

**Assembly of States Parties to the Rome Statute
of the International Criminal Court
Working Group on Amendments**

Chair's Background paper on Article 124

Article 124 is a transitional provision in the Rome Statute according to which a State, on becoming a party to the Statute, may declare that, for a period of seven years after the entry into force of the Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to war crimes as enumerated in Article 8 when a crime is alleged to have been committed by its nationals or on its territory. According to the Statute Article 124 should be reviewed at the first Review Conference of the Statute. The Review Conference decided to retain Article 124 and to further review the provision during the fourteenth session of the Assembly of States Parties to the Rome Statute. At its thirteenth session, the Assembly decided to review the provisions of article 124 of the Rome Statute in the context of the Working Group on Amendments.¹

Throughout 2015, the Working Group on Amendments will examine the question of Article 124. The Chair suggests that before commencing the substantive discussions, the Working Group examines, in an informal setting and benefiting from the input of experts, the following issues:

1. What are the elements of Article 124? What is its relationship to other provisions of the Statute?
2. What were the negotiations that led to the adoption of this provision?
3. What has been the practice of States with respect to Article 124? What has motivated States Parties to make use of Article 124, and what has underpinned the decision of others States Parties which did not make use of Article 124?
4. What are and have been the positive and negative implications of such provision?
5. What would be the positive and negative implications of retaining Article 124?
6. What would be the positive and negative implications of retaining Article 124?

II. Background²

¹ ICC-ASP/13/Res.5, paragraph 15(b).

² The Chairperson does not endorse the views presented in the non-official documents include in this background document. These documents are suggested reading to facilitate the discussions on Article 124. The Chairperson is open to receiving additional information or document references to be added to the materials listed below.

A. Article 124

Article 124 of the Rome Statute provides that:

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

To date only two countries have lodged with the UN Secretary-General, upon ratification of the Rome Statute, a declaration under Article 124: France on 21 June 2000,³ and Colombia, on 16 August 2002.⁴

The Rome Statute entered into force for France on 1 July 2002, therefore its declaration would have expired on 30 June 2009, but on 13 August 2008, France withdrew its declaration.⁵ On 31 October 2009, the seven-year period in relation to Colombia's declaration elapsed.

B. The Rome Conference

The transitional provision was not included in the draft Statute transmitted to the Rome Conference. It appeared for the first time as Article 111 bis, in the draft statute contained in the report of the Committee of the Whole, on 17 July 1998, on the morning of the last day of the Rome Conference. The positions of delegations on the transitional provision were recorded only once the Statute was adopted.

Related documents

- 9th plenary meeting, Friday, 17 July 1998, A/CONF.183/SR.9, in Rome Conference, Summary record, Volume II, Agenda item 12, adoption of a

³ France Declaration to the Rome Statute of the International Criminal Court, 21 June 2000 available at <http://treaties.un.org/doc/Treaties/1998/11/19981110%2006-38%20PM/Related%20Documents/CN.404.2000-Eng.pdf>:

“Pursuant to Article 124 of the Statute of the International Criminal Court, the French Republic declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory.”

⁴ France, Declaration to the Rome Statute of the International Criminal Court, 16 August 2002, available at <http://treaties.un.org/doc/Treaties/1998/11/19981110%2006-38%20PM/Related%20Documents/CN.834.2002-Eng.pdf>: “Availing itself of the option provided in article 124 of the Statute and subject to the conditions established therein, the Government of Colombia declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by Colombian nationals or on Colombian territory.”

