



American Nongovernmental Organizations Coalition for the International Criminal Court Report on the 16th Session of the Assembly of States Parties

This report covers issues at the 2017 session of the Assembly of States Parties (Assembly, ASP) of the International Criminal Court (ICC) that were and are priorities for the Coalition. Thus, it does not cover the session as a whole. However, it does also provide an overview of the atmosphere and nature of the meeting as a context for its actions on those priorities. Foremost priorities for us were the existential questions of the budget and enforcement. The others were: the Court's responsibilities for victims and reparations, the activities and role of the Prosecutor and particularly her report featuring the situations in Afghanistan and Palestine/Israel, gender crimes and crimes against children – especially the recruitment and abuse of child soldiers, due process in ICC prosecutions and trials, and the crime of aggression. All of these issues especially arise in the advocacy of the American NGO Coalition for the International Criminal Court (AMICC) and its members and supporters. In support of our interactions with the Trump administration, we also monitored the members, statements, and activities of the United States observer delegation.

A list of the AMICC delegation of eleven members is in the appendix. These were in two groups. Senior delegates were persons with special expertise on the ICC; other delegates followed and analyzed for this report specific assigned priority issues.

Background and Context

This 2017 session (ASP 16) came at the end of a year of progress and maturation of the ICC as well as of frustration and continuing obstacles in its work. The Court's problems were both external and internal. The latter particularly included the logistics of victim participation, the slow pace of too many prosecutions and trials, continuing questions of due process, difficulties in expanding outreach and dilemmas in improving structures, processes and efficiency with too little money. The most important external difficulties were ASP approvals of very inadequate budgets, governments refusing to enforce ICC orders (particularly arrest warrants) and nations failing to cooperate with ICC investigations and information gathering.

In 2017, the ICC had a full workload. It continued with four trials and acted on some key unsettled aspects of its subject matter and personal jurisdictions and on questions of trial conduct and due process. Trial and appeals chambers dealt with important as well as novel aspects of Court jurisdiction, such as command responsibility, witness tampering, and the destruction of historic cultural and religious sites and buildings. It also clarified its responsibilities to victims with decisions about making and implementing orders for reparations.

Budget

The Court requested 151,475,700 euros for 2018, an increase of 4.4% over 2017. At the recommendation of the Committee on Budget and Finance (CBF), the ASP approved a 2018 operational budget of 147,431,500 euros (\$181,381,028 at the time of the session), a 1.47% increase. In statements during, before and after the session, the Prosecutor, Registrar, and other ICC officials indicated that this amount was grossly inadequate to meet the Court's urgent needs, even after its best efforts at cost saving and efficiency. Many experts and supporters of the ICC believe that if this trend of inadequate budgets continues, the Court will be unable to meet its Rome Statute responsibilities as its caseload constantly grows as expected.

Seventeen delegations addressed the budget question in their statements. Seven of these supported the CBF recommendation, although five of them mentioned the importance of funds adequate to the needs of the Court, while insisting that the budget should not grow. Six said that the budget was too small to meet those needs. One demanded zero-based budgeting as the main theme of its statement, and others said that they preferred this approach. (Zero-based budgeting automatically reduces the real value of the budget because of the effect of inflation). Three other countries spoke about additional budget issues such as payment of overdue assessments. Most of the statements called for more efficiency and cost saving at the Court and further improvements in creating and presenting the budget. Several delegations called for both no growth in the budget and a larger caseload for the Court.

See the section below for an analysis of the functioning of the Assembly and the role of the CBF, as observed at this session.

The Structure and Functioning of the Assembly

Although the Rome Statute gives the ASP the right to establish subsidiary bodies, the Committee on Budget and Finance is the only standing committee of the Assembly. The rest of the ASP's infrastructure is composed of the intergovernmental Hague and New York Working Groups and their associated task forces and subgroups. They report not directly to the Assembly, but instead to its Bureau. They have done valuable work on such issues as amendments to the Statute, the crime of aggression, child soldiers, and victims. Their consideration of these issues and reports on them have been essential to the work of the ASP.

