Lesson Series 46

The International Criminal Court

Summary

This lesson introduces the International Criminal Court, with particular focus on some of its unique characteristics. These include victim and witness protection and participation, as well as the principles of complementarity and universality.

The International Criminal Court is the first permanent court with the power to try individual perpetrators of grave crimes. Many such crimes have occurred in Asia, where impunity is rife and the perpetrators go free. This lesson will also discuss the importance of the Court for Asia.
THEME: The International Criminal Court

The Issue

The International Criminal Court is considered to be the most significant development in international relations after the creation of the United Nations. This is because it is the first permanent court with the authority to try perpetrators of grave crimes, no matter their official status. In this way, the Court is an attempt to end impunity for perpetrators and to genuinely provide justice to the affected victims and communities.

The last century has seen horrific crimes occurring in many different countries of the world. Very few of the perpetrators of these crimes have been criminally prosecuted. This serves to encourage the perpetrators, while demoralizing the victims. Furthermore, in the few instances where persons have been prosecuted, political elements have been present in their trials. With the establishment of an international court however, future such trials will be judicial in nature, excluding any political elements.

The Lessons

This lesson series is an introduction to the International Criminal Court, focusing on its key and distinctive characteristics; it is not an exhaustive narrative.

Lesson 1 gives an overview of the International Criminal Court while spotlighting some of its unique features.

Lesson 2 examines the Court’s provisions for victims and witnesses.

Lesson 3 studies the importance of the Court for Asia.
Lesson 1

This lesson provides information on the development of the International Criminal Court and some of its unique features.

A. Why ICC?

The International Criminal Court (ICC) is the first treaty based, permanent court capable of trying individuals accused of the most serious violations of international humanitarian and human rights law, namely genocide, crimes against humanity and war crimes. These individuals may be heads of state, commanders of armed forces or members of parliament; their official capacity does not exempt them from criminal responsibility under ICC provisions. This notion of individual criminal responsibility leads to two new developments. Firstly, rulers can no longer expect to get away with committing gross abuses; there is an international judicial institution able to try them for their crimes. Following from this precept—that the ICC is a judicial, not political body—comes the second development: such trials no longer give form to political expressions, but are instead part of legal standards.

The idea of an international criminal court is an old one. At numerous times throughout history the need has been felt to try criminals, particularly those having committed grave crimes and when national jurisdictions were not capable of holding the perpetrators responsible. Efforts to create a global criminal court can be traced back to the early 19th century; in 1872, Gustav Moynier—one of the founders of the International Committee of the Red Cross—proposed a permanent court in response to the crimes of the Franco-Prussian War. The next serious call for an internationalized justice system came from the drafters of the 1919 Treaty of Versailles, who envisaged an ad hoc international court to try the Kaiser and German war criminals of World War I. Following World War II, the Nuremberg and Tokyo tribunals were set up to try Axis war criminals. Meanwhile, the United Nations General Assembly, following the adoption of the four Geneva Conventions of 1949, invited the International Law Commission (ILC) “to study the desirability and possibility of establishing an international judicial organ for the trials of persons charged with genocide”. Although the ILC drafted such a statute in the early 1950s, the Cold War hindered these efforts and the General Assembly effectively abandoned the attempt pending agreement on a definition for the crime of aggression and an international Code of Crimes.

In June 1989, motivated in part by an effort to combat drug trafficking, Trinidad and Tobago resurrected a pre-existing proposal for the establishment of an international criminal court and the General Assembly asked the ILC to resume its work on drafting a statute. The conflicts in Bosnia-Herzegovina and Croatia as well as in...
Rwanda in the early 1990s—which were responsible for heinous crimes against humanity and genocide—led to the establishment of two ad hoc tribunals to hold individuals accountable for these atrocities. These tribunals further spotlighted the need for a permanent international criminal court.

In 1994, the ILC presented its final draft statute for an ICC to the UN, and recommended that a conference be convened to negotiate a treaty and enact the statute. The Ad Hoc Committee on the Establishment of an International Criminal Court was then set up to discuss substantive issues of the draft statute; it met twice in 1995 before reporting back to the General Assembly. Based on its report, the Preparatory Committee for the Establishment of the ICC was set up by the General Assembly to prepare a consolidated draft text. From 1996-1998, six sessions of this Committee were held, together with the participation of non-governmental organizations (NGOs).

