
ANICC News

Bulletin



**A PUBLICATION OF THE ASIAN NETWORK FOR AN
INTERNATIONAL CRIMINAL COURT (ANICC)**

Vol. No.1 Issue. 1. December 1999

CONTENTS

Features

The future of ICC In Asia
Vitit Muntarbhorn.....(2)

Unearthing of Killing Fields in Bangladesh
Iftequr Mahmood.....(14)

Ensuring Protection to Children in Armed Conflict: The ICC a Positive Step Forward
Chitrlekha Massey.....(17)

Country Profile

Should India View the ICC With Double-Tined Spectacles of Suspicion?
Saumya Uma.....(11)

Report

UNGA Sixth Committee on Establishment of an ICC: Asian Intervention.....(5)
The Destruction of East Timor.....(13)

ICC Updates

Bangladesh signed the Rome Statute..... (4)
Asian Network for an ICC (ANICC)(9)

F E A T U R E

THE FUTURE OF ICC IN ASIA

Several Asian countries remain opposed to the creation of the International Criminal Court. Vitit Muntarbhorn writes on ways to encourage them to accept it.

The statute of the International Criminal Court was adopted by the international community in 1998 in Rome. What was Asia's reaction? Although many Asian states participated constructively in the lead-up to the adoption of the statute, the pattern of voting for it indicates non-co-operation and reluctance on the part of a number of key Asian countries. The vote was 120 to seven for the treaty without amendment. The no votes came from the United States, Iraq, Libya, Qatar, Yemen, China and Israel. Five of these countries are Asian. Other Asian countries also showed a degree of hesitation towards the statute. They were among the 21 who abstained.

Position in Rome Conference

India wanted a reference to weapons of mass destruction, i.e. nuclear, chemical and biological weapons, but this was not adopted. It also wanted restrictions on the Security Council's role, as was seen in its statement at the time of the vote: "The statute gives to the Security Council a role in terms that violate international law. The UN Charter did not give the Council the power to set up international criminal courts. What the Council seeks to do through the court is the power to block and the power to bind non-state parties. It is unfortunate that a statute drafted for an institution to defend the law should start out straying from established international law. Before it tries its first case, the court would claim its first victim – the Vienna Convention on the

Law of Treaties." As a nuclear power, India tabled an amendment to list nuclear weapons among those whose use is banned for the purposes of the statute. This was not accepted. India said: "The message this sends is that at the level of plenipotentiaries the international community has decided that the use of nuclear weapons is not a crime. What is worse, the statute does not list any weapon of mass destruction among those whose use is banned as a war crime."

Israel's statement was "Israel has reluctantly cast a negative vote. It fails to comprehend why it has been considered necessary to insert into the list of the most heinous and grievous war crimes the action of transferring population into occupied territory. The exigencies of lack of time and intense political and public pressure have obliged the conference to by-pass very basic sovereign prerogatives to which we are entitled in drafting international conventions, in favour of finishing the work and achieving a statute on a come-what-may basis. We continue to hope that the Court will indeed serve lofty objectives for the attainment of which it is being established."

Sri Lanka's standpoint was as follows: "We recognise the great importance attached to the establishment of the court but regret we have to abstain because the crime of terrorism was not included in the statute."

China said: "we have made many positive efforts to establish a fair and effective court. We have always held the view that the court should be an effective system, playing a supplementary role in international co-operation in judicial affairs. 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 an individual. The pre-trial chamber provisions to check those powers fall short. The adoption of the statute should have been on consensus and not by vote." China voted against the statute.

Turkey's views were these: "Turkey supported the establishment of the court throughout the preparatory work and the conference itself. However, it had wanted to see the crime of terrorism included in the statute under crimes against humanity. A formulation should be found allowing the opt-in, opt-out approach for states. For war crimes, it would have been better to have language stating that the court will not have anything to do with internal matters of states. Also Turkey did not support the powers of the prosecutor." Turkey abstained on the vote.

Singapore also abstained. Its stance was "We always supported a strong court; however, in the last hours provisions were drafted which involved just a small group of countries. There was a strange fix for the question of jurisdiction, which had appeared for the first time in the last minutes of the conference. To our dismay, chemical and biological weapons have been inexplicably dropped. The non-inclusion of the death penalty was also a negative aspect. That will not affect national jurisdiction, however."

Clearly, there was reticence on the part of several Asian countries towards the establishment of the court, varying from disagreement over the types of crimes covered to the jurisdiction of the court, the role of the prosecutor and the interaction with the Security Council. Underlying such reticence was the fear that the court would impinge strongly on national sovereignty.

In spite of such reluctance on the part of several Asian countries, it is intriguing to speculate about areas where confluence rather than conflicts will be possible.

From an international perspective, a key orientation will be to encourage Asian countries to become parties to the international humanitarian law treaties, which deal with, armed conflicts and the statute of the International Criminal Court. While these treaties are not up to date, their evolution has been concretely for the benefit of humanity. Inherently they also contain a degree of flexibility on many issues, which should allay the fear felt by some countries that they will erode national sovereignty excessively. These include the fact that several of these instruments do not reject the application of national laws but accept them, subject of course to international monitoring and consistency with international standards. The notion of national security is not neglected but is accommodated in some of the treaties, again subject to consistency with international norms.

Even the newly emerging jurisdiction of the International Criminal Court provides for various ways by which states can limit or block the operations of the court. In terms of confidence-building for the future, it should be recognised that there are at least two international forums where representatives of Asian countries meet and where humanitarian concerns are addressed: the periodic Red Cross conferences, backed by the Red Cross Movement, and the annual Asia-Pacific human-rights workshops, with the support of the United Nations High Commissioner for Human Rights. In particular, as part of the latter process, representatives of Asia-Pacific countries met in Tehran last year, followed by a meeting in New Delhi this year, to adopt the following ideas for more concrete programming: evolution of national human-rights action plans, promotion of human-rights education and fostering of national human-rights institutions. These components interrelate closely with peace and armed-conflict situations. From the angle of international humanitarian law and action, they can be utilised to press for a stronger agenda incorporating the key humanitarian treaties and principles noted above.

