



International Law Meeting Summary

The International Criminal Court: Reviewing the Review Conference

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INTRODUCTION

The meeting was held under the Chatham House rule. The participants in the discussion included representatives from government, NGOs, academia and practising lawyers. In the discussion the speakers highlighted particular aspects of the Review Conference and their views were discussed by participants.

The conference was held in Kampala, Uganda from 31 May to 11 June 2010. The Chatham House International Law Discussion Group had held a meeting on prospects for the conference on 29 April 2010 (http://www.chathamhouse.org.uk/research/international_law/papers/view/-/id/890/).

STOCK-TAKING

The 'stock-taking exercise' was seen by civil society as a key element of the Review Conference, and was considered by participants to have been a notable success, although it had not covered, and was not intended to cover, the actual operation of the Court. The location of the conference in Kampala had contributed to this success. The format of the Panel discussions for the stock-taking meant that experts (rather than States' representatives) lead discussions and this was felt to add an expertise and a focus on practical steps.

Peace and Justice

Participants considered that the discussion in the Kampala Conference marked a turning point in the 'peace vs. justice' debate. The paradigm has moved from assertions that peace could be incompatible with justice towards acceptance of the view that peace could not be achieved at the expense of justice. The tensions will remain in this relationship but they can be addressed in part by sequencing, the use of the possibility of deferring investigations under Article 16 of the Statute, and by using transitional justice mechanisms carefully – both judicial and non-judicial interventions. This view has important implications for amnesties which are no longer seen as an acceptable way to resolve tensions between these important objectives. Mediators need to be mindful that the individuals with whom they deal may face prosecution in the future.

While no Resolution or Declaration was adopted, in recognition that this was a continuing discussion with no finality, a very useful summary of the discussion was adopted.¹

Victims and Affected Communities

A key aspect was the role of the ICC in breaking the silence of the victims as part of healing. Before, the ICC victims had been spoken *about*, now they were entitled to speak for themselves. However, while the ICC was innovative in bringing victims into the process, considerably more needed to be done on outreach to reach women and children. NGOs, tribal and religious leaders needed to be included to help reach these vulnerable groups. Getting information out helped to create realistic expectations on the part of victims as to what the court could achieve through their participation.

The innovation of holding the Conference in a country in which the ICC was investigating crimes was extremely positive and allowed some delegations to visit the work of the field offices in Bunya (Democratic Republic of Congo). The discussion on victims was one of the major successes of the Review Conference, highlighting the role of the Court with victims and in particular the work of the Trust Fund for Victims. A Resolution re-affirmed the rights of victims and need for outreach.²

Complementarity

The discussion at the Conference had focused on 'positive complementarity': the building of national capacity to prosecute ICC crimes. The Kampala conference reinforced the common will to fight impunity and recognised that closing the impunity gap had to be done at national level. It emphasised that the ICC was a court of last resort and re-focused the debate away from the role of the ICC to re-invigorating the primary role of States to prosecute. That the term itself was accepted was a positive development in light of some previous disquiet that it was not a term in the Rome Statute.

International organisations and civil society had an important role to play in helping States build rule of law capacity to prosecute these crimes. Acting within its existing resources the ICC should play a facilitating role, a co-

¹ http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-PJ-1-Rev.1-ENG.pdf

² RC/Res 2 'The impact of the Rome Statute system on victims and affected communities' http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.2-ENG.pdf

ordinator or catalyser acting through the Assembly of State Parties (ASP) Secretariat, bringing together the various players, exchanging information but focussing ultimately on its primary judicial function. This affirmation of the primary role of States has placed the burden of action on States, with a supporting role for international organisations, and this was reflected in a Resolution.³

Co-operation

Notwithstanding the mandatory obligations on States in certain areas (Part IX, Rome Statute) it was important to note that co-operation was also needed on the non-mandatory areas (eg interim release, witness re-location, sentence enforcement) for the Court to succeed. Although over 85% of requests met with a bilateral response, co-operation was very uneven. Not a single agreement on interim release had been reached. It raises questions over the right to bail and temporary release, which were compromising the presumption of innocence. It was stressed that without effective arrest and surrender - without people to prosecute - the ICC would lose credibility in the fight against impunity.

The 'equality of arms' principle meant that States needed to support both Defence and Office of the Prosecutor (OTP) teams. Some complaints of lack of assistance had been received from Defence teams and States need to ensure that Defence teams assisted, for example through information sharing and logistical support.

States were very willing to share their experiences on witness relocation and sentencing co-operation. Greater use needs to be made of ad hoc interim agreements pending the passing of implementation legislation. The formal pledges to enact legislation by Italy and Democratic Republic of Congo were welcomed while including pledges made informally in the discussions would prove a useful tool to remind States especially when listed in the 'pledge section' of the Review Conference. A Declaration⁴ was adopted recommending that the issue remain on the ASP Agenda.

