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ARTICLES

Women's rights in the Nikahnama in Bangladesh : A critical study

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Prevention of Crime in Islamic Criminal Law: Perspective Bangladesh

যৌতুক : একটি সামাজিক ব্যাধি

সড়ক দুর্ঘটনা ও ট্রাফিক আইন : প্রেক্ষিত বাংলাদেশ

আদালত অবমাননা, সাংবাদিকতা-প্রকাশনা ও তথ্যের অধিকার : পরিপ্রেক্ষিত বাংলাদেশ

বাংলাদেশের রাজনীতিতে পঞ্চম জাতীয় সংসদের কার্যকারিতা : একটি পর্যালোচনা

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The International Criminal Court: A Remarkable Achievement Striving against Global Political Setbacks

Dr. Mohammad Abdul Hannan^{*}

INTRODUCTION

The twenty first century starts with unprecedented global complexities encompassing so-called 'war on terrorism' led by the United States (US) and its allies. The world population helplessly experienced two world wars in previous century and severely suffered thereby. In this century, so called terrorist attacks and the highly debatable 'war on terrorism' ultimately victimised the civilian population and resulted in mass-killing, forcible transfer of people and custodian tortures worldwide. Thus the humanity cries. International community became aware in response of long day cry of the world population. With a view to trying and punishing the criminals who could often avoid his criminal accountability with impunity, the International Criminal Court (ICC) took birth in the earth. The marginalized world population find a ray of hope for a world free from such heinous crimes committed by some ruthless individuals. They dream a world enriched with peace, security and happiness. By promoting an integrated and effective international justice, capable of providing justice and accountability for genocide or such other gravest crimes, the ICC, the first ever permanent treaty based criminal court of international character will combat impunity and thus deter the occurrence of such deadly human rights violation in future.

Undoubtedly, the creation of the ICC ushers in a new era in the protection of human rights. However it is facing some unexpected obstacles in its functioning. In this Article it will be attempted to show the prospects of the ICC with critical analysis of the historical background, jurisdictional facts, the preconditions of exercising such jurisdiction and the trial procedure of the Court. The global contemporary power politics, which hinders the court to be effective and fruitful, will also be disclosed. Lastly some certain possible recommendations thereof will be proposed in this article so that the court can function smoothly and reach its goal overcoming the barriers it faces.

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HISTORICAL BACKGROUND

A remarkable development in the fifteen years since the fall of the Berlin Wall is the growing consensus in support of international mechanisms for enforcing international humanitarian law. The Security Council of United Nations (UN) established ad hoc tribunals to try individuals guilty of atrocities in the Former Yugoslavia and Rwanda. A UN commission of experts has recommended creation of a similar panel to try senior leaders of the Khmer Rouge regime responsible for the deaths of nearly 2 million Cambodians from 1975 to 1979 (Becker, 1999: A1). And a Spanish judge has requested the extradition from the United Kingdom of former Chilean dictator Augusto Pinochet for mass murder and torture committed by his regime. Perhaps the most compelling evidence of this consensus is the overwhelming approval in 1998 by a Rome diplomatic conference of a treaty to create a permanent ICC.¹ The enthusiasm evident in Rome has not abated. In the months since, 76 countries have indicated intent to ratify by signing the treaty, and Senegal has become the first nation to ratify. The court will be set up once 60 nations have ratified the Rome Statute.² Once established, it will have jurisdiction over genocide, crimes against humanity and serious war crimes in situations where there is not a national judicial system available.

The actual creation of the Court is not the end of the challenge to enforce international humanitarian law effectively. As explained in this Article, jurisdictional limitations and other aspects of the Statute will hamper the Court's effectiveness. But the Statute does establish the basic framework for a legitimate judicial institution capable of combating impunity for crimes of mass violence. The ultimate success of the Court will depend upon the

¹ The treaty's official title is Rome Statute of the International Criminal Court, A/CONF.183/9 (July 17, 1998). It was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court by a vote of 120 in favour to 7 against, with 21 abstentions. The text can be found at: www.un.org/law/icc/statute/rome.htm. Briefing papers prepared before and after the Rome Conference by the Lawyers Committee for Human Rights can be found at <http://www.lchr.org>. The Lawyers Committee site includes answers to frequently asked questions.