Suggested Advocacy for Asia

The activities which could be concretised even more strongly as orientations for the future include: -

-Training and education in international humanitarian law targeted not only on the general population but also power groups, especially the military and law-enforcers;

-Dissemination of international humanitarian law not only to government personnel but also to non-government armed groups; -

-Translation of international humanitarian law treaties into local languages and promotion of public participation, for example through public hearings, to discuss them;

-Protection of not only the victims who fall under the scope of international humanitarian law but also of those who do not fall under it (for instance victims of internal disturbances and tensions) by means of effective interventions through relevant and accessible services;

-Networking between civil society and non-governmental organisations to monitor violations; Prosecution of violators to counter impunity and offer reparation to victims;

-Establishment of independent and pluralistic national institutions for the promotion of human rights and humanitarian law, for instance national human-rights commissions and/or committees for humanitarian law;

-Improved monitoring from local to international levels to forewarn of potential violations, trace violations/violators and enhance transparency, accountability, reform and reparation to assist the victims. □

Vitit Muntarbhorn is a Professor of law, Chulalongkorn University, Bangkok, Thailand.

@COPYRIGHT 1999 BY WORLDSOURCES INC., A JOINT VENTURE OF FDCH, INC, AND WORLD TIMES, INC.

U P D A T E

Bangladesh signed statute of Int'l Criminal Court

In September, Bangladesh became the 3rd signatory of the ICC Statute from Asian region. Bangladesh Prime Minister Sheikh Hasina signed the statute of the International Criminal Court (ICC) on Sept 17 Thursday 1999 at the Signature Room of the UN Secretariat in New York City. In a statement on the occasion, Hasina said, "*Just now, I have signed the statute of the ICC on behalf of Bangladesh. At the Hague Peace Conference in May this year, I committed that Bangladesh would sign (and ratify) the statute very soon. I am happy to have fulfilled that commitment today*" reports UNB. She said Bangladesh welcomed the adoption of the statute of the ICC in July last year as Bangladesh itself was a victim of genocide during its Liberation War. Bangladesh, the Prime Minister said, has a particular interest in the establishment of a permanent international court to ensure that such heinous crimes are not committed in future and perpetrators brought to justice. "*We also believe that its establishment would promote human rights world wide,*" she said assuring that Bangladesh would always be ready to co-operate with the court in carrying out its responsibilities.

In separate statements, members of Bangladesh Coalition for an International Criminal Court (BCICC) and Amnesty International-Bangladesh Section congratulated Government of Bangladesh for signing the ICC Treaty and urged to ratify it immediately. Previously two countries from Central Asia, namely, yrgyzstan and Tajikistan, signed the ICC Treaty. □

R E P O R T

UNGA Sixth Committee on Establishment of an ICC: Asian Intervention

The Sixth Committee of UN General Assembly considered the Agenda item 158 (Establishment of the International Criminal Court) at its 11th to 14th meetings held from 20 to 22 October 1999. It had before it the reports of the first and second session of the Preparatory Commission for the ICC held in 1999. The representatives of 60 member states of UN made statements. In the following we are providing the statements delivered by the representatives of Asian states, namely Bangladesh, China, Indonesia, Iran, Japan, Republic of Korea, Mongolia, Thailand. All delegations expressed support for the ICC, as well as appreciation for the efforts of the Preparatory Commission.

Bangladesh

ANWARUL KARIM CHOWDHURY, said his country attached importance to the establishment of the Court since it had been a victim of genocide during its liberation struggle in 1971.

Bangladesh had embarked upon the ratification process, which involved difficult technical matters and important legal implications at the domestic level, he noted. His country, like other least developed countries, might need technical co-operation in order to complete that process, as well as to assist it the implementation of the Statute in future.

He said that the Rules of Procedure and Evidence and the Elements of Crimes should respect fully the letter and spirit of the Rome Statute to ensure fairness and effective functioning of the Court. Furthermore, the Elements of Crimes should describe in clear

terms the crimes under the Court's jurisdiction, taking account of international humanitarian law.

China

GAO FENG said his country had taken an active part in the formulation of the Rules of Procedure and Elements of Crimes. He was satisfied with the progress made so far and appreciated the positive and constructive approach taken by all members of the Commission. Referring to the

Elements of Crimes, he said the letter and spirit of the Statute with regard to crimes under the jurisdiction of the Court should be fully respected.

Further, the constituent elements of crimes must be described in accurate terms. The document should also reflect the Court's objective of suppressing the most serious international crimes. Only by strictly abiding by those principles, could the Elements of Crimes accurately reflect the spirit of the Statute and

enjoy universal acceptance. Any attempt to lower or raise the thresholds by which crimes were defined, or to expand or limit the jurisdiction of the Court, would only weaken the Court's ability to suppress the most serious crimes and would run counter to the original purpose of the international community.

The elaboration of Rules of Procedure and Evidence was complex; it called for a harmonization of different legal systems and rules of nations. The document was highly technical in nature. It needed to be as comprehensive as possible, while at the same time providing for flexibility. Any irrational provision could create a serious imbalance among the rights and obligations of the parties concerned and, again, could run counter to the purposes and objectives of the Court.

In welcoming the establishment of a working group on the crime of aggression, he said that crime was among the most serious of international crimes and should definitely be suppressed. Defining the crime, though, involved sensitive political and legal issues; the definition must respect the role of the Security Council and adhere to the principles of the Charter. Given the amount of work that remained to be done on outstanding issues, he favoured extending the duration of the Commission's sessions. China was ready to join in the effort to set up the Court and to promote its universality and authority.

Indonesia

FERRY ADAMHAR said his country had been active in all phases of deliberations on the Court. It was still in the process of giving meticulous consideration to the Statute, seeking in particular an effective mechanism to disseminate its contents to almost 200 million Indonesians across 13,000 islands. It was imperative to give an opportunity to all Indonesians, particularly the ones potentially affected by the ICC, to know about the establishment of a new institution aimed at furthering justice. Universal participation should be the cornerstone of the ICC, he said. The Court should be a product of mutual co-operation among all nations regardless of political, economic, social or cultural differences. Equally important was the need to scrupulously observe the precepts embodied in the Charter, such as consent, impartiality, non-discrimination,

State sovereignty and territorial integrity. The ICC was intended to supplement and not supplant national judicial mechanisms. Therefore, it should only be able to exercise jurisdiction with the consent of the State concerned, and should refrain from handling a case that was already before national court.

"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", he said. The Court must function with a clear understanding as to what constituted a specific crime. The fact that the Statute had been adopted did not mean that the concerns of States who had not yet signed could be disregarded. The international community should strive for a broad-based Statute with wide acceptance and universal participation.

Iran

SAEID MIRZAEI YENGEJEH said the Commission should prepare a long-term programme of work to ensure that it discharged all its assignments within its lifespan. It must take into account the concerns of all delegations in order to facilitate universal adherence to the future Court. However, care should be taken not to depart from the letter and spirit of the Rome Statute, which had been so delicately crafted. Attempts to reopen discussion on specific subtle issues would prolong the negotiation process and might prevent the Commission from finalising the Draft Rules of Procedure and the Elements of Crimes by the due date.

