

News: Second Week of the Assembly of States Parties to the ICC

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By: Amanda Ghahremani, Leah Gardner and Isabelle Jacovella Rémillard

As mentioned in a previous post, the Canadian Centre for International Justice (CCIJ) attended the Assembly of States Parties (ASP) to the International Criminal Court (ICC) Statute in New York City as a member of the Canadian Partnership for International Justice ("the Canadian Partnership").

The goal of the second week recap, as in the first, is to inform those who were not at the ASP about the topics and discussions that were on the agenda, with relevant links for those who would like to pursue these topics further.

This recap was collated and edited from contributions by the student delegates of the Canadian Partnership who have been taking notes on all the events during the ASP. The student delegates are, in alphabetical order: Silviana Iulia Cocan, Sophie Gagné, Geneviève Geneau, Maxime Mariage, Jenny Poon, Catherine Savard, Nicole Tuczynski, and Annika Weikinnis.

Day 6: 11 December 2017

Mama Koité Doumbia (Malian Coalition for the ICC), Abdoulaye Doucouré (ASFC in Mali), and Gaël Pét

Mama Koité Doumbia (Malian Coalition for the ICC), Abdoulaye Doucouré (ASFC in Mali), and Gaël Pétillon (ASFC) at the event "5 ans après la crise de 2012: quelles avancées dans la lutte contre l'impunité au Mali". Photo by Maxime Mariage

Assembly Plenaries

Panel Discussion on Cooperation

The plenary on cooperation included two panels, composed of State delegates, ICC staff, officers of the ASP, and external experts, as well as an open session wherein States Parties shared statements. The first panel, which included ICC Prosecutor Fatou Bensouda, the ambassadors of France and Senegal, the Vice-President of the ASP, and special experts, explored the topic of money laundering and the need for States to cooperate with the Court with regards to financial crimes and asset recovery. The second panel, which included newly elected President of the ASP, O-Gon Kwon, Counsel from the ICC's Office of Defence, a national prosecutor from France, and the Coalition for the International Criminal Court, examined the issue of cooperation more broadly and reiterated the primary duty of States Parties to cooperate with the ICC during its investigations.

Select Side Events

The Role of the ICC in Promoting Accountability for Grave Crimes Committed in Ukraine

The Permanent Mission of the Netherlands to the UN, the International Renaissance Foundation, the International Partnership for Human Rights, the Regional Centre for Human Rights, the Ukrainian Helsinki Human Rights Union, Crimea-SOS and Truth Hounds co-hosted this event which highlighted the difficulties of investigating alleged international crimes perpetrated by powerful States such as the Russian Federation. The panelists noted that, in the case of Georgia, the ICC's Pre-Trial Chamber had authorized the opening of an investigation almost 8 years after the Office of the Prosecutor had started its preliminary examination. Considering that the situation in Eastern Ukraine is similar to the one in Georgia, the panelists noted that several communications had been submitted to the ICC during the last two years, in order to trigger a preliminary investigation, which have not yet been acted on and require the ICC's attention more quickly than in the case of Georgia.

Progress in Drafting a Convention on the Prevention and Punishment of Crimes against Humanity

This event was co-hosted by Chile, Germany, Jordan, the Republic of Korea, Sierra Leone and the International Law Commission (ILC). Panelists outlined the need for a multilateral convention on crimes against humanity (CAH), to increase the number of States with domestic CAH legislation and

to encourage international cooperation in the domestic prosecution of atrocity crimes. Currently, 50% of states in the world, and 1/3 of states parties to the Rome Statute do not have CAH legislation. While speakers supported the International Law Commission's current draft agreement, some pointed out areas to be improved. For example, the current draft does not contain a ban on amnesty legislation, the use of military courts to prosecute CAH, or a prohibition on reservations to the convention. The International Law Commission will be taking comments from states and civil society groups until December 2018.

How the Security Council and the ASP Can Improve States' Cooperation with the ICC

The Institute for Security Studies and the Governments of Ireland and Norway organized an event on the key issues relating to cooperation with the International Criminal Court. The panelists argued that the non-execution of arrest warrants remains the main challenge for the ICC and that the Security Council should consider imposing sanctions on individuals indicted by the Court but who are still at large. Kimberly Prost, the Canadian Judge who was elected this week to sit on the International Criminal Court, emphasized that the credibility of the Security Council is undermined when it refers a situation to the ICC and then fails to enforce its own resolution.