Finally, the Rome Conference was held to “finalize and adopt a convention on the establishment” of an ICC. The conference took place from 15 June-17 July 1998 in Rome, Italy with 160 countries participating. At the end of five weeks of intense negotiations, 120 nations voted in favor of the adoption of the Rome Statute of the ICC, with seven nations voting against the treaty (including the United States, Israel, China, Iraq and Qatar) and 21 states abstaining. The Rome Statute was then open for signatures and ratifications, and was to enter into force upon the 60th ratification. Senegal was the first country to ratify. In the meantime, governments convened regularly through bi- or tri-annual meetings of the Preparatory Commission for the Establishment of the ICC, which was set up by the Rome Conference and altogether held 10 sessions. During these the Commission produced a large volume of work regarding the Court’s procedures and standards, including the *Elements of Crimes and Rules of Procedure and Evidence* for the investigation and prosecution of genocide, crimes against humanity and war crimes. Several Asian countries that had not ratified the Rome Statute at that time still played an important role in the Commission, including Japan and South Korea. After the 66th ratification on 11 April 2002, the Rome Statute entered into force on 1 July 2002, and provisional headquarters for the Court were opened during the same year, at The Hague, Netherlands.

It is important to note here that although the UN played an important role in facilitating its establishment, the ICC is an independent international organization. In accordance with article 2 of the Rome Statute, the ICC’s relationship with the UN system is governed by a separate agreement, unlike the International Court of Justice (also known as the World Court), which is the principal judicial organ of the UN and which gives advisory opinions on legal disputes submitted to it by the state parties of the UN. (For more information on the ICJ, please see www.icj-cij.org).
B. Jurisdiction and composition

Following the Rome Statute’s entry into force on 1 July 2002, countries that have ratified the Statute have convened in the Assembly of States Parties (ASP), which is the ICC’s governing body, responsible for political, legislative, financial and management oversight. All state parties to the ICC have an equal voice. Anyone committing any of the crimes under the Statute after this date will be liable for prosecution by the Court. As of April 2006, 100 countries have ratified the Rome Statute.

Court jurisdiction

Once a country becomes party to the Rome Statute, it accepts the ICC’s jurisdiction with respect to crimes under the Statute. For the ICC to exercise its jurisdiction, the territorial state (the state on whose territory the situation which is being investigated has taken or is taking place), or the state of nationality (the state whose nationality is possessed by the person being investigated) must be a party to the Rome Statute.

The Court only has jurisdiction over natural persons aged 18 and above. Official capacity as a head of state or government, a member of parliament or a government official does not exempt a person from criminal responsibility. Commanders and superiors will also be held liable for criminal offences committed by armed forces under their effective command/authority and control.

The ICC has jurisdiction over the most serious crimes committed by individuals, namely, genocide, crimes against humanity, war crimes and once defined, crimes of aggression. The first three crimes are carefully defined in the Rome Statute to avoid ambiguity or vagueness, and are further detailed in the Elements of Crime.

Genocide, article 6
For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(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.

Crimes against humanity, article 7
1. 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 any civilian population, with knowledge of the attack:
(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

**War crimes, article 8**
1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, “war crimes” means:
   (a) Grave breaches of the Geneva Conventions of 12 August 1949...;
   (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law...;
   (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949...;
   (d) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law...

**Crimes of aggression**
As yet there is no definition of crimes of aggression, so the ICC is unable to exercise jurisdiction at present. It is reported that the ICC Review Conference in 2009, seven years after entry into force of the Rome Statute, will most likely adopt a definition.
Preconditions to the exercise of jurisdiction

The ICC’s Chief Prosecutor may start an investigation upon referral of situations in which there is a reasonable basis to believe that crimes have been or are being committed. Such referrals must be made by a state party or the UN Security Council, acting to address a threat to international peace and security. In addition to state party and Security Council referrals, the Chief Prosecutor may also receive information on crimes within the jurisdiction of the Court provided by other sources, such as individuals or NGOs, on which he may investigate *propio motu*, on his own. In accordance with the Statute and the Rules of Procedure and Evidence, the Chief Prosecutor must evaluate the material submitted to him in all cases before deciding whether or not to proceed.

When the situation is referred to the Chief Prosecutor by the Security Council, the Court may exercise its jurisdiction in all cases and no preconditions are applicable. However, in the two other cases, when the Chief Prosecutor decides to initiate an investigation on his or her own decision with the authorization of the Pre-Trial Chamber, or when the situation is referred to the Prosecutor by a state party, strict preconditions shall be met before the Court can exercise its jurisdiction.

Among those preconditions are that the Court may exercise its jurisdiction only if either the state on the territory of which the suspected crime occurred (state of territoriality), or the state of which the person suspected of having committed the crime is a national (state of nationality of the suspected person), is a party to the Statute.

