THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT AND IMPLICATIONS FOR BANGLADESH

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Bangladesh has been an important actor in the process of establishing an independent, international court to try war crimes and crimes against humanity. Bangladesh has a particular interest in such a court coming into being. The brutality of Bangladesh's war of liberation in 1971 prompted successive governments to ratify various international covenants to protect human rights. The ongoing enrichment of international humanitarian law through the process of establishing and implementing an International Criminal Court (ICC) forms the thrust of this article. As such, this article details the process of the establishment of an independent International Criminal Court (ICC) till and highlights some of its implications at various levels, domestic as well as international, including those for Bangladesh.

THE MAKING OF THE ROME STATUE

Resolutions of conflicts, reconciliation and mediation have been elemental in almost all political institutions. In most cases these resolutions have been brought about by judicial institutions. Regionally, the creation, functioning and development of important judicial institutions are well established. These institutions include the European Court of Human Rights, the Inter American Commission, and the Organisation of African Unity. On an international level there is the International Court of Justice ICJ). While the ICJ deals with bringing states to justice, the driving force of the ICC, an equally universal judicial institution, is to bring to justice individual perpetrators of crimes against humanity.

The legislative history of the ICC (Rome Statute of the International Criminal Court) can be traced back to the Hague Conferences of 1899 and 1907, which attempted to maintain international peace through multilateral commitments. The history is also linked to the establishment of the

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International Court of Justice, the 50th anniversary of which was celebrated in 1996. Inevitably, the establishment of the ICC is also part of the greater post WWII humanitarian agenda for world peace. Since the end of the Second World War, we have seen the far-reaching consequences of the absence of an International Criminal Court. The absence of a punitive structure has allowed hundreds of high officials and scores of dictators to reign with impunity. The high political drama surrounding the trial and subsequent immunity of Senator Pinochet of Chile is an apt example of this vacuum. While millions have been killed, annihilated, maimed and forced into disappearance the perpetrators of these crimes have too often remained beyond the reach of national justice.

The proposal for an International Criminal Court was made as early as in 1948. The proposal was made along with other proposals for adopting a universal declaration of human rights and a convention to prevent genocide. However, the proposal for a criminal court of international dimension was found to be far too controversial for adoption then.[1] Nevertheless, the proposal was assigned to the International Law Commission, which subsequently concluded that the establishment of such a court was desirable as well as possible. But it was not until 1990, having been spearheaded by Trinidad and Tobago, that the actual process of establishing such a court began. The lapse in between proposal and materialisation can be attributed to the difficulties on the adoption of an acceptable definition of aggression. In 1994, the International Law Commission presented a Draft Statute of a Criminal Court. This Draft evolved out of its earlier project, the draft Code of Crimes Against the Peace and Security of Mankind. The Commission recommended, however, that a conference of plenipotentiaries be convened prior to the establishment of an International Criminal Court. Consequently, the General Assembly convened the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) from June 15 to July 17, 1998, in Rome, to finalise and adopt the Rome Statute of an International Criminal Court (The Statute).

The Rome Conference was attended by 160 States. In addition to these States, there was a large and active participation of more than 20

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[1] Report of the International Law Commission on the work of its forty-sixth session, United Nations General Assembly Official Records, Forty-ninth Session, Supplement No.10, A 49/l0 (1994). *See,* also, Lee. R. S. (ed.), The International Criminal Court - The Making of the Rome Statute, The Hague, 1999, at p.2.

intergovernmental organisations, 14 specialised agencies of the UN and some 200 non-governmental organisations. Nearly 500 journalists were accredited to cover the proceedings. After five weeks of meetings, gatherings, and several rounds of informal yet intense negotiations the Rome Statute containing 128 articles was adopted by an overwhelming majority of the participating States.[2]

Today, the process of creating an International Criminal Court has gained a palpable sense of urgency. This sense of urgency signifies that the world has reached a saturation point for tolerance and ambivalence towards war criminals. There is now a swifter pace in the process to materialise a concept which has been contemplated over decades. Bangladesh too has become an active participant in keeping up the momentum and scale of the cumulative activities of the past few years and has helped to bring to the universal centre stage the absolute necessity of having an International Criminal Court.

FEATURES OF THE INTERNATIONAL CRIMINAL COURT

Once established, the main feature of the International Criminal Court will be its permanence. It will be a Court that will investigate and bring to justice individuals who commit the most serious violations of international humanitarian law. The multifaceted purposes for having such a Court include, "dispensing exemplary and retributive justice, providing victim redress, recording history, reinforcing social values, strengthening individual rectitude, educating present and future generations, and deterring and preventing future human depredations."[3] The Court's jurisdiction is to try genocide, war crimes and crimes against humanity - such as widespread or systematic extermination of civilians, enslavement, torture, rape, forced pregnancy, persecution on political, racial, ethnic or religious grounds, and enforced disappearances.

The ICC, being a treaty-based body will not be an organ of the United Nations but will be linked to the United Nations by means of various formal agreements. The Rome Statute, through which the ICC is to come into being, will enter into force after sixty countries have signed and

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[2] 120 countries voted in favour of the Statute, with 7 against and 21 abstentions.

