The ICC’s 17th Assembly of State Parties (2018)

Written for AMICC by Elena Moreno from delegation reports

I. Introduction

The Assembly of States Parties (ASP) is the governing body of the International Criminal Court. It oversees the Court’s management, the Office of the Prosecutor, the Presidency and the Registrar. It is also the Court’s legislative body. Among its first actions, it adopted the Elements of Crimes and the Rules of Procedure and Evidence. It continues to consider and pass resolutions on other issues, reorganizations and subjects important to the Court. It meets every December at The Hague or in New York to discuss and decide upon key issues regarding the Court’s future. Every Member State is represented by one delegate who is given one vote. Non-State Parties can participate in the ASP as observers but are unable to vote. The Court reports to the Assembly on its activities and progress of the year. The ASP decides on the Court’s budget and discusses issues like States’ contributions, complementarity and cooperation. Its members also elect the Court’s judges, prosecutor and deputy prosecutor, and can vote to remove them by secret ballot. The ASP has a Bureau (executive committee), consisting of a president (Mr. O-Gon Kwon), two vice-presidents, and eighteen members elected by the Assembly for a three-year term, and supported by a secretariat. The Bureau assists the Assembly in the discharge of its mandate and meets regularly throughout the year in New York or The Hague.

This year, the 17th annual session of the ASP took place in The Hague, at the headquarters of the Court. Civil society representatives were present including those for the Coalition for the ICC and for AMICC. Our delegation to the ASP has sent us detailed reports covering a variety of issues relevant to our advocacy, which we combined into his report.

II. Topics important to AMICC’s advocacy

A. Victims

Throughout this year’s Assembly, States Parties and civil society reiterated that victims are at the heart of the Court’s mission. Both during plenary sessions and in side events, they focused on victim participation and reparations. The overall message from the States was that the Court must still do more.

When discussing at what stage in proceedings victim participation would be most effective and appropriate, States agreed that it should be as early as possible, meaning in
the preliminary investigation process. States also raised the issue of victims in Arabic speaking countries, where the court is currently carrying out investigations. The Court’s official documents are rarely translated into Arabic, which is an official but not working language of the Court. This might prevent these victims from participating and staying informed of the trial’s developments. Several side events covered this specific topic, with participants suggesting the translation of those documents and the ICC website into Arabic. Unfortunately this would not be enough given the limited access to the internet in those countries and the resources required to further verify the translations. Outreach to victims on the ground in person is the favored approach, even if it represents significant costs.

States Parties also widely discussed reparations for victims. They praised the amount of reparations that have been awarded to victims in the last twenty years. Member states also explored different ways to track assets of war crimes suspects during the preliminary investigation, so that this information may later be used when deciding on reparations. They encouraged States Parties and civil society to make voluntary contributions to the Trust Fund for Victims. They frequently emphasized the importance of a more responsible use of resources. Many states also expressed their concerns about the Bemba acquittal and how it would affect victims’ redress and reparations.

An interesting suggestion often reiterated by States is that the Court should improve its relationship about victims with civil society actors by increasing communication between the Court and NGOs. For this cooperation to be fully effective, NGOs need to communicate victims’ concerns to the Court and the Court must work with the NGOs to address these. This strengthened relationship would allow greater outreach to victims, increased victim participation and higher levels of voluntary contributions from various sources.

Two side events discussed victims. The first one was “Victims’ Right to be Heard: How to Strengthen Victim Participation in the Arab World”. The panelists explained the crucial need to make documents accessible by translating them. The ICC’s overall website must also be in Arabic to allow Arab victims to navigate through it. Arab local communities are frustrated with the lack of communication from the Court, which leads to mistrust and misunderstanding. This is worsened by the unexecuted arrest warrants, which seem generally to affect the faith in the Court of its constituents, and the will of victims and witnesses to participate in trials.

The second event was “Listening to Victims from Afghanistan- Views on Afghan Society on the ICC and the Peace Process”. It showcased a film followed by a panel discussion that mainly focused on the lack of involvement of victims and Afghan civilians in the peace process. Several panelists suggested that having the government making all the decisions on implementing the peace process without involving the population would not result in lasting peace.
An interesting suggestion often reiterated by States is that the Court should improve its relationship about victims with civil society actors by increasing communication between the Court and NGOs. For this cooperation to be fully effective, NGOs need to communicate victims’ concerns to the Court and the Court must work with the NGOs to address these.

