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THE ATTITUDE OF ASIAN COUNTRIES TOWARDS THE INTERNATIONAL CRIMINAL COURT

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I. WHY DO SO FEW ASIAN GOVERNMENTS SEEM TO SUPPORT THE ICC?

The International Criminal Court (“ICC”) will surely count as one of the more important new international legal institutions in the dawn of the new millennium. The Statute of the International Criminal Court (“Rome Statute”) was adopted on 17 July 1998 in Rome at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in a non-recorded vote of 120 States in favour, 7 against, and 21 abstaining.¹ The Rome Statute requires the ratifications of 60 States before it can enter into force and the ICC can be actually set up. By 1 April 2002, it had already been signed by 139 States and ratified by 56 States. Many other States had signaled their intention to become Parties at a special ceremony to be convened at UN Headquarters in New York on 11 April 2002. However, few Asian countries have taken the necessary steps to join the new ICC regime. While the Rome Statute continues to attract the signatures and ratifications of States from all corners of the globe, Asia remained conspicuously absent and uninvolved.

Of the 46 Asian States, counting the Russian Federation as part of Europe rather than Asia, and counting the Arab States in the Middle East, excluding

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1. The Statute of the International Criminal Court (A/CONF. 183/9). China, Libya, Iraq, Israel, Qatar, the United States and Yemen were the only States to have voted against the adoption of the Rome Statute.

On 1st July 2002, the Statute came into force after receiving sixty ratifications. By 1st July 2002 there were 84 ratifications.

North African Arab countries and not counting Oceania, 17 had signed but not ratified the Rome Statute, namely: Armenia, Bahrain, Bangladesh, Cambodia, Georgia, Iran, Israel, Jordan, Kuwait, the Republic of Korea, Kyrgyzstan, Mongolia, Oman, the Philippines, Thailand, the United Arab Emirates and Yemen, which makes Asia the only region where such a small number - roughly only a third (36%) of states had even signed the Rome Statute.

Asia also exhibited the absolute worst record of ratifications: only Tajikistan and Cyprus (on the fringe of Asia) had ratified the Rome Statute by 1 April 2002, which means less than 4% of the total number of Asian countries. The largest and more influential Asian countries, such as China, India, Japan, Pakistan, Indonesia, Malaysia and Singapore had neither signed nor ratified the Rome Statute. If we consider the coverage of the Rome Statute in Asia not by the number of countries, but by the number of people covered, i.e. in terms of population, the picture is far worse. According to the United Nations Population Division, of roughly 6 billion people living on earth, some 3.6 billion live in Asia, only 1.5 billion in Africa² and Europe³ combined, slightly more than half a billion live in Latin America and the Caribbean, one-third of a billion live in North America, and some 30 million altogether live in Oceania. In effect, the continent of Asia, with 60% of the world's population, stands to be the least covered by the protections offered by the new ICC, because of the inadequate response from Asian governments. This is particularly regrettable because Asian countries have seen more than their share of ethnic hatred and bloody armed conflict and the peoples of Asia have suffered and continue to suffer some of the worst violations of human rights and humanitarian law. Sadly, in the region of the world that most needs an effective system of international criminal enforcement, governments have shown the greatest resistance to the ICC.

This rather poor showing on the part of countries in Asia contrasts sharply with the record of countries in Africa, the Americas and Europe. A region-by-region survey reveals just how far Asia lags behind the rest of the world on the ICC. By 1 April 2002, 44 of the 53 States of Africa had already signed the Rome Statute of which 12 States had already ratified or acceded to it.⁴ In the Americas, 26 of the 36 States had already signed the Rome

2. There were some 793,627,000 people living in Africa according to UN Population Division 2001 estimates. See <http://esa.un.org/unpp/p2k0data.asp>.

3. *Ibid.* There were some 727,304,000 people living in Europe according to the UN Population Division 2001 estimates.

4. These were Benin, Botswana, Central African Republic, Gabon, Ghana, Lesotho, Mali, Mauritius, Nigeria, Senegal, Sierra Leone and South Africa. Only Ethiopia, Equatorial Guinea, Libya, Mauritania, Rwanda, Somalia, Swaziland, Togo and Tunisia had neither signed nor ratified the Rome Statute.

Statute by 1 April 2002, of which 12 had ratified.⁵ Of the 43 European States, every State had signed the Rome Statute⁶ except for Belarus, and 26 States had already ratified it by 1 April 2002.⁷ Of the 11 Oceanic States,⁸ seven had signed the Rome Statute of which four had ratified. Thus, in Africa, over four-fifths of States had signed, and over one-fifth had ratified, in the Americas, around three-quarters the number of States had signed and almost a third had ratified, in Europe, every State but one had signed, and well over half had ratified, and in the Oceanic States, almost two-thirds had signed and a third had ratified.

To understand why many Asian governments have shown sluggishness, marked reluctance, or even outright opposition, to the emerging ICC regime, it is essential to view the question from several angles. The Rome Statute imposes criminal responsibility on any individual, regardless of rank or official capacity, for certain crimes that in essence constitute the worst violations of human rights and humanitarian law - genocide, war crimes and crimes against humanity - and it therefore carries revolutionary implications. The Rome Statute symbolizes the international community's determination that such crimes cannot be excused by any recourse to national security, national sovereignty, national politics or national law. Consequently, the attitude of any government to the ICC is coloured not only by the benefits that the effective enforcement of international criminal law could bring to people generally, but also by the understanding that one day, its own nationals and officials could be held criminally responsible for these kinds of severe violations, where domestic criminal courts were unwilling or unable

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5. These were Antigua and Barbuda, Argentina, Belize, Canada, Costa Rica, Dominica, Ecuador, Panama, Paraguay, Peru, Trinidad and Tobago and Venezuela. The Cayman Islands, Cuba, Dominica, El Salvador, Grenada, Guatemala, Nicaragua, St. Kitts and Nevis, St. Vincent and the Grenadines, and Suriname, had neither signed nor ratified the Rome Statute.
 6. These were Albania, Andorra, Austria, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Netherlands, Turkey, Ukraine, United Kingdom, and Yugoslavia. The European Union has made ratification of the Rome Statute an important condition for entering the European Union. In this connection, see Council Common Position of 11 June 2001 on the International Criminal Court; 2001/4443/CFSP of the Council of the European Union.
 7. These were Andorra, Austria, Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Italy, Liechtenstein, Luxembourg, Macedonia (FRY), The Netherlands, Norway, Poland, Portugal, San Marino, Slovenia, Spain, Sweden, Switzerland, United Kingdom and Yugoslavia.
 8. Namely, Australia, Fiji, Marshall Islands, Micronesia, Nauru, New Zealand, Palau, Papua New Guinea, Samoa, Solomon Islands and Vanuatu.

to prosecute. The reluctance or opposition of certain Asian Governments to joining the ICC might be motivated less by lofty considerations of principle, but rather, by serious apprehensions over the eventuality that Government officials might incur criminal responsibility for gross inadequacies in the country's observance of the most basic human rights standards.

Accordingly, it is instructive to contrast the high-minded statements that so many Asian governments presented to the opening of the Rome Conference, an expression of their official position to the ICC *par excellence*, with their actual poor record in joining the ICC regime. One has to take account also of the particular human rights situation in each country and its geostrategic and transnational concerns as these may affect the government's consideration of the ICC.

Before considering the attitude of Asian governments to the ICC, it is critical to grasp the origins, rationale, and character of the ICC as an emerging institution, as well as its main operating principles; to appreciate fully its implications for Asian countries.

II. A SKETCH OF INTERNATIONAL CRIMINAL LAW FROM ITS EARLIEST ORIGINS THROUGH NUREMBERG AND TOKYO TO THE ICTY, ICTR AND THE ICC

International criminal law originates in rules that date back more than 2500 years ago in China and India that basically limit hostilities against sick, wounded and elderly during time of armed conflict. There were similar rules also in ancient Greece and Rome. In medieval Europe, certain limitations on the means and methods of warfare were recognized as part of the ancient *jus militare* governing the conduct of men of arms, and included prohibitions on the use of the crossbow, poisoning of wells, or wanton attacks on the civilian population. Such means and methods were considered to offend the code of knightly honour and to constitute crimes beyond merely local concern.⁹

Although such rules date back hundreds of years, war crimes have been prosecuted very rarely, and almost exclusively through domestic rather than international military trials, owing to the absence of genuine international cooperation among States until very recently.¹⁰ Although actual enforcement

9. See Timothy L.H. McCormack, "War Crimes and the Development of International Criminal Law", 60 *Albany Law Review* vol. 60 (1997), pp. 681-732; and see generally Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (1992), Chap II(2).

10. An interesting trial of one Seigneur de Barbasan for the breach of the medieval laws of war was conducted in 1419 which had some international aspects to it. Another war crimes trial, this time of Peter von Hagenbach, was held in 1465, for murder, rape, perjury and other crimes committed by troops under his command.

of norms prohibiting war crimes was rather rare, the fact remains that war crimes, such as murder, torture and rape, were early on widely recognized as a matter of common concern in many diverse jurisdictions. The Congress of Vienna, convened in 1815, formalized the new international balance of power following the defeat of Napoleon's armies and represents the first step among the Major Powers to maintain international peace and security through a collective security arrangement. It also provided States an opportunity to address other matters of common concern, including the need to outlaw and prosecute the trading of slaves and acts of piracy on the high seas. It is significant that the Final Act of the Congress of Vienna recognizes the right of any State to prosecute and punish an individual for piracy or slave-trading regardless of the nationality of the offender or the place where he or she committed the crime, even if the Congress of Vienna did not establish any implementation mechanisms to prosecute and punish individual offenders and left enforcement to domestic courts.

It was not until the end of the First World War and the establishment of the League of Nations in 1919 as a forum for improved multilateral cooperation that States could further develop international norms providing for individual criminal responsibility. An Allied Commission established to look into the question of facts and responsibilities for war-time atrocities recommended that any person who committed war crimes, even a Head of State, should be liable to prosecution.¹¹ A special provision was inserted into the Treaty of Versailles which stipulated that former Kaiser Emperor Wilhelm II would be prosecuted in a personal capacity by a special international tribunal "for a supreme offence against international morality and the sanctity of treaties". However, this provision was never executed because the former Kaiser fled to neutral Holland where the Dutch Government refused to prosecute or extradite him. Other provisions in the Treaty of Versailles recognized the right of the Allied Powers to try war criminals for crimes committed against the Allies and obligated the government to surrender German suspects to the Allied Powers for prosecution.¹²

Following the Second World War, the Allied Powers established the International Military Tribunals at Nuremberg and Tokyo to try enemy persons responsible for crimes against peace, war crimes and crimes against humanity, regardless of their rank or official capacity. At Nuremberg,

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11. History of the United Nations War Crimes Commission and the Development of the Laws of War (1948) p. 32.
 12. However, in December 1919, the Government of Germany offered to prosecute its own nationals for war crimes and the Allied Powers felt compelled to agree for reasons of politics and practicality. The Allies therefore submitted a list of 901 war crimes suspects to the Supreme Court of the Reich at Leipzig. However, few trials were actually conducted and these turned out to be sham trials. There were few convictions and only insignificant sentences were handed out.

twenty-two German nationals were tried of whom twelve were sentenced to be hanged, seven were imprisoned, and three acquitted. At Tokyo, twenty-eight Japanese nationals were tried, of whom seven were sentenced to death, eighteen were imprisoned, one died during the trial of tuberculosis, another died of natural causes during the trial, and one was released to psychiatric custody.