[3] Bassiouni, Cherif M., "Historical Survey: 1919 – 1998", in ICC Ratification and National Implementation Legislation, Nouvelles Etudes Penales, 1999 at p. 2 (Association Internationale de Droit Penal).

ratified it. Ninety-seven countries, including Bangladesh, have signed the Statute while twelve have already ratified it. The Statute will remain open for signature until December 31, 2000. The seat of the Court would be at The Hague, the Netherlands, but it would be authorised to try cases in other venues when appropriate.[4]

Perhaps the most unique feature of the Court will be its complementarity with national jurisdictions. National jurisdictions would have primary responsibility for investigating and prosecuting genocide, war crimes and crimes against humanity. However, the Court will have jurisdiction over crimes committed only after the Rome Statute enters into force.

The Court will consist of 18 Judges elected to non-renewable terms of nine years by a two-third majority vote of the State Parties to the Statute. Only citizens of countries that are Parties to the Statute and at least nine of the eighteen who have at least five years of established competence in international law (human rights and humanitarian law) can be considered as Judges. An equitable geographic and gender representation will also be a factor in selection of judges. No two judges can be of the same country.

For the selection of the ICC Prosecutor and Deputy Prosecutor/s an absolute majority of the State Parties to the Statute is necessary. The ICC Prosecutor and Deputy Prosecutor/s must be persons with extensive practical experience in the prosecution of trial of criminal cases.

Cases coming before the Court can be brought by States Parties, or referred to the Prosecutor by the Security Council (Article 13 of the Statute). The Prosecutor also has the authority to initiate investigating a crime that has come to his or her attention. But in that case, the Prosecutor needs prior permission from the Pre-Trial Chamber of Three Judges, and then too the Court can only exercise its jurisdiction if the State in whose territory the crime was committed, or the State of the nationality of the accused is a party to the Statute. The Security Council can request the Court not to open proceedings or to suspend proceedings already underway for a renewable period of 12 months.

While the jurisdiction of the International Court of Justice (ICJ) applies to States, the International Criminal Court (ICC) applies to individuals. Its scope is over all individuals, irrespective of official standing. No person is exempt from criminal responsibility, even if that person is the head of a State or Government, a member of Parliament, a Government

[4] Most of the following information in this section has been taken from the Internet. For further update please visit http:/www. un.org/icc.

official, a member of the armed forces or of a paramilitary group. The Statute establishes the highest international procedural standards and guarantees of due process and fair trial. These standards are applied to the accused as well as the petitioner. The Statute incorporates the presumption of innocence and does not permit trials *in absentia,* and in consonance with current trends in international law, it does not permit the death penalty as a form of punishment.

ENRICHMENT OF INTERNATIONAL LAW THROUGH THE ROME STATUTE

The process of the establishing an International Criminal Court has ushered strident progress in the evolution of international law. In assessing the benefits of having such a permanent international court, it has been stated

> ... the Court will encourage States to investigate and prosecute genocide, war crimes and crimes against humanity and will itself, in suitable circumstances, investigate and prosecute these crimes. It will thus advance its main goal in deterring abuses and of reducing the victimisation which has so bloodied the twentieth century. By reducing victimisation, the Court will ease tensions threatening the peace and security of nations, and could also significantly cut the costs that States and the international community bear in ending armed conflict and repairing its results. The Court will further provide a neutral venue for prosecutions, thereby reducing the friction that might arise from a hesitation to extradite an individual to a particular state, from competition between States for the right to try a particular suspect or from the resort by States to a progressive unilateral enforcement action.[5]

JURISDICTIONAL DEVELOPMENT

The strength and sustenance of law lies in its effective implementation mechanisms. The Rome Statute not only takes up the responsibility of establishing a permanent mechanism to enforce international criminal law, but it also undertakes the challenge of enforcing that law without impairing national jurisdiction. This juxtaposition is a breakthrough in traditional international law. Traditionally, the preservation of national criminal jurisdiction has been maintained and guarded enviously. By introducing the

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[5] Broomhall, B., "The International Criminal Court: Overview and Co-operation with States", in ICC Ratification and National Implementation Legislation,1999 at pp. 46-7 (Association Internationale de Droit Penal).

principle of complementarity,[6] the Rome Statute has struck an important balance. It has preserved national jurisdiction, on the one hand, and upheld the jurisdiction of the ICC, on the other.

The principle of complementarity means that the Court will "complement, but not supercede, national jurisdiction. National Courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions, but the International Criminal Court will act when national courts are 'unable or unwilling' to perform their tasks."[7]

Along with complementarity, one of the widest tracts of development paved by the Rome Statue has been the issue of synchronic jurisdiction. Traditional international law made a clear distinction between the acceptance of the instrument that creates a tribunal or court, from the jurisdiction of the court or tribunal itself. The Rome Statute departs from this position and instead provides that States Parties to the Statute automatically accept the jurisdiction of the Statute.[8] Furthermore, the Rome Statute provides that the Court may also exercise its jurisdiction over nationals of a non-State party, if the State in whose territory the crime occurred is a Party to the Statute.

Situations may arise, for a variety of reasons, where States Parties might prefer ICC jurisdiction to their own courts. In such cases the ICC would decide whether it would implement the complementary provisions to investigate and prosecute a particular case. Because the Statute attempts to protect State jurisdictions from being supplanted by the ICC jurisdiction, it is important to keep in mind the rules of admissibility by which the International Criminal Court is bound. On that account, Article 17 (1) of the Rome Statute states:

> 1 ... the Court shall determine that a case is inadmissible where:

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[6] *See*, the Preamble of the Rome Statute. This principle of admissibility, *re bis in idem* (double jeopardy), provides the basis for preliminary ruling and challenges to jurisdiction of the Court or the admissibility of a case. The feature of complementarity is regulated through the admissibility procedures of Articles 18 and 19 of the Rome Statute, while Articles 17 and 20 of the Statute provide the substantive tests.