**B. The crime of genocide**

This year’s ASP did not discuss how to understand “genocide” and related crimes like persecution and extermination. The Plenary sessions considered genocide only while discussing specific subjects like prevention and the crimes committed against the Rohingya people. At least one side event considered these crimes. However, its attention was not on genocide specifically because in the Rohingya case the Prosecutor is investigating crimes against humanity (article 7 of the Statute), including deportation.

**C. The Myanmar/Bangladesh preliminary investigation**

The preliminary examination of the Myanmar and Bangladesh situation is a win for ICC Prosecutor Fatou Bensouda, because there was uncertainty whether the judges would accept the court’s jurisdiction on the matter considering that Myanmar is not a State Party. In September 2018, following a request submitted by the Prosecutor, the Pre-Trial Chamber decided that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh (a member state since June 2010). The reasoning for this conclusion is that an element of the crime – the crossing of a border – took place on the territory of Bangladesh which is a State Party.

The investigation focuses on crimes committed against the Rohingya population in Myanmar and their deportation to Bangladesh as well as other potential crimes against humanity under article 7 of the Rome Statute, including persecution. This innovative way to exercise jurisdiction derives from impact on a State Party of crimes in a Non State Party. This is a positive sign for the Court’s future. We can hope that this precedent will allow more situations to fall under the jurisdiction of the Rome Statute.

**D. Sexual and Gender Based Violence**

Opening statements and side events of this year’s ASP highlighted the topic of sexual and gender based violence (SGBV). Among the States Parties that addressed it in their opening statements were Guatemala, Austria and Uganda.

Four side events were specifically dedicated to sexual and gender based crimes (SGBC). Canada and the International Federation for Human Rights (FIDH) hosted the first one, “Investigating and Prosecuting for SGBC at the ICC and Beyond”. Panelists discussed the
issues in investigating SGBC, like the struggles of prosecutors and NGOs to gather evidence because of the pressure on victims to remain silent. They also raised the importance of training staff specifically to deal with victims of these crimes, as untrained questioning can be further traumatizing. This event focused on SGBV by ISIS against the Yazidi women and girls in Iraqi-Kurdistan, on SGBV in illegal prisons in Eastern Ukraine, and on sexual violence against men in Libya, particularly migrants in prison. Speakers emphasized the need for States to adopt national definitions of rape and SGBV containing international standards, so that countries can adequately prosecute these crimes at home.

The second event was a screening of the film “The Prosecutors” followed by a panel discussion. The movie focused on national prosecutors trying perpetrators of SGBC in three countries: The Democratic Republic of the Congo, Colombia and Bosnia and Herzegovina. The panel discussion highlighted a trend to favor local justice over international tribunals, so victims can more easily have access to and participate in the trial. This implements the crucial ICC principle of complementarity and the importance of national courts trying their own citizens.

E. Children

The Assembly of States Parties did not cover the topic of children as such. No side events focused on it. Some States briefly mentioned it, when discussing the most vulnerable victims of crimes: women, children and the elderly. A few side events on SGBV raised the issue of children as victims of rape and sexual assault. These events emphasized that they are more vulnerable to the trauma and injury these crimes cause. Other side events focusing on Palestine and reparations mentioned children and reiterated the need to protect the most vulnerable. The lack of attention received by children at this year’s Assembly seems to be explained by States Parties’ need to prioritize the topics of debates given the short period of time the ASP offers, and does not reflect a lack of interest in the issue.

F. The US position

Although the US position on the ICC was not a primary focus of the ASP, States did make comments referring to it and implored other member states to publically support and protect the Court as it faces political attacks from the United States. Among others, Luxembourg, Costa Rica, Spain and Palestine voiced their support for the Court.