The Nuremberg and Tokyo Trials are often criticized, as they should be, for having been one-sided. The Judges all came from Allied Powers and only enemy nationals were prosecuted. Moreover, the categories of crimes against peace and crimes against humanity did not even exist prior to the onset of the Second World War which meant that the Nuremberg and Tokyo Tribunals applied criminal law retroactively - a serious breach of procedural fairness. Many other substantive and procedural inconsistencies in both the Nuremberg and Tokyo Trials, as well as weak observance of basic fair trial guarantees, combined to make them far from perfect examples of criminal justice.¹³

However, while the Nuremberg and Tokyo trials suffered from all sorts of imperfections and dealt with a relatively small number of war criminals, they proved to be of critical importance in a number of ways. The Judgments firmly rejected the defenses of superior orders as well as the doctrine of the sovereign immunity of Heads of States and high ranking officials, and in so doing established the principle of individual criminal responsibility for crimes against peace, war crimes and crimes against humanity, regardless of official rank or capacity. More broadly, they reinforced the illegitimacy of Axis aggression and contributed to an international political environment based at least nominally on the rule of law. Furthermore, the Judgments at Nuremberg and Tokyo exerted a lasting effect on the development of international criminal law norms and institutions as well, although their elaboration was to take many more decades. On 21 November 1947, the General Assembly adopted resolution 177 (II) requesting the International Law Commission to “formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the name of the Tribunal” and to “prepare a draft code of offences against the peace and security of mankind”. In resolution 95(I) adopted on 11 December 1946, the UN General Assembly codified the main principles of international criminal responsibility affirmed in the Nuremberg Judgement.¹⁴

13. See further Lyal S. Sunga, *Full Respect for the Rights of Suspect, Accused and Convict: From Nuremberg and Tokyo to the ICC*, in Marc Henzelin et. al. (ed.) *Le droit pénal à l'épreuve de l'internationalisation* (2002), pp. 217-239.

14. The General Assembly further requested the Economic and Social Council to draft a convention against genocide, which was eventually adopted on 10 December 1948 in the form of the *UN Convention on the Prevention and Punishment of the Crime of Genocide*, adopted unanimously on 9 December 1948, entered into force on 12 January 1951; 78 UNTS 277.

International recognition that enforcement of international criminal law had to be strengthened, peaked in the immediate aftermath of the Second World War, and was heightened by the high publicity surrounding the Nuremberg Trials, and to a lesser extent, the Tokyo Trials. This concern is reflected in the four Geneva Conventions of 1949 governing the conduct of hostilities in time of armed conflict. The Diplomatic Conference in Geneva inserted provisions into each of the Conventions that oblige States Parties to prosecute and punish individuals guilty of “grave breaches” of the Conventions, namely, “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” as well as compelling a protected person to serve in the forces of a hostile power, depriving a protected person of the guarantee to a fair and regular trial, unlawful confinement of hostages, unlawful deportation or transfer of civilians, and hostage-taking.¹⁵

Aside from the Genocide Convention of 1948 and the grave breaches system of the Geneva Conventions of 1949, the United Nations made little progress on developing an international criminal code and court until the end of the Cold War opened up new opportunities for global cooperation in the 1990's.

The outbreak of hostilities in the former Yugoslavia, Rwanda, Burundi, the Democratic Republic of Congo, Abkhazia / Georgia and many other countries and places demonstrates that situations in which particularly serious crimes are left unchecked, can spiral out of control and eventually degenerate into the threat or breach of international peace and security. When Yugoslavia dissolved in 1992, a number of the governments of the newly emergent States were either unable or unwilling to prosecute the perpetrators of serious violations of international human rights and humanitarian law. In some cases, the judiciary was either intimidated from prosecuting alleged offenders because the government responsible remained in power, or it lacked the necessary independence from the executive to prosecute alleged offenders and it considered them “war heroes” rather than

15. See Article 50 of Geneva Convention I, Article 51 of Geneva Convention II, Article 130 of Geneva Convention III, Article 147 of Geneva Convention IV and Article 85 of 1977 Protocol I additional thereto. See generally, Yves Sandoz, “Implementing International Humanitarian Law” in *International Dimensions of Humanitarian Law* pp. 259-282 (UNESCO ed. 1988), Igor Blishchenko, *Responsibility in Breaches of International Humanitarian Law*, *Ibid.* pp. 283-296; Stanislaw Nahlik, *A Brief Outline of International Humanitarian Law*, Extract (No. Review of the International Committee of the Red Cross (1984 July-Aug.) 48 p.; Stanislaw E. Nahlik, “From Reprisals to Individual Penal Responsibility”, in *Humanitarian Law of Armed Conflict: Challenges Ahead* (eds. Astrid Delissen and Gerard Tanja) (1991) pp. 165-177.

criminals. In other cases, for example in Rwanda, 80% of judges and lawyers were murdered during the genocide and judicial premises were smashed to prevent prosecutions. In both the former Yugoslavia and Rwanda, the war's destruction made it impossible for domestic courts to get hold of many perpetrators who simply took safe haven in other countries or territories.

These days, with instant communications, a more active UN Commission on Human Rights, and vigilant NGOs, the option to let perpetrators of genocide, mass rape, torture and other serious violations go unpunished, has become politically unacceptable to governments and the international community at large. Influential governments had completely failed to prevent or halt the armed conflict raging in the former Yugoslavia, so the Security Council had to act quickly to set up the ICTY by invoking the "threat or breach of international peace and security" provisions of Chapter VII of the UN Charter binding on all States. When the Rwandan civil war broke out in 1994, and the genocide and associated violations committed there claimed some one million lives, it would have been patently discriminatory not to establish an international criminal tribunal also for Rwanda, even though Rwanda did not lay in the geostrategic interests of the major Powers.

However, *ad hoc* tribunals, such as the ICTY and ICTR, typically are limited in temporal and material competence and have to be established after the major part of violations have already been committed. As such, they are essentially retrospective and their deterrent value is therefore limited. Moreover, the process to establish *ad hoc* tribunals is inherently politically selective, and to that extent arbitrary, because it depends upon the will of a political body - the Security Council - which explains why we do not have an international criminal tribunal for the Democratic Republic of Congo, Burundi, Chechnya, or why no international criminal tribunal was ever established to prosecute West Pakistani soldiers and commanders for crimes under international law as they tried to prevent East Pakistan from becoming Bangladesh. Furthermore, a proliferation of *ad hoc* mechanisms with a variety of mandates and competences can waste resources and hinder the coherent development of international criminal law jurisprudence.

In contrast, the ICC is intended to be a permanent, standing institution that can symbolize the international community's seriousness and commitment to prevent, punish and deter crimes under international law and dispel the climate of impunity for major crimes. As such, it can act prospectively by providing a more universal presence and more effective deterrence of crimes under international law than could any *ad hoc* institution.

The ICC is intended to be a permanent institution, exercising jurisdiction over natural persons rather than corporations or States, in situations involving only the more serious crimes of international concern, namely,

genocide, war crimes, crimes against humanity, and the crime of aggression, once aggression can be defined for the purposes of international criminal prosecutions.¹⁶ The ICC is not intended to replace the domestic obligation to prosecute crimes generally or even crimes under international law generally. Every State has the legal right, even the responsibility, either to prosecute or extradite alleged offenders of certain very serious crimes, such as war crimes, slave-trading or piracy, despite that the perpetrator or the crime itself may have little or no connection to the prosecuting State. The essential point is that the ICC is designed to act on a complementary basis to the domestic criminal jurisdiction of any State, in other words, only where a State will not or cannot prosecute individuals for the crimes under the Statute.

The ICC provisions on genocide come directly from the Genocide Convention, 1948,¹⁷ and are relatively uncontroversial, although important issues relating to the threshold level of criminal intent and the question of the number of persons that have to be killed, if any, remain to be resolved.¹⁸

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16. Aggression was included although not yet defined because the majority of Delegations at the Rome Conference felt that it would be inconsistent to prosecute genocide, war crimes and crimes against humanity, without also establishing criminal responsibility for starting a war, since it is typically in armed conflict situations that these crimes are committed. Leaving out the crime of aggression from the jurisdiction of the ICC would be tantamount to treating only symptoms while ignoring the principal cause. It is important to note that the illicit trafficking of narcotic drugs, colonial domination, intervention, terrorism or the threat of aggression were not included as crimes within the ICC's jurisdiction because, during preparatory negotiations in New York as well as at the Rome Conference, Delegations realized that there would be a better chance of agreement if the Statute covered only the so-called 'core crimes', the proscription of which was relatively well established in customary international law and generally recognized by the international community as a whole, rather than other norms which, although expressed in treaty law and perhaps to a certain extent enshrined in customary norms, such as the illicit traffic in narcotic drugs, were less recognized or more controversial.
17. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted unanimously* on 9 December 1948, *entered into force* 12 January 1951; 78 UNTS 277.
18. See Lyal S. Sunga, "The Crimes within the Jurisdiction of the International Criminal Court" *European Journal of Crime, Criminal Law and Criminal Justice* vol. 6, n. 4 (1998) pp. 377-399. See also William A. Schabas, *Genocide in International Law* (2000); George J. Andreopoulos, (ed.), *Genocide: Conceptual and Historical Dimensions*, vols. (1994) 265; Louis René Beres, "International Law: Personhood and the Prevention of Genocide", *Loyola of Los Angeles International and Comparative Law Journal* vol 11, n. 5 (1989), pp. 25-65; Ward Churchill, *Genocide: Toward a Functional Definition*, 11 (No. 3) *Alternatives: Social Transformation and Human Governance* (1986), pp. 403-430; Yoram Dinstein and Mala Tabory, (eds.), *The Protection of Minorities and Human Rights*, vols. (1992) 537; Joseph Kunz, "The United Nations Convention on Genocide", *American Journal of International Law*, vol. 23, n. 2 (1949), pp. 738-746; Lawrence Leblanc, "The Intent to Destroy Groups in the Genocide Convention: Proposed U.S. Understanding", *The American Journal of International Law*, vol. 78 (1984), pp. 369-385; Lawrence Leblanc, *The United States and the Genocide Convention* (1991); Nehemiah Robinson, The

More controversial was the category of 'crimes against humanity' which the Rome Statute defines with greater detail than did the Nuremberg or Tokyo Charters, or the ICTY or ICTR Statutes. The Rome Statute removes any connection between 'crimes against humanity' and the requirement of the existence of an armed conflict. Prior to the Rome Statute, it had not been clear whether norms prohibiting crimes against humanity applied only in time of armed conflict, or also to peace-time situations.

The Rome Statute introduces important elements to the definition of 'war crimes' under international law. The Rome Statute establishes that war crimes can be committed either in international or non-international armed conflict and it specifies with some precision the kinds of acts that qualify as 'war crimes'. This ensures that the international legal norms prohibiting war crimes remain relevant to the changing character of armed conflict, which these days occurs more frequently in the non-international context, i.e. as 'civil wars' rather than as war between or among States. The Rome Statute also clarifies that crimes of sexual violence qualify as war crimes and prohibits the recruitment of child soldiers of less than the age of 15 years. Unfortunately, the Rome Statute does not prohibit the use or deployment of nuclear weapons.

Concerning structure, the ICC will consist of: the Presidency of the Court; Pre-Trial, Trial and Appeal Divisions; the Office of the Prosecutor; and the Registry. Any State Party can nominate one of its nationals to be a Judge of whom there will be 18 in total elected by the Assembly of States Parties. There is intended to be a gender balance, equitable geographical representation and representation of the principal legal systems of the world. The Prosecutor, also to be elected by an absolute majority of the Assembly of States Parties, shall act as an independent organ of the ICC. In this respect, he or she shall be authorized to initiate investigations on his or her own motion and to gather information from any reliable source, although the decision to initiate an investigation requires Pre-Trial Chamber approval to proceed on an investigation.¹⁹ Also, the Security Council can defer an investigation into a situation for a period of 12 months,²⁰ by adopting a

Genocide Convention: a Commentary (1960); John Webb, "Genocide Treaty: Ethnic Cleansing, Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia", *Georgia Journal of International and Comparative Law*, vol. 43, no 2 (1993), pp. 377-408.