² In the meantime, a Preparatory Commission will be meeting to draft Rules of Procedure and Evidence and "Elements of Crimes" intended to assist the Court in the interpretation and application of the definitions found in Articles 6, 7 and 8.

political will of the international community to enforce compliance with the Court's judgements and orders.

The Rome Statute caps a century of international humanitarian law development that began in 1899 with the Peace Conference in The Hague. Even as humanitarian standards developed, however, the 20th Century's appalling carnage highlighted the need for effective enforcement of those standards. Impunity for the worst atrocities was too often the rule. The idea of a permanent international tribunal to hold individuals responsible for international crimes was widely discussed after World War I. The victorious Allies established a Commission of Responsibilities of the Authors of the War and the Enforcement of Penalties to consider how to deal with accused war criminals. The Commission divided sharply on the issue of an international tribunal, with the majority recommending the creation of an international "High Tribunal" to try individuals accused of "violations of the laws and customs of war and of the laws of humanity". However, the American delegation, headed by Secretary of State Robert Lansing, dissented. The Americans objected, among other things, to the undefined concept of "laws of humanity"³ (Clark & Kudriavtsev, 1990: 177-212) and to the idea of an International Criminal Tribunal, "for which there is no precedent, precept, practice, or procedure" (Marrus, 1997: 3-10).

The Versailles Treaty was signed the month after the Commission's report. Article 227 provided for the creation of an international tribunal to try the Kaiser "for a supreme offence against international morality and the sanctity of treaties". As for other accused war criminals, the Treaty opted for trial by military tribunals of the individual Allied countries and required German cooperation with those efforts. In the end, the tribunal for the Kaiser was never established and Allied trials of other officials never occurred (Marrus, 1997: 12).⁴

³ The term "laws of humanity" appears in the so-called Martens clause of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land. The Martens clause is a type of savings clause that, in contrast to the reciprocal protections of the Convention, provides that all inhabitants and belligerents enjoy the protection of "the principles of the law of nations, as established by and prevailing among civilized nations, by the laws of humanity, and the demands of the public conscience".

⁴ As an alternative to Allied trials, the Germans agreed to prosecute 45 individuals (out of almost 900 accused) of which only 12 actually faced trial.

In contrast to the American opposition to international justice in 1919, the idea of putting top Nazi leaders on trial at the end of World War II originated in the US. Other allies initially favoured summary execution of German leaders. But there was a strong feeling among US leaders that a larger and more valuable point could be made by formally charging those men with criminal violations of international law. An international trial would help strengthen the rule of law over the rule of force. As US Supreme Court Justice Robert Jackson, the Chief Prosecutor at the trial of major war criminals, explained in his opening statement, "that four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the most significant tributes that Power has ever paid to Reason" (Conot, Justice, 1983: 105).

Even more importantly, the Nuremberg trial established that the international community could hold individuals personally accountable for committing heinous crimes. Precisely noting that the Nazi leaders embodied "sinister influences that will lurk in the world long after their bodies have returned to dust," Justice Jackson went to the heart of the matter: "The [Nuremberg] Charter recognizes that one who has committed a criminal act may not take refuge in superior orders nor in the doctrine that his crimes were acts of state" (Conot, Justice, 1983: 105). The Nuremberg defendants were charged with three types of substantive crime: war crimes, crimes against humanity and crimes against the peace or aggression.

The vital principle of individual accountability for these international crimes was reiterated in the judgement handed down by the Nuremberg Tribunal. Rejecting the defendants' argument that international law deals only with the actions of sovereign States, the judges held that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".⁵

In the years after Nuremberg, the principle of individual accountability took root. In 1948, the Genocide Convention defined genocide and made it an international crime for which individuals could be held responsible, either

⁵ Judgement of the International Military Tribunal for the Trial of German Major War Criminals of "Nuremberg Judgment" at 41 (Nuremberg, September 30-October 1, 1946)

before national courts or a contemplated international tribunal.⁶ The four Geneva Conventions of 1949 codified many of the laws of war and established individual responsibility for grave breaches of those laws.⁷ In 1950, the International Law Commission (ILC), a body of legal experts acting at the direction of the UN, distilled the "Principles of the Nuremberg Tribunal". The first principle was that "[a]ny person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment." More recently, countries ratifying the Convention Against Torture obligated themselves to extraditing or prosecuting any public official or person acting in an official capacity found in their jurisdiction who is accused of committing torture, no matter where the torture occurred. Although the principle of individual accountability became well established, there was no progress in creating a mechanism to enforce that principle. Hopes for a permanent international court were dashed by Cold War rivalries, and proposals for such a court were shelved, left to gather dust for four decades. The "tragic irony" (Neier, 1998: xiii) was that international humanitarian law gained wide acceptance, but was seldom enforced.

