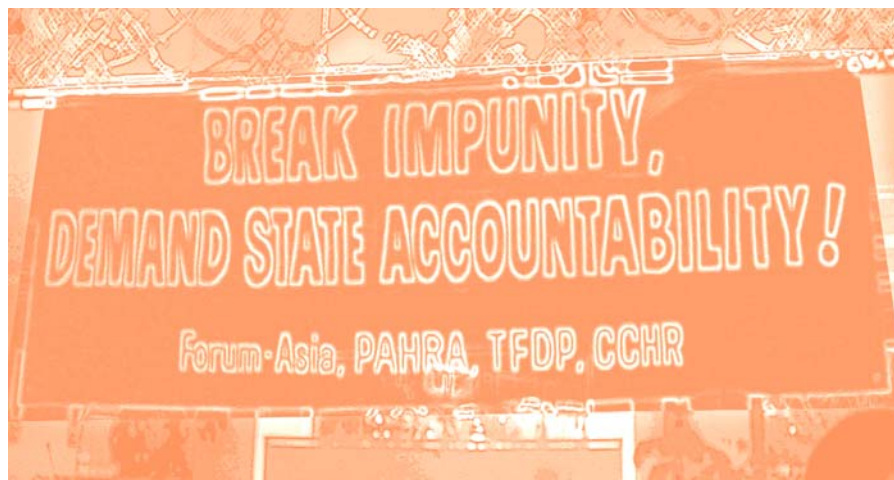


Moving from Impunity to Accountability

By Rebecca D. E. Lozada

Ancients say, "War is a vanishing point of law, and before arms, the laws fall silent."



Civil society groups from Southeast Asia calling for state accountability.

The countries of Southeast Asia know this well. The culture of impunity in times of war and internal conflict has been horrifically evident in the subregion. During the Second World War, the Japanese Imperial Army forced some 2,000 women – mostly coming from Korea and China, and also women

from Malaysia, Indonesia, East Timor and the Philippines – into sexual slavery as “comfort women.” More recently, the Khmer Rouge regime in Cambodia laid to waste a million lives in its reign of terror between 1975 and 1979. Today, the peoples of Burma, Aceh, and Manipur among others constantly call for the rule of law to prevail in the midst of turmoil in their lands.

These are tragedies not only to the victims and their families but also to the entire world. While impunity reigns, transgressions of human rights and international humanitarian law will go on threatening human security and peace.

ICC: a new mechanism for justice

The horrors the world has experienced, and continues to experience, in times of conflict and war manifest the need for the International Criminal Court.

Mayang Taldo

The ICC is the first permanent international court that can prosecute and pass judgment on individual perpetrators of genocide, war crimes and crimes against humanity. The Court will also have jurisdiction on the crime of aggression once it is defined. (A review conference on the ICC treaty will take up the definition of the crime of aggression in 2009.)

The treaty that created the ICC, the Rome Statute, is a breakthrough in the world's long struggle for international justice. It was adopted by 120 states taking part in the United Nations Conference of Plenipotentiaries in Rome in 1998 and later signed by 139 states. The Rome Statute came into force in 2002 with the ratification of 60 countries. To date, 104 countries have ratified or acceded to the treaty.

Established only in 2003, the Court now stands as the most important mechanism for human rights protection, the rule of law, and justice for all victims of the most grievous international crimes. The ICC has set new standards in the types of crimes within its jurisdiction, especially on gender crimes, and in judicial processes and structures.

Internal conflicts

Unfortunately, of the 10 member-states of the ASEAN, only Cambodia has so far ratified the Rome Statute. The Philippines and Thailand have signed but have not completed the process of ratification. Asia is in fact the least represented region in the Court. Only Afghanistan, Cambodia, the Republic of Korea, Mongolia and Timor- Leste have ratified or acceded.

Governments have explained non-ratification in light of recurrent internal conflicts. They contend that they do not want to be hampered by the Rome Statute in fighting rebellions and defending national security.

Ironically, it is in times of conflict that the rule of law is most needed. Ratification of the ICC treaty protects civilians and both state and non-state actors locked in conflict against atrocities. The citizens of ASEAN countries are deprived of a mechanism for deterrence and justice as a result of inaction or slow action on ratification.