19. According to Article 15 of the Rome Statute, the Pre-Trial Chamber has to determine whether "there is a reasonable basis to proceed"

20. Article 16 of the Rome Statute entitled "Deferral of investigation or prosecution" provides that: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

resolution pursuant to Chapter VII of the UN Charter. The requirement that the Security Council can only defer an investigation by adopting a Chapter VII resolution in effect limits Security Council's members to acting only where there is sufficient consensus, which helps to attenuate the possibility of Security Council interference.²¹ On the other hand, if the Security Council does manage to reach the consensus necessary to defer an investigation, it has the authority to renew it.

In terms of actually triggering the operation of the ICC, the Rome Statute sets out four possible mechanisms: (1) the Prosecutor may initiate investigations *ex proprio motu*; (2) a State Party may refer a situation to the Prosecutor requesting him or her to investigate a situation pursuant to the terms of Article 14; (3) the Security Council may invoke Chapter VII and refer a situation to the ICC pursuant to Article 13; or (4) the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed, thereby reactivating an investigation, which essentially constitutes another trigger mechanism.

As for the trial, the ICC is obliged to conduct a fair and expeditious trial with full respect for the rights of the accused, and with due regard for the rights of victims and witnesses (Article 64). Delegations at the Rome Conference were careful to insert provisions in the Rome Statute that will ensure the ICC applies international human rights standards systematically in all its work.²² The ICC does not permit trials *in absentia* and the accused shall be present at trial unless he or she has to be removed from the Court proceedings because of disruptive behaviour. In contrast to the Nuremberg and Tokyo Charters, the ICC extends a full right of appeal against

21. Article 27 of the Charter of the United Nations provides that: 1. Each member of the Security Council shall have one vote. 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members, provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting. Thus, the main distinction in UN Security Council votes is between procedural matters and all other matters. However, the precise criteria for this distinction have not been spelt out anywhere. So the Security Council itself has to decide what is procedural as a 'preliminary question' before moving to a decision on the actual dispute at hand. In the early 1950's, the USSR and later France, contended that wherever a dispute arose over what constitutes a procedural decision in any given case, there must be the affirmative vote of seven votes including the five permanent members. This 'solution' would have meant that the permanent members would have had a double veto. Fortunately, the UN Charter itself indicates broadly the kinds of questions that are considered procedural because the chapter headings of Chapters IV, V, X and XI, actually use the word 'procedure' In sum, the UN Security Council cannot take a decision if even one permanent member decides to use its veto.

22. See Articles 21(3), 55(2) and 69(7) of the Rome Statute.

convictions on an error of law invalidating the decision or an error of fact which has occasioned a miscarriage of justice. The maximum sentence is life imprisonment and there is no death penalty.

III. THE ATTITUDE OF ASIAN GOVERNMENTS TO THE ICC

A. Country Groupings at the Rome Conference

Even before the Rome Conference began, delegations tended to coalesce into informal groupings reflecting broad similarities in their positions to the draft statute under discussion. Thus, mostly governments of western countries, except the United States, including Europe, Canada and Latin America, but often including Egypt and Jordan and a number of African countries which strongly supported the establishment of the ICC, came to be known as the "Like-Minded Group". Arab countries tended to adopt common positions, and the governments of South and Southeast Asia also adopted common positions on many ICC issues. For the purpose of analyzing Asian attitudes on the ICC, it is therefore convenient to consider the positions of governments loosely according to sub-regional groupings.

B. Armenia, Azerbaijan, Cyprus, Georgia, Turkey

The position of Armenia, which was admitted to the Council of Europe on 25 January 2001, was set out by Mr. Armen Baibourtian, Deputy Minister for Foreign Affairs, in his 16 June 1998 statement to the Rome Conference:

It is evident that we need a permanent and effective enforcement mechanism to enhance the prosecution of certain core crimes. In this regard, the creation of the ICC will be the most significant contribution to the current void in international law. There are several international instruments which govern the law of war, but in practice there is no real mechanism to punish individuals guilty of war crimes.

Protection of human rights will not be implemented at a national level, if gross violations remain unpunished. The recognition of the principle of individual responsibility for crimes has now made it possible to prosecute individuals for serious violations of international law. No authority, including a Head of State or Government, should have the power to exclude a person from his / her criminal responsibility or to intervene to reduce or reject a sentence imposed by the ICC.²³

23. Statement of 16 June 1998 to the Rome Conference, of Armen Baibourtian, Deputy Minister for Foreign Affairs, Republic of Armenia.

Despite the government's indications of support for the main elements in the Rome Statute, Armenia has not signed the Rome Statute.

Similarly, Azerbaijan had neither signed nor ratified the Rome Statute by 1 April 2002, and it has indicated little intention to do so in the near future. Interestingly the Government of Azerbaijan seemed more concerned with past atrocities rather than with the threat of such crimes being perpetrated in future. The country was the scene of bitter ethnic conflict as members of the Armenian minority tried to secede from Azerbaijan in the Nagorno-Karabakh enclave region in late 1989. The failure of Soviet authorities to maintain law and order led to opposition movements in Azerbaijan in late 1989 in the last days of the Soviet Union,²⁴ but protests by the Azerbaijani Popular Front were smashed by Soviet forces. Martial law was invoked and hundreds of people were killed and thousands jailed. The political instability in the region resulted in the flight of around 1 million refugees. Human Rights Watch reported²⁵ that Azerbaijan continued to suffer from the systematic use of torture during police custody and a climate of impunity for such crimes throughout the country. Significantly, international humanitarian organizations were not allowed to visit prisons and detention centres to verify the condition of detainees.²⁶ One can hope, however, that since Azerbaijan joined the Council of Europe on 25 January 2001, it will have a greater incentive to pursue domestic legislative reform in line with international standards, including eventually, joining the ICC.

In contrast, Cyprus signed the Rome Statute on 15 October 1998, and on 7 March 2002, ratified it. At the Rome Conference, the Government of Cyprus underlined the necessity to establish the ICC and to ensure that the crime of aggression would be included in its jurisdiction and expressed particular concern over the establishment of settlers in occupied territory, changes to the demographic composition, and transfer by the occupying Power of parts of its own civilian population into occupied territory.²⁷

Georgia signed the Rome Statute on 18 July 1998 the day after it was adopted - but had not ratified it by 1 April 2002. In his statement²⁸ to the

24. Azerbaijan became independent on 30 August 1991.

25. See *World Report 2000: Events of 1999* (1999) pp. 246-249.

26. On 26 March 1998, the President of Azerbaijan issued a lengthy Decree recounting a long history and the claim that, between 1905 and 1907, Armenians had subjected Azerbaijanis to mass atrocities that amounted to genocide, and declared 31 March as "The Day of Genocide of the Azerbaijanis". The Presidential Decree was adopted by the Supreme Assembly (Milli Majlis) in March 1998 and published in a press release of the Embassy of the Republic of Azerbaijan in Washington on 30 March 1998.

27. Statement of 18 June 1998 of Ambassador Myrna Kleopas, Head of the Cyprus Delegation to the opening of the Rome Conference.

28. Statement of 18 June 1998 to the Rome Conference, of Dr. Peter Chkeidze, Permanent Representative of Georgia to the United Nations.

Rome Conference, the Permanent Representative of Georgia to the United Nations pointed to attempts at the dismemberment of Georgia, ethnic cleansing and the forced expulsion of thousands from the Abkhaz region. The Representative supported the inclusion of aggression, genocide, crimes against humanity and war crimes into the ICC jurisdiction, the principle of complementarity, the notion of a strong and independent Prosecutor as well as a close relationship between the ICC and the United Nations.

By 1 April 2002, Turkey was the only member of the Council of Europe that had neither signed nor ratified the Rome Statute. In his statement to the Rome Conference, Ambassador Mehmet Guney²⁹ drew attention to the risk that a proliferation of *ad hoc* international criminal tribunals would frustrate the coherent and systematic development of international criminal law and he reiterated Turkey's strong support for a universal, impartial and independent ICC and supported the principle of complementarity.

C. Arab and Middle Eastern States

The Islamic State of Afghanistan was represented by the Northern Alliance Government which then controlled little territory of Afghanistan, but enjoyed international recognition as the lawful Government of Afghanistan. Afghanistan reaffirmed its support for the establishment of the ICC and called it "the most important international institutional innovation" since the establishment of the United Nations and the adoption of the Universal Declaration of Human Rights. He further stated that:

It is with great regret that I concede to say since Afghanistan was and still is victim of aggression and the theatre of actions against humanitarian law in recent two decade of its history, we are best placed to insist on the necessity of such a Court. If such a Court existed twenty years ago we would have less victims, horrors and atrocities.³⁰

In terms of the character and operation of the ICC, the Vice-Minister urged that aggression should be among the core crimes of the ICC, that the ICC should be independent, and that the ICC's material jurisdiction should be limited to aggression, genocide, war crimes and crimes against humanity. However, by 1 April 2002, Afghanistan had neither signed nor ratified the Rome Statute.

29. Statement of 18 June 1998 to the Rome Conference, of Ambassador Mehmet Guney, Chief of Delegation of Turkey.

30. Statement of 16 June 1998 by Dr. A Abdullah, Vice-Minister of Foreign Affairs of the Islamic State of Afghanistan to the Opening of the Rome Conference.

The Minister of Justice of Bahrain, Abdullah Khalid al Khalif also indicated his Government's support for the establishment of the ICC.³¹ Bahrain signed the Rome Statute on 11 December 2000, but had not ratified it as of 1 April 2002. However, the country seemed ripe for progress in undertaking and observing its international commitments to human rights and the rule of law. Bahrain released almost all its political prisoners in February 2001 and began to introduce wide ranging political and legal reforms, including the establishment of an elected parliament, and measures to make the judiciary independent and to raise legal procedures to the level of international human rights standards.

Similarly, Iran signed the Rome Statute on 31 December 2000, but by 1 April 2002, had not yet ratified it. Iran has remained active in the Preparatory Commission process in New York to work out the actual implementation of the ICC, and in this respect it is worth noting that Mr. Saeid Mirzaee-Yengejeh of the Iranian Delegation has acted as Coordinator of the Preparatory Commission working group on the Agreement on the Privileges and Immunities of the Court.³²

In contrast, Iraq was one of the seven countries that voted against the adoption of the Rome Statute on 17 July 1998 at the Diplomatic Conference. Iraq's negative vote should not have surprised anyone in the least since the Iraq Delegation represented the positions and policies of the Ba'ath Party and President Saddam Hussein. No one should forget that, on the morning of 2 August 1990, Iraq invaded Kuwait - the first instance in the history of the United Nations that one Member attempted to completely annex another by force.³³ Moreover, Iraq has shown appalling disregard for human rights. In

31. See *Official United Nations Press Release, L/ROM/15* "UN Conference on Establishing International Criminal Court Concludes Four Days of General Statements" of 18 June 1998.

32. Statement of 17 June 1998 by H.E. M. Javad Zarif, Deputy Foreign Minister of the Islamic Republic of Iran to the Opening of the Rome Conference.