The Commission had managed to prepare elements for 37 out of 48 war crimes that fell under its jurisdiction, he said. That had been done despite the fact that some elements did not exist in the criminal codes of many countries. That work would greatly assist the judges of the future Court. However, proposals relating to direct or indirect modification of the Statute should be set aside and considered later by a review conference. Concerning the Rules of Procedure and Evidence, he said that if the working group adopted a flexible approach and did not engage in unnecessarily detailed drafting exercises, it would be able to accomplish its task on schedule.

He underscored the importance of a definition of aggression, saying that progress on that topic would undoubtedly encourage ratification of the Statute by many States. He welcomed the decision to establish a working group. The Commission should strike a delicate balance between the responsibilities of the Security Council on the one hand, and the independence of the ICC on the other. There should be a clear provision empowering the Court to render judgement if the Security Council failed to fulfil its mandate.

Japan

HIROSHI KAWAMURA recalled the excitement at the moment of adoption of the Rome Statute, saying the establishment of a permanent international criminal court had been an aspiration of the international community since the beginning of the twentieth century. Rome, however, represented only one step towards the goal of an effective, credible and functioning court.

The Elements of Crimes text was vital to the proper functioning of the Court, he said, since it would guide the Court in applying the Statute. There should be as much clarification as possible of crimes not specifically defined in the Statute. Moreover, consistency with existing laws of armed conflict should be maintained in elaborating the elements of crimes. For example, the law of naval warfare tended to be neglected, yet required serious consideration. The Rules of Procedure and Evidence were also of vital importance, since they were used in the day-to-day business of the Court. While the rights of victims were duly stressed, not enough attention was being paid to the rights of suspects or the accused. "My delegation has no intention of trying to weaken the Statute, but we are not allowed to violate human rights in the name of international justice."

Financial rules and regulations were the cornerstone of the Court since it would not be able to function without the proper financial basis, he went on. Delegations that had concerns about the Statute could not be ignored. "We should not consider them as a kind of outsider." Japan had long stressed the importance of having the ICC win the blessing of the international community as a whole. Countries that did not support the adoption of the Statute should be kept involved in

the discussions. However, Japan had no intention of reopening the debate on the Statute, which must remain untouchable. "What is important is for us to try to work out seriously something that would enable those delegations that could not share the excitement of Rome to join with us within the actual framework of the Rome Statute."

Republic of Korea

SUH DAE-WON said that the Rules of Procedure and Evidence and the Elements of Crimes should fully respect the letter and spirit of the Rome Statute. Their contents should derive from the relevant provisions of the Statute, without any change. Any question of their interpretation and application should be consistent with the Statute. Work on them should proceed in a manner that enhanced the independent and effective functioning of the Court.

He welcomed the decision of the Preparatory Commission to establish a working group on the crimes of aggression. Aggression was the gravest of all crimes against peace and security. As his country had throughout its history experienced the agony of aggression, it had a legitimate interest in the elaboration of the definition and elements of that crime.

Priority should first be given to the work on drafting the Rules of Procedure and Evidence and the Elements of Crimes as provided for in Resolution F, he said. At the same time, delegations should maintain momentum in preparing proposals for the definition and elements of the crime of aggression. Constructive co-operation and a spirit of compromise should guide deliberations on contentious issues.

Mongolia

JARGALSAIKHANY ENKHSAIKHAN said the successful completion of the Preparatory Commission's work would accelerate the process of signing and ratification of the Court's Statute. The creation of a viable and credible Court would deter the commission of the heinous crimes of genocide, crimes against humanity and war crimes and promote the bringing to justice of their perpetrators.

On the Rules of Procedure and Evidence being drafted by the Preparatory Commission, he said the right balance should be achieved between the rights of victims, suspects and the accused in order for justice to be carried out and basic human rights protected. With respect to Elements of Crimes, he said that possible crimes that were not sufficiently defined in the Statute should be clarified in that text as much as possible. Mongolia therefore welcomed the decision to establish a working group on the crime of aggression at the next session of the Commission. Mongolia had consistently supported the view that the crime of aggression should be clearly defined and reflected in the Statute. It hoped the working group would accomplish its task before June 2000.

The Preparatory Commission should be given high priority in the allocation of time and resources, he went on. A third three-week session next year should not be ruled out. If the need arose, inter-sessional meetings should also be envisaged. His Government was completing the translation of the text of the Statute into Mongolian. It intended to sign the Statute in the near future and to present it at the State *IkhHural* (parliament) for ratification.

Pakistan

JAMSHED HAMID said the Court would have a deterrent effect, forcing at least some of those tempted to commit atrocities to think twice. People planning truly heinous crimes would know that the international community would eventually hold them accountable. Victims and their families would also be able to come to terms with their painful past and embark upon a process of mental reconciliation, knowing that those who committed the atrocities had been brought to justice. A sovereign State would be failing in its duty if it permitted crimes covered by the Statute to go unpunished. For that reason, the principle of complementarity was the cornerstone of the Court's jurisdiction.

Reiterating his support for a strong and effective Court, he said his country's main concerns related to provisions that had the potential of impinging on State sovereignty. The Court should complement and not supplant national legal systems. In Rome, Pakistan had sought to make

the Court effective and independent within the spheres of its jurisdiction. However, there were still a number of provisions that tended to undermine the basic principle of complementarity. As examples, he cited the prosecutor's role in initiating investigations, the Security Council's ability to initiate proceedings through referral, and the possibility for challenging a trial conducted by a State.

He welcomed the establishment of a working group on definition of the crime of aggression. Although it was a complex task, with understanding and goodwill, the difficulties could be overcome.

Thailand

MANOP MEKPRAYOONTHONG said his country was heeding the call for States to become parties to the Rome Statute, so that there would no longer be impunity for perpetrators of the most serious crimes of concern to the international community. For a number of States, including his own, the Rules of Procedure and Evidence being drafted by the Preparatory Commission would be a crucial yardstick by which to determine whether it was feasible to assume the obligations of the Statute.

He urged that the Elements of Crimes reflect, rather than depart from, contemporary international law. If lacunae existed, he hoped that they would be filled in such a manner as to facilitate and not impede the rendering of international criminal justice by the Court.

Above all, he said, the June 2000 deadline for completion of the Commission's work, must be adhered to. He expressed appreciation to the various bodies, including the International Committee of the Red Cross (ICRC), which had played an important role in conducting research and presenting an impressive compilation on elements of crimes, particularly war crimes, under prevailing law. □

Source: *United Nations Web Page*
<http://www.un.org/law/cod/sixth/54/>

U P D A T E**ASIAN
NETWORK
FOR
AN ICC**

“The ICC promises, at last, to supply what has for so long been the missing link in the international legal system, a permanent court to judge the crimes of gravest concern to the international community as a whole-genocide, crimes against humanity, and war crimes.”