Both Cambodia and Timor- Leste (which is seeking membership in ASEAN) are still seeking justice for the atrocities committed against their people under the rule of the Khmer Rouge and Indonesia respectively. These countries know that moving ahead into a new order that adheres to the rule of law and democracy entails an accounting of the past.

Impunity agreements

But there is another reason cited by Asian governments against ratification: the United States government's opposition to the ICC and pressure on countries to sign bilateral immunity agreements (BIAs). The agreements grant immunity to American nationals from prosecution by the ICC for any crime they may have committed in countries that have forged BIAs with the US. Some 20 governments in Asia, most under fear of cuts in US military aid, have signed BIAs and most of them have been reluctant to ratify and implement the ICC treaty.

Ironically, while only Cambodia has ratified the ICC treaty among the 10

ASEAN members, seven countries have entered into BIAs with the United States.

The US has gone so far as suspending military assistance to those states parties to the ICC that do not sign BIAs, an open attempt at bullying economically vulnerable states like Laos, Indonesia, and other countries. Besides the BIAs, the US Congress adopted the American

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Servicemembers' Protection Act (ASPA), also known as "The Hague Invasion Act," which restricts US cooperation with the ICC, making US support for peacekeeping missions largely contingent on achieving impunity for all US personnel and even granting the President permission to use "any means necessary" to free US nationals and allies from ICC custody in The Hague, the site of the ICC headquarters.

The US also attempted to get blanket immunity for US peacekeepers through the United Nations Security Council resolutions which passed once in 2002 and was renewed in 2003 despite opposition from a number of states. US withdrew the resolution in 2004 after realising it would not get enough votes for its passage.

What is to be gained

The difficulties notwithstanding, there are many reasons why ASEAN states, including the Philippines, should ratify the Rome Statute of the ICC. These include, among others:

- To provide a venue for justice at the court of last resort to victims of the crimes within the ICC's jurisdiction;
- To become a part of the Court that serves as a deterrent to heinous crimes such as genocide, war crimes, crimes against humanity;
- To provide protection for nations, especially small and underdeveloped ones, from crimes of aggression [when crime of aggression is defined in 2009 and becomes one of the crimes within the jurisdiction of the ICC];
- To be able to participate in the Court and be part of shaping this new mechanism for justice by being part of the Assembly of States Parties as well as having ASEAN judges, prosecutors and other court personnel appointed to the ICC; and,
- To support the rule of law and contribute to international justice.

Since it came into force in 2002, the Court has already made an impact in upholding international justice. Though no criminal has been tried and punished so far, ICC's deterrence effect was felt in countries where the ICC prosecutor conducted investigations on cases.

The impact on the ground in Uganda and the Republic of Congo was dramatic. In Northern Uganda, crimes

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committed decreased drastically after arrest warrants were issued against five top commanders of the Lord's Resistance Army. This resulted in displaced persons leaving camps to return home and tens of thousands of children, formerly vulnerable to being abducted, no longer having to stay in night commuter shelters.

The people of the Democratic Republic of Congo are vigilantly monitoring the first ever proceedings at the ICC against a charged person. In November 2006, the Court started confirmation of charges hearings against Mr. Thomas Lubanga Dyilo with victims, former child soldiers, participating in proceedings through their legal representatives. If the ICC pre-trial chamber judges confirm the charges, the first trial of the Court will be conducted during 2007. As the ICC prosecutor, Mr. Luis Moreno-Ocampo stated soon after the hearings started, regardless of the outcome of this particular case, it will send a message around the world that "using children as soldiers is a very serious war crime that will be prosecuted."

The ICC prosecutor is also undertaking

vigorous investigations on Darfur, Sudan where the worsening situation involves multi-parties and much hope is placed on action from the ICC.

The victims of crimes under the jurisdiction of the ICC demand and should get much more if justice is to be served. The 104 ratifications/ accessions to the Rome Statute is a testament to the political will of many peoples, governments, and NGOs that have been campaigning for the Rome Statute and supporting the ICC to help end impunity and to uphold accountability.

Standing with the states parties of the Rome Statute would be an act of solidarity as well as a demonstration of sovereignty for ASEAN members. Parties to the ICC treaty strengthen their own domestic judicial systems through implementing legislations that states are required to adopt when they ratify the Rome Statute. The ICC recognises the primacy of national courts and can only intervene in cases where the states are unwilling and are unable to prosecute.