33. See generally *The United Nations and Iraq-Kuwait Conflict: 1990-1996*, Department of Public Information, United Nations, 1996. As early as February 1990, Iraq began to claim that Kuwait had been drilling close to the Kuwait-Iraq border at a slant which allowed it to access Iraqi oil fields, that Kuwait illegally held the Persian Gulf islands of Bubiyan, Falaika and Warba and that Kuwait was undercutting the price of oil in its sales on the world market in violation of the relevant OPEC agreements. In response to a letter from the Permanent Representative of Kuwait to the United Nations, (see Letter from the Permanent Representative of Kuwait to the President of the Security Council requesting an immediate meeting of the Security Council, S/21423 of 2 August 1990), the Security Council met the same day and condemned Iraq's invasion of Kuwait, determined "that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait" and, invoking Articles 39 and 40 in Chapter VII of the Charter of the United Nations, demanded "that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990" and decided to keep the matter under consideration.

deciding to appoint a Special Rapporteur on the human rights situation in Iraq, the UN Commission on Human Rights expressed its grave concern over “reliable reports of enforced or involuntary disappearances, mass extra-judicial executions, torture and arbitrary detention by the Government of Iraq, especially as reflected in the report of the Working Group on Enforced or Involuntary Disappearances”, Iraq’s use of chemical weapons against Kurdish civilians and the forced displacement of Kurds in the hundreds of thousands and the destruction of Kurdish villages.³⁴ The Government of Iraq’s abominable human rights record in general, and the likelihood of the direct criminal responsibility of its leaders, led UK Prime Minister Thatcher, US President George Bush (Senior), and other western leaders, in the days of Operation Desert Storm, to consider whether Saddam Hussein should be tried before an international criminal tribunal. However, these ideas were soon rendered moot when it became clear that the Allied Powers could not acquire custody over Saddam Hussein. At the Rome Conference, Iraq argued that norms prohibiting ‘crimes against humanity’ should apply only to international armed conflict situations, and despite its invasion and occupation of Kuwait, argued that the crime of aggression should be included in the Statute along the lines of UN General Assembly resolution 3314, 1974, and it also used the opportunity to complain about the UN sanctions imposed on the country.³⁵

At the Rome Conference, Israel joined Iraq on 17 July 1998 to vote against the adoption of the Rome Statute. However, on 31 December 2000, Israel signed the Rome Statute, but as of 1 April 2002, had not ratified it. What accounts for this reversal and what action is Israel likely to take in future on the ICC?

In explaining his country’s position in voting against the adoption of the Rome Statute at the Diplomatic Conference, Judge Eli Nathan underlined the fact that Israel historically had urged the international community to establish a permanent international criminal court. The Holocaust which involved the systematic genocidal slaughter of some six million Jews, as well as the massacre of large numbers of Gypsies, Communists and others, gave Israel a special interest in preventing such atrocities in future. However, the sticking point for the Government of Israel clearly was the Rome Statute’s criminalization of the mass transfer of population into occupied territories that would implicate continuing Israeli policies in the Israeli Occupied Palestinian Territories. Judge Nathan expressed the view that such policies

34. UN Commission on Human Rights resolution 74 on the Situation of human rights in Iraq; E/CN.4/RES/1991/74 of 6 March 1991.

35. See the summary of the statement of Mr. Yead Al-Admi; *UN Press Release* “UN Conference on Establishing International Criminal Court Concludes Four Days of General Statements: Secretary-General’s Representative Observes ‘Clear Message of Commitment’ towards Fulfilling Mandate of Session; L/ROM/15 of 18 June 1998.

did not constitute war crimes of the most serious concern to the international community:

Mr. President, Article 1 of the Statute clearly refers to “the most serious crimes of concern to the international community as a whole”; the preamble talks of “unimaginable atrocities”, and of “grave crimes which deeply shock the conscience of the whole international community”. And indeed, the core crimes listed in Article 5 were intended to meet these thresholds. We therefore fail to comprehend why it has been considered necessary to insert into the first of the most heinous and grievous war crimes, the action of transferring population into occupied territory, as it appears in Article 8, Paragraph 2(b), subparagraph viii. Without entering here into the question of the substantive status of any particular alleged violation of the Fourth Geneva Convention, which clearly Israel does not accept, can it really be held that such an action as that listed in Article 8 above really ranks among the most heinous and serious war crimes, especially as compared to the other, genuinely heinous ones listed in Article 8? Or is it not clear that this has been inserted as a means of utilizing and abusing the Statute of the International Criminal Court and the International Criminal Court itself as one more political tool in the Middle East conflict?³⁶

He went on to state that if mass transfer of population had not been included in the Rome Statute, his Government would have voted for the Rome Statute.³⁷

36. Statement of 17 July 1998 to the Rome Conference of Judge Eli Nathan, Head of Delegation of Israel, explaining the vote of the Government of Israel against the adoption of the Rome Statute.

37. However, Article 49 of the Fourth Geneva Convention prohibits the occupying Power from deporting or transferring all or part of its own civilian population to territory under its occupation, and under Article 147, “unlawful deportation or transfer” constitutes a grave breach of the Geneva Conventions, giving rise to individual criminal responsibility under international law. Given the *lex lata* on this question, Israel’s stance seemed to be a rather transparent attempt to shield its leaders from criminal responsibility for its settlement policies in the West Bank and Gaza, particularly, in view of resolutions of the UN General Assembly such as that of 20 December 2001, adopted in Emergency Session entitled “Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory” which recalls that the Rome Statute reaffirms “the position of the international community on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, as illegal and as an obstacle to peace”, expresses its concern over “illegal Israeli actions aimed at altering the status of the city and its demographic composition”, and reiterates “the applicability of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 to the Occupied Palestinian Territory, including East Jerusalem” A/RES/ES-10/9 of 20 December 2001, Tenth Emergency Special Session, Resolution adopted by the General

The Hashemite Kingdom of Jordan has been actively involved all through the ICC preparatory process and in the Rome Conference, departing often from common Arab country positions to take much more enlightened and constructive views. On behalf of Jordan, Dr. Waleed Sadi, in his opening statement to the Diplomatic Conference, urged the establishment of a strong and effective ICC with an independent Prosecutor and comprehensive competence over war crimes, genocide and crimes against humanity.³⁸ Jordan has played an active role in the ICC negotiations with its progressive leadership on many specific issues. Jordan has ratified the Rome Statute, on 11 April 2002.

As regards Kuwait, one might assume that the Government would be among the ICC's strongest supporters. As a small country vulnerable to attack, and its experience of invasion from Iraq, it would seem to be in Kuwait's clear interest to join the ICC regime as fast as possible. Although Kuwait signed the Rome Statute on 8 September 2000, by 1 April 2002, it had not ratified it. Kuwait joined with a number of other Arab States at the Rome Conference to urge that the use of the death penalty for crimes under international law be permitted in ICC prosecutions with regard to situations in countries that retained this form of punishment. Kuwait also registered its concern over provisions aimed to ensure gender balance in the ICC.³⁹

Qatar has not signed or ratified the Rome Statute. The United Arab Emirates signed the Rome Statute on 27 November 2000, and Oman signed it on 20 December 2000, but by 1 April 2002, neither country had ratified it. Yemen signed the Rome Statute on 19 December 2000.

Syria took an active role in the Rome Conference and signed the Rome Statute on 29 November 2000, but by 1 April 2002, had not ratified it. In his statement⁴⁰ to the Rome Conference, the Head of the Syrian Arab

Assembly (ES-10/9) entitled "Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory", *adopted* 133 in favour, 4 *against* (Israel, Marshall Islands, Micronesia and the United States), 16 *abstentions*, 36 *non-voting*.

38. Statement of 18 June 1998 by Dr. Waleed Sadi, Head of the Delegation of Jordan to the Opening of the Rome Conference.
39. The Kuwaiti Delegation also joined Algeria, Egypt, Jordan, Libya and Qatar, during the ICC preparatory process to oppose the inclusion of references in the Rome Statute to "gender balance" which might be taken to imply a quota system to ensure equitable female representation in the ICC. In the result, the Rome Statute refers to "fair representation of female and male judges" - a considerably weaker formula than "gender balance" that would seem to have accommodated the Arab pre-occupation over possible gender quotas. See Cate Steains, "Gender Issues", in Roy S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 357-390 at 377.
40. Statement of 16 June 1998 by Excellency Said Al Bounni, Head of the Syrian Arab Republic Delegation to the Opening of the Rome Conference.

Republic Delegation emphasized that the ICC should be an independent body from the Security Council, and he supported the proposal that Rome Statute provisions on 'crimes against humanity' should apply only to international armed conflict rather than also to situations not of an international character. Syria considered also that terrorism and attacks against UN personnel were not defined sufficiently for inclusion in the Rome Statute. The Syrian Delegation strongly supported the definition of aggression as it is formulated in UN General Assembly resolution 3314, 1974, but cautioned that a clear-cut distinction had to be drawn between aggressors and freedom fighters. It also voiced its disappointment that the use of nuclear weapons as a crime was dropped from the Statute.⁴¹

D. Former Soviet Socialist Republics of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan

With the withdrawal of Soviet economic and military support, and located in a region beset with simmering ethnic and religious unrest, the Central Asian States of the former USSR remain vulnerable to foreign intervention and violent civil unrest.⁴² As relatively small States prone to terrorist outbreaks and serious violations of human rights and humanitarian law, the ICC could supplement valuably the role of domestic criminal jurisdiction where the latter fails to check the outbreak of crimes under international law. By 1 April 2002, Kazakhstan and Turkmenistan had neither signed nor ratified the Rome Statute. Kyrgyzstan and Uzbekistan (a country retaining the death penalty) signed the Rome Statute on 8 December 1998 and 29 December 2000 respectively. Until Cyprus ratified the Rome Statute in March 2002, Tajikistan was the only Asian country to have both signed (on 30 November 1998) and ratified (on 5 May 2000) the Rome Statute. Among these countries, only Turkmenistan had abolished the death penalty for all crimes.

E. South Asia: Bangladesh, Bhutan, India, Nepal, Pakistan, Sri Lanka

The Bangladeshi people's special interest in the establishment of an effective international criminal court is rooted in the severe trauma it suffered

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41. More recently, on 3-4 November 2001, Syria hosted a major symposium organized by the ICRC entitled "The International Criminal Court: A Challenge to Impunity" in Damascus at which 21 experts from various countries discussed the ICC's role and character.
 42. Kyrgyzstan, Tajikistan and Uzbekistan have been cooperating to fight the banned Islamic Movement of Uzbekistan and to check its incursions from neighboring Afghanistan.
 43. The drive for independent statehood intensified with widespread Bengali dissatisfaction over the government's failure to provide adequate relief during and after a cyclone that ranked among the 20th century's worst, struck East Pakistan (as it then was) on 13 November 1970. Tidal waves and storm winds combined to kill between 300,000 and

as it broke away from Islamabad in 1971.⁴³ In the ensuing civil war, the Government of Pakistan seems to have conducted a deliberate and systematic programme of genocide and mass rape, and in fact, Pakistani regulars and militia succeeded in slaughtering some one million civilians, and raping women, possibly in the order of one half a million. Some 10 million refugees fled the country to India. During this extremely bloody conflict, the UN Security Council failed to reach a consensus among the five permanent members to declare the situation a threat to international peace and security, finding itself blocked by the opposing vote of the USSR.⁴⁴ The intervention of the Indian army in Bangladesh put an end to the conflict and the Pakistani army signed an instrument of surrender on 16 December 1971.

In April 1973, the Government of Bangladesh called for the trial of 195 Pakistanis for genocide, war crimes, crimes against humanity as well as for grave breaches under the Geneva Conventions. On 20 July 1973, the Parliament of Bangladesh adopted Act No. XIX (1973), entitled "An Act to Provide for the Detention, Prosecution and Punishment of Persons for Genocide, Crimes against Humanity, War Crimes and Other Crimes under International Law". This statute, also known as the International Crimes (Tribunals) Act, 1973, authorizes the establishment of a Tribunal with "the power to try and punish any person irrespective of his nationality who, being a member of any armed, defense or auxiliary forces commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act ..." and then lists: 'crimes against humanity', 'crimes against peace' and 'war crimes' defined along the lines of the Nuremberg and Tokyo Charter definitions; 'genocide' as defined in the UN Genocide Convention, 1948,⁴⁵ "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions, 1949"; "any other crimes under international law"; as well as "attempt, abetment or conspiracy to commit any such crimes" and "complicity in or failure to prevent commission of any such crimes". However, as part of the Bangladesh-India-Pakistan Agreement on the Repatriation of Prisoners of War and Civilian

500,000 people, particularly in coastal areas. Elections were held in December 1970 and the Awami League under the leadership of Sheikh Mujibur Rahman who pushed for increased political autonomy from Islamabad, won a majority of seats. However, Islamabad rejected a proposal put forward by the new Government in Dhaka to convene a first meeting of an independent assembly, and in late February 1971, Pakistani President Yahya Khan decided to deploy troops to East Pakistan to quell the protest brewing there and Sheikh Mujibur Rahman was imprisoned in West Pakistan.