The working groups submit these to the Bureau, which almost always passes them on to the Assembly, unchanged.

The CBF is supposed to be composed of independent experts elected by the Assembly. They are, however, nominated by States Parties that often have considerable influence over them. Since there is no other standing committee in the Assembly, the CBF's report is especially central to the ASP's debates and decisions, focusing them on the budgetary aspects of the issues on its agenda. Moreover, since the Committee is the principal interlocutor in the Assembly for the primary organs and officials of the Court, its work and reports often extend to the non-budgetary aspects of major questions at the ICC such as the logistics of victims' participation in Court proceedings, legal aid, and managing human resources.

Some experts on the Court now argue that in consequence the Assembly's discharge of its oversight responsibilities is too narrow and confined to budget considerations. (ASP sessions are brief, which worsens this situation). They point out that the governing bodies of most international organizations have standing committees assigned to the primary functions and departments of the institution. In those governing bodies, finance committees dealing with the budgets of particular departments usually must interact with the other standing committees responsible for those departments. This helps bring debate and recommendations in line with the full needs of a department in fulfilling its substantive responsibilities.

Enforcement

The ICC has no powers or resources of its own to enforce its orders such as arrest warrants. It is entirely dependent on its States Parties for enforcement. This inability is a fundamental and intrinsic weakness of the Court. Among the arrest warrants the Court has issued, fifteen remain unenforced. The prime example of this problem is Sudan President Omar Al Bashir, who has travelled and acted almost at will without suffering the consequences of a longstanding ICC arrest warrant. Many government statements, including one by the United States observer delegation, deplored this situation and urged international support to the Court in its pursuit of Bashir. The problem of enforcement bolsters a favorite claim among American critics of the Court that since Member States do not respect or really support the ICC, there is no reason for more countries to join it.

ASP reporting and debate on enforcement are included under the heading of "Cooperation" in documents and analyses at the Court and the ASP. The Hague and New York Working Groups under a mandate by the 2016 ASP session prepared with the assistance of the Court an extensive report on cooperation/enforcement. The Bureau transmitted this to the ASP for its debate on the issue of cooperation. This report contained a draft resolution that the ASP adopted almost entirely. It included recommendations on improving enforcement, impounding assets, and contact with individuals under warrants.

Among the many subjects under this agenda item, the other main topic was tracing and impounding assets derived from ICC crimes. The ASP debate on cooperation gave equal priority to this issue and to enforcement. The final ASP resolution on cooperation recognized a Declaration of Paris on impounding assets approved by a conference there.

The resolution also covered many other subjects such as incorporating the Rome Statute in domestic penal codes and enforcement of sentences. However, much of the resolution consisted of recommendations for various methods and processes for encouraging States Parties to improve enforcement. These included avoiding contact with persons under warrants, designating liaison officials in governments to facilitate enforcement, devising an international method for coordinating those officials, and creating better ways for circulating information about persons under warrants.

The working groups' report, the debate and the resolution left the impression that the approach of the Court and the ASP is to create methods and techniques that will make it as efficient and easy as possible for governments to improve enforcement. While this will help, these steps do not really deal with the fundamental problem that nations are very reluctant to offend persons and governments that are important and strategic to them by enforcing the warrants.

The Crime of Aggression

The Nuremburg Tribunal after the end of the Second World War tried the crime of aggression as the crime against peace. A number of countries at the 1998 Rome Conference felt strongly that it should be included in the Statute. However, because of challenges in reaching consensus on a definition, time ran out for negotiating this inclusion. To satisfy Germany and other avid proponents of the crime, the Statute included aggression in the list of ICC crimes. It provided, however, that the crime would be activated in the jurisdiction of the Court only once the ASP had defined it and established the conditions for the jurisdiction. A special review conference of the ASP would negotiate the definition and the conditions.

