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NEWS FROM THE INTERNATIONAL CRIMINAL TRIBUNALS

by Chanté Lasco*

The International Criminal Court

On July 1, 2002 the International Criminal Court (ICC) came into force. Crimes committed after July 1 falling within the Court's other jurisdictional requirements now can be referred to the Court. The date was set in accordance with Article 126 of the Rome Statute (Statute). It stipulates the date of entry into force as "the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."

Throughout the four years that passed before obtaining the 60 ratifications necessary under the Statute, the Preparatory Commission (Commission) drafted several key documents. These include the Rules of Procedure and Evidence, the Elements of Crimes, the Relationship Agreement between the Court and the United Nations, the Basic Principles Governing a Headquarters Agreement to Be Negotiated between the Court and the Host Country, the Financial Regulations and Rules, the Agreement on the Privileges and Immunities of the Court, the Budget for the First Financial Year, and the Rules of Procedure for the Assembly of States Parties (ASP). The Commission completed its work during its Tenth Session, which was held in New York City from July 1-12.

The first meeting of the ASP was held September 3-10. Article 112 of the Statute establishes the ASP, which consists of one representative from each state party and functions as the administrative body of the ICC. Prince Zeid Ra'ad Zeid Al-Hussein of Jordan was elected president of the ASP at the first meeting. Philippe Kirsch, chairman of the Commission, presented the Commission's report to the ASP and congratulated Prince Al-Hussein on "accepting the mantle of leadership." Applause marked the meaningful moment when the ASP took over from the Commission and the ICC became an institution independent of the United Nations.

After electing the president and two vice-presidents of the ASP, the body accepted the ASP Rules of Procedure promulgated by the Commission and its agenda. By consensus, the ASP adopted each of the remaining documents prepared by the Commission and finalized those documents that the Commission was unable to complete (including a procedure for the nomination and election of judges).

The ASP accepted most of the Commission's work by consensus, without further discussion or objection. Adopting a process for the nomination and election of judges was one of the most substantive tasks confronted by the ASP. At issue was Article 36(8) of the Statute, which stipulates that

The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

- (i) The representation of the principal legal systems of the world;
- (ii) Equitable geographical representation; and
- (iii) A fair representation of female and male judges.

The Statute does not provide any guidance on how to meet these representation requirements. The ASP negotiated a process whereby states must vote for a minimum number of candidates from each geographical region and from each gender. For example, states must vote for three candidates from Africa, two from Asia, two from Eastern Europe, three from Western Europe, and three from Latin America. States

must vote for six male and six female judges, provided that at least nine women are nominated from which to choose. The Women's Caucus for Gender Justice (an umbrella organization representing non-governmental organizations (NGOs) from around the world) fought hard in Rome to have women's issues represented in the Statute and is now urging states parties to nominate qualified women, in addition to legal experts on violence against women, to help ensure the proper investigation and prosecution of crimes of gender and sexual violence.

The ASP opened the nomination period for the prosecutor and for judges on September 9th and it will close on November 30, 2002. The elections will be held from February 3-7, 2003. To date, nine countries have announced their candidates. Only one candidate was a woman.

"Article 98" Agreements

A major topic of discussion among the delegates and NGOs was Article 98 of the Statute, which states that

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The United States government is currently using this provision to seek immunity from ICC prosecution for its personnel by entering into bilateral agreements with States Parties that prohibit surrendering U.S. citizens to the ICC. Many NGOs and States Parties oppose such agreements and believe the agreements undermine the purpose of the Statute. Nine countries have signed such agreements, including Uzbekistan, Mauritania, the Dominican Republic, East Timor, Israel, the Marshall Islands, Palau, Romania and Tajikistan. Because some of these states will require parliamentary approval of the agreements, there is still a possibility that the agreements will not be binding.

Next Steps

The ASP will meet again in February to elect judges and a prosecutor. Meanwhile, an advance team arrived in The Hague on July 1, 2002 to begin making practical arrangements for the Court. A building has been provided by the Netherlands and the advance team is dealing with operational issues such as information technology, office space, and vacancy postings for personnel. At the time of writing, 81 countries have ratified the Statute.

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The Special Court in Sierra Leone

The newly established Special Court for Sierra Leone (Special Court) has begun its work. Investigators from the Office of the Prosecutor are visiting massacre sites for evidence that can be used to prosecute those responsible for atrocities committed during Sierra Leone's civil war.