44. "Bangladesh" in Edward Lawson, (ed.), *Encyclopedia of Human Rights* (Second Edition), vols. (1996) 133-135.
45. Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously 9 December 1948, entered into force on 12 January 1951; 78 UNTS 277.

Internees,⁴⁶ the Government of Bangladesh agreed not to proceed with the trials 'as an act of clemency' and that 'the 195 prisoners of war may be repatriated to Pakistan along with the other prisoners of war now in the process of repatriation under the Delhi Agreement'. The fact that none of the 195 suspects of genocide, war crimes and crimes against humanity were ever prosecuted remains a rather shocking reminder of how easily criminal justice can be compromised by powerful political pressures to reach a peace agreement. It also underscores very vividly that it is the smaller States, those more vulnerable to diplomatic pressure and political, economic and military manipulation, that stand to benefit more from a powerful and independent ICC to provide a credible means for the enforcement of individual criminal responsibility for crimes under international law and to deter such crimes in cases of national crises where domestic courts are unwilling or unable to act. Bangladesh signed the Rome Statute on 16 September 1999, but as of 1 April 2002, had not ratified it.

Bhutan and Nepal remain particularly vulnerable as landlocked States between regional giants China and India. Recently, the situation in Nepal seems to have taken a turn for the worse. On 1 June 2001, Crown Prince Dipendra, gunned down his father and mother, King and Queen of the Kingdom of Nepal, before killing his brother, sister, five other relatives and then himself. This came on top of simmering political unrest with the ongoing Maoist guerrilla insurgency and trenchant anti-monarchist opposition in the country. On 17 February 2002, more than 130 soldiers, policemen and civilians were massacred by the Maoist rebels in Achham and on the 25 February, the Government claimed that the Royal Nepal Army had responded by killing some 76 Maoist rebels on 23-24 February. Since the resumption of the Maoist insurgency in 1996, around 2,500 people have died. Another destabilizing factor is the presence in Nepal of some 100 thousand refugees who have fled Bhutan, as well as heavy illicit traffic in narcotic drugs. Should domestic troubles draw Nepal into full-scale civil war and domestic courts find themselves beleaguered or overwhelmed, the people of Nepal might need the assistance of the ICC, and multilateral peacekeeping support in general to avoid prolonged or massive bloodletting.

As of 1 April 2002, Bhutan had not signed or ratified the Rome Statute despite ongoing ethnic unrest. To deter excesses in the conduct of hostilities

46. Bangladesh-India-Pakistan Agreement on the Repatriation of Prisoners of War and Civilian Internees, *signed* in New Delhi on 9 April 1974, by Mr. Kamal Hossain, Minister of Foreign Affairs Government of Bangladesh; Mr. Swaran Singh, Minister of External Affairs Government of India; and Mr. Aziz Ahmed, Minister of State for Defense and Foreign Affairs, Government of Pakistan; *13 International Legal Materials* (1974). The document is reprinted as Appendix E in Javid Rehman, *The Weaknesses in the International Protection of Minority Rights* (2000).

so as to avoid severe deterioration in the country, Bhutan would be well-advised to consider signing and ratifying the Rome Statute as an insurance policy.⁴⁷

The case of India merits special attention as one of the more important countries in Asia that has not signed the Rome Statute. At the Rome Conference, India endorsed the Non Aligned Movement's view, as well as the position of the Asian African Legal Consultative Committee "that the ICC should be based on the principles of complementarity, State sovereignty, and non-intervention in internal affairs of States".⁴⁸ However, the Delegation of India warned that ICC jurisdiction should be optional rather than inherent or compulsory and that it should perform a role complementary to that of domestic jurisdictions, otherwise the ICC could never become accepted as a universal institution. The delegate also flagged the danger of an individual Prosecutor with *proprio motu* powers as contrary to State sovereignty⁴⁹ and stated that the ICC should not become captive to political interference, and therefore, that the UN Security Council should not exercise any role in the ICC's operation, including the referral of situations to the ICC or in any other manner, on the grounds that this would accord pre-eminent authority to the Security Council's permanent members and violate the principle of State sovereignty and equality.⁵⁰

47. The monarchy was established in Bhutan in 1907 by the British and in 1910 Bhutan became a British protectorate. Although Bhutan became independent in 1949, Bhutan signed a Treaty of Friendship with India on 9 August 1949 that accords assigns India the responsibility to provide guidance to Bhutan in foreign affairs and to provide assistance - a role formerly played by the United Kingdom. Bhutan's population of a little more than 2 million, cleaves roughly into 50% Bhote, 35% Nepalese and 15% indigenous or migrant tribes. Three-quarters of the population practice Buddhism and one-quarter Hinduism. Well-armed guerilla rebels from the Indian State of Assam have frequently hid in Bhutan's hillside and India has repeatedly urged Bhutan to allow cross-border search and destroy missions to wipe out the rebels in Bhutanese territory.

48. Statement of 16 June 1998 to the Rome Conference, of Mr. Dilip Lahiri, Head of Delegation of India.

49. Mr. Lahiri stated that: "My delegation, like many others, considers it inappropriate to vest such a competence, which pertains to States, in the hands of an individual prosecutor to initiate investigations *suo motu* and thus trigger the jurisdiction of the Court. The distinction between the sovereign authority of the States, on the one hand, and the professional role of a prosecutor, on the other, should be maintained. These two should be clearly distinguished and not confused." *Ibid.*

50. Mr. Lahiri put it thus: "Any pre-eminent role for the Security Council in triggering ICC jurisdiction constitutes a violation of sovereign equality, as well as equality before law, because it contains an assumption that the five veto-wielding States do not by definition commit the crimes covered by the ICC Statute, or in case they so commit, that they are above the law and thus possess *de jure* impunity from prosecution, while individuals in all others States are presumed to be prone to committing such international crimes. *Ibid.*

In a rather ill-conceived argument, the delegate stated that:

We have been told that the Council must have a role built into the Statute because it had set up the *ad hoc* tribunals for the former Yugoslavia and for Rwanda, and has therefore established its right to do so. Those were decisions of a dubious legality. The Charter did not give the Council the power to set up Courts, the Council did so in any case, and can do so again, only because its power cannot be challenged. But what the Council seeks from the ICC through the Statute, and what the draft gives it, is something else – it is the power to refer, the power to block and the power to bind non-States Parties. All three are undesirable.

As a preliminary point, it should be noted that, contrary to the claim of the Indian Head of Delegation, nothing in the Charter of the United Nations prevents the Security Council from establishing an *ad hoc* international criminal tribunal, and in fact Article 29 authorizes the Security Council to “establish such subsidiary organs as it deems necessary for the performance of its functions.” Chapter VII of the UN Charter assigns the Security Council the primary role to ‘determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security’ and therefore, the legality of the establishment of subsidiary organs, such as the ICTY and ICTR, follows directly. As regards the ICC, the Rome Conference could not have ignored the plain constitutional question of the relationship between the Council and the ICC, given that the exercise of the Council’s Chapter VII powers naturally must be coordinated with the ICC. This need for coordination is particularly pertinent given the fact that the ICC is set to deal with crimes of such magnitude and seriousness that in most cases, they will likely constitute a threat or breach of international peace and security in themselves, even where perpetrated solely within the territorial boundaries of a single State.

A more serious point concerns the Security Council’s power to defer an investigation for a period of 12 months. The Indian delegate railed against the Security Council’s role to refer situations to the ICC for investigation as a violation of the basic principle of treaty law that treaties do not bind third States without their consent.⁵¹ Even worse, non-States Parties could bind other non-States Parties by working through the Security Council.

If that is indeed the intention, why have we gone through this charade of a Conference of Plenipotentiaries, and the agonizing over optional jurisdiction and State consent? Why wait now for signature and

51. Article 34 of the Vienna Convention on the Law of Treaties, 1969, states that a treaty does not create either obligations or rights for a third State without its consent.

ratifications if the permanent Members of the Security Council could have got together with the like-minded and cobbled together a Statute with which the rest of the world in any case has no option but to comply if the Security Council, acting under Chapter VII, demands it. We believe, Mr. Chairman, that the role for the Security Council built into the Statute of the ICC sows the seeds of its destruction.

As for the definition of crimes under international law, the delegate stated his government's clear opposition to the inclusion of criminal responsibility for war crimes committed during situations of non-international armed conflict.

Finally, India objected to the non-inclusion of the use of nuclear weapons as a crime within the ICC's competence. Despite the fact that India exploded a nuclear device in a test at 10:13 GMT on 11 May 1998 a few weeks before the Rome Conference an event followed by Pakistan's nuclear test at 10:16 GMT on 28 May 1998,⁵² the Indian delegate complained that:

The third point of principle for us was that an ICC, whose Statute was being negotiated 50 years after the invention and first use of nuclear weapons should explicitly ban their use as a crime. This, however, has not happened. Expediency has prevailed. As a nuclear weapon state, we tabled a draft amendment to list nuclear weapons among those whose use is banned for the purposes of the Statute. To our very great regret, this was not accepted. The message this sends is that, at the level of Plenipotentiaries, the international community has decided that the use of nuclear weapons, the most inherently indiscriminate of weapons, is not a crime. The appropriate conclusions should flow from this, though we will continue our campaign to have the international community outlaw nuclear weapons.

Moreover, the Rome Statute did not insert the use of any other weapon of mass destruction as a crime, and that implied, said the delegate, that "the use of weapons of mass destruction is not a war crime." He concluded that, for all these foregoing reasons, India could not sign the Rome Statute.

Pakistan took a similar line. In his statement to the opening of the Rome Conference,⁵³ Ambassador Ayub strongly supported the principle that the ICC's jurisdiction should be complementary to that of national legal systems in order to guard the principle of State consent. However, it agreed with

52. See Terry C. Wallace, "The May 1998 India and Pakistan Nuclear Tests" 69 *Seismic Research Letters*, (1998) at 386-393.

53. Statement of 16 June 1998 to the Rome Conference, of Ambassador Arif Ayub, Leader of the Pakistan Delegation.

India that a Security Council role in the ICC would undermine the ICC's impartiality and independence and would represent unwarranted political interference in a judicial body. Pakistan also took the same position as India on nuclear weapons, their use should be qualified as a crime within the jurisdiction of the ICC, and that the Rome Statute's failure to do so meant that Pakistan could not sign it.

Sri Lanka stated its support for the establishment of the ICC, but regretted that it had to abstain from voting at the time of the adoption of the Rome Statute because the Statute did not include the crime of terrorism.⁵⁴

F. Southeast Asia: Burma, Cambodia, Indonesia, Laos, Malaysia, Singapore, Philippines, Thailand and Vietnam

The Government of Myanmar has neither signed nor ratified the Rome Statute. To appreciate the Government's attitude towards the ICC, it is essential to appreciate that the international community has singled out Myanmar for its pattern of serious and systematic violations of international human rights and humanitarian law. The human rights situation in Myanmar has been a matter of serious concern for the UN General Assembly and Commission on Human Rights for years. In March 2001, the General Assembly⁵⁵ recalled its earlier resolutions and that of the Commission on Human Rights⁵⁶ and expressed its grave concern over "the unabated suppression of the exercise of political rights and freedom of thought, expression, association and movement in Myanmar" and over new restrictions placed on Aung San Suu Kyi and other members of the National League for Democracy. The Assembly deplored continuing violations which included 'extrajudicial, summary or arbitrary executions, enforced disappearances, rape, torture, inhuman treatment, mass arrests, forced labour, including the use of children, forced relocation and denial of freedom of assembly, association, expression and movement' as well as violations directed against ethnic and religious minorities including forced portering, forced relocations, use of anti-personnel landmines, destruction of crops and fields and dispossession of land and property, the use of child soldiers, trafficking, sexual violence and exploitation.⁵⁷ In her report to the UN

54. See A/CONF.183/C.1/L.27/Rev.1, proposal put forward by India, Sri Lanka and Turkey to include the crime of terrorism in Article 5 of the Rome Statute.

