

Law and Our Rights

Towards An International Criminal Court

by M S Ahmed and Shuba Mandal

In the 50 years since the Nuremberg trials, massive human rights abuses have been committed and continue to be committed worldwide. It is essential for the international community to demand official accountability for such acts. The International Criminal Court would serve as an institution that would adjudicate cases where national systems are unavailable or ineffective. Recent human rights abuses in Yugoslavia and Rwanda have been dealt with the creation of ad hoc tribunals by the UN Security Council. But ad hoc tribunals, no matter how individually successful, cannot be a substitute for a stable international judicial mechanism. The rule of law precludes selective justice and means victims should be able to seek redress for crimes of concern to the international community as a whole where a domestic system cannot provide it. In understanding this responsibility a permanent ICC must be bound to the highest international standards of due process, justice and independence.

At the end of World War I, the Treaty of Versailles provided for the establishment of an international tribunal to try the German Emperor for a supreme offence against morality and the sanctity of treaties. Yet Kaiser Wilhelm never stood trial. The international tribunals set up following World War II at Nuremberg and Tokyo to try major war criminals were far more successful. The Charter of the Nuremberg Tribunal adopted in August 1945 speci-

were diametrically opposite. While Alfaro was in favour of the establishment of the court, Sandstrom was of the opinion that too many negative factors were involved. Having studied both reports, the Commission reached the conclusion that the establishment of the court would not only be possible but welcome. The Commission added that the court should not become a division of the International Court of Justice, but preferably an independent court. Henceforth the ILC responded favourably and two draft statutes were drawn up in 1951 and 1953, further work became unfeasible during the political and ideological confrontations of the Cold War.

In 1989, it was the concern of a small nation like Trinidad and Tobago that efforts at drafting an ICC statute be resumed in order to create an international judicial institution capable of dealing with the increase in crimes of international drug trafficking, which ultimately renewed attention within the UN on the establishment of an ICC. In 1993, that urgency was underscored in part by the widespread atrocities being committed in the war in erstwhile Yugoslavia. The same year the Security Council created 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 (ICTY). The tribunal's subject matter jurisdiction covers grave breaches of the Geneva

international humanitarian law are not punished by national or international bodies. The time has come to end this impunity by creating a permanent court before which such individuals could be brought to justice. Impunity not only encourages the recurrence of abuses against human dignity but also strips human rights and humanitarian law of their deterrent effect. By prosecuting and trying violators of egregious crimes an international criminal court could provide an important measure of relief to victims and their families and more widely, to affected social communities. For affected population's individual accountability is of twofold significance. First, if the perpetrators of crimes under international law belonged to their ranks, bringing those responsible to justice would help remove the possible stigma of collective guilt. Second, where populations are the victims of atrocities, the punishment of perpetrators is crucial to enable the process of reconciliation with other groups to begin.

Ideally, human rights and humanitarian law violations should be dealt with by the national authorities of the state in which they were committed. Practice has shown, however, that governments are rarely willing to call their own citizens to account, especially when the individuals involved occupy positions of political or military authority. War crimes are a case in point. The ad hoc tribunals for the former Yugoslavia and Rwanda were es-

tates, would resolve this dilemma. An ICC is also needed to overcome one of the main failings of international criminal law — its lack of a permanent and effective enforcement mechanism. The creation of an ICC is therefore a logical step in the development of the international legal order. The Court is also expected to have a strong preventive impact or those decision makers planning to commit an act of aggression should they realize that the threat of being accused before an international court exists. In a case like the terrorist attack which caused the crash of Pan-Am Flight 103 over Lockerbie, the court would offer its services to investigate the case and to condemn those found guilty. Should this alternative lead to a relaxation in tension that might bring sanctions to an end and help to avoid possible military action at great cost, the establishment of the court shall have been justified.

At the same time critics insist that the time is not ripe for this undertaking. As a matter of fact, they do not seem to think that the time will ever be ripe. At times reference is made to a threat to the sovereignty of states, if an ICC is competent to accept jurisdiction in criminal cases relating to officials or nationals of the state concerned. This argument cannot be accepted, for otherwise the value of the doctrine of original jurisdiction would be forgotten. In reality, those objecting to the court believe that they are trying to

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fied crimes that are still considered the key crimes under international law: aggression, war crimes and crimes against humanity. On 11th December 1946, the UN General Assembly adopted Resolution 95 (I) in which the principles of international law contained in the Charter of the Nuremberg Tribunal were given general recognition. This was followed on 21st November, 1947 by Resolution 177 (II) which requested the International Law Commission to formulate the principles of international law used in Nuremberg in order to prepare a draft for laws on crimes against the peace and security of mankind. In 1948 the UN General Assembly adopted the Genocide Convention. Apart from defining the crime of genocide, it provided that persons charged with genocide shall be tried either before a court of the state in which the act was committed "or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." It was not however until 1948 that the General Assembly as a result of discussions concerning the crime of genocide, asked the International Law Commission to undertake a study regarding the need to draft a treaty establishing an international criminal court. The Commission asked two of its members, Alfaro and Sandstrom, to prepare reports on the item. The two members arrived at conclusions which

Conventions, violations of the laws and customs of war, genocide and war crimes. Its establishment marked a turning point in the development of international law.