While ASEAN is still working towards the creation of a viable regional human rights mechanism in the context of the creation of a stronger regional intergovernmental organisation, it should not miss this chance to demonstrate its own commitment to international justice.

ASEAN owes it to the victims of atrocious crimes in the subregion to do its part to protect the gains of the Rome Statute and make the vision of universal ratification a reality.

Before arms, law cannot be silent and action is imperative.

Road to the International Criminal Court and Gender Integration in International Law

Among the advances in the ICC is the re-setting of the course of international humanitarian law toward gender responsiveness. The following is a chronology prepared by the Women's Caucus for Gender Justice:

- At end of World War II (WWII), Allied Powers insist on international military tribunals (IMT) to prosecute war crimes by Nazis (Nuremberg) and Japanese military (Far East)
- Statutes of Nuremberg and Far East tribunals fail to include rape
- Nuremberg Judgment issued
- International community calls for an international criminal code and court [1946-1948: Widespread sexual violence in Europe and Japanese military's widespread practice of sexual slavery of "comfort women" not addressed by IMTs]
- United Nations Universal Declaration of Human Rights (UNDHR) and Genocide Convention adopted
- Convention calls for international tribunal
- International Law Commission drafts statute for an ICC but Cold War prevents serious efforts to create one
- The four Geneva Conventions adopted, with references to sexual violence in terms of honour and dignity, not listed among grave breaches
- Additional Protocols (I & II) to the Geneva Conventions adopted
- End of Cold War clears the way for an international court again
- Former "comfort woman" breaks nearly 50 years of silence about her sexual enslavement by Japanese military in WWII, sparking international movement seeking accountability and reparations
- Vienna World Conference on Human Rights recognises need to address grave violations of women's human rights as part of UN agenda (1993)
- Security Council establishes International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), providing more impetus to develop a permanent court (1995)
- General Assembly (GA) sets up Preparatory Committee to prepare draft text of a treaty to establish an ICC
- 4th World Conference on Women in Beijing adopts Platform for Action (BPFA) affirming rape as a war crime (1998)
- ICTR issues Akayesu judgement finding rape a form of genocide; ICTY follows with Celebici and Furundzija judgements finding rape a form of torture
- July 17, 1998: "Rome Statute" of the ICC adopted by a vote of 120-7. Codifies rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, sexual violence as war crimes and crimes against humanity for the first time in history.

Source: <http://www.iccwomen.org>

Chronology of the International Criminal Court

1945

Establishment of the International Military Tribunal known as the “Nuremberg Tribunal” by the “London Agreement” to try alleged Nazi war criminals.

1946

The Allied Powers of World War II approved the Charter that established the International Military Tribunal for the Far East known as the “Tokyo Tribunal” to prosecute Japanese war criminals.

1947

The United Nations Convention on the Prevention and Punishment of the Crime of Genocide was adopted. Article I of the Convention stated that genocide is “a crime under international law,” and article VI indicated that persons charged with the offense of genocide “shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction . . .” In the same resolution, the General Assembly invited the International Law Commission “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide . . .”

1949 – 1954

The International Law Commission prepared several draft statutes for an ICC but differences of opinions forestalled further developments.

1989

In response to a request by Trinidad and Tobago, the United Nations General Assembly requested the International Law Commission (ILC) to resume work on an international criminal court with jurisdiction to include drug trafficking.

1993

The United Nations Security Council established the ad hoc International Criminal Tribunal for the former Yugoslavia, to hold individuals accountable for the atrocities committed as a part of what was known as “ethnic cleansing.”

1994

The International Law Commission completed its work on the draft Statute for an International Criminal Court and submitted the draft statute to the UN General Assembly. To consider major substantive issues arising from that draft Statute, the General Assembly established the ad hoc Committee on the Establishment of an International Criminal Court.

1994

The United Nations Security Council established the International Criminal Tribunal for Rwanda (ICTR) by resolution 955 of 8 November 1994 for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994 and Rwandan citizens responsible for the same violations in the territory of neighboring states.

1995

The ad hoc Committee on the Establishment of an International Criminal Court met twice. After the General Assembly had considered the Committee's report, it created the Preparatory Committee on the Establishment of an International Criminal Court to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference.