5 ans après la crise de 2012 : quelles avancées dans la lutte contre l'impunité au Mali

This event was co-hosted by Canada, Association malienne des droits de l'Homme (AMDH), Coalition malienne pour la Cour pénale internationale (CMCPI), Fédération internationale des ligues de droits de l'Homme (FIDH) and Avocats sans frontières Canada (ASFC). The panel explored developments in Mali relating to the country's fight against impunity. Although the International Criminal Court found Al Mahdi, who was accused of the destruction of cultural heritage buildings in Mali guilty of war crimes, the panelists exposed several ongoing challenges with accountability for other crimes in the country. These challenges included the absence of peace and security in Mali and the lack of access to justice for victims, including victims of sexual and gender based violence. The panelists also briefly discussed the need to adequately implement the Rome Statute's principle of complementarity by Malian judicial institutions.

The OTP's Preliminary Examination into the Situation in Palestine

This event was organized by the International Federation of Human Rights (FIDH) and Al-Haq and explored the many facets (legal, political, social, and financial) of the Office of the Prosecutor's (OTP) current preliminary examination of the Situation in Palestine. The OTP's investigation includes both the bombardment of Gaza from June to August 2014 as well as the settlement projects pervasive across the West Bank. The panel included a legal advisor to the Palestinian Authority, who underscored the political and financial dimensions of Palestine's cooperation with the ICC and the

punitive response by the United States against Palestine for the country's accession to the Rome Statute. A representative from the Centre for Constitutional Rights emphasized the need to legally classify the situation in Palestine as an international armed conflict, as it will have meaningful legal consequences on the qualification of crimes that have been committed and are ongoing on the territory. The speaker from Al-Haq reminded the audience of the colonial nature of the ongoing occupation and the need to examine the international crimes committed from a broader lens which contextualizes the crimes as part of a larger colonial project.

The ICC and Africa: Panel Debate and Interactive Discussion

This event, organised by the Center for International Law and Policy in Africa, and supported by the CLEEN Foundation, the Coalition for the International Criminal Court, and the Planethood Foundation, explored the relationship between the ICC and Africa, especially with respect to the issue of immunity of heads of States and the non-cooperation by States Parties (South Africa and Jordan) that has ensued as a result. The panelists highlighted the need for the International Criminal Court to continue engaging in a dialogue with African States and for more attention to be given to the issue of immunities in order to resolve the current lack of consensus on the matter.

Day 7: 12 December 2017

> Adriana Benjumea (Corporación Humanas Colombia), Philippe Tremblay (ASFC), Andres Felipe Peña B
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> *Adriana Benjumea (Corporación Humanas Colombia), Philippe Tremblay (ASFC), Andres Felipe Peña Bernal (ASF), and Gustavo Gallo (Comisión Colombiana de Juristas) at the event "Challenges of the Colombian Peace Process: Guaranteeing victims' rights under the Special Jurisdiction for Peace". Photo by Maxime Mariage.*

Assembly Plenaries

The last week of the 2017 ASP began with the submission of the progress report on the 16th ASP, and with the introduction of draft resolutions to ICC member States.

Select Side Events

Challenges of the Colombian Peace Process: Guaranteeing victims' rights under the Special Jurisdiction for Peace

Avocats sans frontières Canada organised this side event, which was co-sponsored by the Permanent Mission of Canada to the United Nations. Speakers discussed the challenges facing the peace process in Colombia, and some of the successes so far. Adriana Benjumea Rúa, of Humanas Colombia, noted that Colombian women's groups successfully pushed for the inclusion of sexual

crimes in the recently adopted peace accord. The agreement recognizes that sexual violence in the context of the Colombian conflict will be treated as a serious crime to be investigated by a specialized unit, with protections for victims in line with international standards. She added, however, that under the transitional justice regime, the burden of proof is such that it may be extremely difficult to obtain convictions for crimes like rape. This and other weaknesses in the transitional justice framework rendered panelists cautious and supportive of the ICC's continued monitoring of Colombia as part of its preliminary examination of alleged war crimes and crimes against humanity in the country.

Accountability for Sexual and Gender-Based Violence Crimes: Central African Republic, Colombia, Democratic Republic of Congo and Iraq

This roundtable discussion, co-hosted by the United Kingdom, Norway, the Centre for International Law Research and Policy (CILRP), and the Case Matric Network, addressed recent developments in domestic accountability mechanisms for sexual and gender-based violence (SGBV). The panelists raised concerns regarding the collection of evidence and the overreliance on survivors' testimony in the investigation and prosecution of SGBV crimes. Stephanie Barbour, from the Commission for International Justice and Accountability, noted the well-established practice of having a dedicated and specialized unit for SGBV crimes and the panel thus welcomed the establishment of an investigative team by the UN Security Council to gather evidence of international crimes, including SGBV, in Iraq.