If neither of these two states is a party to the Statute, the Court will not be in a position to investigate the suspected crimes, unless either of the states accepts the exercise of jurisdiction by the Court, through a declaration lodged with the Registrar. Such a declaration may be made for all suspected crimes committed after 1 July 2002.

Therefore, if nationals of state parties to the Statute are victims of suspected crimes within the Court’s jurisdiction in the territory of a non state party, or committed by persons who are not nationals of a state party, the Court cannot investigate except under two conditions. One, if either the state of territoriality or the state of nationality of the suspected person accepts the jurisdiction of the Court, and two, if the situation is referred to the Court by the Security Council.

**Court judges**

During its first resumed session held in New York from 3 to 7 February 2003, the Assembly of States Parties elected the 18 judges of the Court for a term of office of three, six, and nine years. The judges (10 men and 8 women) constitute a forum of international experts representing the world’s principal legal systems. On 11 March 2003, in accordance with article 38 of the Rome Statute, the 18 judges elected the Court’s Presidency: Judge Philippe Kirsch (Canada) as President, Judge Akua Kuenyehia (Ghana) as First Vice-President, and Judge Elizabeth Odio Benito (Costa Rica) as Second Vice-President.
To ensure their independence and impartiality, although judges are nominated by state parties, once elected they are independent from their own states. Furthermore, judges are elected with a two-thirds majority of the ASP, further emphasizing their independence from any particular state.

**Court prosecutor**

On 21 April 2003, the Assembly of States Parties unanimously elected Mr Luis Moreno-Ocampo (Argentina) as the first Chief Prosecutor of the Court.

As of 10 February 2006, the Office of the Prosecutor has received 1,732 communications from 103 countries. There have been three referrals from state parties referring situations in their own territories—by the Republic of Uganda on 29 January 2004, the Democratic Republic of the Congo (DRC) on 19 April 2004 and the Central African Republic on 6 January 2005. The UN Security Council referred the situation of Darfur, Sudan to the ICC on 31 March 2005.

All the received communications were subject to initial review by the Prosecutor’s office, which found 80 per cent to be outside the jurisdiction of the ICC. Of these, five per cent were referring to situations that occurred prior to 1 July 2002, while 24 per cent were not referring to genocide, crimes against humanity or war crimes. Some of these cases included claims for asylum and medical negligence, or were cases of unfair dismissal. Some of the communications were related to crimes of aggression, which the ICC cannot take up until it is defined. Thirteen per cent of the communications were outside the territorial jurisdiction of the Court; they were crimes committed by the nationals of, or on the territory of, non state parties. Thirty-eight per cent of the communications were ill-founded, such as cases of general conspiracy or national politics.

Since 2003, a total of 10 situations have been subjected to intensive analysis. Three have led to the initiation of investigations—the Democratic Republic of Congo on 23 June 2004, the Republic of Uganda on 29 July 2004 and Darfur, Sudan on 6 June 2005. Two have been dismissed and five currently remain under analysis. Each of the three situations under investigation involves thousands of deliberate killings as well as large scale sexual violence and abductions, and the three situations collectively result in more than five million people having been displaced. The Prosecutor’s office is working with small teams, investigating cases in a sequential manner. Cases within each situation are selected taking into account the policy of focusing on those bearing the greatest responsibility for the gravest crimes.

In accordance with its duty to protect the confidentiality of senders, information submitted and the integrity of analysis or investigation, the Prosecutor’s office has a policy to maintain the confidentiality of the analysis process. In the majority of cases, when it is decided not to initiate investigations, the Prosecutor will submit reasons for the decision only to the senders of the communications. This policy helps to prevent any danger to the safety, well being and privacy of senders and helps to protect the integrity of the analysis process. However,
in the interest of transparency, the Office may make its reasons publicly available where three conditions are met:

(1) A situation has warranted intensive analysis;

(2) The situation has generated public interest and the fact of the analysis is in the public domain; and

(3) Reasons can be provided without risk to the safety, well-being and privacy of senders.

Among the situations currently under analysis, one (Central African Republic) is pursuant to a referral from a state party and another (Ivory Coast) is pursuant to a declaration of acceptance from a non-state party. The Ivory Coast situation appears to involve over a thousand potential victims of willful killing within the jurisdiction of the ICC. The Central African Republic involves lower figures of willful killing but high levels of sexual violence.