[7] Lee. R. S. (ed.), The International Criminal Court - The Making of the Rome Statute, The Hague, 1999, at p. 27. See also, Article 17 of the Rome Statute.

[8] Article 12 (1) of the Rome Statute. See also, Article 36 of the Statute.

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely or unable to carry out the investigation prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned is not permitted under article 20, paragraph 3;

The case is not of sufficient gravity to justify further action by the Court.

TERMS AND DEFINITIONS

Possibly the most intrinsic gains made by the Rome Statute lies in its ability to reach beyond the traditional definitions *of jus cogens* crimes. Terms such as 'genocide', 'war crimes' and 'crimes against humanity' now contain expanded meanings, reflecting developments that have taken place in this century. According to the Rome Statute, these crimes are crimes no matter when or where they are committed. Thus, the crime of genocide is punishable when it is committed in peacetime as well as during armed conflict. The Rome Statute's definition of genocide is based on that of the Genocide Convention of 1948. The essential ingredients of a genocide is where any one of the five acts listed is committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[9]

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[9] Article 6 of the Rome Statute. The five acts are: "(a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group: (e) forcibly transferring children of the group to another group."

There was a strong reluctance among States during the 1996 Preparatory Committee Sessions to change the definition of genocide on the ground that the definition set out in the 1948 Convention already reflected customary international law and that a change might produce conflicting obligations for States Parties when incorporating the crime in their national legislation. Nevertheless, there were quite a number of proposals from States for expanding the definition of genocide. Egypt submitted a proposal to include in the definition of genocide "political and social groups."

See, PrepCom Report, Vol. 1, paragraph 60, and Vol. II, at p. 57. Article I of the Genocide Convention, which declares that conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are also punishable acts, has not

Although during the ICC proceedings States were in general disinclined to alter the definition of genocide, it was readily agreed that the definition of crimes against humanity would have to be modified in order to have a more consistent and precise definition. However, the task of actually reaching agreement on what the precise and consistent definition should be proved to be formidable. The challenge lay in sifting through the ambiguous and assorted precedents of several authorities and jurisprudence. The precedents to be found in the Nuremberg and Tokyo Charters, the Statutes of the International Criminal Tribunal on the Former Yugoslavia (ICTY) and the International Criminal Tribunal on Rwanda (ICTR) on what constitutes crimes against humanity are varied and sometimes contradictory. The definition ultimately agreed upon is found in Article 7 of the Rome Statute.[10] This final definition reflects the developments in customary and conventional international law.

Structurally, the definitions of the crimes of genocide and crimes against humanity are similar. On that account, crimes against humanity can be committed in peacetime or in time of armed conflict, whether international or non-international, and can be committed by State or non-State actors. But what constitutes crime against humanity? The "threshold test" to determine whether a crime against humanity has been committed or not is quite a high one. Paragraph 1 of Article 7 of the Statute contains the threshold, delineating the ingredients of "inhumane acts."[11] The enumeration of the threshold are followed up with further clarifications in paragraphs 2 and 3 of the same Article. The acts constituting "inhumane acts" include murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty; torture; rape; sexual slavery, enforced prostitution, forced

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been included in the definition. But these acts are covered in Article 25 of the Rome Statute, on individual criminal responsibility.

[10] Article 7 of the Statute. Before detailing the specific acts which constitute crimes against humanity, some of which have been mentioned in the text above, the threshold reads, "For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against a any civilian population, with knowledge of the attack."

[11] Much of the controversies of the preparatory negotiations of the Rome Statute revolved around the threshold test. It was argued whether the threshold test should be conjunctive (such as, widespread **and** systematic) or disjunctive (such as, widespread **or** systematic). This threshold, in effect, reflects the compromise between these two positions.

pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity; enforced disappearance; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

War crimes are the longest recognised of international crimes. The consultations and negotiations during the Preparatory Committee Sessions in 1997 and the Rome Conference in 1998 reveal that the definition of war crimes was a politically sensitive issue and thus had to be very carefully crafted. An important point of contention was the necessity of a threshold clause. The United States played a lead role in introducing a threshold clause, arguing that it would help the Court avoid becoming overburdened by minor or isolated cases. Those against the threshold clause argued that it would introduce a false distinction between different categories of war crimes.

According to Article 8 of the Rome Statute war crimes are divided into two clusters: those committed in international armed conflict and those committed in non international armed conflict. International armed conflict is again divided into six types of breaches as understood by the Grave Breaches of the 1949 Geneva Conventions.[12] The non international or internal armed conflicts are also divided in two sections.[13] The norms upon which war crimes are based are derived from The Hague Regulations, the Geneva Conventions and Additional Protocol II to the 1949 Geneva Conventions. The jurisdictional threshold over war crimes is contained in Paragraph I of Article 8 of the Statute, which reads as follows:

> The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.

In terms of application of the Statute, war crimes do not necessarily require a State or organisational plan or policy. But the presence of such a plan or policy will certainly be weighed by the Court when determining whether or not the crime in question is sufficiently grave to be admissible.

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[12] These breaches must be committed against protected persons - the wounded, sick and shipwrecked, prisoners of war civilians - as defined in the conventions. See, Article 8(2)(a). For internal armed conflict, see Article 8(2)(c) through (f).