— **KOFI ANNAN, SECRETARY-GENERAL,
UNITED NATIONS**

Throughout the 20th century, perpetrators of the most egregious crimes against humanity have rarely been brought to justice- they have simply walked free. While ad hoc war crimes tribunals and truth commissions- like the recent ones in Rwanda, Bosnia, and South Africa – present important opportunities for justice and reconciliation on the national regional level, what’s needed is a more systematic approach; a permanent INTERNATIONAL CRIMINAL COURT (ICC).

After two years of negotiations by a Preparatory Committee set up by the UN General Assembly, a Diplomatic Conference of Plenipotentiaries convened in Rome, Italy for five weeks during the summer of 1998. On the 17 of July of 1998, with an overwhelming vote of 120 in favour, 7 against and 21 abstentions, the Conference adopted the Statute of the proposed ICC. The Rome Statute will enter into force --and the ICC will be formally established-- after 60 countries ratify it. As of November 1999, 90 countries had signed the statute, thereby indicating their intent to ratify; and 5 countries, namely, Fiji, Italy, Senegal, San Marino and Trinidad and Tobago, had already ratified the Statute.

**THE IMPORTANCE OF
MOBILIZATION IN ASIA**

Some of the more terrifying crimes of international significance of the last half century have taken place in Asia. However, the governments' consciousness about the necessity to address the scars left by crime and impunity varies. Some countries have taken steps to deal with the important issue of memory, justice and reconciliation, while in others, this is still an issue that is kept apart from public debate.

In Bangladesh, for instance, the massive abuses suffered by the population during their independence war in 1971, prompted successive governments to ratify various international treaties protecting Human Rights. On the other side, the Cambodian government still expresses doubt about how to proceed to put closure to the legacy left by the genocidal Khmer Rouge regime. In countries like Indonesia or Myanmar whose civil societies are actively committed to

re-democratization, the issue of how to deal with past atrocities will be an important test for the strengthening of rule of law. Recent atrocities and crime against humanity conducted by armed militias in East Timor, again showed that human civilization is not matured enough to behave with humanity and dignity.

Asia is the only continent where governments have not been able to produce a comprehensive Human Rights declaration and the instruments to uphold it, such as a Commission or a Court. The current campaign towards the establishment of the Court could raise awareness about the necessity to ratify other important Humanitarian and Human Rights instruments, as well as about the importance to bring internal legislation in line with the duties established by those treaties.

International law can be an exceptionally useful tool to ensure that the future of Asian peoples is protected from abuses by criminal regimes or occupying armies. A permanent International Criminal Court, capable to deter individuals planning aggressive wars, genocide, crimes against humanity and war crimes is essential for a future of peace and justice in the region. Asia needs the court urgently in order to deal with horrible crimes committed in some of its long standing wars and armed conflicts in the region.

A number of Asian countries, particularly the Republic of Korea, Philippines, Singapore and Brunei, have played a very important role along the past few years at the UN negotiations as members of the "Like Minded" group - an informal forum of countries that have agreed in certain core principles regarding the effectiveness and fairness of the future ICC.

From Asian region, Bangladesh, Kyrgyzstan and Tajikistan have already signed the treaty, which indicates their favourable political will towards future ratification. The government of Bangladesh has announced that it will soon ratify the Rome Statute and meticulous study on the necessity to enact enabling legislation previously to signature and ratification is being conducted in Japan. However, these positive steps do not belie the fact that, of 90 signatories to the Rome Statute only 3 come from Asia.

Despite the laudable achievement on international level, in many countries in Asia, the public is largely unaware of the creation of the

ICC. It is therefore urgent to disseminate in the region the good news of the future establishment of this Court and gain more support for its establishment. If a public awareness campaign is not intensified and considerable pressure is not put on state authorities, ratification from Asia will be very slow.

ANICC: CURRENT NEEDS FOR ENHANCED COORDINATION IN ASIA

Despite the activities and the initiatives that have been launched in Asia, the current efforts have not yet amounted to a clear strategic co-ordination capable to enable organisations in the field to conduct advocacy and educational plans adapted to the specific realities of their countries.

In the months to come resources will be needed to co-ordinate an effective advocacy campaign, educational and organisational activities centred in a regional conference involving civil society and governments, and basic operational expenses.

Recently, to strengthen ratification campaign efforts in Asian region an ad hoc secretariat of ASIAN NETWORK FOR AN INTERNATIONAL CRIMINAL COURT (ANICC) was established in Dhaka, Bangladesh. The activities of the Ad Hoc Secretariat includes work in information gathering and dissemination, communication with governments, and co-ordination with NGOs for formation the formal network.

THE TIME TO ACT IS NOW

The nascent ANICC need you and your organisation to call on the government in your country to signal their commitment to international justice by signing and ratifying the ICC Statute. ANICC also invite your organisation to join the network. To join the ANICC, for more information on the ICC, please send message to our Ad hoc Secretariat. □

By Fayazuddin Ahmad, Program Co-ordinator, Ad Hoc Secretariat, ANICC. To contact Fayaz, email aniccmedia@yahoo.com

C O U N T R Y P R O F I L E

SHOULD INDIA VIEW THE ICC WITH DOUBLE-TINTED SPECTACLES OF SUSPICION?

India's staunch opposition to the creation of the ICC is merely an absolutist version of sovereignty.

Saumy Uma writes, it is time India realizes that such an approach is rapidly becoming an anachronism.

India, the largest democracy in the world, abstained from voting at the Rome Conference, which adopted the Statute on the International Criminal Court (ICC). This article seeks to critique the approach of the Indian government to the ICC.

The Indian government's demands during the Conference centred around four issues:

- That first use of weapons of mass destruction (particularly nuclear weapons) ought to be considered a war crime and to be adjudicated in the ICC;
- That terrorism – particularly cross-border terrorism and terrorism externally inspired, aided and abetted - should be included within the jurisdiction of the ICC;

- That provisions facilitating the Security Council to refer cases which constituted a threat to international peace and security to the ICC, ought to be omitted; and

- That the ICC's jurisdiction ought to be restricted to exceptional circumstances.

However, the principal reservation of the Indian government (which was, of course, not voiced) was its anxiety that its sovereignty would be infringed upon, and that its political leaders might be held internationally accountable for the abuses committed within the nation.