It must be noted here that a key consideration made by the Prosecutor with regard to the multiple communications of crimes received, is gravity. Various factors, including the number of victims are taken into account. Even in situations involving clear crimes in national law or human rights violations, the violations may not satisfy the gravity threshold of the ICC.

**ICC Registrar**

On 24 June 2003, Mr Bruno Cathala (France) was elected Registrar of the Court by an absolute majority of the judges meeting in plenary session. He will hold office for a term of five years.

### C. Unique characteristics

The ICC, through the Rome Statute, has a number of unique characteristics. Not only do these make the ICC a stronger institution, but they also strengthen international jurisprudence and allow for innovative approaches at the domestic level. The following are a few of these.

#### Relationship between the ICC and state parties

The Rome Statute imposes direct obligations upon state parties to support and cooperate with the ICC. In his article on ‘Will the International Criminal Court be fair and impartial?’ Dr Lyal Sunga notes that, “Part 9 of the Rome Statute makes clear that the ICC provisions entail mandatory obligations on domestic jurisdictions, thereby establishing a vertical rather than horizontal relationship, with the ICC prevailing”. This is important because when state parties neglect their responsibility regarding domestic implementation of the Rome Statute—either due to unwillingness or inability—there is now an international and credible body able to exercise jurisdiction.
Sunga goes on to detail:

Article 86 provides that, “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court.” Article 88 is particularly important in relation to the observance of international human rights standards by cooperating domestic states because it obliges States Parties “to ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part”. In the case of state non-cooperation, article 87.7 basically provides the ICC with the option to refer the matter to the Assembly of States Parties or, where the Security Council had referred the situation to the Court, to the Security Council. Article 89 concerns procedures for the surrender of a person to the Court. The rest of Part 9 covers the procedures for provisional arrest, competing requests for surrender of the suspect to the Court, contents of request for arrest and surrender, and other forms of cooperation and related issues ['Will the International Criminal Court be fair and impartial?', *article2*, vol.2, no.3, p16].

**Principle of complementarity**

Linked to the relationship between state parties and the ICC is the principle of complementarity. The Preamble of the Rome Statute recognizes that the ICC itself is but a last resort for bringing justice to the victims of genocide, war crimes, and crimes against humanity. It therefore calls upon all states to take measures at the national level and enhance international cooperation to put an end to impunity, and reminds states of their duty to exercise criminal jurisdiction over those responsible for such crimes. Thus, the Rome Statute assigns the ICC a role that is complementary to national systems.

Emphasizing the primary responsibility of states to investigate and prosecute international crimes, the statute provides that a case is inadmissible before the ICC where the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable to genuinely carry out the investigation or prosecution. The Chief Prosecutor is obliged to consider this requirement of the Statute when deciding whether or not to start an investigation. However, unjustified delays in proceedings as well as proceedings which are merely intended to shield persons from criminal responsibility will not render a case inadmissible before the ICC.

Related to the principle of complementarity is that of **universal jurisdiction**. While this concept is not strictly found within the Rome Statute itself, its essence stems from the spirit of the ICC: ending impunity for crimes that threaten the peace, security and well being of the whole world. From this spirit has come the effort to make the ICC a universal mechanism, leading to the universal domestic implementation of the Rome Statute and consequent strengthening of the rule of law.

Prior to the establishment of the ICC, the principle of universal jurisdiction allowed states to claim criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, regardless of nationality, country of residence, or any other relation with the prosecuting country. Such a claim
is made on the grounds that the crime committed is considered a crime against humanity, which any state is authorized to punish. It was under this principle that the former dictator of Chile was legally detained in the United Kingdom. (For more information on universal jurisdiction, visit http://www.globalpolicy.org/intljustice/universal/univindex.htmsee).

**Right to fair trial**

Although the right to fair trial has been extensively explained in international jurisprudence, this does not mean that there has been a corresponding realization of this right. For international bodies such as the ICC, the test of their fairness and impartiality lie in whether or not they uphold the rights of the accused. According to Sunga, “respect for the human rights of the alleged offender will be critical to the ICC’s legitimacy as an exponent of international criminal justice and in turn will determine whether the ICC will be effective over the longer term”, (‘Will the International Criminal Court be fair and impartial?’, p10).

Sunga goes on to describe how the Nuremberg and Tokyo trials were unfair.

... [T]he Nuremberg and Tokyo Trials became widely criticized for having been unfair. Serious substantive and procedural shortcomings in both sets of trials led many to denounce them as ‘victors’ justice’. Numerous scholars agree that both international military tribunals violated the fundamental principles of *nullum crimen sine lege* and *nulla poena sine lege*, i.e. that there shall be neither crime nor punishment unless law so declares. It is well known that the tribunals prosecuted individuals for ‘crimes against peace’ and ‘crimes against humanity’ which, prior to World War II, were not defined for the purposes of imposing individual criminal responsibility...