[13] Article 8(2)(c) lists the four serious violations of common Article 3 to the 1949 Geneva Conventions. Article 8(2)(e) enumerates the norms applicable in internal armed conflict.

OFFICE OF AN INDEPENDENT PROSECUTOR

The Rome Statute creates the office of an independent prosecutor. The independent prosecutor is to be elected by secret ballot. The person being elected to this office must be a person of high moral character, competence and experience in the prosecution or trial of criminal cases.[14] The creation of the office of an independent prosecutor is a major development in the enforcement of international law. The office empowers the independent prosecutor to undertake investigations *proprio motu*. Governments readily agreed upon this very important development of international law. It was settled that the prosecutor should have the *ex officio* power of triggering the jurisdiction of the Court in order to have a truly independent and effective criminal Court. However, strict safeguards were inserted into the provisions of the Statute to maintain the impartiality of the office and to avoid abuse of power. For example, the prosecutor is required to obtain permission from the three judge Pre-Trial Chamber prior to initiating an investigation. This process ensures impartiality as well as helps to limit the docket of the Court to those cases truly deserving investigation and prosecution.

BANGLADESH IN THE ICC PROCESS AND IMPLICATIONS OF HER SIGNATURE TO THE STATUTE

Bangladesh's involvement in the ICC process began prior to the adoption of the Rome Statute, when Bangladesh attended the Fifth Preparatory Committee Meetings of the ICC in December 1997. After attending the Final Preparatory Commission Meeting in March 1998, Bangladesh ratified the Chemical Weapons Convention of 1982 the following month. Bangladesh's expressive role in the Rome Conference of Plenipotentiaries in June - July 1998, where the Rome Statute was formally adopted, earned it the Vice Presidency of the Conference.[15]

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[14] Articles 42(3) and 42(4) of the Rome Statute.

[15] Bangladesh signed the Final Act of the Rome Statute on 18th July 1998. In his opening statement, Ambassador Muhammad Zamir, Head of the Bangladesh Delegation, stated "Bangladesh regards the holding of this Diplomatic Conference for the establishment of the ICC a rare opportunity for the international community to put into place a system of justice which can suitably redress unspeakable crimes of great enormity ... Bangladesh approaches this Conference with an unique background since it has on its statute books vide its Act No. XIX of 1973 a comprehensive law for the trial and punishment of crimes against humanity, genocide, war crimes and

In September of 1999, Bangladesh became the third signatory to the Rome Statute from the Asian region. In October 1999, at the Sixth Committee of UN General Assembly, the representative of Bangladesh at the UN delivered a statement.[16] He stated that Bangladesh had embarked upon the ratification process, which involved difficult technical matters and important legal implications at the domestic level. Without elaborating the nature of the technical difficulties, the representative went on to state that Bangladesh, along with other least developed countries, might need technical co-operation in order to complete the process as well as to assist it in the implementation of the Statute in the future. However, no immediate reasons were forwarded for not ratifying the Statute as well, as promised at The Hague Appeal for Peace held in May 1999.[17] The Government of Bangladesh has reiterated its commitment to the ratification process of the Statute, stating that it is in the process of working out all the remaining modalities for the ratification and implementation of the Statute in Bangladesh.

NATIONAL IMPLEMENTING LEGISLATION

The relationship of the International Criminal Court and the national laws of State Parties (such as Bangladesh) can be examined under two headings: (a) how proceedings at the national level are to be conducted in order to satisfy the complementarity principle; and (b) how the duty to co-operate as envisaged under Part 9 (Articles 86 to 102) of the Statute is to be fulfilled. Implementation of international obligations by States involves having to make changes in national laws. The extent of the changes involved will depend on the nature of particular laws. The investigation and prosecution of crimes within the jurisdiction of the ICC with the "co-

violations of the humanitarian rules contained in the Geneva Conventions of 1949 as well as any other crime with international legal implications."

[16] The 11th – 14th Meetings of the Sixth Committee of the United Nations General Assembly, held from 20 to 22 October, 1999.

[17] In the Closing Plenary of the Hague Appeal for Peace Conference at the Hague, Netherlands on May 15, 1999, the Prime Minister of Bangladesh, H. E. Sheikh Hasina stated, "... that the initiative for this Conference has been taken by a civil society organisation is most significant ... governments should come forward to strengthen peace enforced by civil society organisations. My Government considers doing so a duty. We fully support and endorse the Hague Agenda for Peace and Justice in the 21st century ... I would also like to announce that Bangladesh will very soon sign and ratify the Statute of the International Criminal Court."

operation" of the national court encompass potential implications for national laws. The key ingredients of this compliance of national laws with international obligations under the Rome Statute are the principles of *complementarity* and *ne bis in idem* (double jeopardy).[18] These two principles form the cornerstone of the International Criminal Court.

A major issue during negotiations among delegations on compliance was whether there should be a definite legal obligation on the States Parties to comply with requests from the ICC, or whether the compliance should be left to the discretion of each particular State. The majority of delegations preferred setting out compulsory terms of obligations upon States to "co-operate fully" with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. Thus, Articles 9, 88, 89(1), 93(1) reflect a compromise of the delegations to achieve compliance of the State with the Rome Statute, without impinging upon the sovereignty of the State concerned.