⁵ See Depository Notification, C.N.592.2008.TREATIES-5, 13 August 2008 available at <http://treaties.un.org/doc/Publication/CN/2008/CN.592.2008-Eng.pdf>.

convention and agenda item 13 Signature of the Final Act, pp. 123-129.
http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf

C. The Assembly of States Parties

The Assembly initiated discussions on Article 124 within the New York Working Group in March 2009, on the basis of a “Non-paper by the facilitators on the mandatory review of article 124 of the Rome Statute”, written by Ms. Angela Nworgu (Nigeria) and Mr. Marcelo Böhlke (Brazil). The Bureau reported to the Assembly at its eighth session the positions and reasoning of delegates in favour of and against the deletion of Article 124. See Report of the Bureau on the Review Conference, ICC-ASP/8/43, paras 9 to 14 http://icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-43-ENG.pdf

At the eighth session of the Assembly, a Working Group on the Review Conference was established by the Assembly with Mr. Marcelo Böhlke (Brazil) and Ms. Stella Orina (Kenya) as coordinators. The Working Group held seven meetings, on 20, 21, 23, 24 and 25 November 2009 and two informal meetings on the stocktaking exercise, on 23 and 24 November 2009 respectively.

The discussions held demonstrated views both in favour and against deletion, and considering that that no consensus had been reached so far, the Working Group recommended to defer discussions to the Review Conference. (See Report of the Working Group on the Review Conference, paras. 5 to 14 http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/WGRC-ENG.pdf)

The Assembly thus, in ICC-ASP/8/Res.6, paragraph 3 decided to transmit to the Review Conference the consideration of a proposal to delete Article 124 from the Rome Statute.

Related documents

- Non-paper of facilitators of the Bureau on the mandatory Review of Article 124, 11 March 2009 [see Annex I of this Background Paper]
- Report of the Bureau on the Review Conference, ICC-ASP/8/43, paras. 9 to 14 http://icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-43-ENG.pdf
- Report of the Working Group on the Review Conference, in Official Records of the Eighth Session, ICC-ASP/8/20 paras. 5 to 14 http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/WGRC-ENG.pdf

D. Review Conference

At the Review Conference held in 2010 in Kampala, Uganda, Article 124 was considered by the Working Group on other amendments. The Working Group held three meetings, on 1, 4 and 10 June 2010 and one round of informal consultations on 9 June 2010. Mr. Marcelo Böhlke (Brazil) and Ms. Stella Orina (Kenya) served as Chairpersons of the Working Group. The Chairpersons of the Working Group

introduced the options regarding article 124: These were either, to delete, retain, or redraft article 124. In this respect, one delegation proposed the introduction of a “sunset” clause in article 124, with a timeframe after which it would automatically expire. Some delegations supporting deletion of article 124 were ready to accept the “sunset” provision, while other delegations were against any retention of article 124, whether with or without such a provision. Some other delegations expressed a preference for the retention of article 124. Views were also expressed that, in case of amendment or deletion, the amendment procedure could be undertaken in applying article 40, paragraph 5, of the Vienna Convention on the Law of Treaties. The arguments espoused in support of these different views replicated those expressed during the consideration of article 124 by the Assembly of States Parties at its eighth session.

Following informal consultations, held on 9 June 2010, the Working Group decided to convey a draft resolution on article 124 to the Conference for adoption, whereby the Conference would decide to retain article 124 in its current form and to further review its provisions during the fourteenth session of the Assembly. The Review Conference adopted the draft as Resolution 4.

Related documents

- Review Conference Official Records, Report of the Working Group on other Amendments, Annex IV, paras. 9-11 http://icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.IV-ENG.pdf
- Review Conference, Resolution 4, http://icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.4-ENG.pdf
- Coalition for the International Criminal Court, Report on the first Review Conference, pp. 19-20, http://www.iccnw.org/documents/RC_Report_finalweb.pdf

ANNEX I

NON-PAPER BY THE FACILITATORS ON THE MANDATORY REVIEW OF ARTICLE 124 OF THE ROME STATUTE⁶

Article 124. Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

I. Overview

One of the issues to be addressed at the Review Conference of the Rome Statute of the International Criminal Court in 2010 is the "transitional provision" contained in article 124 of the Statute. As provided for in the last phrase of article 124 "[t]he provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1".