55. UN General Assembly resolution on the Situation of Human Rights in Myanmar; UN. Doc A/RES/55/112 of 1 March 2001.

56. See UN Commission on Human Rights resolution 1992/58 of 3 March 1992 in which the Commission decided to appoint a special rapporteur to look into the situation of human rights in Myanmar.

57. UN General Assembly resolution on the Situation of Human Rights in Myanmar, UN. Doc A/RES/55/112 of 1 March 2001.

Sub-Commission on the Promotion and Protection of Human Rights,⁵⁸ the UN High Commissioner for Human Rights drew attention to abuses against women “especially in the course of violent events, reportedly ranged from having seen their children or husband killed to being raped and losing their homes and means of subsistence” and took note that “in the ethnic areas of Myanmar, the policy of establishing absolute political and administrative control brought out the worst in the military, and resulted in killings, brutality, rape and other human rights violations which did not spare the old, women, children or the weak.”⁵⁹

The Government of Myanmar seems quite prepared to accede to international criminal law conventions it considers will not threaten the regime itself, such as the International Convention for the Suppression of the Financing of Terrorism and the International Convention for the Suppression of Terrorist Bombings, which H.E. Mr. Win Aung, the Minister for Foreign Affairs of Myanmar, signed and ratified on 12 November 2001. The Rome Statute is another matter however, and in light of the systematic violations of international human rights and humanitarian law throughout the country which clearly implicate the Burmese leadership, it seems doubtful that Myanmar will sign or ratify the Rome Statute in the near future, unless there is a sudden change of government.

Indonesia’s population of over 200 million, inhabiting thousands of islands spread over some 1.8 million square kilometres, is highly diverse, comprising roughly 45% Javanese, 15% Sunanese, 7% Madurese, 7% Malay and 26% others. The world’s largest Muslim country, Indonesia’s population comprises 87% Muslim, 9% Christian, 2% Hindu and 2% Buddhist and other. The Government of Indonesia has neither signed nor ratified the Rome Statute. During the Rome Conference, the Government insisted that the Rome Statute should be adopted by consensus only, in order to be as

58. Report of the UN High Commissioner for Human Rights to the Sub-Commission on the Promotion and Protection of Human Rights on “Systematic rape, sexual slavery and slavery-like practices during armed conflicts”; UN Doc. E/CN.4/Sub.2/2000/20 of 27 June 2000, at paras. 41 and 42.

59. See further UN Doc. A/54/440. See also the Interim Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Myanmar, Paulo Sergio Pinheiro, in accordance with Commission resolution 2001/15 and Economic and Social Council decision 2001/251; UN Doc. A/56/312 of 20 August 2001, as well as the Report of the UN Secretary-General on the Situation of Human Rights in Myanmar; UN Doc. A/56/505 of 24 October 2001. See also the resolutions of the UN Commission on Human Rights over the last several years: resolutions 2000/23, 1999/17, 1998/65 and 1997/65 etc. Particularly as regards the human rights situation of women in Myanmar, see the Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, submitted in accordance with resolution 2000/49; UN Doc. E/CN.4/2002/83/Add.1 of 28 January 2002, paragraphs 75-91.

universal as possible - a comment more on the Rome Conference process than on ICC substance or procedure. In Sixth Committee meetings held in October 1999, the Indonesian delegate cautioned that: "If we are to learn from past experience, then we should make sure that the ICC does not become a mechanism established simply to be used for interfering in the internal affairs of a State."⁶⁰ However, Indonesia's rather skeptical position on the ICC is particularly worrying given the incidence of systematic, severe and widespread violations of human rights and humanitarian law in Indonesia and in East Timor, Aceh and Irian-Jaya, as well as the plight of minority communities, for example, ethnic Chinese Indonesians, during times of economic hardship and political instability.

From the time of Indonesia's independence from the Netherlands on 17 August 1945 - only a few days following Japan's unconditional surrender to the Allied Powers - Indonesia has been beset by chronic political instability and the Indonesian leadership has frequently sacrificed human rights to ensure its national sovereignty and territorial integrity. The Indonesian military long ago became politicized as it fought a bitter campaign to win independence from The Netherlands. It is worth recalling here the crisis in East Timor, in particular, the climate of impunity for crimes under international law, the role of the Indonesian military, and the weak response of the international community, because it illustrates not only why the people of Indonesia would benefit from their government's ratification of the Rome Statute, but also why the government may be opposed, or at least reluctant to take that step.⁶¹

60. "States Warn Legal Committee That New International Criminal Court must Not Be Abused for Political Ends"; UN Press Release GA/L/3117 of 22 October 1999.

61. In 1999, Indonesia finally released East Timor which it had annexed illegally in 1975 once Portugal withdrew from the territory. During this period of illegal occupation, the Government of Indonesia was roundly condemned by the international community as a whole for the brutality with which it sought to subjugate the people of East Timor and to hold on to the territory of East Timor at all costs. In November 1945, Indonesia had to fight against British and Dutch troops who were inserted ostensibly to disarm Japanese soldiers, but whom the Indonesians feared wished to retake colonial control. Fighting continued until, in late 1949, a formal agreement was signed by The Netherlands recognizing Indonesian sovereignty over the entire territory. A Round Table Conference was held from 23 August to 2 November 1949 in The Hague to facilitate the transfer of sovereignty from The Netherlands to the Republic of Indonesia. On 28 September 1950, Indonesia was admitted as a Member of the United Nations. Sovereignty over Irian Jaya was left for later settlement between Indonesia and the Netherlands, but it has remained unsolved ever since. On 1 October 1965, even worse disaster was unleashed when the Indonesian Communist Party, alleged to have assassinated a number of top army generals in an unsuccessful coup attempt. This was met with the Government's anti-communist campaign that wiped out perhaps half a million civilians throughout the country, although the scale of such atrocities remain difficult to ascertain. These massacres were followed up by the consolidation of institutionalization of military power throughout the country

The deteriorating situation in East Timor led to the convening of a special session of the UN Commission on Human Rights - only the fourth in its half-century history, and discussions between the High Commissioner for Human Rights and President B.J. Habibie on 13 August 1999, in which the High Commissioner proposed the establishment of an international commission of inquiry to gather evidence of crimes committed. In her report to the Commission, the High Commissioner indicated evidence of the Indonesian military's support for the perpetrators of serious violations including mass killings;⁶² enforced and involuntary disappearances; extrajudicial, summary or arbitrary executions, torture, assault, forcible expulsions, and gang rape. Moreover, the High Commissioner pledged to keep the Commission informed on the East Timor human rights situation and on efforts to prosecute the perpetrators for the crimes. The end result of the UN Commission on Human Rights special session was the establishment of an International Commission of Inquiry on East Timor which prepared a report to the UN Secretary-General⁶³ recommending further investigations and the prosecution of guilty

in General Suharto's New Order. In order to thwart any resurgence from the Left, Suharto instituted a range of national security agencies and policies to maintain national security, not only within Indonesia proper, but also to keep a tight grip over Aceh, Irian Jaya and East Timor. As early as 1995, the UN Secretary-General had begun a process to stimulate political dialogue among the people of East Timor with a view to improving the situation in the territory, and this led to tripartite talks among the Secretary-General, Indonesia and Portugal which continued over the next three years. As reflected in more recent resolutions of the UN Security Council and the UN General Assembly, the pattern of severe violations of human rights and humanitarian law and the question of individual criminal responsibility, did not escape international attention. In resolution 1262 (Security Council resolution 1262 adopted on 27 August 1999), the Security Council called upon all parties to cooperate with the UN Mission to East Timor (UNAMET) (established per Security Council resolution 1236, adopted on 7 May 1999), and underlined the Indonesian Government's responsibility to ensure the safety and security of international staff and observers in East Timor, and to maintain peace and security in the territory. The Council reiterated Indonesia's responsibility to maintain peace and security on 15 September 1999 in resolution 1264 and, expressing its concern at reports of systematic, widespread and flagrant violations of international humanitarian and human rights law in East Timor (Security Council resolution 1264, adopted unanimously on 15 September 1999), invoked Chapter VII of the UN Charter, condemned "all acts of violence in East Timor", called for their immediate end and demanded "that those responsible for such acts be brought to justice" (para. 1 of Security Council resolution 1264) and authorized the establishment of a multinational force to restore peace and security in East Timor.

62. "United Nations staff in East Timor have on numerous occasions witnessed militia members perpetrating acts of violence in full view of heavily armed police and military personnel who either stood by and watched or actively assisted the militia. Whilst prior to the ballot the militia were using machetes and homemade guns, it has been reported that after the ballot the militia were armed with AK47 and M16 automatic weapons and hand grenades.", UN Doc. E/CN.4/S4/CRP.1 (para. 16) of 17 September 1999.
63. Report of the International Commission of Inquiry on East Timor to the Secretary-General; A/54/726, S/2000/59; both of 31 January 2000.

persons. The demands of the international community and proposals to establish an *ad hoc* international tribunal for East Timor⁶⁴ have been forestalled by Indonesia's promise to prosecute some 20 military commanders for the violations in East Timor. On 14 January 2002, President Sukarnoputri appointed 18 judges to sit on a special court for the trial of senior military officers that included a number of generals alleged to have **participated or to have** allowed serious human rights violations to be committed. Whether these trials, which **began on 20 March 2002** in Jakarta, signal a new attitude in post-Suharto Indonesia on the issue of individual criminal responsibility for serious violations of human rights and humanitarian law, remains to be seen.

Interestingly, at the Rome Conference, the Indonesian Head of Delegation said that the ICC would "act as a catalyst hastening the replacement of the rule of force with the rule of law which in turn will contribute to the maintenance of peace and advancement of justice, humanity and democracy at the national as well as the international levels" and he indicated his government's support for the ICC's establishment.⁶⁵ He went on to say that the process to establish the ICC should be brought about by general agreement and that the ICC should be strictly complementary to national criminal jurisdictions, and he reiterated the Non-Aligned Movement's position that UN bodies, including the Security Council, should have no role vis-à-vis the ICC.

By 1 April 2002, the Government of Cambodia had confirmed its intention to ratify the ICC Statute, which it had signed on 23 October 2000, at a special signing ceremony to be held at UN Headquarters at New York on 11 April 2002. Cambodia's indication of its intention to become part of the emerging ICC regime comes on the heels of UN withdrawal from the Khmer Rouge trials on the grounds that the government had failed to enact and implement key legal provisions designed to ensure the conduct of fair and independent trials, and that its participation would lend the trials legitimacy they did not deserve.⁶⁶

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64. See Senate Concurrent Resolution 9 Condemning the Violence in East Timor and Urging the Establishment of an International War Crimes Tribunal for Prosecuting Crimes Against Humanity That Occurred During That Conflict, US Senate resolution of 13 February 2001.
65. Statement of 16 June 1998 to the Rome Conference, of H.E. Mr. Muladi Minister for Justice, Head of Delegation of the Republic of Indonesia.
66. After years of negotiation, the Government of Cambodia agreed to establish a tribunal to prosecute Khmer Rouge leaders. However, from the beginning, the Government sought to limit the reach of the Tribunal and finally agreed only to incorporate a certain number of foreign judges into a special three-level tribunal within the existing Cambodian legal system. The Tribunal was temporally limited to the period 1975 to 1979 to ensure that only Khmer Rouge leaders would be tried. Moreover, the law on the Establishment of a Tribunal for Genocide from 1975-1979 in Cambodia failed to ensure international

The Government of Laos has been studying whether it should sign and ratify the Rome Statute, and to this end, it held a major workshop in Vientiane from 21 to 24 November 2001, which brought a number of internationally recognized experts to meet the Supreme Offices of the Prime Minister, Minister of Justice, Minister of Foreign Affairs, including the Department of Treaties and Legal Affairs, as well as Parliamentarians, Generals of the Armed Forces, officials of the Minister of the Interior Court. Recalling that land-locked Laos suffered massive aerial bombardment from the United States during its disastrous campaign in Vietnam, frequent foreign intervention from neighbouring countries, and an ongoing Hmong insurgency in the north of the country, Government officials indicated their interest to sign and ratify the Rome Statute. However, the process in Laos to ratify the Rome Statute faced a number of practical obstacles. First, by the end of 2001, the Rome Statute had yet to be translated into sufficiently precise Lao to allow the Government's legal experts to consider the pertinent issues from the viewpoint of the relation of international and domestic law. Second, a number of constitutional provisions in the Lao Constitution⁶⁷ required careful consideration so as to determine whether amendments to the Constitution were necessary prior to ratification, or whether the adoption of new legislation was required.