India has a proclaimed legacy of pursuing and promoting international peace. Several centuries ago, *Kautilya* emphasised the importance of

ensuring international peace in his treatise on political governance – *Arthashastra*. Mahatma Gandhi's concept of *ahimsa* (non-violence) was a halfway house to resisting colonial domination. The Indian Constitution provides for promotion of international peace as a fundamental duty of the State. The Indian philosophy of peace was outlined by the former Prime Minister of India, Jawaharlal Nehru, when he said: Hold your security, hold your principle, but recognise the fact that we have to live in this world together in peace even though we differ from each other. (Lok Sabha Proceedings, 9 April 1958). A proclamation of international peace continues to be made by all subsequent national and political leaders.

However, the Indian government's miserable failure, in 1971, to make the then Fascist Pakistani military regimes accountable for committing genocide in Bangladesh, raping thousands of Bangladeshi women and also for committing human rights abuses against the Joint Friendship Force, cannot be erased from public memory. (The Joint Friendship Force included thousands of Indian soldiers). Justice became subservient to diplomacy and the two hundred odd Pakistani prisoners of war that were retained in India for the purpose were finally released. The army officials responsible for the brutal abuses continue to roam around freely today as respectable citizens. Perhaps instituting a regional forum for human rights or the ICC would have made some difference.

It is also not possible to turn a blind eye to the human rights and humanitarian abuses that continue to be perpetuated by the Indian armed forces upon innocent civilians in Kashmir and the north-eastern states such as Nagaland and Manipur – under the pretext of ensuring national security and preserving territorial integrity. Domestic legislations such as the Armed Forces Special Powers Act 1958 and the Jammu and Kashmir Security Forces Acts not only confer excessive and unbridled powers to the armed forces, but also bar channels for legal redress. Of grave concern is the fact that the National Human Rights Commission (NHRC) has been prevented from investigating military atrocities (through Section 19 of the Protection of Human Rights Act 1993), thus facilitating such abuses to continue with impunity. The Indian government has engaged itself in the vicious project of camouflaging its abuses from the public eye

through a propaganda that it can commit no abuses due to its peace-loving nature, and that such accusations are without substance, and are made solely with political motivations. In the light of the Indian power holders' reluctance to making the armed forces accountable to a national institution, namely the NHRC, it is perhaps not surprising that they view the creation of the ICC with double-tinted spectacles of suspicion.

Undoubtedly, the Indian concept of peace has been diluted and distorted through the decades. While proclaiming to be peace loving, the Indian government conveniently forgets the fact that true and lasting peace cannot exist without justice. Failure to bring the perpetrator to justice facilitates perpetuation of these abuses. Justice entails ending impunity and providing redress to victims – precisely the philosophy behind the creation of the ICC. The Indian government should stop viewing the ICC as a judicial institution that would threaten its own sovereignty, and perceive it as a preventive institution for the perpetrators of heinous crimes of the largest order. In the context of Kashmir, such a preventive institution could ensure that the armed forces as well as the terrorists adhere to a minimum, internationally recognised standard of human rights and humanitarian law.

As the largest democracy in the world, India should play an active role in sustaining world peace by supporting the ICC. It should realise that the ICC has the potential to promote rule of law and international human rights. Instead, by abstaining from voting at the Rome Conference, it has moved two steps backwards. The Non-Aligned Movement (NAM) has supported the need to ensure the establishment of the ICC without any delay. India, which has been perceived as the leader of the Non-Aligned Movement (NAM) since its inception, has now ironically positioned itself against the movement. Secondly, it has also failed to recognise the world pulse by aligning itself with the 21 other countries that abstained, as against 120 countries that voted in favour of the Rome Statute. Further, through its abstention, India has grouped itself with countries whose human rights records are poor – such as China, Israel and Libya, as well as the United States. This is a negative trend and does not speak well of India's commitment to human rights and international peace.

India's membership in the United Nations, its active participation in UN conferences and its adoption of several important international conventions indicate that the Indian government does not and cannot live in a political vacuum. Though the Indian leadership may deceive itself to the contrary, some amount of accountability to the international community already exists, in the form of international public opinion. Adopting the Rome Statute and supporting the creation of ICC would ensure a more effective mechanism for such accountability, in those situations where even the most independent and far-sighted judiciaries may be unable to function. With the recent trend of globalisation, India cannot afford to have a rigid approach to the

concept of sovereignty and blindly cling to die hard nationalism. India's staunch opposition to the creation of any supranational body, to which it may have to be accountable, is merely an absolutist version of sovereignty. It is time India realises that such an approach is rapidly becoming an anachronism. □

Saumya Uma, Indian Human Rights Activist, is a practising lawyer, Bombay High Court, India. To contact Saumya, email <sumyauma@excite.com>.

U P D A T E

The destruction of East Timor

An Initial Report prepared by UNAMET

In the first week of September 1999, the events witnessed by the UNITED NATIONS MISSION IN EAST TIMORE (UNMAMET) represent the fulfilment of the worst threats made by the pro-autonomy campaigners and their Indonesian Government supporters. In a report (UN Doc S/1999/976 Annex) UNAMET said that in the guise of a backlash against the vote for independence, what has actually happened is nothing less than a systematic implementation of a "scorched earth" policy in East Timor, under the direction of the Indonesian military. The report said: "In Dili it would appear that virtually every home or building has been systematically looted of its contents, and a large proportion of them have been burned. The central business district has been entirely gutted."

Similarly, reports have been received from all over the western part of East Timor of massive forced displacement of the population to refugee camps in West Timor. The report said, "it now appears that efforts are under way to permanently disperse these people all around Indonesia". But the terror has not ended with their displacement. The UNAMET have reliable and corroborated reports that the militia/TNI are at this moment combing the refugee camps with lists looking for students, intellectuals and activists, then taking these people away.

UNAMET have received reliable eyewitness testimony that people were carefully checked and interrogated during transit, and that certain individuals were killed and thrown overboard. In UNAMET's view, this massive forced relocation outside of East Timor has been designed also as the first stages of a genocidal campaign to stamp out the East Timorese problem by force. In addition to the killings reported as part of the relocation programme, there are many reports of deaths in East Timor. In particular, many pro-independence activists and other community leaders, including the clergy, are feared to have been killed in reprisal for their support, real or implied, for the independence option. There are also reports of mass killings in various locations, including Dili and the IDP camp in the church in Suai. It is clear that these crimes against humanity are part of a "scorched earth" policy. □

F E A T U R E

UNEARTHING OF KILLING FIELDS IN BANGLADESH: DEMANDS FOR TRIAL OF WAR CRIMINALS OF 1971 GENOCIDE

While the Bosnian, Rwandans, Kosovos and East Timorese have succeeded in persuading the international community to form war crime tribunals, the people of Bangladesh are still waiting for the government and the international community to establish a similar kind of war crime tribunal in relation to the genocide of 1971. Iftequar Mahmud reports on the recent unearthing of a killing field in Dhaka which has again led to demands for the trial of war criminals responsible for the 1971 Genocide.