The Security Council drew on its powers in Chapter VII of the UN Charter to set up a judicial organ as one of its subsidiary bodies. It not only defined the tribunal's structure and jurisdiction but obliged all UN member states to cooperate and comply with its requests and orders. The Council's unprecedented step paved the way, a year later, for the creation of an ad hoc tribunal empowered to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda. By bringing the two tribunals into existence, the Security Council clearly signalled the international community's commitment to supporting the principle of individual accountability for crimes under international law. The creation of these ad hoc tribunals has enhanced the prospects for establishing permanent international criminal court.

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established precisely because domestic authorities would not or could not punish those responsible for committing or failing to prevent violations of both domestic and international law. Moreover, situations of international or internal conflict may lead to the disruption or even disintegration of domestic legal systems, with no government capable of dispensing justice at all. In such instances the international community needs an instrument through which it can act to restrain and punish offenders. It must be remembered that ad hoc tribunals cannot be a substitute for a permanent International Criminal Court for both political and legal reasons. The establishment of temporary courts always gives rise to reasonable questions, such as why an ad hoc tribunal to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda. By bringing the two tribunals into existence, the Security Council clearly signalled the international community's commitment to supporting the principle of individual accountability for crimes under international law. The creation of these ad hoc tribunals has enhanced the prospects for establishing permanent international criminal court.

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save their own government officials from possible humiliation, if they were brought to court. Another argument frequently referred to by the critics is that of excessive cost. It is true that the court would be costly. But on an annual basis, the cost would hardly exceed the operating cost of the International Tribunal for the former Yugoslavia.

The International Law Commission has submitted a draft statute for an ICC to the General Assembly in 1993 and a revised draft statute again in 1994 with the recommendation that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an ICC. Further due to political differences on the desirability of creating an effective criminal court and on the pace at which work should proceed, the General Assembly set up an ad hoc committee to review the ILC's draft statute. Once a state accepts its jurisdiction, it faces the threat, where it's own leaders may be accused and convicted by the ICC. This creates serious doubts as to the feasibility of the plan. If, nevertheless, the court is established, there remains one last alternative, namely a refusal to ratify the treaty established by the court. It is evident that the establishment of the ICC will hinge much more on the political readiness of the states to establish an ICC than on the legal issues and other technicalities involved.

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INTERVIEW

It is Necessary to Upgrade DEOs

— Mohammad Abu Hena

by Nurul Kabir



tant presiding officers and polling officers have been arrested, show cause notices have been served on seven presiding officers.

"Besides, two TNOs, eight recording officers and two presiding officers have been asked to clarify their position on various allegations of irregularities. Order has been issued for conducting administrative investigation into twenty allegations of irregularities."

Asked to comment on the fact that the casualties in the just concluded polls were reportedly almost double than that of the previous one in 1992, the CEC said: "While comparing the casualty figures of the two polls, one has to compare the social and political atmosphere of the two different periods. The society is more politically charged right at the moment, while the general crime rate has increased in this part of the world over the last five years."

Requested to comment on the present scope for unlimited expenditure by the candidates in the UP elections, the CEC said: "Like in the parliamentary polls there should be a ceiling of election expenditure for the elections of local bodies." "But imposing a ceiling, or receiving the 'returns' from the candidates, is not sufficient to control the expenditure. There should be a mechanism of the EC itself to monitor the real expenditure by the candidates."

Replies to another query, the CEC said that it would have been better for the EC to offer the present scope for unlimited expenditure by the candidates in the UP elections, the CEC said: "Like in the parliamentary polls there should be a ceiling of election expenditure for the elections of local bodies." "But imposing a ceiling, or receiving the 'returns' from the candidates, is not sufficient to control the expenditure. There should be a mechanism of the EC itself to monitor the real expenditure by the candidates."

He, however, said that giving the Code of Conduct a legal coverage would not be enough to get the cherished result.

"The EC has to have a country-wide mechanism of its own to see whether the code is violated. This involves lot of other reforms in the sector, which would hopefully be done in phases."

Asked whether the Commission has been preparing to conduct the elections of Gram Parishad, the village level local bodies, the CEC said the legislation concerned did not specifically give any role to the Commission in this regard. "We have heard that the government is formulating rules for conducting the polls. However, the government has not discussed anything about it with the Commission yet."

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Giving his observation over the performance of the administration in UP elections, Abu Hena said: "despite some limitations, the district and thana level administrations effectively helped the Election Commission to ensure by and large a peaceful polls across the country. On top of all, they did a very good job at the ground level."

The CEC further said that he took steps to make sure that politicians cannot influence the UP elections free from the party influences, Abu Hena said that the top level leadership of both the opposing

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