Both the Charters of Nuremberg and Tokyo permitted trial *in absentia* which today is recognized to contradict the right of the accused to defend himself or herself. Also, the international military tribunals could and did in fact enforce the death penalty. Trial *in absentia* and enforcement of the death penalty at Nuremberg and Tokyo have to be considered all the more serious together with the fact that no one convicted of a crime by either international military tribunal had a right to appeal against his or her conviction.

Because all those brought to trial at Nuremberg and Tokyo were from the defeated countries, and the judges were drawn only from the victor nations, the defence could argue convincingly that the trials were politically one-sided. Although the political climate of the time made it almost unthinkable to prosecute Allied war criminals, that not a single Allied commander or soldier had to answer for the indiscriminate bombing of Dresden, Hiroshima, Nagasaki, or other civilian targets, reinforces the impression of ‘victors’ justice’ [‘Will the International Criminal Court be fair and impartial?’, pp. 10-11].

The Rome Statute envisages the systematic and comprehensive application of international human rights standards in ICC procedures. Article 55 of the Statute, concerning the rights of persons during an investigation, follows the various elements contained within—among other international human rights instruments—the
International Covenant on Civil and Political Rights. Article 63 provides for the trial to be held in the presence of the accused and sets out provisions for situations where the accused disrupts the proceedings. Article 64 (2) provides explicitly that the Trial Chamber shall ensure the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Importantly, the protection of the accused, witnesses and victims is among the Trial Chamber’s functions and powers; see article 64 (6) (e). Provisions guaranteeing the right of the accused to have a public trial, and not to make a confession except voluntarily after sufficient consultation with defence counsel are found in articles 64 and 65. The right of everyone to be presumed innocent until proved guilty is provided for very clearly in article 66. In fact, article 67 details minimum guarantees for the accused in the determination of any charge.

Furthermore,

It is important to note also that the Rome Statute’s provisions on the participation of victims and witnesses in the proceedings and on evidence (articles 68 & 69) are to be applied in ways that are not prejudicial to, or inconsistent with, the rights of the accused. In conformity with international human rights standards, violation of the rights of the accused must be redressed with just compensation. In this regard, article 85 of the Rome Statute, entitled “Compensation to an arrested or convicted person”, provides in paragraph 1 that, “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” This remedy is lifted word for word from article 9.5 of the ICCPR. The rest of article 85 sets out a framework for compensation to be awarded to a person whose conviction has been reversed in circumstances amounting to a miscarriage of justice, or to a person who has suffered such injustice and has already been released. Article 85.3 states that:

In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or termination of the proceedings for that reason [“Will the International Criminal Court be fair and impartial?”, pp. 15-16].

Another unique factor inherent in the ICC is victim and witness protection and participation, which is described in detail in Lesson 2 of this series.

Questions For Discussion

1. Has your country ratified the Rome Statute? If yes, has it enacted effective corresponding domestic legislation? If not, what are its reasons and are they justifiable?
2. Are you aware of any national campaigns regarding the ICC?
3. In your opinion, what is the most significant and useful aspect of the ICC? What is its weakest aspect?
4. Discuss one or two violations that occurred in your country or in a neighboring country which could be taken before the ICC if the country had ratified the Rome Statute.
5. Discuss other crimes and human rights violations that do not come under the Rome Statute. How could these be addressed by the international community?

Lesson 2

This lesson focuses on the ICC’s innovative provisions on the participation and protection of victims and witnesses. Without the effective participation of victims and witnesses it is not possible to truly seek justice.

Participation

For the first time in the history of international criminal justice, the Rome Statute gives victims the possibility to present their views and observations before the ICC. Participation before the ICC may occur at various stages of proceedings and may take different forms, although it will be up to the judges to give directions as to the timing and manner of participation. Participation in the Court’s proceedings will in most cases take place through a legal representative and will be conducted “in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial”. The victim based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. It is this balance between retributive and restorative justice that will enable the ICC not only to justly punish the criminals, but also to provide redress to the victims.

Retributive justice is the infliction of punishment justified on grounds that the wrongdoing of a criminal has created an imbalance in the social order that must be addressed by action against the criminal.

