

## A Report on the Negotiations for the Creation of an International Criminal Court

by Fanny Benedetti\*

Negotiations for the creation of a permanent International Criminal Court (ICC) were held at the United Nations in New York from August 4 to 15 of this year. The preparatory committee on the establishment of an ICC held its fourth session of discussion and review on the draft statute initially written by the International Law Commission (ILC) in 1994. A final text will be submitted for review at the United Nations Treaty Conference in Rome, Italy to be held in June 1998.

The August session's agenda was handled by two separate working groups. The first working group debated two critical political issues. Participating states first discussed the question of which actors (e.g. UN member states, UN Security Council, or the court prosecutor) could initiate or "trigger" a criminal court proceeding. This same group also reviewed the delicate issue of "complementarity," which involves the relationship between the international criminal court and national jurisdiction. The second working group's discussion was devoted to procedural issues of the ICC.

Extensive debate over complementarity and trigger mechanisms clarified the disagreement of states over the very nature and power of the international criminal court. Although important revisions were adopted, they did not necessarily reflect agreement on key principles. On the contrary, the working groups often affirmed or acknowledged differing or contradictory positions in order to gain consensus.

On the issue of complementarity, the discussion centered on Article 35 of the ILC draft statute which deals with the admissibility of a case before the ICC. The preamble of the ILC draft statute provides that the court "is intended to be complementary to national criminal justice systems in case such trial procedures may not be available or may be ineffective." The notions of availability and effectiveness were open to very different interpretations among the states during their debate on admissibility. Some argued that there should be a subjective test of the intent of the authorities in proceeding with an ICC investigation. Others favored the listing of

objective criteria (e.g. unreasonable delay in national criminal proceedings, lack of extradition or a lack of respect for the fundamental rights of the accused in the national courts) as a basis for proceeding with an investigation. Some states also argued that instances of ineffective criminal justice systems would relate only to a limited number of countries where the judicial system had suffered a complete collapse. In light of the varying views, the draft finally adopted was seen as an important achievement. However, the agreed upon text specifically notes that neither the content nor the approach to be included in Article 35 is in its final form.



There is also no general consensus on defining the concept of admissibility.

On the question of how to initiate or "trigger" an ICC proceeding, a majority of states disagreed with the proposition—advocated mainly by the five permanent members of the United Nations Security Council (UNSC)—of giving the UNSC an exclusive role in initiating or preventing an ICC proceeding. Although only a small group of countries were totally opposed to the proposed UNSC role in referring matters to the ICC, an overwhelming majority

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were opposed to Article 23(3) of the draft statute. This article provides that ICC prosecution may not commence, if the matter arises from a situation being handled by the UNSC in accordance with Chapter VII of the United Nations Charter, without approval from the UNSC. Article 23(3) makes it possible for one permanent member of the UNSC to oppose an ICC investigation. Many countries expressed concern that control over the ICC by a political organ such as the UNSC would greatly affect the independence and impartiality necessary for an independent judicial body. Such control would also make it virtually impossible for an investigation to be commenced against a permanent member of the UNSC. The Singapore delegation introduced a revised version of the controversial paragraph as a compromise solution. The revision requires that the UNSC make an affirmative decision to oppose an ICC proceeding. Of the five permanent UNSC members, the United Kingdom and China were the only States to express an interest in considering the Singapore proposal.

In response to this controversy, a broadly defined group of 40 to 50 self-called "like minded countries"—Canada, Australia, South Africa, Argentina, Singapore, the Netherlands, Germany and Egypt, among others—have taken more progressive positions to effectively guarantee an independent and effective court. Most members of this group have agreed to keep to a minimum any preconditions for ICC jurisdiction or any additional state consent requirement for jurisdiction. An even larger number of states support the principle of "inherent" jurisdiction of the ICC (i.e., where no additional consent is required of states which are a party to the statute) for the core crimes (war crimes, crimes against humanity, and genocide) under the jurisdiction of the ICC. Other countries, particularly France, are opposed

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to this and have lobbied to raise the level of state consent necessary to commence a proceeding to up to five interested countries, which would include the country of the nationality of the victim and suspect(s), the country where the crime was committed, and the country having custody of the suspect. The state's consent requirement had not been intended by the ILC to apply to the core crimes under the statute.