As the result of a request by President Ahmad Tejan Kabbah of Sierra Leone, the Special Court was created by treaty between Sierra Leone and the UN. President Kabbah wrote to UN Secretary-General Kofi Annan in June of 2000 to ask for UN assistance. A Security Council resolution passed in August 2000 authorized the establishment of a Special Court and called for the formation of an agreement between the UN and Sierra Leone to that effect.

The Special Court has jurisdiction over those individuals accused of committing crimes against humanity, violations of Common Article 3 of the Geneva Conventions and Additional Protocol II, and other serious violations of international humanitarian law. The temporal jurisdiction of the Special Court began on November 30, 1996 and continues indefinitely. The Lomé Peace Accords were signed in 1999 in Lomé, Togo, between the government of Sierra Leone, the Revolutionary United Front, and the special representative of the UN Secretary-General to end the civil war. Although amnesty provisions are included in the Lomé Peace Accords for crimes committed during the course of the conflict, the UN representative stated upon signing the accords that these provisions are not applicable in instances involving genocide, crimes against humanity, war crimes, or other serious violations of international humanitarian law. Therefore, the amnesty provisions of Lomé will not preclude the Special Court from prosecuting those responsible for such grave crimes.

Unique Features of the Special Court

The Special Court differs from the ad hoc tribunals for the former Yugoslavia and Rwanda. The ad hoc tribunals were created entirely under the auspices of the UN Security Council, employ all international judges and prosecutors, and apply only international law. The Special Court represents a "hybrid" court, containing aspects of both an international tribunal and a domestic court. Consequently, in addition to the international crimes listed above, the Special Court can prosecute individuals for domestic crimes delineated in its statute. These crimes include offenses relating to the abuse of girls under the Prevention of Cruelty to Children Act of 1926 and offenses relating to the wanton destruction of property and arson under the Malicious Damage Act of 1861. The amnesty provisions contained in the Lomé Agreement are applicable to crimes that originate from Sierra Leonean law, and not only to those crimes originating in international humanitarian law.

Other crimes covered by the Statute that respond to the unique characteristics of the Sierra Leonean conflict are enumerated in Article 4. These crimes include:

- (b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Article 4(c) addresses one of the most shocking aspects of the events that took place in Sierra Leone—the widespread involvement of children in the hostilities. Children as young as ten were abducted, made to commit atrocities against their will, and given drugs such as cocaine and alcohol to fuel the violence. The Special Court sets 18 as the age of adult criminal responsibility and will not prosecute any child who was under the age of 15 at the time of the alleged commission of a crime. Article 7 of the Statute provides that any child who was between 15 and 18 years of age at the time of the commission of his or her crimes should not be imprisoned. Rather, such a child should

be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child. . . . In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Because the Special Court has been created to prosecute those who bear the greatest responsibility for crimes, 15 to 18-year-olds are unlikely to be targeted for prosecution.

The hybrid character of the Special Court is also reflected in its personnel. The Special Court's Trial Chambers consists of three judges, two who are appointed by the UN Secretary-General and one who is appointed by the Sierra Leonean government. The Appeals Chamber is made up of five judges. The UN Secretary-General appoints three judges and the Sierra Leonean government appoints two judges. These eight positions, plus two alternate judge positions, were filled on July 26, 2002.

Another unique aspect of this tribunal is its location in Freetown, Sierra Leone. Many people have criticized the tribunals for the former Yugoslavia and Rwanda because they operate a great distance from the communities where the crimes occurred, and prevent victims from seeing and understanding the justice processes at work. Policymakers, activists, and academics see the Special Court as a possible model for future "hybrid" tribunals and are evaluating the Special Court's progress for encouraging signs. In drafting the Statute for the Special Court, UN personnel attempted to incorporate lessons learned from the ad hoc tribunals and to improve upon those models.

U.S. attorney David Crane was selected as chief prosecutor of the Special Court and began his appointment in August 2002. He recently traveled to the interior of Sierra Leone for the first time to examine massacre sites for evidence that could be used in his cases. Talking to a crowd of Sierra Leoneans, he said, "No one in the world deserves to suffer in the way that the people of your district have suffered. Justice cannot be reserved only for the rich. It is the right of every person in the world, no matter how poor."

The coming months and years will reveal whether this new tribunal will be able to afford victims of widespread atrocities a true measure of justice. ☉

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