The discussions on complementarity and co-operation were important for emphasising to new States their continuing responsibilities subsequent to

³RC/Res 1 'Complementarity' http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf

⁴RC/Decl.2 'Declaration on co-operation' http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.2-ENG.pdf

ratifying the Rome Statute. There was substantial experience to share among States with different legal traditions and different capacity levels and a general sense that discussion was centring on how to move forward on issues, focussing on why States were unable to co-operate or implement legislation, for example. Sensitivity among States in earlier ASP sessions over who had implementing legislation ('name and shame'), between those who felt bigger States should carry more of the burden, was contrasted with a positive sense at the Review Conference of a collective project in making the ICC work. The emphasis had been on *why* States found it difficult to cooperate, and in helping them with that.

One participant however raised a serious concern that some State Parties – including EU Members - had stated that their legislation would not allow them to arrest and detain President Bashir because he was not from a State Party. Denmark had invited President Bashir to a conference on climate change, for example.

THE CRIME OF AGGRESSION

The meeting noted that the Review Conference had, at the last minute, succeeded in adopting amendments to the Statute which would allow the Court to take jurisdiction over the crime. 'Understandings' had also been adopted with regard to the interpretation of the definition.

Definition

The discussion focused first on the definition of aggression which was to be included in the Statute. It was observed that no changes were made to the text of the definition which had been recommended by the Special Working Group on the Crime of Aggression prior to the Kampala Conference. Hence, the definition which was to be Art.8 bis of the Statute provided.

'For the purpose of the Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity or scale, constitutes a manifest violation of the Charter of the United Nations.'

The participants noted that the definition incorporated a threshold for use of force contrary to the Charter, in a similar way to the requirement by the International Court of Justice in the *Nicaragua* and *Oil Platforms* cases that there be a certain level of armed attack before force in self-defence was justified. But the meaning of the threshold was not entirely clear. The

requirement that the act of aggression should be a 'manifest' violation of the Charter was a key part of the definition but raised many questions. In particular, what does 'manifest' mean? The discussion focused on whether the qualifier implied:

- i) an obviously illegal violation;
- ii) a violation with serious consequences;
- iii) a violation which is both obviously illegal and serious.

The speaker drew attention to the Understandings attached to the text, which state:

'6. It is understood that aggression is the most serious and dangerous form of the illegal use of force, and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.'

There was a discussion between participants as to whether two of the three criteria of 'character, gravity and scale' would suffice or whether all three are required. With regard to Understanding 7, the first sentence could be indicative that all three criteria must be fulfilled, and this was probably the better view; but the second sentence could indicate that meeting two criteria will suffice. It was suggested that it was the seriousness of the consequences of the use of force which must be considered, and therefore either or both of gravity and scale must justify the conclusion that the use of force is a 'manifest' violation of the Charter. However, there did not appear to be a requirement that the law on the matter must be clear.

A participant raised the question as to whether the understandings were legally binding. It was noted that the US had proposed changing the definition itself but there was no support; they fairly quickly accepted the concept of understandings. Definition of terms forms part of the context of a treaty to assist in its interpretation. The Vienna Convention on the Law of Treaties allows the context to be considered when the wording of a provision is unclear, as well as agreements reached by the parties. It was considered by the discussion participants that understandings had a higher status than just context; on the other hand they could not be considered as part of the treaty

amendments (similar to an Annex, for example): no special ratification process had been decided upon for them and in any case not all States Parties were present at Kampala to ratify their inclusion. But a similar approach had been used for the Convention on Jurisdictional Immunities.

Exercise of Jurisdiction

The discussion moved on to the exercise of jurisdiction over aggression and the trigger mechanisms for prosecution of aggression. The delegations in Kampala had agreed that the amendments would come into force under Art.121(5) of the Statute. Of course that agreement could not in itself override a contrary provision in the Statute or it would itself have to be adopted by an amendment procedure. But it was a reasonable interpretation of the Statute to adopt (that is, that the amendments ancillary to the amendment to Article 8 should be adopted by the same procedure as for that Article) and it should therefore be accepted as merely reflecting the proper interpretation of the Statute, rather than changing anything.

Since Article 121(5) is the relevant amendment procedure, the amendment will '*...come into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.*' (Art.121(5)) Thus, the consequence for States Parties which do not accept the amendments is that the Court will not be able to prosecute their nationals for aggression, not prosecute other nationals for the crime of aggression committed on the territory of those States.

In addition to the requirements of Art. 121(5) the delegations in Kampala agreed two further provisions: first, the Court may only exercise jurisdiction over aggression committed one year after the ratification of 30 States, and secondly, not until two-thirds of States Parties have taken a further decision after 1 January 2017. These conditions are to apply to prosecutions commenced as a result of state party referral and *proprio motu* prosecutions (Art.15 bis) as well as to prosecutions relating from a Security Council referral (Art.15 ter). Although there had been support for allowing the Security Council to refer situations to the Court without the delay to 2017, the US for one had not wanted there to be a distinction between Security Council referrals and others.