Some of the safeguards to ensure this delicate balance of primacy of national jurisdictions and international standards are enshrined in Articles 88, 89, 96 and 97 of the Statute. For example, Article 88 contains provisions whereby States are obliged to ensure that procedures are available under their national laws for all forms of co-operation; Article 97 obliges States to consult with the Court if there are problems that impede or prevent a State from executing the request made by the Court. Article 96(3) makes these consultations between the State (national jurisdiction) and the ICC mandatory where the contents of a request for other forms of assistance do not meet the requirements under national law. Article 93(3) helps avoid specific references to national substantive law by allowing States to raise derogation from existing fundamental legal principles of general application. Article 93(3) also obliges States to consult the Court when the State considers it necessary to modify the request of the Court.

All of the safeguards outlined above, however, are in place keeping in mind the essence of the whole admissibility scheme of the Statute. The admissibility scheme is that, the ICC will exercise jurisdiction over the nationals of a State Party or with respect to actions taking place on the territory of a State Party only where the State Party itself voluntarily relinquishes the case to the ICC or is proved to be inactive or unwilling or genuinely unable to conduct the case itself. Therefore, if cases being tried

[18] Complementarity describes the relationship between the ICC and national jurisdictions. This is regulated by Articles 17-20 and Part 9 of the Rome Statute.

by national laws are proved to be carried out in accordance with the principles and defences of the Statute, the case would not be admissible before the ICC. Again, where national laws circumscribe a wider area of culpability than the Statute, the national courts would have jurisdiction to that extent that it exceeds. Where national laws have very narrow definitions of crimes or more restrictive general principles than the Statute, the case may be admissible within the ICC. Nonetheless, in cases where national courts proceed in good faith the jurisdiction of the ICC could still be exercised. For this to happen the gap between national law and the Statute would have to be significant.

Thus, some of the major aspects of the implementation of the Statute in national legislation can be summarised as follows:

(i) The ICC will not act where national criminal jurisdictions have already proceeded in good faith;

(ii) A case becomes admissible under the ICC's jurisdiction only in cases of genuine unwillingness or inability to act by the State or the State's inaction;

(iii) The ICC through interpretation and application of the Statute will determine what constitutes unwillingness, inability or inaction; and

(iv) Non-Party States enjoy the same procedural rights as States Parties to challenge the jurisdiction of the Court or the admissibility of a case.

Despite striving to achieve a harmonic system, certain subjective elements nevertheless remain in the admissibility criteria of the Court. These subjective elements may pose as a hindrance to determine admissibility in the future and these may be used by States to bypass the ICC from exercising jurisdiction. For example, Article 17(3) of the Statute states: "In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." Here, the word "substantial" makes it difficult for the prosecution and the ICC to pass the test for admissibility. The greater difficulty with the harmonic structure is the Statute's silence on pardons.[19]

[19] A similar problem relates to amnesties before an investigation and trial. In such cases, it is assumed, the Prosecutor has some discretion to trigger investigation. This amounts to the Court's ability to act where no investigation takes place.

A State can investigate, prosecute, convict and sentence a person and forthwith pardon or parole the person. It has been argued that in such cases, Article 20 of the Statute *(ne bis in idem)* could be relied upon since the Article allows the Court to try the person for the same conduct if the proceedings were for the purpose of shielding the person from criminal responsibility or if the proceedings were not otherwise conducted independently or impartially.[20]

For the Statute to have effect over Bangladesh, it would be necessary to draft necessary implementing legislation. The amendments in question would be mostly to do with adopting appropriate language in order to provide certainty in application. For example, the crime of 'enforced pregnancy' has not been fully covered in the existing laws of Bangladesh. But the crime of enforced pregnancy was, nevertheless, carried out on a widespread scale during the war of liberation in l971. Again, it would be necessary to have complementary language to ensure co-operation under Article 93 of the Statute, such as, taking of evidence, examination of witnesses before the ICC, and safety of witnesses on Bangladeshi soil. Furthermore, the laws relating to the armed forces of Bangladesh would have to be amended to conform to the provisions of the ICC Statute and other international instruments of humanitarian laws.

IMPLICATIONS OF BANGLADESH'S SIGNATURE AND IMPENDING RATIFICATION[21]

Article 47(3) of the Constitution of Bangladesh provides that any law designed to prosecute, try and punish persons accused of international crimes may not be challenged on the grounds of inconsistency with the Constitution. Thus, the implementation of the International Crimes Tribunal Act of 1973 is safeguarded from constitutional challenges. Moreover, the Fundamental Principles of State Policy of the Constitution, as per Article 25, require that Bangladesh shall base its international relations on respect for international law and the principles of the UN

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[20] Holmes, J. T., (1999), "The Principle of Complementarity", in Lee, R.S. (ed), The International Criminal Court - The Making of the Rome Statute, supra note 7.

[21] For a more detailed discussion of Bangladesh's position vis-à-vis ratification of the Statute, see, Ziauddin, A., "National Interest Analysis: Ratification of the International Criminal Court Statute", Keynote paper presented at the Inaugural Session of the National Conference on "The International Criminal Court and Ratification by Bangladesh" held in Dhaka, organised by ANICC (Asian Network for an International Criminal Court).

Charter. Overall, the impact of Bangladesh's signature and ratification of the ICC Statute could be seen on three levels, as described below.