Malaysia's diverse population comprises 60% Malay and other indigenous populations, around 25% Chinese, 10 % Indian, and 5% others, practices a wide variety of religions, and speaks many languages. At the Rome Conference, the Malaysian delegate outlined his government's views on the Rome Statute, in particular, its support for the complementarity principle, the Statute's inclusion only over the core crimes of genocide, war crimes and crimes against humanity, and an 'opt-in opt-out' clause to allow States to accept the ICC's jurisdiction on a case-by-case basis.⁶⁸ The delegate also argued against conferring on the Prosecutor the power to initiate an investigation on his or her own motion. Possibly, the Government of Malaysia's seeming hesitance to sign and ratify the Rome Statute may be related to international criticism of its judiciary, given that were Malaysia to become a party to the Rome Statute, its judiciary would have to carry out its duties in line with international human rights standards. However, two particularly high profile cases have called into question Malaysia's judicial

supervision of the trials or to provide the Tribunal with the authority to override amnesties from prosecution previously granted. See Nicole Barrett, "Note: Holding Individual Leaders Responsible for Violations of Customary International Law: the U.S. Bombardment of Cambodia and Laos" *Columbia Human Rights Law Review*, vol. 32 (2001) p. 429.

67. Constitution of the Lao People's Democratic Republic, adopted by the 6th Session of the People's Supreme Assembly (2nd Legislature) in Vientiane, 13-15 August 1991.
68. Statement of 18 June 1998 of H.E. Mr. Ramanathan Vengadesan, Ambassador of Malaysia to Italy to the opening of the Rome Conference..

practices. The defamation suits launched against United Nations Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy, in violation of his privileges and immunities as a UN official on mission, and contrary to an Advisory Opinion of the International Court of Justice⁶⁹ has raised the question of systematic corporate interference in the judiciary. The trial of former Deputy Prime Minister Anwar Ibrahim for corruption and sodomy and the Supreme Court's sentence of 9 years' imprisonment, has also drawn international criticism of political rights and the integrity of the administration of justice in Malaysia. Thus far, the Government's reaction to allegations that it has been cavalier or at least indifferent, has been to respond that such charges are themselves politically biased. Malaysia's warnings that the ICC might be politically biased, and that the Prosecutor's role should be strictly limited, seems to fall within this general pattern of Government policy to international human rights issues. Malaysia has not signed or ratified the Rome Statute.

Although Singapore has neither signed nor ratified the Rome Statute, it played an active role throughout the ICC preparatory process and in the Rome Conference. At the Rome Conference, the Singaporean delegate urged that the Rome Statute be drafted in such a way as to claim the most universal level of support possible so as to ensure that, being reliant on State cooperation, it could function effectively. In particular, he urged the Conference:

to take into account the diversity of interests of the various regions, their different stages of development, the different social and cultural traditions and the positions of the major powers. It will not always be easy to come up with a broad consensus on solutions for the many issues at hand. But the mere papering over of differences will not meet the interests of those of us who seek to build an effective, working institution and not simply a showpiece devoid of any meaningful role.⁷⁰

The Philippines signed the Rome Statute on 28 December 2000, but as of 1 April 2002, had not ratified it. The government has suffered persistent terrorist insurgency from Abu Sayyaf Islamic fundamentalists in Basilan and Zamboanga, linked with the Al Qaeda network. The terrorist threat has assumed greater significance since the 11 September 2001 attack on the World Trade Centre towers in New York and the Philippines has begun active military cooperation with the US to help stamp out terrorism in the Philippines. In his statement to the Rome Conference opening,⁷¹ the

69. See, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Advisory Opinion of 29 April 1999.

70. Statement of 16 June 1998 to the Rome Conference, of Mr Lionel Yee Woon Chin, Deputy Head of Delegation of Singapore.

71. Statement of 16 June 1998 of H.E. Lauro L. Baja, Jr., Under-Secretary of Foreign Affairs for the Philippines to the Rome Conference.

Philippines delegate underlined his Government's firm support for the development of international criminal law and justice through the ICC, and emphasized that the ICC should be complementary to domestic criminal jurisdiction, exercise jurisdiction only over genocide, war crimes and crimes against humanity, and that the Prosecutor should be independent and vested with *proprio motu* powers of investigation. The delegate also considered that the use of weapons of mass destruction, including the use of nuclear weapons, should be considered a war crime. He also drew attention to the need to ensure gender sensitivity in the ICC and to have provisions that would protect the interests of minors, including a minimum age of criminal responsibility.

Like the Philippines, Thailand has signed the Rome Statute (on 2 October 2000), but as of 1 April 2002, had not ratified it. In his address to the opening of the Rome Conference, the delegate of Thailand said that the ICC was needed to obviate the need for the establishment of *ad hoc* international criminal tribunals, which at least in the cases of Nuremberg and Tokyo, represent victors' justice.⁷² He indicated the government's support for the principle of ICC complementarity with domestic criminal jurisdiction. Interestingly, Thailand strongly urged the inclusion of illicit trafficking in narcotic drugs within the ICC's jurisdiction, but this proposal was not accepted owing to a lack of consensus at the Rome Conference.⁷³ In September 2001, the Thai Ministry of Foreign Affairs, together with the Law Society of Thailand and Forum Asia, invited international experts to brief government officials on the need and mechanics of the Rome Statute, and to encourage relevant Ministries to move ahead with ratification. The government indicated that it had taken much time to arrive at a satisfactory translation of the Rome Statute into the Thai language and that it needed further time to study whether amendments to the Thai Constitution or to existing legislation might have to be introduced.

72. Statement of 18 June 1998 of Mr. Somboon Sangiambut, Representative of the Kingdom of Thailand to the opening of the Rome Conference.

73. The Delegate stated that: "The international community realizes that narcotic drugs bring suffering to humankind and destroy the social structure of nations. It is my conviction that countries must act collectively to help bring the wrongdoers to justice. Thailand has dealt with crimes relating to narcotic drugs through extradition and other forms of international cooperation for many years. These crimes are transboundary. They usually involve several individuals such as producers, traffickers, sellers and consumers, who in most cases are in different countries. Yet, co-operation through bilateral agreements or through the mechanism of Interpol are not sufficient to effectively combat these crimes. The International Criminal Court could be a credible alternative mechanism in the suppression of crimes relating to narcotic drugs. In view of the urgent need to eradicate these crimes, Thailand has proposed that illicit traffic in narcotic drugs and psychotropic substances should fall under the jurisdiction of the International Criminal Court." *Ibid.*

At the Rome Conference,⁷⁴ Vietnam endorsed the Declaration by the Non-Aligned Movement on the Establishment of the International Criminal Court, adopted in Colombia in May 1998 that the ICC had to be independent, fair, impartial and effective, and he indicated his government's support for the principle of the ICC's complementarity with domestic courts, as well as for ICC jurisdiction over the core crimes, including the crime of aggression. The delegate of Vietnam also urged the Conference to ensure that all geographic regions and legal and political traditions were fairly represented in the ICC's functioning. As of 1 April 2002, Vietnam had not signed or ratified the Rome Statute.

G. China, Japan, Mongolia and the Koreans

As one of the five permanent members of the UN Security Council, and with its growing economic, political and military influence being felt throughout Asia and the world, China's position on the ICC is important. China has not signed or ratified the Rome Statute, and was one of the seven countries that voted against its adoption.

At the opening of the Rome Conference, the Head of the Chinese delegation said that the ICC should not be used as a tool to interfere in the internal affairs of States, and neither should it compromise the principal role of the Security Council in maintaining international peace and security.⁷⁵ Hence, the Rome Statute had to conform fully with the principles of the Charter of the United Nations. He also urged that the Rome Statute should be adopted by consensus rather than by vote, in order to found the institution on the broadest possible consensus. The delegate reiterated his government's support for the principle of complementarity and, in this sense, the ICC should exercise "its jurisdiction only with the consent of the countries concerned and should refrain from exercising such jurisdiction when a case is already being investigated, prosecuted or tried by a relevant country."⁷⁶ He also emphasized that the ICC was obliged to respect fully State sovereignty, security and basic legal principles. However, he concluded by reminding the Conference of China's experience of war:

Like many other countries, China has been a war victim since the late 19th century. From 1931 to 1945 alone, China suffered a loss of over 30 million lives and of countless property. 'The past, if not forgotten, can serve as a guide for the future.' If the international

74. Statement of 18 June 1998 of Dr. Nguyen Ba Son, Delegation of Vietnam to the Rome Conference.

75. Statement of 16 July 1998 of Mr. Wang Guangya, Head of the Chinese Delegation to the opening of the Rome Conference.

76. *Ibid.*

community is still incapable of enforcing thorough and effective trial and punishment on this kind of crimes, world peace will always be threatened. Therefore, the Chinese Government, like other governments, stands for the establishment of the ICC.”⁷⁷

In explaining its vote against the adoption of the Rome Statute, the Chinese delegation stated that:

State consent should be the legal basis for the Court’s jurisdiction. China cannot accept the universal jurisdiction accorded to the Court over core crimes. Granting the Prosecutor the right to initiate prosecutions places State sovereignty on the subjective decisions of the individual. The pre-trial chamber provisions to check those powers fall short. The adoption of the Statute should have been on consensus, and not vote.⁷⁸

On the official internet web page of the Ministry of Foreign Affairs,⁷⁹ the Government stated that “China actively participated in the work of the PrepCom in various aspects with a serious, practical and constructive attitude”, but it indicated that it had a certain number of concerns remaining. In particular, the Government did not want to see a low threshold for crimes against humanity, and it had certain reservations over the crimes of enslavement,⁸⁰ enforced sterilization⁸¹ and ‘enforced disappearance of persons’.⁸² Perhaps most serious for China has been the definition of the crime of aggression and the need to work out the relationship of the ICC with the UN Security Council in the determination of aggression.

... this issue all along remains as the major difference between the five Permanent Members of the Security Council and the other states. The five Permanent Members all along insist that the determination of the Security Council is the prerequisite for the court to exercise jurisdiction over the crime of aggression and that this content should become an indispensable part of the definition of the crime of aggression. ... China stressed in its intervention that since the precondition for an individual to bear the criminal responsibility

77. *Ibid.*

78. “UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court”; UN Press Release L/ROM/22 of 17 July 1998.

79. See “Part VI. China and the International Criminal Court” at <http://www.fmprc.gov.cn/eng/14686.html> (last accessed on 1 April 2002).

80. The Rome Statute prohibits ‘enslavement’ as a crime against humanity in Article 7(1)(c).

81. The Rome Statute prohibits “enforced sterilization” as a crime against humanity in Article 7(1)(g), as a war crime in the context of serious violations of the laws and customs applicable in international armed conflict in Article 8(2)(b)(xii), and also as a war crime committed in armed conflicts not of an international character in Article 8(2)(c)(vi).

82. Article 7(1)(i) of the Rome Statute qualifies ‘enforced disappearance of persons’ as a crime against humanity.

is that the state commits an act of aggression, in the absence of a determination by the Security Council on the situation of aggression, the court lacks the basis to prosecute the individual for his criminal liability.