The end of the Cold War made the creation of a permanent court politically possible. As more and more countries replaced authoritarian and totalitarian regimes with democratically accountable governments, sentiment in favour of international mechanisms of accountability grew. Among the countries active in the so-called "like-minded group" pushing hardest for the creation of the Court were nations such as South Africa, Argentina and South Korea. The horror of ethnic cleansing in the former Yugoslavia and of genocide in Rwanda added urgency to efforts to create a permanent court.

The ad hoc tribunals set up to deal with the former Yugoslavia and Rwanda demonstrated the possibilities of international enforcement, but also made clear that an ad hoc approach was no substitute for a permanent court. The ad hoc tribunals had to start from scratch in hiring judges and prosecutors, drafting procedural rules, even building courtrooms. Moreover, their ad hoc nature left them open to charges of political motivation and selective justice.

⁶ Over 125 countries, including the US, are parties to the Genocide Convention

⁷ Acceptance of the 1949 Geneva Conventions is virtually universal - 188 countries, including the US, have ratified. The Conventions deal with the treatment during war of wounded, sick and shipwrecked military personnel, prisoners of war and civilians

Intensive international negotiations to create a permanent court proceeded through the 1990s. The five-week conference that ended with overwhelming international support for the Rome Statute represented the culmination of those efforts. On the cusp of a new century, the world stands poised to create an important international institution for upholding the rule of law.

AN INCREMENTAL STEP

Although the Rome Statute represents an important step toward establishing accountability for crimes of mass violence, it is nevertheless incremental. Several aspects of the Statute demonstrate the measured nature of what was agreed to: the Court's narrow subject matter jurisdiction; the primacy of national judicial systems; strict, sovereignty-related preconditions to the exercise of any jurisdiction; and a very conservative regime for State co-operation.

THE COURT'S JURISDICTION ON SUBJECT MATTER

The Court will have very narrow subject matter jurisdiction, limited to "the most serious crimes of international concern": genocide, crimes against humanity and war crimes, the so-called "core crimes".⁸ High thresholds and definitions that in some cases are narrower than existing international law will further limit the Court.

Genocide

The definition of genocide was not controversial and was taken from the 1948 Genocide Convention. The essence of this most horrific of crimes is the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" [Article 6].

Crimes Against Humanity

A major achievement of the Rome Conference was the codification in a multilateral treaty, for the first time since the Nuremberg Charter, of crimes against humanity [Article 7]. For purposes of the Court's jurisdiction, a crime

⁸ The treaty also provides that the Court will have jurisdiction over aggression, if the treaty is amended to define the crime and to provide for the conditions under which the Court will exercise that jurisdiction. [Article 5] Given deep international divisions over definitional issues and over the Security Council's role in determining whether aggression has occurred, as well as the treaty's onerous amendment requirements, the Court is not likely to be able to exercise jurisdiction over the crime of aggression for many years to come.

against humanity is an inhumane act, such as murder, torture or rape, when committed against a civilian population pursuant to a State or organizational policy. It must be part of "a course of conduct involving the multiple commission" of inhumane acts, and the defendant must have knowledge of the overall plan. The Court has jurisdiction without regard to whether the perpetrators are government officials and without regard to the existence of armed conflict.

The Rome Statute sets a high bar to the Court's jurisdiction over crimes against humanity by the way that it defines "attack directed against any civilian population." That term only covers conduct that is "pursuant to or in furtherance of a State or organizational policy" [Article 7(2) (a)]. Thus, no matter how widespread acts such as murder might be, they will not fall within the ICC's scope unless there is a showing that they were committed in the execution of a State or organizational policy. Because of this requirement, the Court's jurisdiction over crimes against humanity will not reach as broadly as customary international law⁹, reflecting the drafters' intent that the Court be limited to the most serious crimes of international concern.