Many of the non-governmental organizations (NGOs) attending the discussions were also concerned about the role of the UNSC and about guaranteeing the independence of the prosecutor in the ICC. Most of the NGO participants are members of a worldwide coalition, The Coalition for an International Criminal Court (CICC), whose main goal is to foster awareness and support for an independent and effective ICC among civil society organizations. Although convinced, as are a majority of states, that the process toward

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establishing the court is irreversible, many CICC members expressed concern over what Richard Dicker from Human Rights Watch calls "the opposition of the Permanent 5 to a court free from Security Council interference and equipped with an independent prosecutor." Indeed, all agree with the view of Jelena Pejic from the Lawyers Committee on Human Rights that "the Prosecutor of the International Criminal Court should be empowered to initiate cases on its own, subject solely to the independent judicial supervision of the Court." Some members of the CICC from developing states expressed fear that the creation of the ICC would ultimately act to increase the Security Council's powers, and that there was a risk that the ICC would be used to harass nations of the South. In the opinion of many governments, the presence of NGOs during the negotiations was an important reminder to governments that the world is watching.

Time limitations forced the UNSC debate to be curtailed and more time was allotted to the second working group to focus on procedural matters of the ICC. Procedural issues were discussed based on a summary version of earlier proposals



William R. Pace (left), convener of the Coalition and Adriaan Bos (Netherlands), ICC prepcom chair, addressing fellow delegates and NGO representatives at a reception organized by the NGO Coalition.

which were compiled during the intersessional period by government delegates (in their personal capacity), members of the office of the prosecutor of the International Criminal Tribunal for the Former Yugoslavia, and representatives of the CICC.

Several governments had difficulty focusing on the basic underlying principles of criminal procedure rather than the finer points of procedural law, as had been requested by the chairperson. France and Argentina, in particular, expressed the need to go into greater procedural detail in order to guarantee the proper application of key legal principles. The session was marked with difficulties in reconciling the different legal traditions of various states. A particular issue of great debate concerned a proposal to create a pre-trial body to supervise the ICC prosecutor's

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investigation. Many states from common law legal systems had difficulty accepting the idea of a pre-trial chamber supervising any pre-trial activities related to the prosecution and investigation of a case. Most common law states, however, supported the idea of establishing a pre-trial chamber only to either balance the rights of the defense counsel with the powers of the prosecutor or, in very limited circumstances, to act so long as there was no prejudicing of the prosecutor's independence. On the other hand, civil law countries, such as France and Portugal, strongly supported the intervention of a pre-trial chamber in supervising all acts of investigation, as well as reviewing the indictment process.

The notion of a confirmation hearing for indictments also raised questions for many common law countries. Some expressed strong reservations with regard to the presence of the accused at a confirmation hearing and argued that the suspect's participation in the hearing be kept at a minimum. Another contentious issue with regard to differing legal traditions was the effect of an admission of guilt. This issue was resolved by a compromise article, devel-

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oped to reconcile the differences between common law and civil law systems over the concept of an admission of guilt. Taking into account the strong opposition of civil law countries to plea bargaining mechanisms, the compromise article ensures that the admission of guilt is not binding on the court and requires the court to consider other evidence as well.

States were also divided on the issue of how much power should be given to both the prosecutor and the court during investigations, and the degree of state "involvement" in such investigations. For example, with "on-site" investigations, the consent of the state where the investigation is to be conducted was a point of discussion. Many argued that "on-site" investigations first required the cooperation of the state(s) in which the investigation was to be conducted. Several delegations, however, insisted that special consideration be given in cases of great civil upheaval or governmental collapse. The ICC would have to act quickly to ensure the preservation and protection of evidence given the high likeli-

Pat Medige, the managing attorney of Colorado Rural Legal Services, Inc., Migrant Farm Worker Division, states that since the 1996 Immigration and Welfare Reform laws were passed, she has witnessed both tangible and intangible effects of the laws.