In other words, for China, the ICC should not be authorized to prosecute any individual for the crime of aggression unless the Security Council has first determined that the situation constituted a case of aggression, which in effect would give every permanent member of the Council a veto over any ICC prosecutions of the crime of aggression. Despite its opposing vote at the Rome Conference, the Chinese government remained engaged in the ICC process and continued to seek the advice of international experts and NGOs on the technicalities of the Rome Statute, perhaps adopting a 'wait-and-see' approach.

Like Singapore, the government of Japan has played an influential role in the ICC negotiations from the beginning, and in the Rome Conference itself, but it has neither signed nor ratified the Rome Statute. In his statement to the Rome Conference opening,⁸³ the Japanese delegate stated the government's position that the ICC should be strictly independent and impartial, capable of ensuring cooperation with States, complementary to domestic criminal jurisdiction, and universal in reach in participation. The delegate also hoped that all States would rise above parochial considerations in order to see the successful establishment of the ICC. Japan supported the principle of complementarity, and as regards the ICC's relationship with the UN Security Council, the delegate stated that his government supported the proposal to make Council determination of an act of aggression a precondition to the ICC's seizing of jurisdiction over this crime in relation to an individual. He also emphasized the importance of State cooperation with the ICC as well as the imperative of full human rights guarantees in all operations of the ICC and in those of cooperating States.

Since Mongolia declared its independence on 25 November 1924, it has always faced difficult challenges in charting a path to full political independence, sandwiched as it is between regional heavy weights China and Russia. With the collapse of the Soviet Union - Mongolia's traditional ally - and the withdrawal of Russian economic, political and military support, and wary of China's burgeoning influence as well as a steady flow of illegal migrants from bordering Chinese provinces into Mongolia, the government of Mongolia seems conscious of the urgency to become more closely integrated with the international community. In this sense, and despite Mongolia's position as one of the world's poorest countries, Mongolia has worked in close cooperation with UN agencies and the diplomatic community

83. Statement of 15 June 1998 by H.E Mr. Hisashi Owada, Head of Delegation of Japan, to the Opening of the Rome Conference.

to improve the promotion and protection of human rights in the country, and to reform its economy and legal system.⁸⁴ Mongolia has also kept itself actively involved in the process to establish the International Criminal Court, as reflected in the address of former Prime Minister of Mongolia, Mr. Mendsaikhany Enkhsaikhan to the UN General Assembly in New York on 1 October 1996.⁸⁵ On 29 December 2000, Mongolia signed the Rome Statute of the International Criminal Court, and on 11 April 2002, it had ratified it.

In January 2002, the Government invited international experts to brief parliamentarians of the Mongolia's Ikh Khural, judges and lawyers, the Office of the Prosecutor, officials of the Ministry of Foreign Affairs, the Department of Law and Treaties and the Ministry of Justice, the Office of the President, and NGOs, on the rationale and main principles governing the operation of the ICC, and the ICC's relevance to Mongolia. As in Laos, the Government was still in the process of translating the text into the Mongolian language and in spreading awareness about the possible benefits to Mongolia. A recurring theme in these discussions, in addition to Mongolian participation in the ICC as ICC judges and staff, was the threat of future foreign intervention and the benefit of ensuring Mongolians were covered by complementary international criminal jurisdiction in case crimes under international law were committed during such an eventuality.

The 20th century has been a tumultuous one for the Korean peninsula and the special situation there makes the application of international criminal law through the ICC particularly relevant for the Korean people.⁸⁶ In his statement to the opening of the Rome Conference, the delegate from South Korea recalled his government's commitment to the ICC and its active

84. The Constitution of Mongolia, adopted on 13 January 1992, refers to "human rights" in the Preamble, and in Articles 14, 15 and 16, provides for a wide range of human rights guarantees. Significantly, these constitutional rights guarantees are matched by provisions which spell out corresponding obligations on the State and government to promote and protect human rights, specifically, in Article 19 in the context of State obligations to the citizens, in Article 38(7) in respect of the government's responsibilities, and in Article 50 concerning the powers of the Supreme Court.

85. "Today, it is vital to foster respect for and compliance with the norms of the international law. In this regard, Mongolia welcomes the establishment of the International Seabed Authority and supports the creation of an International Criminal Court."

86. Japan occupied the Korean peninsula from 1910 until its surrender to the Allies on 15 August 1945. On 2 September 1945, North Korea was separated from South Korea along the 38th parallel and a Demilitarized Zone was established. On 25 June 1950, North Korea invaded South Korea, which the UN Security Council qualified as a breach of the peace and recommended that "Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area" (UN Security Council resolution 83 (1950) of 27 June 1950, adopted in the absence from the Council of the representative of the USSR). This was followed by Security Council resolution 84 (1950) of 7 July 1950,

participation at all preparatory stages.⁸⁷ The delegate reiterated his government's support for automatic jurisdiction over the core crimes of aggression, genocide, war crimes and crimes against humanity and he emphasized the need to bring internal conflicts within the definition of war crimes. He also supported the establishment of a strong prosecutor, particularly in the light of a high probability that the UN Security Council would many times deadlock due to one or other Member's use of the veto. The Delegate also considered that the primary responsibility of the Council with regard to the maintenance of international peace and security had to be left intact and therefore that the Council should be empowered to refer a situation to the ICC for investigation. The delegate also voiced his government's support for the principle of complementarity, and the inclusion of special provisions to protect children and cases involving gender-related violence. He concluded by stressing the importance of full State cooperation with the ICC and of procuring and sustaining solid finances to ensure the ICC's effective operation.

South Korea signed the Rome Statute on 8 March 2000, but as of 1 April 2002, had not ratified it. There has been much speculation to the effect that, during her official visit to South Korea as Secretary of State, Ms. Madeleine Albright pressured the government of South Korea not to ratify the Rome Statute so as to avoid the possibility that any of the some 37,000 US troops located on South Korean territory to prevent a possible attack from North Korea would ever be surrendered to the ICC. This question remains a

resolution 85 (1950) of 31 July 1950, resolution 85 (1950) of 31 July 1950, and resolution 88 (1950) of 8 November 1950. United Nations forces comprised mainly of forces from the US, the United Kingdom, Canada, India, Australia, New Zealand and South Africa, were deployed and succeeded in pushing back the North Korean army until China backed up North Korean forces with its own troops, producing entrenched positions. Fighting continued until an armistice was signed on 27 July 1953 by the Senior Delegates for the UN Command, the Korean Peoples Army and the Chinese Peoples Volunteers, but a peace treaty between North and South Korea has never been signed. According to the Congressional Research Service, there were some 3.8 million casualties: "The United States suffered 33,652 battle deaths and 103,284 wounded, in addition to 8,177 remaining unaccounted for. South Korean casualties included 58,127 dead and 175, 743 wounded. The estimated losses of North Korea and China were 523,000 and 945,000, respectively. In addition, the two Koreas each suffered estimated casualties of one million civilians." See further Rinn S. Shinn, "North Korea: Chronology of Provocations. 1950-2000", Foreign Affairs, Defense and Trade Division, Congressional Research Services, the Library of Congress, USA. In fact, the United Nations Command Military Armistice Commission (UNCMAC) continues to monitor the Military Armistice Agreement between North and South Korea along the Demilitarized Zone and constitutes the longest running UN peacekeeping operation.

87. Statement of 15 June 1998 of Ambassador Taeik Chung, Head of Delegation of the Republic of Korea to the Opening of the Rome Conference.

sensitive one for the US Administration, particularly given the large numbers of US troops stationed abroad and allegations of their serious misconduct. One of the more notorious incidents in South Korea came to light with the publication of an Associated Press article on 29 September 1999 alleging that, over a period of four days from 26 to 29 July 1950, US soldiers massacred some 300 Korean civilians at No Gun Ri. Despite the issuance of an order from Major General William Kean on 27 July 1950 that, since Korean police had been directed to remove all civilians from the area, "All civilians seen in this area are to be considered as enemy and action taken accordingly" and the account of many surviving eyewitnesses as to the commission of serious war crimes, the US Army has denied that its soldiers deliberately killed any Korean civilians.⁸⁸ The future reunification of the two Koreas remains uncertain and the prospects for violence, and hence the need for credible deterrence of crimes under international law on the peninsula, remain high.

IV. DOES THE ICC NEED ASIA OR DOES ASIA NEED THE ICC?

The Rome Conference, like any successful treaty negotiation process, involved much debate and give-and-take, that left no one State perfectly happy with the outcome. Delegations expressed their particular concerns and interests, but the majority of States from various regions were able to look beyond parochial concerns to the common interest of establishing a system of international criminal law and justice through the ICC. Although the Rome Statute is not a perfect document, it contains sufficient checks and balances between judicial oversight of the power of the Prosecutor, fair trial standards, and the relationship between the ICC and the UN Security Council's Chapter VII authority, that 139 States have attached their signatures to it in a very short time. All regions, except for Asia, have been moving rapidly forward in the pace of ratifications of the Rome Statute as well.

As we have seen, some Asian governments remain concerned that, were they to ratify the Rome Statute, the new international obligations would conflict with certain constitutional or other provisions in domestic law, for example, those relating to immunities from prosecution for the Head of State or other government officials, domestic rules prohibiting the extradition of nationals abroad for prosecution, or the use of the death penalty in the case of many Arab States. For some countries, such as Thailand, Laos, Mongolia and Vietnam, inadequate translation of the Rome Statute into the local language has hampered comprehension in key government ministries of the

88. See "No Gun Ri Review" of January 2001, Department of the Army Inspector General, at internet site: <http://www.army.mil/nogunri/BookCoverJan01Summary.pdf>, accessed on 30 March 2002.

full implications of the ICC as a new international institution and of the particular role it is intended to play. These practical difficulties in turn have slowed down amendments to domestic law that may be required before ratification. For such countries, eventual ratification of the Rome Statute may be more a matter of available time and legal and translation expertise, rather than a question of political will.

For certain other countries, particularly those more powerful and influential, such as China, India, Pakistan, Indonesia and Malaysia, understanding the principles and implications of the Rome Statute has been less of a challenge. Many of these governments probably recognize that, in spite of all their rhetoric for the ICC, and the great pride they can take as regards the functioning of their national political and legal institutions, actual implementation of international human rights and humanitarian law remains woefully inadequate. When a country ratifies the Rome Statute, it not only signifies its official commitment to the ICC as a working institution, but it undertakes to abide by international standards of fair trial, human rights and the rule of law, and to be assisted by the ICC in the eventuality when domestic prosecution efforts fail substantially. As we have seen, the official statement of each of these governments to the Rome Conference poses that the Rome Statute did not include this or that desired provision; one or other issue was not sufficiently addressed, the Rome Conference should have adopted the Statute by consensus and not by vote, and so on and so forth - and therefore the government could not sign or ratify the Rome Statute.

The ICC can and will carry out its important mission with or without the participation of Asian countries. It is likely to develop with the substantial involvement and support from Africa, the Americas, Europe, and Oceania, and to become recognized as a legitimate, credible and effective, if not universal, institution mandated to fight impunity for crimes of the worst character and greatest magnitude.

While the ICC would benefit from the cooperation of Asian countries to acquire custody over offenders, locate assets and get hold of information, Asia needs the ICC more than the ICC needs Asia. The survey above shows that, particularly in the smaller countries more vulnerable to invasion, foreign intervention or civil war stemming from ethnic or religious unrest, the ICC could supplement the efforts of domestic criminal courts to prosecute crimes under international law, ensure deterrence of further violations and help re-establish the rule of law, wherever domestic courts are unwilling or unable to do so.

Once the ICC becomes operational and demonstrates that it can dispense international criminal justice fairly and effectively, hopefully, the more influential Asian countries will realize that joining the ICC regime is squarely

within their interest also. The ICC represents a major step towards the better promotion and protection of human rights, good governance and the rule of law, through multilateral cooperation and support. Rather than a threat to any national interests, the extension of a universal system of international criminal justice could benefit the peoples in all countries and regions, including Asia.