A major development in the Rome Statute is the explicit inclusion of crimes of sexual assault as crimes against humanity and war crimes. Among the acts that can constitute crimes against humanity and war crimes are "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" [Articles 7(1) (g) (crime against humanity); 8(2)(b)(xxii) (war crime in international armed conflict); see also 8(2)(e)(vi) (war crime in internal armed conflict)]. The explicit enumeration of these acts as crimes within the Court's jurisdiction is a critical affirmation that rape and other crimes of sexual assault are, under appropriate circumstances, among "the most serious crimes of concern to the international community as a whole".

War Crimes

The Rome Statute gives the Court jurisdiction over serious war crimes committed in both international and internal armed conflicts [Article 8(2)].

⁹ Customary international law provides that either widespread or systematic acts can constitute a crime against humanity, without regard to the existence of a policy to commit the acts. See, *Prosecutor vs. Tadic*, No. IT-94-I-T, para. 646 (May 7, 1997)

The war crimes article of the Rome Statute draws from sources such as the four 1949 Geneva Conventions and other conventional and customary laws of war. Although in some cases the treaty provides narrower definitions than existing international law, the scope of the war crimes article will allow the Court to address the most serious atrocities committed in armed conflict. In particular, the inclusion of war crimes committed in civil wars is vital,¹⁰ because most conflicts in the modern world take place within the borders of a single nation (Holsti, 1996: 25).

As with crimes against humanity, jurisdictional limits were attached to war crimes. First, the Court will have war crimes jurisdiction "in particular" when those crimes are "part of a plan or policy or part of a large-scale commission of such crimes" [Article 8(1)]. This language presumptively restricts the Court to cases in which war crimes are either systematic or widespread, though it gives the Court the leeway to act, if circumstances dictate, even in the absence of evidence of a plan or of large-scale commission of war crimes. Second, the Court will have jurisdiction over many crimes committed in internal armed conflict only when "there is protracted armed conflict between governmental authorities and organized armed groups or between such groups" [Article 8(2)(f)].

SUPERIOR ORDERS

Unlike the defendants at Nuremberg and before the Yugoslavia and Rwanda tribunals, those tried by the ICC for war crimes will be able to offer superior orders as a defence. Under the Rome Statute, a defendant will be able to avoid criminal responsibility by showing that he was under a legal obligation to obey the order, that he did not know that the order was unlawful and that the order was not manifestly unlawful [Articles 31. The defence, however, is not available to that accused of genocide or crimes against humanity [Article 33(2)],

COMMAND RESPONSIBILITY

The Rome Statute also departs from the Tribunal statutes by making it more difficult to establish the criminal responsibility of the civilian superiors of

¹⁰ Surveying the past 480 years. Professor Holsti finds that "classical interstate wars have declined dramatically compared to previous historical periods, and constitute only about 18 percent of all wars since 1945".

those who commit war crimes or other crimes within the Court's jurisdiction [Article 28]; For example, Article 7(3) of the Statute of the Yugoslavia Tribunal (ICTY) provides that any superior, military or civilian, can be held criminally responsible for the acts of a subordinate if the superior "knew or had reason to know" of the subordinate's actions and the superior "failed to take the necessary and reasonable measures" to prevent or punish the acts. Under the Rome Statute, this standard applies only to military commanders [Article 28(1)].

Civilian leaders, by contrast, can be held responsible only if (i) the subordinate was under the superior's "effective authority and control;" (ii) the subordinate's criminal acts were "a result" of the superior's "failure to exercise control properly;" (iii) the superior "knew, or consciously disregarded, information that clearly indicated" a crime was being or would be committed; (iv) the criminal activities "were within the effective responsibility and control" of the superior; and, finally, (v) the superior did not take all reasonable and necessary measures to prevent or punish the crimes [Article 28(2) (emphasis added)]. This provision obviously raises a big barrier to the successful prosecution of accused civilian leaders.

THE PRIMACY OF NATIONAL JUDICIAL SYSTEM

The Court is not intended to replace functioning national judicial systems. Rather, the goal is to provide an alternative to impunity where independent and effective judicial systems are not available. Thus, a fundamental principle of the Rome Statute is that the Court must defer to national courts, except in those cases where they are "unwilling or unable genuinely" to investigate or prosecute [Article 17]. This principle, known as "complementarity",¹¹ can be invoked by interested States and by individuals who have been accused of crimes to block Court action [Article 18; Article 19].