This conference convened in Kampala, Uganda in June 2010. Delegates agreed on the text of a Statute amendment for the crime of aggression after a long struggle to achieve consensus lasting well into the early hours of the final day. The conference achieved the number of ratifications necessary to send the amendment to the ASP much more quickly than many observers had expected. This gave the 2017 ASP the mandate to decide on adopting the amendment.

The discussion surrounding the crime of aggression turned out to be the most difficult and dramatic debate of the session. Almost all delegation statements discussed it. In order to avoid the painful and difficult process of amendment by vote, the meeting agreed that the decision would be by consensus. As usual with such decisions, this process gave great power to a few obstinate holdouts. These delegates proved to be France and the United Kingdom, with the United States pushing from the sidelines. These countries disagreed with the majority reading

of the amendment's provisions on jurisdiction agreed in Kampala. Their stolid insistence on their position of limited jurisdiction clashed with impassioned appeals by proponents of the crime as previously determined. In the end and in the final hours of the closing day of the session, the minority swayed the interpretation in their favor.

The final resolution on the crime provided that a State Party may file a declaration opting out of the Court's jurisdiction over its territory or citizens. Moreover, if a State Party has not ratified or accepted the amendment including the crime into the Rome Statute, the Court has no jurisdiction over that Party for crime of aggression cases referred to the Court by a State Party or begun at the initiative of the Prosecutor. Thus, the Court will have jurisdiction over such a State Party only through a referral by the United Nations Security Council. Finally, the Kampala meeting had already agreed that non-State Parties and their nationals would be completely exempt from the Court's jurisdiction, except in the case of Security Council referrals.

The ICC has therefore lost for the crime of aggression the automatic jurisdiction established for its other core crimes in Rome. This is an unfortunate and potentially damaging precedent for future amendments. Furthermore, this very limited jurisdiction gives the United States, Russia, and China—the Security Council permanent members that are not parties to the Statute—almost complete protection from prosecution of their nationals. The amendment bringing the crime of aggression into the Rome Statute activates on July 17, 2018, the Court's twentieth birthday.

Prosecutor's Report: Afghanistan and Palestine, Child Soldiers, and Gender Violence

These issues primarily came before the session through the Prosecutor's report on her activities. Government statements generally praised the report and the Prosecutor's regular personal presence at the session, giving them the opportunity to speak with her directly.

There was little discussion of the two country situations in Afghanistan and Palestine in the general debate, but several side events included discussion of them. In particular, a side event co-sponsored by Palestine offered another opportunity for its delegates to continue their campaign to urge the Prosecutor to announce quickly a decision on her preliminary examination of its situation. Except for the remarks by the US delegation described below, there were virtually no objections in government statements to the Prosecutor's work on Afghanistan and Palestine.

The report emphasized the Office of the Prosecutor's high priority for crimes of gender violence and against children – especially the abduction and abuse of girls and the recruitment of child soldiers. The Prosecutor's oral introduction of her report expressed with strong but restrained emotion her personal concern and determination to act in response to these crimes.

The Court's work on them particularly attracts support for the ICC in the United States by many groups and individuals. In addition to general concern and sympathy, religious groups and

NGOs have dedicated themselves to publicizing and opposing these offenses. This support offers AMICC the opportunity to enlist these groups in our advocacy both to further their own objectives and to help us reach sympathizers in the public.

Victims

The statements of thirty-one countries addressed the issue of conduct with and services for victims, frequently discussed in the session and in side meetings. These statements generally expressed satisfaction at the Court's recognition that one of its fundamental values is service to victims both where they live and in participation in trials so that their voices can be heard. They frequently emphasized that this service is important on the merits and as an essential part of the role of the ICC. Ironically, some of the strongest supporters of this expensive part of the Court's work in separate remarks also demanded reductions in its budget.

Much of the debate on victims arose in response to the Victims Report. This discussed current activities, including recent Court decisions elaborating on the nature and implementation of reparations, the need for additional funding, and the difficult issue of whether reparations should be collective or individual. The report explained that the Court's recent guidelines in decisions required much more funding to implement fully. It urged voluntary contributions from governments and donations from NGOs and individuals.