Ecosoc Chamber – The ICC as a Catalyst for National Justice: Lessons from Côte d'Ivoire for the Central African Republic

This roundtable discussion, organised by Human Rights Watch (HRW), the International Federation for Human Rights(FIDH), the Central African League for Human Rights, the Observatory for Human Rights of the Central African Republic(OCDH), the Ivorian League for Human Rights, and the Ivorian Movement for Human Rights (MIDH), explored how the ICC could act as a catalyst in the situation of the Central African Republic (CAR) by analyzing the lessons learned in Côte d'Ivoire. The panel, comprised of Me Yacouba Doumbia (MIDH), Amady Ba (ICC's Office of the Prosecutor, "OTP"), Me Mathias Morouba (OCDH), Marta Riggio (FIDH) and Elise Keppler (HRW), emphasized that cooperation between the OTP, national authorities and NGOs is crucial to end impunity. Considering that the situation in CAR is complex, with the ongoing conflict and the collapse of the national justice system, the accountability process in CAR will heavily rely on the newly created Special Criminal Court. The panelists thus highlighted the work of the OTP, among others, in contributing to the training of judges for this Court.

Accountability for Sexual and Gender-Based Violence as a Method of Warfare

This side event was organized by the Darfur Women Action Group and focused on the use of sexual and gender-based violence (SGBV) as a method of warfare. In particular, panellists discussed violence targeting women in the context of the Darfur conflict. Women and girls are disproportionately

affected by SGBV, which have long been perceived as inevitable consequences of war and armed conflict. It is clear, however, that SGBV often constitutes a deliberate and calculated attempt to punish and subjugate civilian populations in the context of conflict, constituting war crimes. Unfortunately, the culture of silence and impunity surrounding SGBV contributes to a continued lack of accountability for these crimes.

Day 8: 13 December 2017

> Fannie Lafontaine (Université Laval), H.E. Amadu Koroma (Permanent Mission of Sierra Leone to the U
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> *Fannie Lafontaine (Université Laval), H.E. Amadu Koroma (Permanent Mission of Sierra Leone to the UN), Valerie Oosterveld (Western University), Sharanjeet Parmar (Price Waterhouse Coopers UK), and Emily Kenney (UN Women) at the event "Prosecuting Sexual and Gender-Based Violence at the Special Court for Sierra Leone".*

Assembly Plenaries

The Assembly of States Parties discussed next years' commemoration of the 20th anniversary of the adoption of the Rome Statute. To this effect, the Vice-President of the ASP addressed the Assembly to highlight the contribution of the ICC to the development of international justice. He emphasized that the Court still faces challenges, including issues of efficiency and cooperation, and that States need to pursue their efforts and continue supporting the Court to strengthen the international criminal system.

Select Side Events

Prosecuting Sexual and Gender-Based Violence at the Special Court for Sierra Leone

This event, co-hosted by the Permanent Missions of Canada and Sierra Leone, UN Women and the Canadian Partnership for International Justice, examined the lessons learned from the prosecution of sexual and gender-based (SGBV) crimes at the Special Court for Sierra Leone (SCSL). Valerie Oosterveld, who led a UN Women-funded project on the investigations and prosecutions of SGBV crimes at the SCSL, and Sharanjeet Parmar, former prosecutor at the SCSL who supervised field investigations related to gender crimes, both celebrated the ground-breaking role of the SCSL and highlighted the lessons learned and resulting best practices that can be transferred to new contexts. Notably, the panellists stressed that context sensitivity is crucial to any justice process, hence the need for integrating local and international staff and synchronizing international expertise with local knowledge. They also emphasized that the experiences and vulnerabilities of conflict-affected women and girls are not homogenous, so prosecutorial strategies need to be flexible to adapt to the victims' needs and realities. Finally, Ms. Parmar made a call for orienting strategies to respond to root causes

of SGBV and thus break the patterns of marginalization.