TRIAL OF WAR CRIMINALS OF 1971

Despite the International Criminal Court being devoid of retrospective jurisdiction, which is a core issue for Bangladesh, the role played by Bangladesh in the ICC coming into being is laudable on all accounts. A general reading of the Statute shows that it is not possible for Bangladesh to bring the 1971 war criminals before the ICC. However, an interpretative reading of certain portions of the Statute reveals an interesting case. Let us take, for example, the manner in which the term "enforced disappearance" has been defined in the Statute. The present definition of "enforced disappearance" in Article 7(2)(I) of the Statute reads:

> 'enforced disappearance of persons' means the arrest, detention or abduction of persons, by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

A close reading of this definition makes it clear that it is possible to try the 1971 war criminals for the crime of enforced disappearance as it is a continuing crime and the Court would not be wanting in jurisdiction under the retrospective clause. The war criminals would be triable as long as specific information about the disappeared persons is not established, as was in the case of litterateur Zahir Raihan. Bangladesh is yet to know the fate of thousands of Bangalee freedom fighters, intelligentsia, literati and general people at the hands of the Pakistani soldiers and their Bangalee collaborators, such as the *al-Shams* and *al-Badrs*.

According to Article 145A of the Constitution of Bangladesh, all international treaties are to be placed before parliament. But in reality such treaties are not so placed. It is assumed that all treaties entered into have to be ratified after necessary domestic legal amendments, where necessary. This again is not in fact the case in Bangladesh. The most recent example of this practice is the ratification of the Comprehensive Test Ban Treaty (CTBT) by an executive order on March 7, 2000, without being placed in Parliament. For the implementation of the ICC provisions in Bangladesh there is no necessity to enact any new laws. Compared to most other countries Bangladesh is in a much better position in that it already has in place The International Crimes (Tribunal) Act, 1973. Although it is true that this Act has never been applied and no Tribunal has ever been established to try the war criminals of 1971, Bangladesh's positive role in

the ICC process would enable the creation of the necessary environment for activating the 1973 Act.

PREVENTING FUTURE MARTIAL LAW REGIMES

All acts of murder, torture or violent usurpation of power committed against any civilian population in Bangladesh would come under the definition of "crimes against humanity" as expressed by the Rome Statute.[22] The establishment of the ICC would prevent the emergence of despots like Pinochet or Pol Pot. Given the Bangladeshi experience with Martial Law regimes, the immediate relevance of this definition and the provisions it purports can be especially appreciated.

CHITTAGONG HILL TRACTS, THE PEACE TREATY AND ENSURING REGIONAL HARMONY

The 1997 Peace Treaty signed between the Government of Bangladesh and the ethnic minorities groups of the Chittagong Hill Tracts was a major break-through in terms of peaceful resolution of internal armed conflict through negotiations. However, the Treaty which was supposed to end a 25 year-old conflict, failed to mention at all the atrocious torture suffered by the indigenous population during these years. The Treaty is also ominously silent on the question of the trial of the criminals who perpetrated torture on the tribal population. The gravity of this omission is such that it amounts to a violation of the fundamental human rights of the indigenous population of Bangladesh. Future atrocities in the nature suffered by the people of the Chittagong Hill Tracts could be prevented under Articles 4 to 8 of the Rome Statute once the ICC is established.

OTHER CONCERNS OF BANGLADESH

The signing and ratification of the Statute will not oust Bangladesh's jurisdiction to try and punish international crimes. On the contrary, the jurisdiction of Bangladesh shall supersede the jurisdiction of the ICC. Only in cases of grave constitutional disorder or collapse in government would

[22] Article 7 of the Statute, which lays down the definition of "crimes against humanity" provides wide and inclusive understanding of the terms "murder", "extermination", "enslavement", "deportation or forcible transfer of population", "imprisonment of other severe deprivation of physical liberty", "torture", "rape", "sexual slavery", "enforced prostitution", "forced pregnancy", "enforced sterilisation", "persecution against any identifiable group or collectivity", "enforced disappearance", "apartheid" and "inhumane acts".

the jurisdiction of the ICC supersede that of Bangladesh. Bangladesh would be in a strong position, once it has ratified the Statute, not only to try Pakistani soldiers who committed war crimes in 1971, but also try military dictators who overthrow democratic systems of governance.

Bangladesh's signature does not imply that it has assumed all of the obligations under the Statute. Rather, it implies that Bangladesh will not adopt any laws or policies contrary to the provisions of the Statute.

There are no financial implications for Bangladesh until it has ratified the Statute and the Statute itself has come into force. The Government of Bangladesh had previously raised concerns about the potentially heavy financial burden of becoming a State Party to the Statute. This concern reflected similar apprehensions voiced by other developing nations. Much of this concern is addressed by Article 79 of the Statute which states that a Trust Fund shall be established for the benefit of the victims of the crimes within the jurisdiction of the Court, and of the families of such victims. In 1998, in an effort to ensure participation of all members of the international community many States and the European Union made contributions to a Trust Fund. According to the 1998 Preparatory Committee Report, the Trust Fund sponsored 35 delegates from 33 least developing countries and 19 delegates from 19 developing countries. The Trust Fund also facilitated participation of a number of delegates who, without such assistance, would not have been able to participate in the codification process for its whole duration. In like manner, a process is in place to work out more concrete ways to assist developing or least developed countries carry the monetary responsibilities of becoming a State Party.