The exceptions to the basic presumption of deferral to national systems are quite narrow. By the treaty's terms, "unwillingness" in effect requires that national proceedings be undertaken in bad faith before the ICC can step in

¹¹ The treaty's Preamble "emphasis[es] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." (Emphasis in original) Article 1 also specifies that the Court "shall be complementary to national criminal jurisdictions".

[Article 17(2)]. Thus, the use of established, transparent judicial procedures - the norm in the military and civilian courts of established democracies governed by the rule of law - precludes a finding of "unwillingness." Unwillingness is not established just because an investigation does not result in prosecution. When a State carries out its obligation to investigate, even if it decides not to prosecute, the Court will be barred from acting.

"Inability" means "a total or substantial collapse or unavailability" of the national courts [Article 17(3)]. This exception would apply to countries in which the judiciary has ceased in whole or substantial part to function. It would not apply to a State with a functioning judicial system, even if the system had structural flaws. Article 18, which was proposed and strongly pushed by the United States, allows a State to assert the primacy of its national system with regard to individuals within its jurisdiction at the very outset of an investigation, even before the individual suspects have been identified. The Prosecutor must defer to the State unless she can bear the burden of convincing two panels of judges that the State is not willing and able genuinely to investigate and prosecute. On the one hand, this provides a safeguard against an overzealous prosecutor interfering with a functioning and independent judicial system (such as the US). But it also offers authorities in less responsible States an opportunity to delay and obstruct an investigation.

The complementary provisions were strongly supported by countries that wanted to limit the ICC's reach. Their immediate concern was to ensure that the Court would not oust a functioning national system that is available to deal with allegations of wrongdoing against a country's own nationals. The extradition proceedings in the United Kingdom (UK) against former Chilean dictator Augusto Pinochet cast complementary in a different light. Ironically, those that fretted about an ICC with too much reach now see that it might be a desirable alternative to national courts exercising universal jurisdiction. Nevertheless, the Statute's complementary provisions, as well as jurisdictional limitations described below, will sharply curb the Court's scope.

PRECONDITIONS TO THE EXERCISE OF JURISDICTION AND GLOBAL POLITICS

Court proceedings will be "triggered" in three ways: by the Security Council

acting under Chapter VII of the UN Charter,¹² by a State Party to the statute and by the Prosecutor acting on her own initiative "proprio motu" (Article 13). When the Security Council refers a "situation",¹³ the Court will be able to exercise its jurisdiction without regard to whether interested countries, such as the country of a suspect's nationality, have accepted the Court's jurisdiction. The authority for the Court's jurisdiction in such circumstances, like the authority of the *ad hoc* tribunals created by the Security Council, stems from the Security Council's plenary authority to maintain international peace and security. Thus, the Court's reach is greatest when it is given a Security Council mandate. As with any Security Council action, referrals to the Court will require the support of all five permanent members, as well as an overall majority of the Security Council. This form of triggering the Court's jurisdiction represents an institutionalisation of the precedent of the *ad hoc* tribunals.¹⁴

The Court's reach is much more limited if proceedings are triggered by a State Party referral or initiated on the Prosecutor's own motion.¹⁵ In these circumstances, the Court can exercise its jurisdiction only if either (a) the State on whose territory conduct in question occurred or

¹² Chapter VII of the UN Charter gives the Security Council plenary authority to maintain or restore international peace and security.

¹³ The Statute provides that the Security Council or a State Party can refer a "situation in which on or more of [the] crimes [within the Court's jurisdiction] appears to have been committed" [Article 13(a), (b)].

¹⁴ The Security Council also will have the power when acting under Chapter VII to defer investigations or prosecutions for renewable twelve-month periods. (Article 16) in light of these powers to trigger and defer investigations, it is surprising that some opponents of the ICC in the US Congress, such as Senator Jesse Helms (R-NC) and Senator Rod Grams (R-MN), criticize the Rome Statute as an attempt to do an "end run" around the Security Council. Senator Grams has asserted that the treaty is "a great victory for the critics of the Security Council." In fact, the most vociferous critics of the Security Council - such as India, Iraq and Libya - refused to support the treaty, while three of the five permanent members of the Security Council voted for it.