Towards the Creation of a Latin American and Caribbean Criminal Court Against Transnational Organized Crime

This side event was hosted by the Coalition for the Latin American and Caribbean Criminal Court against Transnational Organized Crime (COPLA), the World Federalist Movement, the Institute for Global Policy and Democracia Global. Panellists discussed the need for a regional court aimed at supressing and prosecuting transnational organized crime in Latin America. While many aspects of the court are still being conceived and debated, speakers noted that it would aim to complement national jurisdictions, and only focus on high-level offenders. Crimes would include the illicit trafficking of drugs and arms, human trafficking, transnational bribes, money laundering, and “cybercrime”. The proposal has been well-received in Argentina, where it has the support of elected officials. Campaigners now wish to gain additional support from civil society groups and other countries in the Americas.

A World Free of Landmines

This event was hosted by Canada, Belgium and Colombia in the context of the 20th anniversary of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. This instrument has historical significance considering it was the first treaty to be adopted that banned landmines, and that condemned any of their use. The panellists were unanimous in affirming that collaboration between States, international organizations and members of civil society on mine clearance has led to great results in the past 20 years, and should therefore be continued and strengthened.

Day 9: 14 December 2017

> The Assembly of States Parties celebrating after the historic activation of the crime of aggression during
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> *The Assembly of States Parties celebrating after the historic activation of the crime of aggression during the final plenary on December 14, 2017.*

Assembly Plenaries

During this session, the two vice-presidents who will serve the ASP for the next three years were elected by consensus. Michal Mlynár, the Ambassador of Slovakia to the UN, will chair the New York Working Group, and Momar Diop, the Ambassador of Senegal to the Netherlands, will chair the Working Group in The Hague.

The recommendations on the election of the Registrar were also adopted by consensus. The election of the Registrar will take place in March 2018.

The afternoon plenary session included the consideration and adoption of the Credentials Committee report and of the Rapporteur's oral report.

The Activation of the Crime of Aggression

The final plenary of the ASP lasted nearly 12 hours, with both closed and open sessions. While the activation of the crime of aggression was central to this year's ASP, and negotiations took place during the two-week conference, no consensus had been reached by the final day. States Parties were given a new draft resolution by the ASP Vice-President that attempted to serve as a compromise between the States' differing interpretations on the Court's jurisdiction over the crime.[1] The Vice-President very explicitly warned States that the new text was not open for further negotiation. After a review period, most States were ready to adopt the resolution except for the UK and France who wanted to make further amendments. Many of the States reacted with exasperation because, as expressed by Liechtenstein – which had been spearheading the activation of the Crime of Aggression along with Cyprus for the last decade – the majority of States were already accepting a text that deviated significantly from their original intention but had not objected for the sake of consensus. Cyprus, Slovenia, South Africa, Palestine, and Liechtenstein expressed frustration with the additional amendment, given that the text was not open for negotiation, and disappointment with the perceived unfairness of the negotiation process. They articulated their discontent with the fact that the majority of States had made significant concessions to reach consensus, but that the UK and France refused to make any compromises and in doing so have severely restricted and curtailed the ICC's jurisdiction over the crime.

Ultimately, there was no agreement among States to amend the draft text so the Vice-President indicated that either the current draft text would be activated by consensus or it would go to a vote. No States objected and the crime of aggression was finally activated by consensus. Nevertheless, as a result of the final text which adopted a very restrictive jurisdictional regime, a string of countries made statements thereafter emphasising that the jurisdiction of the ICC on the crime of aggression did not extend to them, or any State who has not ratified the Kampala amendments, even if one of their nationals has carried out acts amounting to aggression on the territory of a State who has ratified the amendments. This position is legally questionable and quite controversial, and has prompted a series of commentaries on the matter (and undoubtedly more to come).

Some interesting analyses about the activation of the crime of aggression can be found here by Dapo Akande, here by Jennifer Trahan, and here by Alex Whiting.

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Amanda Ghahremani, Leah Gardner & Isabelle Jacovella Rémillard **About the Authors**

Amanda Ghahremani (Legal Director), Leah Gardner (Public Interest Articling Fellow), and Isabelle Jacovella Rémillard (Community Engagement Project Coordinator) work at the Canadian Centre for International Justice (CCIJ). They have been monitoring the activities and events during the sixteenth session of the Assembly of States Parties (ASP) as part of the Canadian Partnership for International Justice's delegation. Amanda also co-leads the delegation with Erick Sullivan from Université Laval.

References

1. The majority of States believed that the ICC's jurisdiction over aggression – when an investigation is either referred to the Court by a State or investigated *proprio motu* by the Prosecutor – should extend to ***all*** States Parties unless they actively opt-out. However, a handful of countries, led by the United Kingdom and France, believed that the Court's jurisdiction should not extend to States Parties unless they actively opt-in.