The Muslim Bazaar Killing Field

In Bangladesh, the name of Muslim Bazaar is now known to almost everyone. This market area is located in a suburb of Dhaka at the edge of Mirpur . For the last 28 years this was just another isolated place but covering up some have the most gruesome and gory part of Bangla's Liberation History.

After 28 years of Bangla-holocaust, the victims of Pakistani barbarism couldn't bear it any longer that their horror stories were not being heard or told.

On 27 July 1999, a killing field from 1971 was discovered at the Mirpur Muslim Bazaar situated in Dhaka, the capital of Bangladesh. The people of Bangladesh might have remained in oblivion about this killing field if the construction workers at the site of the Nuri Mosque at Mirpur Bazaar had not discovered numbers of bones on the construction site. As soon as the news of this discovery appeared in the press, the Liberation War Museum of Bangladesh took the initiative to conduct extensive excavation of the area to find the remains of the victims of the 1971 Bangladesh-Holocaust. All available scientific and medical facilities were utilised to gather evidence of the individuals and the cause and time of their death. Initial examinations have

provided enough evidence for claims that these bodies are those of victims of the 1971 Genocide [in fact may have been caused by collaborators]. So far, several human skulls and over 500 small and big bones have been discovered at the killing field at Muslim Bazaar's Nuri Mosque.

The Jalladkhana (Slaughter House)

After the excavation of Muslim Bazaar and the exhumation of the remains of some of the victims of 1971, the Liberation War Museum began the work of cataloguing and pre-investigation on different sites where the unfortunate victims of 1971 were dumped. The Museum decided to select ten sites for further excavation and exhumation of the remains according to appropriate scientific and technical methods as suggested by Dr. William Haglund of the international organisation, Physician for Human Rights.

The Jalladkhana (Slaughter House), also located in Mirpur (Section 10 Block D), has been selected for immediate excavation and exhumation. The Bangladesh Army's 46 Brigade 7 Field Regiment Artillery has assisted the Museum in this task. The excavation began on November 15 1999. After preliminary investigation it was found that the Pakistan Army and their agents had used this site (an abandoned pump house) during 1971 to kill, slaughter and dump many innocent Bengalis. The bodies were thrown into a house built under the pump house. As of end-November, 76 human skulls and hundreds of human bones were discovered from the Jalladkhana Killing Field.

Demand for Establishing A War Crimes Tribunal

The discovery of the killing field at Muslim Bazaar has Awakened a response in all Bengalis, and especially the younger generation. Akku Chowdhury, Director of the Liberation War Museum commented:

"What I have experienced by the participation of all those who were born after 1971 has been an eye opener for me. Most of those who have come forth in the actual work of excavation and

exhumation and extended their support in many ways belong to the generation that has not seen the liberation struggle or they were very young at that time. The Army personals that participated mostly belonged to the generation born after 1971. Their ages ranged were from 22 to 32. But I was most impressed with the spirit, determination and commitment they had to accomplish this work most diligently. It reminded me of 1971 during the war when we all shared a similar spirit and dream of freedom."

The discovery of the mass grave at Mirpur has raised immediate questions about what to do next. The unanswered questions regarding trials of the perpetrators of the genocide have surfaced again, especially at a time when memories of similar holocausts in Bosnia, Rwanda, Kosovo and East Timor are still so fresh.

Recently civil society in Bangladesh urged the Prime Minister Sheikh Hasina to take urgent steps to hold the trial of the alleged perpetrators of the 1971 Genocide. It is noted that that no new law is required for initiating such trials. The International Crimes (Tribunals) Act, 1973 (Act No. XIX of 1973) enacted by the then Government of Bangladesh is sufficient for this purpose.

Taking necessary steps under this Act is also an international obligation for Bangladesh as a state party to the Genocide Convention of 1948. Bangladesh acceded to the Genocide Convention in October 1998. The Genocide Convention obligates any State Party to not only enact "necessary legislation" but "to punish" the perpetrators of genocide. Most recently, the Bangladesh Prime Minister signed the Rome Statute on the International Criminal Court. Bangladesh officials said that they approached the signing of the ICC Statute with a sense of the nation's unique history, and in the knowledge that that it has on its Statute books Act No. XIX of 1973, a comprehensive law for the trial and punishment of crimes against humanity, genocide, war crimes and violations of the humanitarian rules contained in the Geneva Conventions of 1949 as well as any other crime with international legal implications. Therefore Bangladesh does need to pass any legislation to fulfil the complementarity obligation under the ICC Statute.

Although this Act remains in force, it remains unutilised. No one has yet been prosecuted, tried or punished under the Act, and no tribunal has ever been set up, as required by its provisions.

The Liberation War Museum and the civil society have called on the Government of the Bangladesh to set up one or more Tribunals

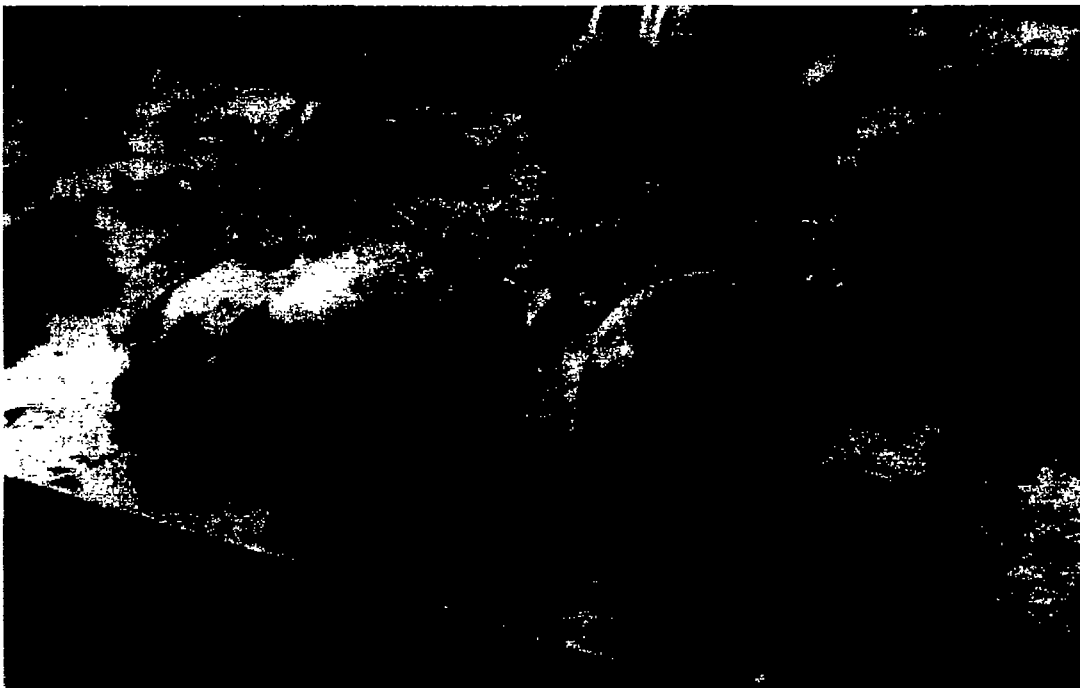
under section 6 of the International Crimes Tribunals) Act, 1973. Therefore Bangladesh is not only required under national law, but also obliged by international law, after acceding and signing the Genocide Convention and the ICC Statute respectively, to set up such a Tribunal.