2. In accordance with article 124, despite the general preconditions to the exercise of jurisdiction by the International Criminal Court foreseen in article 12, paragraphs 1 and 2 of the Statute, a State may declare, on becoming a party to the Statute, not to accept the jurisdiction of the Court with respect to war crimes when alleged to have been committed by its nationals or on its territory. The States concerned can make a non-renewable declaration at the time of ratification, acceptance or approval of or accession to the Statute, the effects of which will cease after a period of seven years following the entry into force of the Statute in relation to those States.

II. Status of the declaration under article 124

3. Two States Parties (Colombia and France) have made a declaration under article 124 therewith not accepting the jurisdiction of the Court with respect to war crimes for a period of seven years after the entry into force of the Statute for them. For States that were parties on 1 July 2002, when the Statute entered into force, the period of seven years began to run from that date. On 13 August 2008, the Government of France informed the Secretary-General of the United Nations that it had decided to withdraw the declaration under article 124 made upon ratification. In the case of Colombia, which deposited its instrument of ratification on 5 August 2002 with the corresponding entry into force of the Statute on 1 November 2002, the seven-year period will end on 31 October 2009. After

⁶ Ms. Angela Nworgu (Nigeria) and Mr. Marcelo Böhlke (Brazil).

this period, Colombia will be subject to the automatic jurisdiction of the Court also for war crimes.

4. Another implication of article 124 is that its utilization is restricted to the moment of ratification, acceptance, approval or accession by a State. It is therefore now available only to new States Parties, at the moment they deposit their instrument of accession or ratification. Article 124 also allows for the withdrawal of the declaration at any time.

III. Article 124 as a temporary measure

5. The categorization of article 124 under the Statute as a “Transitional Provision” could be interpreted as ascribing a temporary nature to it. The way the article is drafted could also give the impression that it is for a one-time application in order to accommodate differing views during the 1998 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference). The use of the word “shall” in the last phrase of the article may also connote a desire by the drafters to expunge it at the forthcoming Review Conference of the Rome Statute. The foregoing is also given credence by the limited use of the declaration foreseen in the article.

IV. Amendment to the Statute

6. While the Statute provides for the “review” of article 124, such a review could result in an amendment. Any amendment to the Statute is subject to the amendment procedures set out in article 121, which means that a State Party to the Statute shall have to propose an amendment by submitting it to the Secretary-General of the United Nations, who must circulate it to all States Parties as provided under article 121(1). The proposal of amendment has to be approved by a majority of two-thirds of the States Parties, if consensus cannot be reached, and accepted or ratified by seven-eighths of them, in accordance with article 121, paragraphs 3 and 4.

V. Article 124: the way forward

7. The transitional provision contained in article 124 of the Statute will have to be addressed at the Review Conference. As the title says, it is transitional in nature and States Parties will have to decide on how to proceed with this provision, either retain it, reformulate it or delete it. The provision was accepted at the Rome Conference as a compromise deal to allow for the adoption and entry into force of the Statute by accommodating States that had at the time concerns over the functioning of the Court. But it was not the outcome originally expected by many delegations. It was argued by some that this partial “exclusion” of the Court’s jurisdiction would run counter to article 120, which prohibits reservations to the Statute, and appeared to some contrary to the spirit and objective of the Court and its Statute.

8. In light of the above, it can be expected that States Parties will use the informal consultations on the Review Conference to discuss the deletion of article 124 as one possible result of the Review Conference. As mentioned above, this would amount to an

amendment that shall follow the procedures established in article 121 of the Statute. Another aspect that should be taken into consideration if a deletion or reformulation of the article was envisaged, is how the amendment would affect potential future article 124 declarations made prior to the entry into force of the amendment, and that will not have expired yet at that time. As any other amendment under article 121(4), the amendment to article 124 would require the majority of two-thirds of the States Parties, if consensus cannot be reached, and would enter into force one year after seven-eighths of the States Parties have ratified or accepted it.