Restorative justice is a response to wrongdoing that emphasizes healing the wounds of victims, offenders and communities affected by the act.
Protection

Experience from the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) has shown that it is crucial to arrange for the protection and assistance of victims and witnesses appearing before the court/tribunal. Unless this is done, it is difficult to ensure that the truth surrounding the gravest of crimes will be revealed.

Accordingly, article 43 (6) of the Rome Statute requires the Registrar to set up a Victims and Witnesses Unit, which in consultation with the Office of the Prosecutor, is to provide counseling and other appropriate assistance for witnesses and victims appearing before the Court, as well as others at risk on account of testimony given by such witnesses. The Unit is also to plan protective measures and security arrangements for these persons. Its staff should include persons with expertise in trauma, including trauma related to crimes of sexual violence. Article 68 (4) of the Statute further notes that this Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counseling and assistance for victims and witnesses as referred to in article 43 (6).

The Rules of Procedure and Evidence provides further details regarding the functions of the Victims and Witnesses Unit. It notes that the Unit shall establish short and long term plans for the protection of all witnesses and victims that appear before the Court. In consultation with the Office of the Prosecutor, the Unit shall draw up a code of conduct emphasizing the importance of security and professional secrecy for investigators of the Court, the defense and for all inter-governmental and non governmental organizations acting on behalf of the Court. The Unit shall also help victims and witnesses to receive medical and psychological care. Finally, the Unit will be in charge of negotiating agreements with states concerning the resettlement of traumatized or threatened persons.

Reparation

Another first in the history of international criminal justice is an international court having the power to order an individual to pay reparation to another individual. Article 75 of the Rome Statute allows the ICC to set out principles for the reparation for victims. Furthermore, the Court is to enter an order against a convicted person stating the appropriate reparation for the victims or their beneficiaries. This reparation may also take the form of restitution, indemnification or rehabilitation.

Other procedures relating to the participation and compensation of victims have been entrusted to the specialized Victims’ Participation and Reparations Unit. Prior to the court making an order for reparation, the victims may make representations with the Registrar, which the Court will consider. These representations should
contain the elements laid down in Rule 94 of the Rules of Procedure and Evidence. The Victims’ Participation and Reparation Unit is currently producing a standard form to make this easier for victims. They may also apply for protective measures for the purposes of confiscating property from the persons prosecuted.

The Court has the option of granting individual or collective reparation, concerning a whole group of victims or a community, or both. As a general rule, individual reparation is to be paid directly to the victims. If the Court decides to order collective reparation, it may order that reparation to be made through the Victims’ Trust Fund and the reparation may then be paid to an inter-governmental, international or national organization.

Victims’ Trust Fund

Providing justice to the victims of grave crimes is important. Just as important is providing them with assistance and compensation to rebuild their lives, often shattered by war and violence. The Victims Trust Fund aims to do this by channeling money to the victims, among who can be child soldiers—minors pressed into military service—who may have suffered great ordeals as a result of being forced into front line service, rape victims in need of counseling, or villagers in need of resources to rebuild their bombarded village.

The fund was established by the ICC, and is administered by the Registrar, but it is also supervised by an independent board of directors. The money for the fund comes mainly from the compensation imposed upon the convicted persons, as well as from voluntary contributions made by governments, organizations or individuals. However, all voluntary contributions must first be approved by the board of directors.

The fund may make payments directly to victims or to other bodies, such as international or local aid organizations. The money can be allocated either to individuals or to a group. Furthermore, when convicted persons are not able to pay the requisite compensation imposed by the Court, the fund can be used as an alternative (but temporary) source of resources.

Questions For Discussion

1. How are the ICC’s provisions for victims and witnesses different from other international or national provisions that you are aware of?
2. Does your country have a victim and witness protection legislation and programme? If so, how effective is it?
3. Discuss how some of these provisions can be integrated into your domestic institutions and laws.
Lesson 3

This lesson discusses the importance of the ICC to Asia and some of its challenges.

A. ICC and Asia

The people of Asia have witnessed many grave crimes in the course of history, including genocide, crimes against humanity and war crimes. These atrocities have taken millions of lives, while thousands of others are still suffering the trauma of these crimes; the massacres in Cambodia, the forced disappearances in Sri Lanka, the genocide in Gujarat, India. There was no effective international mechanism to prevent such crimes from occurring or to grant redress to the victims. In fact, even today, impunity remains a major obstacle for the redress of these crimes; not a single person responsible for the crimes in Cambodia, Sri Lanka or Gujarat, India has been prosecuted or punished in accordance with international law.