¹⁵ In order to alleviate concerns of prosecutorial abuse of power, the Rome Statute tightly circumscribes the Prosecutor's authority. Before she can proceed on her own initiative, she must convince a panel of judges that the investigation has "a reasonable basis" and that the case is within the Court's jurisdiction [Article 15(4)].

(b) the State of nationality of the accused has accepted the Court's jurisdiction [Article 12(2)]. States accept the Court's jurisdiction by ratifying the treaty or filing an ad hoc declaration [Article 12(1), (3)]- The jurisdiction of the Court is thus firmly tied to the sovereign power of the States that create it. Any State has undoubted authority to adjudicate crimes committed on its territory or the conduct of its nationals. In non-Security Council cases, the Court's authority thus stems directly from this underlying sovereign authority.

This sovereignty-based limitation on the Court's jurisdiction will sharply restrict its ability to deal with many situations that might otherwise involve "the most serious crimes of international concern". Many, if not most, of the nations on whose territory the crimes subject to the Court's jurisdiction are likely to be committed or whose nationals are likely to be responsible for such crimes will not be among the early parties to the Rome Statute. The preconditions of territory and nationality therefore mean that for many years the ICC will be primarily a Security Council court. And whenever the Security Council is unable to act, whether because of a permanent member's veto or because of a simple lack of political will, the Court also will be unable to act.

Some have argued that the limitations of Article 12 will leave the Court a permanent invalid. It is certainly true that for this generation and perhaps the next, Article 12 will seriously hamper the Court. But the hope among human rights groups and other supporters of the Court is that it eventually will obtain universal acceptance, allowing it to serve future generations as an independent and effective judicial institution. Over time, many of today's rogues will be replaced, even if temporarily, by governments that will seek full membership in the community of nations by, among other things, ratifying the Rome Statute. And once a nation is a party, future autocrats will find their options limited. Denunciation of the Statute will incur serious public relations costs and not become effective for a year, leaving substantial exposure to prosecution. As restrictive as it is, Article 12 is the central reason that the United States has given for opposing the Statute.¹⁶

¹⁶ For a more complete discussion of U.S. objections to the Court, see Lawyers Committee for Human Rights, *The International Criminal Court: The Case for U.S. Support* (December 1998) and Jerry Fowler, *World Leadership and International Justice: The United States and the International Criminal Court*, Translex (Transnational Law Exchange), at 3 (Feb. 1999).

The US objects to the territorial basis for the Court's jurisdiction, insisting that the Court only be able to exercise jurisdiction if the State of the suspect's nationality has acquiesced. United States officials have labelled the territorial basis "a form of jurisdiction over non-party States" and denounced it as "contrary to the most fundamental principles of treaty law".

These harsh words notwithstanding, there is nothing remarkable about a State's deciding how to adjudicate crimes that occur on its territory, especially when those crimes are among the most serious imaginable. Indeed, the territorial basis for jurisdiction is probably stronger even than nationality.¹⁷ The reference to "jurisdiction over non-party States" is misplaced. The Rome Statute does not accord the Court jurisdiction over any "State". Rather, the Court will have jurisdiction over individuals - in particular, individuals who have committed crimes on the territory of an accepting State or who are nationals of an accepting State. The treaty does not bind States that are not parties. Such States have no obligation, for example, to surrender suspects, cooperate with investigations or do anything else.

Article 12's final text is much narrower than proposals that enjoyed widespread support at Rome. For example, there was strong sentiment in favour of including the State that has custody over a suspect and the State of the victim's nationality on the list of countries whose acceptance could provide a basis for the Court's jurisdiction. Pressure from the US and other major powers forced the eventual compromise. Including the custodial State as a basis for the Court's exercise of jurisdiction would have significantly extended the Court's goal. It would at least have caused the perpetrators of these crimes to remain within the borders of their own countries or face the possibility of apprehension. The Pinochet case has illustrated the usefulness of such a jurisdictional basis. As the treaty stands now, however, the Court will be powerless to prosecute an individual who is accused of genocide and who is in the custody of a signatory State, absent some other basis for jurisdiction.

Depriving the Court of this basis of jurisdiction illustrates the incremental nature of the Rome Statute. It is widely accepted, including by the United

¹⁷ See Restatement (Third) of the Foreign Relations Law of the United States, § 402 comment (1987) ("Territoriality is considered the normal, and nationality the exceptional, basis for the exercise of jurisdiction".)