GENDER-SPECIFIC CONCERNS

One of the most active groups involved in the ongoing process of setting up the International Criminal Court is the Women's Caucus for Gender Justice. The Caucus is built upon the significant work advanced by women in previous UN Conferences (Human Rights – Vienna; Population and Development – Cairo; Social Development Summit – Copenhagen; Fourth World Conference on Women - Beijing). A significant contribution to the process by the Caucus has been to bring women from all parts of the world to participate in the Preparatory Commission Meetings and voice their concerns to incorporate gender perspectives in the ongoing process of setting up the Court. During the Rome Conference in 1998 the Women's Caucus fought for a broader concept of automatic, universal jurisdiction, thus allowing the Court to exercise jurisdiction over cases referred by

States having custody of the accused or whose citizens were victims. During the 1st and 2nd Preparatory Commission Meetings held in 1999, the Women's Caucus found itself having to negotiate on several aspects of the definitions of sexual violence and the elements of crimes texts. It was crucial that rape and other forms of sexual violence be explicitly identified as crimes within the Court's jurisdiction, and that sexual acts be charged as genocide, killing, mutilation, torture, inhuman treatment and other war crimes or crimes against humanity.

In the 3rd and 4th Preparatory Committee Meetings, the Caucus found itself having to restate and sometimes renegotiate its core concerns. With regard to evidentiary rules relating to sexual violence, for example, the Caucus has re-emphasised that the Rules must preclude discriminatory and inflammatory evidence in case of sexual violence and state that (a) no corroboration of the victim's testimony will be required, (b) no evidence of the victim's prior sexual conduct be received, and (c) there be no inference or defence of consent where coercive circumstances exist. Coercive circumstances include, but are not limited to, violence, duress, force or threat thereof, detention or psychological oppression, abuse of power or threat thereof to the victim or a third party.

The Women's Caucus continues to emphasise on the point that the Rules of Procedure and Evidence must provide adequate victim and witness protection. According to the Caucus, where there is risk of death or serious harm to the physical and mental health of the witness or others at a risk on account or their testimony, it should be left to the Court to decide when, where or if at all the witnesses should be permitted to testify without their identity being made known to the defendant.

The recognition of sexual crimes as war crimes in the Statute is a far-reaching and strident achievement, particularly for women who are vulnerable to gender-specific abuses. The impact of this achievement is especially appreciated in Bangladesh, where the memory of countless women raped, maimed and sexually tortured in 1971 is still vividly alive.

IMPACT OF THE ICC IN ASIA

Some of the worst crimes against humanity in the past fifty years have taken place in Asia. A permanent international criminal court, with the necessary jurisdiction and tools to ensure protection of Asian people from war crimes, is an essential need. Crimes that have occurred in Bangladesh, Cambodia and Kashmir, and those that continue to occur in East Timor, are addressed differently by different regimes. This varying trend is reflected in the fact that Asia is the only continent in the world that is yet

to produce a comprehensive, uniform human rights mechanism, such as a Commission or a Court. The ICC could provide an important platform for uniform and consistent redressal of crimes in Asia.

The Asian Network for an International Criminal Court (ANICC) has been in the forefront of raising awareness about the necessity of a permanent international criminal court. The ANICC works on mobilising support to make internal legislation conform to international treaties and obligations entered into by particular Asian States. The ANICC carries out its mobilisation through establishing national networks to support the creation of an ICC; strengthening dialogue between governmental and non-governmental bodies and delegations of the ICC, and gathering and disseminating relevant information from the United Nations and from Asia regarding the ICC.

A challenge before the ANICC, and indeed all proponents of the ICC, is to encourage those Asian States that are opposed to the creation of the ICC, to accept it. A number of key Asian countries, such as India, Sri Lanka, China and Singapore remain reluctant to adopt the Statute.[23] India's position at the Rome Conference was to demand restriction of the Security Council's role and a reference to weapons of mass destruction, such as nuclear, chemical and biological weapons. Sri Lanka's abstention was based on the non-inclusion of crimes of terrorism in the Statute. China objected on the point of universal jurisdiction granted to the prosecutor over core crimes. China's position was that such universal jurisdiction places state sovereignty on the subjective decisions of an individual. Singapore's objection was, among others, on the non inclusion of the death penalty in the Statute.

The challenge of the Asian Network lies in undertaking effective advocacy to help opposing countries overcome their reticence. Much of this advocacy would involve confidence building measures of these countries and highlighting the important role that could be played by Asia in the process of ensuring the protection of human rights in the continent. As the closing date for signing the Statute (December 31st, 2000) draws near, some significant progress has already taken place.

PAST CRIMINAL TRIBUNALS AND THE ICC

Over the past 50 years, four ad hoc tribunals and five investigatory commissions have been established.[24] The four tribunals are: (1) The

[23] ANICC News Bulletin, Vol.1 Issue I. December 1999.

[24] Supra note 3 at p. 6.

International Military Tribunal (IMT) sitting at Nuremberg,[25] (2) The International Military Tribunal for the Far East (IMTFE) sitting at Tokyo,[26] (3) The International Criminal Tribunal for the former Yugoslavia (ICTY) sitting at the Hague,[27] and (4) The International Criminal Tribunal for Rwanda (ICTR) sitting at Arusha.[28] The five investigatory commissions are: (1) The 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties, which investigated crimes occurring during World War I, (2) The United Nations War Crime Commission, which investigated German war crimes during World War II, (3) The 1946 Far Eastern Commission, which investigated Japanese war crimes during World War II, (4) The Commission of Experts Established Pursuant to Security Council Resolution 780, to investigate Violations of International Humanitarian Law in the former Yugoslavia, and (5) The Independent Commission of Experts Established in Accordance with Security Council Resolution 935, the Rwandan Commission, to investigate violations committed during the Rwandan civil war.