The tangible effects include the separation of families. Parents send their undocumented children back to Mexico before the season's end in order to complete the harvest without the risk that their children will be deported. "People are really leaving," Medige stated, "and this is going against all the family values rhetoric we have heard from Congress."

Medige describes the intangible effects as stemming from the "migrants' feelings of being under siege and feeling as if they are criminal when they are not criminal." In fact, they are playing a vital role in the U.S. economy. The migrants seek work for fair pay, but are frequently discriminated against because they lack organization and education. Being taken advantage of through unfair wages is not unusual to them. Under the new laws, it becomes an employer's right to abuse employees because they are easily dispensable.

This trend in the United States is inconsistent with international progress toward the protection of human rights. In its 95th session, the Inter-American Commission on Human Rights

appointed a Special Rapporteur for investigating human rights abuses against migrant workers in the hemisphere. Next year, the Special Rapporteur will release a report which will include a study of U.S. farm workers. Additionally, the Helsinki Accord, which the United States joined with 51 other nations, states that "human rights and fundamental freedoms are universal, that they are also enjoyed by *migrant workers* wherever they live. . . ." [emphasis added]

In 1992, the Conference on Security and Cooperation in Europe (CSCE) conducted an on-site study of migrant farm workers in the U.S. The study found that agricultural laws were inadequate or ineffective in ensuring equal treatment of migrant farm workers. It reported that the human rights of U.S. farm workers were not being addressed by the U.S. government.

In addition, the International Covenant on the Elimination of All Forms of Racial Discrimination, to which the United States is a party, purports in Part I, Article 5, ". . . to guarantee the right of everyone. . . to work, . . . to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, . . . the right to housing, the right to public health, medical care, social security and social services. . . ." Although the U.S. is not a signatory to the UN International Covenant on Economic, Social & Cultural Rights (ICESCR), the Covenant states in Part III, Article 7, ". . . Parties to

the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work. . . ." The Covenant is evidence of a widely accepted norm of international law. To that end, all workers are entitled to "safe and healthy working conditions, fair wages, a decent living for themselves and their families, and rest, [and] leisure. . . ." In addition, Article 10 of the ICE-SCR provides that all Parties must afford the "widest possible protection to the family as the fundamental group unit of society."

The backlash against the migrant farm worker is growing in Congress. With the changes to the Immigration and Welfare Reform Laws in 1996, and the potential changes in the AWPAs, the U.S. farm worker is facing severe insecurity and extreme impoverishment.

The above stories demonstrate two things. First, both documented and undocumented migrant farm workers have few protections even though AWPAs ensure they exist and are to be enforced. Second, the backlash found in the new Immigration and Welfare Reform Laws are tearing families apart and driving workers into a hopeless state. The agricultural worker is an essential part of the U.S. economy; yet, the United States refuses to recognize current violations of fundamental human rights by which it has promised to abide. ☹

hood of such scenarios. A member of the prosecutor's office from the International Criminal Tribunal for the Former Yugoslavia noted that the credibility of an "on-site" investigation could only be guaranteed in the absence of supervision from state officials where the evidence was being collected. Several states also insisted on including in the statute a provision protecting politically sensitive information from public disclosure (based on reasons of national security) and a procedural

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mechanism allowing states to apply for court orders securing such information.

The NGOs working on victims rights and gender issues were successful in their efforts to remind states of the importance of protecting victims and witnesses and acknowledging their rights to reparations and to participate in the proceedings. A redrafted version of Article 43 includes the creation of a victims' and witnesses' protection unit, allowance for victim's views and concerns to be presented at appropriate stages of the proceedings, and specific reference to victims of sexual and gender based violence (as beneficiaries of measures ensuring safety, integrity, and privacy).

With only two preparatory sessions planned before the diplomatic conference in June 1998, there is still much to achieve. Fortunately, the number of states working in favor of a truly effective and independent court is increasing at each stage of the process. Growing attention to this process from all sectors of society, and in particular from the media, could prove to be the key to successful negotiations. Procedural

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questions will remain a significant issue at the next preparatory meeting this December, as Part VII of the statute on judicial cooperation between the ICC and states will be heavily discussed. At this session, States will also revisit the definition of crimes, principles of criminal law, and the remaining articles of procedure. ☹

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