States government, that a custodial State has the authority to try an individual for genocide. And the 1949 Geneva Conventions impose on States an explicit obligation to prosecute or extradite individuals in their custody who are accused of grave breaches of those treaties - all crimes that are included in the Court's jurisdiction. Yet under the terms of the Rome Statute, the Court created by a group of States has less jurisdictional reach than any one of them has individually. Including the State of the victim's nationality also would have extended the Court's reach in a meaningful way. In particular, it would have provided increased protection to soldiers sent on peacekeeping missions in the territory of non-ratifying countries. The Court would have been able to exercise its jurisdiction over war crimes committed against such peacekeepers, even if neither the territorial State nor the State of the perpetrator's nationality accepted jurisdiction. The irony is that those nations most intent on restricting the scope of the Court's jurisdiction are among those who profess greatest concern for the relationship of the Court to soldiers on international peacekeeping missions.

ENFORCEMENT AND COMPLIANCE

Effecting compliance with the Court's orders and decisions will be one of the great challenges facing those countries that ratify the Statute and comprise the Assembly of States Parties. Article 12(3) and Article 86 imposes on States Parties an obligation to "cooperate fully with the Court". But the Court itself will have no practical means to enforce its orders and decisions. In cases initiated by the Prosecutor or pursuant to a State Party referral, the Court can refer cases of non-compliance to the Assembly of States Parties. It will then be up to the Assembly to bring pressure to bear on recalcitrant States [Article 87(7)]. In cases where the Court is acting pursuant to a Security Council referral, the Court can turn to the Council for assistance [Article 87(7)]. Under those circumstances, the Council would be able to use its plenary authority under Chapter VII. The practical challenges of obtaining compliance will be exacerbated by the fact that the Statute does not give the Prosecutor the authority to conduct investigations independently of national authorities. Under the ICTY Statute, the Prosecutor is accorded unqualified power to question individuals, collect evidence and conduct on-site investigations. She "may, as appropriate, seek the assistance of the State

authorities concerned".¹⁸ Recent events in Kosovo have demonstrated the difficulty of actually exercising that authority.

The ICC Prosecutor can investigate only by means of requesting the assistance of a State Party in accordance with the Statute and "under procedures of national law" [(Article 93(1))]. Although States Parties are required to "ensure that there are procedures available under their national law for all forms of cooperation" [Article 88], the requirement of working through national procedures offers tremendous opportunity for mischief by recalcitrant governments. One can imagine how much more problematic Justice Arbour's efforts in Kosovo would be if she were required to obtain assistance from the Yugoslav authorities under Yugoslavian national procedures. The Statute also gives States scope to refuse information on national security grounds [Article 72] and resist cooperation "on the basis of an existing fundamental legal principle of general application" [Article 93(3)]. A big question mark is the attitude of the United States. So far, the U.S. has expressed an interest in continuing to discuss its concerns with other countries, and a US delegation participated constructively in the February meeting of the Preparatory Commission. But some voices inside the Administration and on Capitol Hill are urging a more antagonistic approach to the Court. It is difficult to see how a hostile approach would serve any US interest.

United States opposition - no matter how active - is unlikely to stop the Court from coming into existence, given the breadth and depth of international support for the Statute. But it would deprive the US of any influence over the details of the Court's procedures and undermine US efforts to promote its interest in the enforcement of international law in other areas, such as the work of the *ad hoc* tribunals and Security Council resolutions on Iraq.

CONCLUSION

The creation of a permanent international criminal court is the result of a long day desire. The remarkable nature of the growing consensus on international justice should not obscure the fundamentally incremental character of the Rome Statute. Many aspects of the Statute may limit the

¹⁸ Statute of the ICTY, Article 18(2)

Court's effectiveness: the restrictions of Article 12, departures from international law on superior orders and command responsibility, the restrictive nature of the definition of crimes against humanity, the threshold for war crimes, the conservative regime for State cooperation - to name some of the most problematic. It will under any circumstances depend upon the political will of the international community to enforce its judgements and orders. As satisfaction of the Court approaches open and universal, its jurisdictional reach will be global. On balance, the statute offers a viable framework of international justice for future generations and represents a step, however measured, toward ending impunity for crimes of mass violence.

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