It was noted that aggression will be able to be prosecuted by the Court without a prior determination from the Security Council; this had been of course a contentious matter throughout the negotiations.

There was a further feature of the provisions, namely that State parties may 'opt out' of ICC jurisdiction over aggression under Art 15.bis; with this opt-out the Court may not exercise jurisdiction over the crime of aggression when '.....committed by a national of a non-State party or on its territory.'(Art.15bis 5)

The confusing concept of opting out raised discussion amongst participants. States parties are free not to accept the amendments in the first place, since Article 121(5) applies (see above), so what is the point of accepting the amendments - in effect opting in - only to then opt out? The discussion disclosed that in the heat of negotiations, a proposal originating with Canada had been insisted on, and included, even though it was not clear that it was needed or how it would fit.

It was observed that on this point an alternative interpretation of the effect of the amendments was being put forward. It had been argued that all State parties are to be regarded as bound by the amendments, so that the jurisdiction of the ICC can be exercised over aggression committed by the nationals of all State parties unless a State opts out. There was some puzzlement as to how such a view could be taken, in view of the fact that the first question had to be: were the amendments in force in accordance with the Statute and for whom, a question which was answered by reference to Article 121(5). The question of opting out could be relevant only if and when the amendments were brought into force for a State in accordance with the terms of the Statute.

One speaker made reference to the *Monetary Gold* principle (from an ICJ case), which laid down that a State's consent is necessary before that State can be subject to the jurisdiction of a court. The crime of aggression was unique in that it involved State responsibility for an act of aggression, and thus in effect required the ICC to make a determination against a State. This supported the view that States must first accept the new amendments before it can be said that they are binding upon them.

The question was asked whether *in practice* a State which did not want to have the jurisdiction of the Court exercised in relation to its nationals would accept the amendments and then opt out, or would simply not accept the amendments. To do the former would be to accede to an interpretation of the effect of the amendments which is erroneous; to do the latter might

nevertheless be the safer course, depending upon whether the controversy as to the meaning of the amendments had been settled by then.

On the aggression amendments generally, a participant commented that this “unsatisfactory approach to treaty-making” will produce academic argument “for decades to come”. Nevertheless, it was agreed that it had been useful for the Court as a whole that amendments on the crime of aggression had been adopted by the Conference, so that the Parties were now able to turn to more urgent issues.

OTHER MATTERS

Article 8 Amendment (Belgian proposal)

It had been proposed to apply the prohibition in international conflict of certain weapons (poison, gas, expanding ‘dum dum’ bullets) to non-international conflict; the proposal had been adopted without much difficulty. One participant expressed regret that in the Elements of Crime adopted with the amendment⁵ it was required that: ‘The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.’ This was explained by the lawful use of such bullets in law-enforcement situations to avoid ricochet damage to bystanders; the position was one which was shared by the International Committee of the Red Cross.

Article 124 Amendment (Seven year opt-out for war crimes)

Only two countries (France, Colombia) have used this provision, which allows States to opt out of the jurisdiction of the Court with regard to war crimes; it had been proposed that the Article be deleted from the Statute. China (a non-State Party) stated it did no harm to leave it in, while Japan (a party to the Statute) and the Philippines (a non-State Party) noted that the provision could attract further States to ratify. Apparently the OTP has cited it as a factor influencing his decision against initiating a *proprio motu* investigation in Colombia. The provision was left in and will be assigned to the future Working Group and a future discussion, when any positive impact on ratification can be assessed. One participant expressed the view of civil society that the retention of the provision was most regrettable.

Future Working Group

Several issues raised by various delegations before and at the Review Conference were put off to a future date in a 'catch-all' Working Group to be established at the next ASP Session in December. These issues included discussion of prosecution guidelines, crimes of terrorism and piracy, amending Article 16 and analysis of the concerns raised by Japan on the amendments procedure.

Conclusions

The Review Conference was seen as an opportunity successfully taken to draw a line under certain issues, in particular to move from discussion of the crime of aggression to a focus on complementarity and co-operation. To have put off adoption of any part of the amendments on aggression would have been unfortunate for the discussion of other urgent issues. A Governance Report is due and certain governance issues between pillars need to be addressed. Many positions need to be filled or renewed in the next couple of years (6 Judges, and a new Prosecutor, Registrar and President of the ASP).

Concerns that recent statements by the African Union over the arrest and surrender of President Bashir would introduce a critical note had been unfounded. Positive opening statements from Uganda and Tanzania set a tone in which almost all African States were supportive of co-operation with the ICC, Kenya particularly so. These statements at the Conference were felt to have negated the problems earlier AU statements had caused. An important development was a sense, reflected in the Kampala Declaration,⁶ that diverse agendas had coalesced into a sense of collective purpose to make the ICC succeed.

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⁵ http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf

⁶ RC/Decl.1 Kampala Declaration, <http://www.icc-cpi.int/NR/rdonlyres/C35392FF-E272-4761-94D0-3878A911E9BC/0/RC4ENG.pdf>