An Appeal to the International Community

The Liberation War Museum sent an urgent appeal for international observers to visit this spot to verify for themselves the evidence of atrocities committed by the Pakistani Forces and their agents in 1971. " We appeal to all conscientious people of the world to find the truth and help us do it"- the Museum said. Bangladesh civil society further requested the Government of Bangladesh to make an appeal to the international community to take up the matter of genocide committed by the Pakistani Army and their local auxiliary forces, which could clearly be categorised as offences under the Genocide Convention of 1948 and to conduct an effective investigation regarding the alleged perpetrators of genocide in Bangladesh during 1971. Bangladesh civil society believes that establishing the truth regarding the 1971 genocide and holding the trial of those responsible is critical to establishing peace and justice in the region.

Iftequre Mahmud, a postgraduate law student of Dhaka University, is General Secretary of Law Review, Dhaka. To contact Iftequre, email <ask@citechco.net>

Source: www.liberationmuseum.org



RECENTLY EXACAVETED HUMAN SKULLS AND BONES OF BENGALEES KILLED IN 1971
@ PHOTO : LIBERATION MUSEUM DHAKA

F E A T U R E

ENSURING PROTECTION TO CHILDREN IN ARMED CONFLICT: THE ICC A POSITIVE STEP FORWARD

By Chitrlekha Massey

Children are the future and core of any society. It is a universally accepted fact that children are entitled to special status because we accept and recognise that childhood is a special time in our lives. Childhood is important in itself. Children have a right to be children and not adults or mini-adults. They are for many reasons an especially vulnerable group: because of physical, psychological and emotional reasons. However, the biggest reality of children's lives is that others, i.e. adults, rule their lives. Children are developing and potential personalities. There is therefore a great moral responsibility on adults in terms of obligatory responsibility towards children. Unfortunately, adults are not always the best guardians for children and the "best interests of the child" do not always guide their actions.

Children in Armed Conflict: A Horror Image from Asia

As we stand on the threshold of the next millennium, there are more than 300,000 children participating in armed conflict's all over the world today. Some of the reasons attributed

to this are the common problems of social injustice, poverty, and insurrection. In Asia there has been an unfortunate use of children in armed conflict one such prominent example that springs to the mind immediately is the time of the Viet - Cong years. Why? Why use children at all? Children are used as they make good fighters, they are dependable, they obey orders, don't make demands, they are dangerous as they seem harmless, are effective spies, can be used to sabotage and lay mines, and given the easy availability and lightness of weapons such as the AK-47 or the M-16 which are easy to master and use: these children are deadly on any frontline! Since the end of the Vietnam War, there have been other countries in Asia that have seen the widespread use of children in armed conflict such as Afghanistan, Burma, Philippines and Sri Lanka.

In Afghanistan, for instance given the difficulty in accessing this information not much is known currently. Modern Afghan misery began in 1978. Eighty-five thousand Soviet soldiers invaded Afghanistan. The *Mujahedin* put up an unexpected and bitter resistance to the new government. The fighting was bloody, and both sides settled into a war of attrition, not unlike

the U.S. effort in Vietnam a decade earlier. We need not go into details of the Afghan - venue and the proxy Soviet -US war. The question however is the "when and how" more and more children ended up on the battlefield in Afghanistan. Children are there growing up fighting, fighting for an ideology that they don't necessarily understand. Many *Mujahedin* claim that it is impossible to stop zealous children from enlisting in support of the cause, but their participation has been so highly valued that for children it seemed the "right thing to do" to be a man! The *Taliban* continues its fight for control over the country and children in Afghanistan continue to be devastated by the war. Some fight for revenge, for others, it's the only means of survival. On August 20 1999, the UN called on the *Taliban* and all opposition forces in Afghanistan to stop recruiting children in the civil war. The UNICEF representative Lous Georges Arsenault has been quoted by the BBC as saying "We know its increasing and that why we are worried. There are more fighters being recruited and there are more students under the age of 18, that's why we are making it an issue much more now."

In Burma or Myanmar another Asian State, the State Law and Order Restoration Council (SLORC) has child soldiers in its ranks. The official conscription age of the SLORC is 14 years. The recruits are designated "*Ye -Nyunt Youth*". They are given political training and taught to be loyal to the government and the army. UNICEF has identified one such camp run by SLORC in the *Shan State* where children of 7 years and above are being indoctrinated. Children are killed, forcibly conscripted, unwillingly separated from their parents and families, kidnapped, tortured, forced to kill, torture and rape and they are either underpaid or not paid at all. They suffer drug abuse, ethnic discrimination and sexual exploitation. A Burmese boy testified, "sometimes I fell asleep when I was on guard duty, I was beaten by my corporal. He beat me like a dog, like I was an animal, not a human being. There were two or three suicides during that time, of boys who had been hospitalised and finally shot themselves." Children in the Burmese conflict are used as porters by the SLORC forces, in the daytime they are made to carry guns and ammunition and follow the soldiers and at nighttime the girls frequently suffer mass rapes.

What is it like in the opposition forces? Almost all-Burmese groups have child soldiers in their ranks. The treatment, recruitment and conditions of service vary from group to group. The phenomenon of child soldiers in Burma can be understood only within the context of militarisation of the society as a whole. Children grow up in an environment where they are fighting for resistance and to is a soldier is to be a hero and on the other hand for many joining the armed forces is the only means of survival often their only chance of a meal.