Such rampant impunity has meant that many Asian countries continue to be plagued with grave crimes, particularly those countries faced with military and civil conflict, including Kashmir, Sri Lanka, Indonesia and the Philippines. The key reasons for the impunity are weak domestic legal systems, as well as a lack of political will to hold the perpetrators—many of whom are senior state officers—accountable.

The ICC can help to reduce this impunity in two significant ways. Firstly, those responsible for grave human rights abuses, particularly heads of state and other senior officials, will no longer be able to use their own weak domestic systems as a shield to protect them from criminal liability. Secondly, the nature of the ICC involves the strengthening of domestic institutions. In this way,

... [T]he ICC can also give rise to more consensual forms of governance. Citizens and states may cooperate in new and more invigorating ways when both are aware of the limits to the use of power. What is defined by international law and implemented by an international court can have a powerful effect on the internal management of a nation. In particular, the possibility that internal jurisprudence may be developed in keeping with international law is now more likely than before [Basil Fernando, ‘The International Criminal Court and its effect on Asia’, article 2, vol. 2, no.1, p 7, February 2003].

As mentioned earlier, the ICC complements the local jurisdiction, it does not take precedence. In other words, the local jurisdiction is given priority consideration. Ratifying the ICC will therefore lead to the strengthening of national legislation and institutions relating to human rights. Many Asian countries at present have ineffective laws and mechanisms to deal with human rights violations. A clear indicator of this is that while police torture is endemic in almost all Asian countries, it constitutes a crime in only two places: Sri Lanka and Hong Kong.
Similarly, causing forced disappearances is also not a crime in most Asian countries, resulting in the absence of any legal provisions to deal with this gross abuse of basic human rights.

Under the Rome Statute however, systematic and widespread torture and disappearance amount to crimes against humanity. Therefore, in enacting domestic legislation to correspond with the Statute provisions, widespread torture and disappearances need to be defined as crimes, with provisions for their punishment and compensation. However, domestic legislation will necessarily evolve to include individual acts of torture and disappearance as well, thereby strengthening the domestic criminal justice system.

Another role to be played by the ICC in Asia relates to the fact that the Court is a legal, not political body. By its very nature then, the ICC excludes power politics, in contrast to political institutions such as the United Nations. The ICC will allow international issues of concern to be subject to judicial scrutiny, not merely political pressure. As Basil Fernando notes,

“Equality before international law”, is a less commonly heard expression than simply “equality before the law”, meaning equality within local jurisdictions. In fact, in Asia the overwhelming assumption is that there is no equality in international law. That assumption arises because international law has developed in favour of the historic colonial powers and worked against the interests of ‘non-western’ countries. However, since the Second World War the emergence of the United Nations has fuelled a counter-assumption, that equality before international law is not only possible but can in fact be the only basis for international relations.

The Non-Aligned Movement—which brought together countries from Asia, Africa and the Arab world during the mid-twentieth century—was intended as a united voice of disparate nations pursuing interests that did not correspond to those of the superpowers. After initial enthusiasm, however, it died away. Similar alliances have emerged from time to time. Presently, there is a growing movement to address global disparities of wealth as a matter of international justice...

However, without the possibility that international norms and standards may be upheld on a judicial basis, rather than on a political basis, the realization of equality before international law is an ideal that can be treated sceptically. While the ideal is yet to be realized, with the International Criminal Court (ICC) becoming a reality, using the Rome Statute as its basic law, the global debate on equality before international law has taken a giant step forward. This will have tremendously important consequences on thinking about both international and domestic law in Asia.

For the historically ‘weaker continents’, the emergence of the International [Criminal] Court is much more important even than the emergence of the United Nations, though they are interrelated. The reason is that the United Nations is basically a political institution, which constantly gives rise to political game-playing, where the more powerful have advantage over the less powerful. The effect of the ICC is substantially different, as being a judicial institution, by its very nature it will exclude power politics. Therefore, international equality is no longer based purely on political considerations. International
issues that had previously been subject only to political pressure may now become subject to judicial scrutiny. That a juridical element has entered into the equation opens new opportunities for the ‘weaker’ parties of the United Nations system [Basil Fernando, ‘The International Criminal Court and its effect on Asia’, pp. 5-6].

Current status of ICC ratifications in Asia

Despite the active participation of many Asian and Pacific governments at the Rome Conference, meetings of the Preparatory Commission and Assembly of States Parties, as well as current representation at the ICC by Judges Sang-Hyun Song of the Republic of Korea and Tuiroma Neroni Slade from Samoa, the Asian region remains significantly underrepresented at the ICC. To date, only 11 countries, including Australia, Afghanistan, Cambodia, Fiji, Marshall Islands, Mongolia, Nauru, New Zealand, the Republic of Korea, Samoa and East Timor have become state parties to the ICC. Although the Solomon Islands, Thailand and the Philippines have signed the Rome Statute, they have yet to ratify it.

