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A Permanent International Criminal Court: Soon to Be a Reality

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A Permanent International Criminal Court: Soon to Be a Reality

*By Richard J. Wilson**

On December 17, 1996, the UN General Assembly adopted Resolution 51/207, which calls for a diplomatic conference in Italy in June 1998 to review and open for signature a convention to establish a permanent international criminal court (ICC). In preparation for that meeting, the General Assembly has called for a continuation of the work of the Preparatory Committee (Prepcom), with three week-long conferences scheduled in 1997 and another three weeks of meetings to be held before April 1998 to complete work on the draft. At the second Prepcom, held in New York from August 12-30 of 1996, it became clear that no states are challenging the need for an ICC or the efforts to create one. Thus, all indications are that a permanent ICC will come into being before the millennium, perhaps becoming the last major international institution to be created in this century.

This short article will give an overview of the proposed structure and powers of the ICC, as it is now conceived, and will address some of the major disputes which must be resolved before the ICC can come into being. Unless otherwise indicated, the analysis here draws from the draft Statute for an International Criminal Court, prepared by a working group of the International Law Commission (ILC), and the Report of the August 1996 Prepcom meeting.

See page 12 for New Frontiers in Human Rights Law — Genetic Rights as Human Rights

Crimes Within the ICC's Jurisdiction

Much of the effort in the creation of an international criminal court has focused on the offenses for which it should assume jurisdiction. Historically, it was assumed that the lack of domestic enforcement capabilities for international crimes such as terrorism, narcotrafficking and related crimes required the creation of a specialized tribunal with international reach. In part because of the attention given to the statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/ICTR), the focus of the ICC has shifted discernibly toward crimes which constitute gross violations of human rights and which often arise in armed conflict. Drawing from what are widely accepted international crimes under existing treaty law, the drafters have generally agreed on the inclusion of three groups of offenses: genocide, crimes against humanity and war crimes. There is less agreement about a second group of crimes which include aggression and an array of other crimes such as air piracy or highjacking, apartheid, drug trafficking, hostage taking, torture, or endangering the safety of UN personnel.

continued on page 7

Indonesia's National Human Rights Commission: A Step in the Right Direction?

By Monika Talwar

When Indonesia's President Suharto issued a decree establishing the National Commission on Human Rights four years ago, many thought it would amount to nothing more than an ineffectual body that would condone the Government's well-documented human rights violations. Four years later, however, attitudes toward the Commission are changing. The Commission has acted with a fair degree of independence in its criticism of human rights abuses. The question

continued on page 18

INSIDE:

ICC, continued from page 1

Genocide: The definition of the crime of genocide is taken directly from Articles II and III of the Genocide Convention of 1948. It includes the commission of certain acts — killing, causing serious bodily or mental harm, destruction of means of survival, preventing births, transfer of children — committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group.

Crimes Against Humanity: Although there was general agreement that crimes against humanity should be included within the ambit of the ICC's powers, there was concern that there is no generally accepted definition of crimes against humanity under treaty law. Various possible definitions may be found in the Nuremberg and Tokyo Charters, the Statutes of the ICTY and ICTR, and the ILC's draft Code of Crimes Against the Peace and Security of Mankind. It is likely that this offense will include certain acts such as extermination, murder, torture, or rape, when committed systematically against a segment of the civilian population in either international or internal armed conflict. It might be noted, however, that the Statute of the ICTY in its Article 5 definition of crimes against humanity, fails to require systematic commission of the enumerated offenses.

The definitions of both genocide and crimes against humanity, drawing from customary international law, provide liability for acts committed in either war or peace, by either public or private actors, with no exception for amnesty, pardon, or other statutory limitation.

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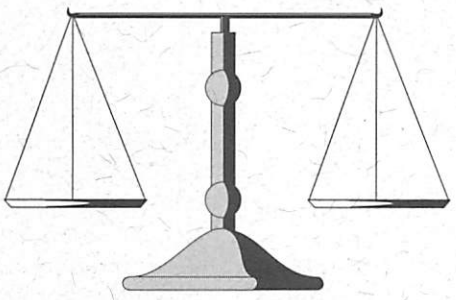
War Crimes: Again, there was general agreement that war crimes should fall within the mandate of the ICC, and only minor differences on definitions for such offenses, because much of this law is embodied in the Geneva Conventions and their Protocols, as well as established customary international law. Nonetheless, there was some disagreement among the delegates as to whether this category of crimes should include violations committed in internal as well as international conflict. Some used the statute of the ICTR, as well as the decision of the ICTY Appeals Chamber in the *Tadić* case, to justify such inclusion, noting that national criminal justice systems are ill-equipped to deal with such issues. It is likely that the offenses punishable under these provisions will include torture of prisoners of war, taking civilian hostages, subjecting detainees to medical and scientific experiments, and other such offenses.



Aggression: Because the crime of aggression was not included in the original draft statute, and because there is no generally accepted definition for the offense, general consensus for inclusion breaks down with this offense. Some delegations, however, felt quite strongly that the absence of a crime of aggression would be a significant gap in the jurisdiction of the court, and that the crime of aggression is one of those which are of greatest concern to the international community. These delegations felt that the failure to include the offense was an invitation to impunity for individuals responsible for the crime, and that its inclusion would constitute a deterrent to such conduct. Aggression is defined in the ILC draft Code of Crimes Against the Peace and Security of Mankind as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." Under the draft's definition, any unsanctioned first use of armed force constitutes prima facie evidence of an act of aggression. Typical acts constituting aggression would be invasion, bombardment, blockade, and land, sea or air attack. The crime raises interesting issues, noted by the delegates, as to actions taken by countries in self-defense.