In Sri Lanka, most children are reportedly fighting for the Tamil Tigers or the LTTE. There have been reports of forced conscription by the liberation fighters and families that were in a position to pay for their children to leave the country have paid up, and protected their children from the fighting but for the poor this is not always possible, Life for these rebels is hard, they fight, kill, torture are tortured. The LTTE claims that young recruits are volunteers for the cause. Most parents feel that their children are attracted by the *rambo-esqe* image of the LTTE or the promises made by them, one soldier stated that he had run away from home to join the LTTE because he believed he would be able to learn to ride a motorcycle and have special glasses for motorcycle riding! Others join for reasons of revenge, or as a measure of security.

According to an Images Asia report, these children on the frontlines do not really have any choice and besides, " they make the best fighters." Fear is the major determining factor in their obedience and performance. They have only the options of murder or suicide. It has been noted that when a large-scale battle is impending the recruitment of children in Burma for example shoots up drastically.

Child soldiers interviewed by the Images Asia Team report the expression of fear, despair and horror as their feelings when they were constrained to beat, torture and rape or witness such crimes as part of their initiation into the forces. Unfortunately there exists very little understanding of Post -Traumatic Stress Disorder, and hence the scars, mental and physical, of these children remain. Research conducted has established that children exposed to violence grow up to be violent

adults and as *Mahatma Gandhi* said if we are to make peace in the world, we have to begin with the children.

Protecting Children: International Legal Regime

In the examples used above all the three countries are parties to the Convention on the Rights of the Child, 1989 (CRC). According to Article 38 of the CRC, State Parties "undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child." They are also under an obligation to take "all feasible measures to ensure" that anyone under 15 does not take a direct part in hostilities. In fact it is expected that states would not recruit under 15 years old and when presented with a choice would opt for the older over a younger.

Article 38 has the infamous reputation for being the most controversial of all articles during the drafting of the CRC. It has been described as the "most shameful" the reason being that military feasibility has been accorded greater importance than children did lives. Today the drafting process of an Optional Protocol (OP) to the CRC has similar problems. Since the CRC came into force and it has almost universal ratification, the exceptions being the USA and Somalia. Yet despite this we know that children as young as 7 are on the battlefields, kidnapped and brutalised, drugged and forced to fight. Children have been forced to commit atrocities. Rwanda being the unique example of children being tried for the crime of genocide! The international community has spoken of its moral outrage at this abuse of children but not enough has been done.

As we can see from the above examples, though these countries are under a legal obligation to protect their children from the effects of armed conflict, the reality is that children are fighting and suffering extreme violations of their rights. Article 38 of the CRC, which is the most powerful and all-encompassing legal protection available to

children today, fails them in times of armed conflict, by not having stronger standards and in-built implementation of Art 38. It is not enough to simply have good laws, ensuring the implementation of good laws is imperative. Since the CRC has come into force, the international arena has seen the beginning of some positive developments. The ILO Convention 182 for example has described a child as every individual under the age of 18, a first in any international legal instrument and has described the recruitment of children as one of the "worst forms of child labour".

Article 8 of the Rome Statute: A Good Beginning

Further Article 8 (2) (xxvi) of the Rome Statute of the International Criminal Court (ICC) though not yet in force, it makes the recruitment of children under the age of 15 and their participation in hostilities a "war crime" is a very positive step forward in ensuring protection to children forced to fight in conflicts like in Afghanistan, Burma or Sri Lanka, because it means that the person responsible for recruiting them will be punished. Like any international treaty this is a negotiated outcome and there was much disappointment in Rome that "18" was not been the age the international community settled for, disappointing yes, but it is a beginning, a good beginning and given the potential of the ICC in supporting world peace and promoting justice by ending impunity, this article offering protection to children, by protecting them from this vicious cycle of violence, making a reality of the ICC would be a positive step forward to world peace. A step that all countries aiming for world peace should seriously consider.

Chitralekha Massey, human rights activist from India, is a Ph.D. candidate at the University of Nottingham Law School in the United Kingdom. Her research focuses on Child Soldiers and International Law. To contact Chitra, email <llxjcm@brn9.reg.nottingham.ac.uk>

ASIAN NETWORK FOR AN INTERNATIONAL CRIMINAL COURT

ANICC Ad Hoc Co-ORDINATION COMMITTEE

Dr. Mario Gomez,
Lecturer of Law, University of Colombo
Sri Lanka

Somchai Homlaor
Secretary General Forum Asia
Bangkok Thailand

Sara Hossain
Legal Officer (South Asia) Interights
London United Kingdom

Zaved Hasan Mahmood
Postgraduate Research Nottingham University UK
Ain O Salish Kendra Dhaka Bangladesh

Prof. Osamu Niikura
Professor of Law, Kokugakuin University
Japan

Shushil Pyakurel
Executive Chairman INSEC
Kathmandu Nepal

Usha Ramanathan
Advocate, Supreme Court of India
New Delhi India

Dr. D.J. Ravi-Ravindharan
Consultant Cambodia Office
UN HCHR

Indai Lourdes Sajor
Director, Asian Centre for Women Human Rights (ASCENT)
Philippine

Program Co-ordinator
Ad Hoc secretariat (Dhaka)

Fayazuddin Ahmad

ANICC News Bulletin published by the Ad Hoc Secretariat of the Asian Network for an International Criminal Court. *Edited by:* Zaved Hasan Mahmood. Member, Co-ordination Committee. *Ad Hoc Secretariat:* c/o Ain O Salish Kendra, 26/3 Purana Paltan Line, Dhaka 1000 Bangladesh Tel: 0088 02 831 5851 Fax: 0088 02 831 8561 Email: aniccmedia@yahoo.com

ANICC News

Bulletin



**A PUBLICATION OF THE ASIAN NETWORK FOR AN
INTERNATIONAL CRIMINAL COURT (ANICC)**

Vol. No.1 Issue. 1. December 1999

CONTENTS

Features

- The future of ICC In Asia***
Vitiit Muntarbhorn.....(2)
- Unearthing of Killing Fields in Bangladesh***
Iftequre Mahmood.....(14)
- Ensuring Protection to Children in Armed Conflict: The ICC a Positive Step Forward***
Chitralekha Massey.....(17)

Country Profile

- Should India View the ICC With Double-Tined Spectacles of Suspicion?***
Saumya Uma.....(11)

Report

- UNGA Sixth Committee on Establishment of an ICC: Asian Intervention***.....(5)
- The Destruction of East Timor***.....(13)

ICC Updates

- Bangladesh signed the Rome Statute***.....(4)
- Asian Network for an ICC (ANICC)***.....(9)