The most powerful speech regarding these attacks was by Professor John Dugard in an afternoon panel event. He encouraged the ICC to address criticisms constructively and to answer threats “boldly and gravely”. He stated the ICC was under threat from forces of nationalism and populism, before directly pointing at National Security Advisor John
Bolton’s attacks later endorsed by President Trump. He emphasized it was for the ASP to respond and not the Court itself. He also encouraged the ASP to address the legitimate concerns about the Court including slowness, corruption, preoccupation with African states and the charge that the ICC is too protective of European interests. Although he was very direct in his criticism of the US attack and of the Court’s flaws, Professor Dugard’s remarks were well received by the present States Parties and civil society.

G. Enforcement

Enforcement was also not a main focus of the ASP. Most statements made by States Parties (including France, Poland and Mali) seemed to follow a standard framework reaffirming commitment to the Court and emphasizing cooperation, accountability and universality. Prosecutor Fatou Bensouda also reiterated these points in her speech, and informed the ASP on the Court’s progress. She stressed that as the ICC’s executive arm, States need to execute arrest warrants. Failure to do so undermines the Court’s mandate since it cannot prosecute in absentia. She also highlighted the success of two arrests this year thanks to State cooperation.

One side event covered the issue of enforcement. This was “Prosecuting International Crimes Committed against the Palestinian People”. The main takeaway from this panel was that Palestinians have grown weary of the lengthy investigation process and seem to have lost hope that it will amount to any conviction. It has been four years since they submitted their formal complaint and the Court has not taken any substantive action since then. They reaffirmed that the low threshold of “reasonable basis” should apply to the Prosecution’s investigation. Their frustration was palpable both during this event and all though the ASP.

H. 2019 Budget

The topic of the 2019 program budget for the ICC was prominent throughout the Assembly. At the time of the first opening statements, eleven states were in arrears on paying their assessments to the Court, therefore making them ineligible to vote. In addition, the United Nations Security Council (UNSC) does not pay the Court for any of the expenses of investigations and trials requested by the UNSC, now totaling 61 million euros.

In their opening statements, many countries like Ecuador, Japan and Brazil advocated a zero nominal growth in the budget. Unsurprisingly, most of these States either have ongoing preliminary examinations (Venezuela and the United Kingdom), or formal investigations (Kenya). Member States raised other issues: they called for greater transparency (Germany), budgetary discipline and strict prioritization (UK) as well as
effective allocation of resources (Uruguay, Slovakia). Overall the significance of these statements was that States Parties are dissatisfied with the way the Court makes use of its resources which makes them reluctant to increase the budget.

The ICC budget is composed of program and operating expenses (Program Budget) and a separate line item for loans and other expenses on the new premises. By the end of the ASP, members voted for a 2019 program budget of 144.55 million euros which represents a mere 0.6% increase over 2018. Including fixed expenses for the new ICC premises, the total approved budget was 148.13 million euros. Nonetheless, Venezuela and Brazil complained about this increase. Because of inflation, this reduced budget is a zero increase. This means there is no room to take on new investigations should they arise and the Court’s capacity for outreach to victims (a critical issue emphasized during the ASP) severely diminishes.

During the ClICC meeting with the Registrar, civil society members pointed out a number of areas where outreach to victims and witnesses needed improvement. First, they repeated that the website and its documents must be translated into the languages of the individuals trying to access them. This problem also needs to be addressed on the ground. In Georgia for example, there is not enough ICC staff who speak the local language and some have been trying to communicate in Russian, which is traumatic and offensive since the crimes being investigated there were perpetrated by Russians. Another concern raised was that outreach needs to be improved to explain in advance to victims about the issuance of arrest warrants. The Registrar agreed that a shift needs to be made from outreach delivered from The Hague to outreach delivered on the ground. Personal interaction with victims and witnesses is crucial for the Court to gain their trust. However, as mentioned above, this year’s budget unfortunately leaves no room for such changes.

Another issue pressed by many States and civil society organizations is the need for a thorough, fair and transparent process for finding the next Chief Prosecutor. Nonetheless, again, no funding was specifically earmarked for this process.