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A more troubling potential offense is that of "threat of aggression" which the draft Code defines in Article 16 as "declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated." That offense, still on the table, implicates issues of free expression of opinion.

Other Crimes: As noted above, the original draft statute included a number of other treaty-based offenses relating to terrorism and drug trafficking, in part due to heavy media coverage of these topics in recent years and the concern that domestic law was inadequate to combat the phenomena. These offenses, however, achieved little consensus for inclusion in the statute. The ILC draft had, for example, included the unlawful seizure of aircraft, hostage-taking and related crimes, crimes defined as piracy, the practice of apartheid, and crimes against diplomatic personnel. The major concern of the delegates appeared to be that such crimes, while defined by treaty, have not been uniformly subscribed to or recognized, and their exclusion from "core crimes" of the ICC might facilitate the acceptance of jurisdiction of the Court by States that are not parties to the treaties in question.

Establishment and Structure of the ICC

Some of the most contentious issues in the drafting process are the questions of the status of the court, how it will

continued on page 14

ICC, continued from page 7

come into being, and what its relationship will be to the UN. Some support the idea that the court should be an independent judicial institution, while others prefer that the court form part of the UN, either as a principal or subsidiary organ. The ICTY, for example, is a subsidiary organ of the UN. The methods for establishment of the court would affect its relationship to the UN. Various suggestions have been made, such as an amendment to the UN Charter to make the court a principal organ like the International Court of Justice; a resolution of the General Assembly and/or Security Council, as with the Yugoslav tribunal; or the adoption of a multilateral treaty.

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As currently contemplated, the ICC will be established by means of a multilateral convention which will be opened for signature as early as 1998. This scheme comports with the recommendation of the ILC draft, and seems to provide the necessary degree of flexibility and independence sought for the court. Any party to the treaty will be eligible to participate in the workings of the court, which would function as a permanent institution. The court would have jurisdiction, according to ILC draft Article 4.2, within the territory of each State party "as may be necessary for the exercise of its functions and the fulfillment of its purposes." The major issues left open by the creation of a treaty-based entity are the financing of the court and the relationship of the body to the UN when conflicts develop between the two.

The basic mechanisms for the court's operation have been broadly agreed upon. One central question was whether the court should reflect the structure and ideology of the civil or common law traditions. The subject was debated at the August 1996 Prepcom. Several days were devoted to discussion of a French proposal to adopt the tenets of the civil law as practiced in France, but the delegates ultimately opted for the ILC draft structure, which is a more adversarial model.

The court will operate with a permanent Presidency, Procuracy, and Registry. The Presidency, three presiding officials to be elected from among the membership of the judges, would perform the administrative duties of the court and rule on all pre-trial and procedural matters not undertaken by a chamber of the court. The Procuracy would investigate and prosecute all offenses within the jurisdiction of the court, while the Registry would carry out the administrative functions delegated to it by the Presidency. The Prosecutor and Deputy Prosecutor would be elected by secret ballot of a majority of the States parties, and could not be of the same nationality, while the Registrar would be elected by ballot of the court on the proposal of the Presidency.

The court itself would be made up of trial and appellate chambers. The States parties would nominate and elect 18 judges, with the caveat that no two judges could be nationals of the same state. Six of the elected judges would sit as an appellate tribunal while the remainder would rotate in trials in panels of five, as assigned by the Presidency. Judges would hold office for a term of nine years, and would not serve on a full-time basis unless the work load of the court justified such action. The working languages of the court would be English and French.

While the list of controversial topics seems to be long and potentially divisive, the drafters appear confident that a permanent international criminal court can become a reality before the turn of the century.

The Prepcom also devoted significant time and energy to the questions of how a prosecution would commence, the processes by which trial and appeal would be accomplished, and the protection of the rights of the accused to a fair trial and due process. Space does not permit the full development of these issues here, but some of the most important questions which remain to be resolved are:

- What would constitute a "trigger mechanism" for exercise of the court's jurisdiction? Should the court have jurisdiction only over offenses specifically included in its mandate or more general jurisdiction when national systems fail to prosecute? At minimum, it seems that consent would be required from both the State where the crime was committed and that in which the accused is found or is in custody, a condition which may do damage to the traditional concept that states are obligated to either try or extradite accused offenders found in their jurisdiction.

- Who will carry out the functions of the prosecutor with regard to arrest and pre-trial custody of the accused, and how will the court and its officers gain access to witnesses and evidence deemed necessary for full and adequate preparation for trial?

- Is the accused entitled to trial in his presence or may trials be conducted *in absentia*? What penalties should be imposed for crimes within the ICC's jurisdiction? The Prepcom has already concluded that capital punishment will not be allowed.

While the list of controversial topics seems to be long and potentially divisive, the drafters appear confident that action on a draft treaty can be completed by April 1998, and that a permanent international criminal court can become a reality before the turn of the century.

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The ILC's draft statute of September 1994 for the ICC can be found in the official web site of the ICC at *http://www.igc.apc.org/icc* operated by the NGO Coalition for an International Criminal Court, which also publishes a quarterly newsletter, *The ICC Monitor.* The Coalition for International Justice also maintains a web site regarding the ICTY and ICTR at *http://www.cij.org/tribunal.*