In response, governments endorsed the call for more contributions while describing their own contributions to the Fund. They recognized that the Fund demonstrated its maturity and advanced development by its acceptance and execution of the Court's guidelines. Governments generally approved the Fund's preference for collective reparations, while endorsing its recognition that in the end, the final preferences of victims must be respected.

The Court's concern for and extensive obligations to victims is another issue which draws the favorable attention of Americans to it. Their growing awareness of the horror of atrocity crimes, the gradual spread of the victims' rights movement in the United States, and natural human sympathy combine to make the ICC commitment and extensive responsibilities for victims appear more familiar and highly important.

Due Process

At this session, due process questions arose in discussions of the needs of defense counsel and the slowness of preliminary examinations and trials. The Court pays the defense counsel of indigent defendants (which is most of them) far less in fees and staff costs than most of the lawyers command in their private practices.

Individually and through their organizations, defense lawyers criticized again at this ASP session about these underpayments. They pointed out that on-site investigations are often especially prolonged, expensive, and difficult for them because of the hostility of some governments to

the defense. This further worsens the constant problem of the inequality of the prosecution and the defense in human and material resources and in access. Governments speaking to these problems recognized and discussed them, for the most part without suggesting solutions.

ICC officials conceded that ICC proceedings were slower than the usual law's delays and understood that this was a threat to the legitimacy and credibility of the Court. The officials said that they were urgently at work on the problem. They cited some steps already taken, such as reducing the number of judges in certain hearings and trials so that those released could be available for other cases and trials. However, these officials also pointed out that the Court needed more money, which is not available, for larger staffs to speed up preparing for and supporting investigations and trials.

American lawyers are an important potential constituency for the ICC. However, due process problems at the Court, though familiar enough from courts in the United States, alienate American counsel. This partly explains why too few US lawyers enroll at the Court.

United States Observer Delegation

The members of the delegation were all career government officials from the departments of Defense and Justice, the State Department offices of the Legal Adviser and Global Criminal Justice and its Bureau of European Affairs. The Legal Adviser in the U.S. Mission to the United Nations was also a member. Delegation members attended almost all meetings of the session and interacted with the delegations of close allies of the United States.

In statements to the session, the United States recounted at length objections to any ICC claim of jurisdiction over Americans. It included the claim that treaties cannot apply to countries that have not ratified them. (This assertion is rejected by ICC States Parties and countries outside the Court on the ground that it has jurisdiction only over individuals, not states or governments, who are either State Party citizens or whose crimes meet certain requirements such as being committed on the territory of a State Party.) In addition, although the delegation declared that it remained committed to the principle of complementarity, it objected to ICC pronouncements about US courts without US consent. In any case, the US sees complementarity as unnecessary since the United States has always held itself to the highest standards of accountability.

However, statements also recalled the history of American commitment to international legal accountability for atrocity crimes, beginning with the Nuremberg Tribunal. This commitment would continue in its working with the ICC. Finally, the US delegate statements reviewed the achievements of the Court, especially in its successful priority for crimes of gender violence, as well as its failures such as the situation in Sudan.

State Party delegations did not much remark upon the American presence, although some hoped that it would continue in future sessions.

Conclusion

This ASP session demonstrated through its debates and its interchanges between delegations and Court officials that the Court had reached an early maturity. The session accepted the permanence of and future need for the Court as a matter of course. The threat of mass withdrawals had ended. The election of South Korea's O-Gon Kwon as the new ASP president was smooth and warmly greeted by most delegations.

However, this generally positive performance by delegates and ICC officials at the ASP session remained shadowed by the continuing problems of the budget and enforcement. The solutions to these are either very difficult or not apparent and will remain themes of continuing discussion and analysis in working groups, within the Court, by civil society and in academia. These solutions must be found if the Court is to achieve its full effectiveness and efficiency.



American NGB Coalition for the International Criminal Court

**American Non-Governmental Organizations Coalition for the International Criminal Court
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