Finally, the Director of the Trust Fund for Victims explained that the indigence of convicted perpetrators poses a serious problem for victims’ reparations. The TFV cannot provide victims with rehabilitative resources and pay out the reparations the perpetrators owe them. This is neither a sustainable nor fair model. It is important to understand that the Court’s budget does not fund the TFV, which is supported by voluntary state and private contributions. Nonetheless, states’ willingness and ability to donate to the TFV are heavily influenced by the amount they are required to contribute to the ICC’s annual budget: the more they spend on the annual budget, the less likely they are to donate to the TFV.
I. Selection process for next Prosecutor

Fatou Bensouda’s non-renewable mandate of nine years will end on June 15, 2021. One of the CICC’s priorities has been to press for a committee of independent experts who would both conduct a wide search for future Prosecutor candidates and recommend candidates to the Bureau. The goal is to have a less political process that would not be based so much on state-sponsored candidates as in the past. The Women’s Initiative for Gender Justice and other NGOs also pushed for more geographic and gender diversity in the committee itself as well as in candidates.

AMICC representatives reported that in the CICC meeting with ASP President O-gon Kwon, he indicated that there would still be one representative for each regional group on the committee. He also stated that he would like to have three to five independent experts, but it was unclear if this would happen. The committee is likely to start working in August so that they will have more than a year for the process.

President Kwon and others in the ASP are well aware of how important it is to civil society that the process is both perceived and in fact fair and less political than in the past. CICC and other NGOs have had a significant impact in pressing for this change, which illustrates once more the critical role that civil society plays in ensuring the ICC acts with transparency.

III. Overall conclusion

Our AMICC delegation representatives were overall very pleased with the ASP. They all expressed hope in the future of the International Criminal Court. They reported that States Parties were very interested in the election of the next Prosecutor. They also expressed enthusiasm about Fatou Bensouda’s initiatives to promote geographic and gender diversity: she announced that the ICC had achieved most of its goals of bringing women to leadership positions at the Court. This is a sign members are committed and invested in the Court’s future. The AMICC delegation was pleased to see that States Parties were advocating for the ICC’s involvement in the Middle East (specifically in Palestine, Iraq, Syria and Afghanistan) and in Bangladesh on behalf of the Rohingya.

Furthermore, our delegation witnessed how civil society plays a vital role in urging the Assembly (and its individual member states) to uphold its responsibilities to make international justice effective. NGOs use the opportunity to interact with governments and other delegates to advocate for a fair, effective and independent ICC. They press the Assembly to improve its working methods, transparency and state support for justice and the ICC. They organize most side events, sometimes with the cooperation of States Parties. Civil society is crucial to the ICC and this is why the positive relationship between the Court and civil society is encouraging. Several side events were organized specifically
for NGOs, such as the meetings with the ASP President, the Prosecutor, and the ICC President. This reaffirms that dialogue continues between the Court and civil society and that the two work together to promote the Court’s mandate and fight impunity.

Another point from AMICC representatives was the professionalism and talent of all of those involved with the ICC, especially in the leadership positions. Prosecutor Fatou Bensouda spoke directly and was not afraid to promote new initiatives at the Court such as fair hiring practices that encourage gender and geographic diversity. Similarly, President Chile Eboe-Osuji was well spoken, extremely knowledgeable and competent.

However, the Assembly has its challenges and must improve. A recurring complaint from civil society is that the ASP sessions are too brief. It is insufficient simply to have ten days a year to cover all the issues that need discussion. This leads to rushed decision-making and an inadequate debate. One way to maximize this time would be to prioritize individual resolutions. Many subjects mentioned in the omnibus resolution are discussed in greater detail in individual resolutions. This leads to unnecessary repetition and wastes precious time in the plenary sessions. The Assembly would benefit from mentioning these topics in the omnibus resolution only if it finds that it adds significant weight to their discussion.

Another way the Assembly could be more time efficient is by creating new standing committees. This would allow issues to be discussed more frequently throughout the year and therefore the policymaking during the ASP would be more effective.

The Committee on Finance and Budget (CFB) is the ASP’s only standing committee, which leads to another problem. It is composed of twelve government financial experts, and is responsible for the technical examination of any document submitted to the Assembly that contains budgetary implications. Because there is no other standing committee to counterbalance the CFB, financial concerns usually prevail over all other considerations. Consequently, the Court faces limited resources to exercise its mandate. New standing committees could help ensure that the Court’s budget enables it to conduct its core functions effectively, including investigations, outreach, legal representation as well as victims and witness protection.