against impunity; make a statement in support of the integrity of the Court; enhance the independence of the Court in the eyes of the people; and emphasize the importance of the Court becoming a truly field-based institution. NPWJ asserts that this would further give the opportunity to the Court and national civil society to work together and promote the work of the Court.

NGO Participation at the Review Conference

The Working Group on the Review Conference established that the venue should allow for the broadest possible participation of as many States as possible as well international organizations and civil society organizations. The Ugandan government stated that it welcomed the activities of NGOs and will allow the full participation of civil society.





Next Steps for a Decision on the Review Conference

At this resumed sixth session, the ASP did not refer to financial issues, nor to the length, date or scope of the RC. However, at the preceding sixth session, it was agreed that the RC shall be held for five to ten working days during the first half of 2010. This information, as well as a decision on the venue of the RC, will be the subject matter of discussions at the seventh session of the ASP in November 2008. Countries agreed that these issues must be resolved fully at that meeting.

US Participation at the Review Conference

As stated in Article 112, States which have signed the RS or the Final Act may be observers in the Assembly. States may participate in the RC on the same terms as in the ASP. Accordingly, the US, having signed the Final Act is entitled to attend and participate in the ASP and the RC. The US can simply appear; no other action is necessary. However, if it intends to participate the US should carefully prepare well in advance.

A new administration is likely to consider a number of issues, including the crime of aggression, terrorism and drug crimes and Articles 121 and 124 of the RS, when making a decision as to whether or not it will participate in the RC or not.

Crime of aggression

The RS provides that the ICC cannot exercise jurisdiction over the crime of aggression until it has defined the crime and set out the conditions under which the Court shall exercise jurisdiction with respect to this crime. The RC will discuss how the definition of the crime of aggression will enter into force, the possible deletion of Article 5(2), the definition of individual crime, the definition of state act, the conditions for the exercise of jurisdiction and the elements of crime.

One issue of particular interest to the US will be how the definition of the crime of aggression will enter into force as an amendment to the RS. The RS offers two ways for an amendment to enter into force. Both ways first require adoption by the ASP or RC by consensus or two-thirds majority. Under Article 121(4), the crime of aggression would enter into force for all States Parties once seven-eighths of them ratify it. If the amendment enters into force under Article 121(4), US nationals could be subject to the jurisdiction of the Court for crimes of aggression regardless of whether the US joins the Court in the future.

Under Article 121(5), the crime of aggression would enter into force for those States Parties which have accepted such an amendment. In this situation, the States Parties at the RC may decide to specify in the amendment that a State Party which joins the Court after the amendment has entered into force may decide whether to accept the amendment. The US might prefer Article 121(5) because it would give the US the option not to accept the amendment if it joins the Court before or after the RC. Under either amendment scenario, the Court could exercise jurisdiction over US nationals accused of crimes committed in the territory of a State Party if the US does not join the ICC.

Another issue the US would follow closely is the debate on the conditions for the exercise of jurisdiction. There is disagreement among the States Parties with respect to the role of the Security Council (SC) in determining





whether an act of aggression has occurred. Under Article 39 of the UN Charter, “the SC shall determine the existence of any [...] act of aggression and shall decide on what measures shall be taken [...] to maintain or restore international peace and security”. In addition, Article 5(2) of the RS states that a provision on the crime of aggression shall be consistent with the relevant provisions of the UN Charter, including Article 39. Thus, the SC’s permanent members have argued that the Court must not proceed if the SC has not determined that an act of aggression has occurred. The US would be in favor of that option. Participation in the RC would be an opportunity for it to communicate its views on the matter.

Terrorism and drug crimes

Based on statements made by US delegates following the Rome Conference, the US opposes the inclusion of terrorism and drug crimes in the jurisdiction of the Court on the basis that this could undermine more effective national and transnational efforts to fight against these crimes. The US considers that these crimes necessitate ongoing law enforcement effort against criminal organizations and patterns of crime, with police and intelligence resources, something the US believes the ICC cannot provide.

As mentioned previously, it is possible that the RC will consider both of these crimes as a step towards later reaching a definition and their inclusion within the list of crimes of the RS. Given that it will be the beginning of discussions on the matter – if it is on the agenda – it is essential for the US to attend and participate in the RC so that it can share its views and concerns.

Articles 121 & 124 of the Rome Statute

Under Article 121, a State Party can decide not to accept amendments to Articles 5, 6, 7 or 8 of the Statute at the time of the amendment, thus exempting its nationals from the jurisdiction of the Court for any amendments to the crime of genocide, war crimes and crimes against humanity. However, a non-State Party seeking to join the Court after an amendment to one of these articles enters into force cannot opt out of it. If the RC decides on the necessary elements of the crime of aggression, the ASP will determine whether this amendment falls under Article 121(5) and in the amendment may specify that future States Parties will have the choice to accept the aggression provision upon ratification.

In addition, Article 124 of the RS is an opt-out provision of seven years for war crimes available only to nations as they ratify the RS. Some have argued that in theory, though unlikely in practice, such an article might permit a country disposed to commit war crimes to join the treaty and opt out of the war crimes jurisdiction for seven years while the citizens of a non-State Party would always be subject to this jurisdiction. The US is hostile to these aspects of Articles 121 and 124. Given that the RC is likely to discuss these issues, the US ought to join in the debates and seek understanding of its concerns.

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