The precedents set by the four tribunals are significant for the establishment of the ICC. The principles and systems developed and exercised during the Nuremberg, Tokyo, Yugoslav and Rwandan Tribunals have crystallised, along with earlier principles of international criminal law, into the Rome Statute. For example, the Rome Statute enshrines the principle of individual criminal responsibility. This is a unique development in international law, even though the concept dates back to the time of Hugo Grotius.

A major departure of the Rome Statute from its precursors has been its comprehensive coverage of the general principles of criminal law found in most of the national legal systems. None of the previous international tribunals was as expansive. The Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, each contained two articles dealing respectively with personal jurisdiction and individual

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[25] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8 1945*,* Charter of the International Military Tribunal, 59 Stat. *1544,* 1546, 82 U.N.T.S.279.284.

[26] Special Proclamation: Establishment of an International Military Tribunal for the Far East. January 19, 1946, T.I.A.S. No. 1589, at 3, 4 Bevans 20.

[27] Res. 827, U.N. SCOR, 48th Session, 3217th Meeting, U.N. Doc. S/RES/827 (1993).

[28] Res. 955, U.N. SCOR, 49th Session., U.N. Doc. S/RES/955 (1994).

criminal responsibility.[29] The Statutes of the Nuremberg and Tokyo Tribunals covered more or less the same principles as those of the Yugoslav and Rwanda Tribunals.

The issue of trials *in absentia* proved to be one of the most contentious legal questions that was dealt with during the negotiations on the adoption of the Rome Statute. This contention was mainly between common law and civil law countries. Most countries with a civil law background favoured holding trials in absentia, while most of the common law countries strongly opposed it. Hovering over the negotiations was the legacy of the Nuremberg Tribunal – which was permitted exercise of trials in *absentia.* As the arguments of both sides were equally compelling it was very difficult to broker a compromise position in the Rome Statute. Ultimately, Paragraph 3 of Article 63 of the Statute, which dealt with trials *in absentia,* was dropped. The present position of the Rome Statute is that it does not provide for trials *in absentia.*

The Rome Statute deals extensively with the issue of right of appeal and revisions. However, the Charter of the Nuremberg Tribunal did not give this right to convicted persons.[30] Again, the Rwandan and Yugoslav Tribunals permit convicted persons to appeal their conviction. For example, Article 25 of the ICTY Statute permits a convicted person to appeal on the grounds of an error of law or an error of fact.

A survey of the negotiating history behind the right to appeal and revision in the Rome Statute reveal that here too a compromise had to be struck between the common law and civil law positions. Moreover, these positions had to be tested against well-established human rights instruments as well. For example, the provisions of the International Covenant on Civil and Political Rights,[31] the American Convention on

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[29] Articles 6 and 7, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, (Hereinafter, ICTY Statute).

[30] Article 26 of the Nuremberg Charter provided for the judgement of the Tribunal as to the guilt or innocence of a defendant to be final and not subject to review.

[31] The wording of Article 14(7) of the ICCPR, which allows for final conviction or acquittal "in accordance with the law and penal procedure of each country" seemed to cover both the common law and civil law approaches to appeal and revision.

Human Rights,[32] and the European Convention for the Protection of Human Rights and Fundamental Freedoms[33] had to be enfolded. In the final analysis, however, Part 8 of the Rome Statute demonstrates a healthy compromise between various national legal systems and schools of thought. It also indicates a positive evolution from the previous Tribunals.

CONCLUSION

The Nuremberg and Tokyo Tribunals brought into sharp focus the individual as the primary bearer of responsibilities. This was a departure from conventional international law practice until then, wherein the State was the main actor. The ICC builds upon the focus of its precursors and aims to set in motion a mechanism by which individual wrong-doers are brought to justice. Bangladesh, in particular, has rightly identified the necessity of having an international forum wherein egregious violations against humanity can be redressed. Bangladesh has emerged as an Asian forerunner in the ICC process. Bangladesh's signature to the Statute and imminent ratification is recognised by the international community as an important harbinger for all of Asia. An early ratification for Bangladesh can only be propitious. There is no material argument for not ratifying the Statute, particularly since Bangladesh has already completed its detailed appraisal of national interest and implementation scheme. The sooner Bangladesh ratifies the Statute the more assured it is of having a strong presence and influence on the early days of the functioning of the ICC. It is only desirable that Bangladesh's committed support till now in the process for the establishment of the ICC should translate into a meaningful position in the ICC structure once it has finally materialised. Once established, the success of the ICC will then depend on the collective

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[32] The language of Article 8.4 of the American Convention contemplates the civil law position, that is, the acquittal of a person by a judgement which is appealable. Article 8.4 states, "An accused person acquitted by a non-appealable judgement shall not be subjected to a new trial for the same cause."

[33] Article 14(7) of the Convenant, along with Article 4(1) of Protocol No.7 to the European Convention, qualifies acquittal or conviction with the words, "in accordance with the law and penal procedure of that State." Thus, Article 4(1) of the Protocol states, "No person shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedures of that State."

efforts of all State Parties. Bangladesh can certainly pave the way for the rest of Asia in being amongst the first to make the ICC a successful reality.

The success of the ICC ultimately depends on a very simple formula - consistency and fairness. The ICC can never achieve to be the replacement for national jurisdictions. In essence, the ICC is a counterpart to national jurisdictions. As long as the ICC retains that essence, its credibility and function is ensured. Besides its formulaic success, two important factors determine its functional credence: first, those who initially run this machinery of justice, and second, the political will of the world's super powers. It is on the successful conjunction of these factors, along with consistency and fairness, that the justification of the ICC as an expression of universal morality will rest.