Amongst those countries having ratified the Rome Statute, the relevant corresponding legislation has been enacted in Australia and New Zealand, while significant progress towards this has been made in Mongolia, East Timor, the Republic of Korea and Samoa. In many of these cases, partner civil society groups have worked closely with governments through roundtables and discussions, commenting on and enriching the draft legislation.

B. Efforts by the United States of America to undermine the ICC

American President Bill Clinton signed the Rome Statute on 31 December 2000, the last day it was open for signature. Shortly after George Bush took over the presidency however, and just before the 1 July 2002 entry into force of the Rome Statute, Bush “nullified” the Clinton signature on 6 May 2002. Since then, the United States has launched a multifaceted campaign against the ICC, claiming that the Court may initiate politically motivated prosecutions against US nationals.

A key part of its campaign has been the conclusion of Bilateral Immunity Agreements (BIAs) with countries around the world, purportedly based on article 98 of the Rome Statute, excluding its citizens and military personnel from the jurisdiction of the Court. These agreements prohibit the surrender to the ICC of a broad scope of persons including current or former government officials, military personnel, and US employees (including contractors) and nationals. These agreements, which in some cases are reciprocal, do not include an obligation by the United States to subject those persons to investigation and/or prosecution. In Asia, these agreements have been made with 16 countries, including four countries party to the ICC; Afghanistan, Cambodia, East Timor and Mongolia. (See http://www.iccnow.org/documents/CICCFS_BIAstatusCurrent.pdf for details).
Many legal experts and scholars have concluded that these bilateral agreements are in fact contrary to international law and the Rome Statute. Furthermore, there is a common misperception that these agreements exclude countries from becoming parties to the ICC; this is not correct, and all concerned groups and individuals should continue to pressure their governments to join the ICC, regardless of whether or not they have any other agreements.

Another facet of the United States’ campaign has been the adoption of two pieces of legislation known as the American Service Members’ Protection Act (ASPA) and the Nethercutt Amendment. The ASPA, passed by Congress in August 2002, contains provisions restricting US cooperation with the ICC, making US support of peacekeeping missions largely contingent on achieving impunity for all US personnel and even granting the President permission to use “any means necessary” to free US citizens and allies from ICC custody. The Nethercutt Amendment, signed into law in December 2004, cuts aid from the Economic Support Fund to all countries which have ratified the ICC treaty but have not signed a BIA.

C. Role of NGOs

A pivotal role in the establishment of the ICC was played by NGOs. Many important features of the Rome Statute, especially in relation to the participation and compensation of victims would not have come about without their contribution.

Initially, a small group of NGOs decided to work together and coordinate their efforts to support the establishment of an ICC in 1995. Since then, the Coalition for the ICC (CICC)—simultaneously a global network, coalition and campaign—has grown to include more than 2,000 member organizations from all regions, representing a vast array of interests and expertise. These groups came together in their support for a fair, effective and independent ICC and made a significant contribution at all stages of the process. They also played an important role in expediting the ratifications to the Rome Statute. Additionally, NGOs have also assisted state delegations to resolve important—legal and technical—issues during the numerous sessions of preparatory and other commissions.

At a national level, these groups have worked hard in developing domestic legislation corresponding to the Statute provisions, as well as educating the public on these provisions. While there has been marked success in these aspects in certain countries, considerable work remains in the campaign for universal ratification and effective implementation of the Rome Statute. While every region of the world is represented amongst ratifying countries, further support is needed from key regions including Asia and the Middle East.
In accordance with article 15 of the Statute, NGOs may send communications to the Chief Prosecutor regarding crimes to be investigated by the Court. This is another role that all concerned NGOs should take seriously.

Questions For Discussion

1. Are there any national campaigns in your country to pressure the government to ratify the Rome Statute if it has not already done so? Briefly discuss the strengths and weaknesses of such campaigns.
2. In your opinion, what would be the greatest benefit of becoming party to the ICC?
3. Discuss the ideas of ‘equality before international law’ and universality.

References


*article 2*, vol.2, no. 1, February 2003, (Asian Legal Resource Centre, Hong Kong).


Web site of the Coalition for ICC: [www.iccnow.org](http://www.iccnow.org)

Web site of the ICC: [www.icc-cpi.int](http://www.icc-cpi.int)