1996 – 1998

The Preparatory Committee met over this period and held its final session in March and April of 1998 where it completed the drafting of the text.

17 July 1998

Adoption of the Statute of the International Criminal Court at the United Nations Conference of Plenipotentiaries in Rome with the participation of representatives of 160 states, 33 intergovernmental organisations and a coalition of 236 non-governmental organisations. 120 countries voted in favor, seven against and 21 abstained. The ICC was established not as an organ of the United Nations but as an independent organisation with an independent budget.

16 January 2002

Agreement between the United Nations and the government of Sierra Leone for the establishment of the Special Court for Sierra Leone to try individuals responsible for “those who bear greatest responsibility for crimes committed in Sierra Leone during the country's violent conflict after 30th November 1996.”

11 April 2002

Sixty ratifications of the Statute of the International Criminal Court were required before the Statute could be enforced. The 60th instrument of ratification was deposited with the United Nations Secretary General when 10 countries simultaneously deposited their instruments of ratification as provided by Article 126 of the Rome Statute.

1 July 2002

The Statute entered into force on 1 July 2002. Anyone who commits any of the crimes under the Statute after this date is liable for prosecution by the

Court (As of 26 February 2003, with 139 signatories, 89 states have ratified or acceded the Rome Statute). In order to prepare for a smooth and timely beginning for the Court once its officials were elected, an advance team of experts began work in The Hague, The Netherlands, seat of the Court. The team was responsible for the first practical arrangements for the coming into operation of the Court. The team consisted of eight technical experts in, among other things, human resources, finance, building and facilities management, information technology, legal matters, and security. With the host state, the team did preparatory ground work to enable the Court to start recruiting and commence its basic operations when it formally begins its work. As mandated, the advance team also acted as a custodian for all information addressed to the Court. Systems were put in place to allow the team to take possession of such material, register it in accordance with international standards, and store it in a safe place until it can be given to the prosecutor. The mandate of the advance team ceased on 31 October 2002.

August 2002

The first session of the Assembly of States Parties to the Rome Statute adopted the budget of euro 30 million for the first financial period of the Court (ICC-ASP/1/Res.12) and adopted various instruments including the “Rules of Procedure and Evidence” and “Elements of Crimes.” In addition, a Director of the Division of Common Services was appointed, becoming the first senior officer of the ICC responsible for leading the process to allow the Court to become operational.

15 October 2002

The Director of the Division of Common Services formally took over the functions carried out until then by the advance team. The Division was established with the intention to maximise efficiency and economy within the parameters of the strict division of powers set out in the Statute between the judiciary and the Office of the Prosecutor. The Division provides the judiciary, the Office of the Prosecutor, the Registry and the Defence with administrative services that are a common requirement of all four.

3-7 February 2003

The resumed session of the first Assembly of States Parties elected the first 18 judges to serve the Court.

11 March 2003

Inauguration of the ICC and swearing-in of the judges before the President of the Assembly of States Parties HRH Prince Zeid Ra’ad Zeid Al Hussein. The inaugural public session was held at the Hall of Knights in The Hague. The ceremony was attended by Her Majesty Queen Beatrix of the Kingdom of The Netherlands, in Her capacity as Head of the host state of the Court and by the United Nations Secretary-General Mr. Kofi Annan.

21-23 April 2003

Second resumption of the first session of the Assembly of States Parties. Mr. Luis Moreno-Ocampo from Argentina elected by consensus as first Chief Prosecutor of the International Criminal Court.

16 June 2003

Mr. Luis Moreno-Ocampo pledged his solemn undertaking during an open session of the Court presided by Judge Philippe Kirsch, President of the ICC, and witnessed by the President of the Assembly of States Parties, HRH Prince Zeid Ra'ad Zeid Al-Hussein of Jordan. The solemn ceremony was held at the Great Hall of the Peace Palace in The Hague and was followed by a two-day public hearing and debate on the policies of the Office of the Prosecutor. ■

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Status Of ICC Process in Asia

Sub-region	No. of States	Signature	Ratification (r) Accession (a)	Drafting of implementing legislation	Bilateral Immunity Agreement (BIA)	Agreement on Privileges and Immunities (APIC)
Southeast Asia	11	2	2	2 stalled	7	
South Asia	8	1	1	1 on-going	8	
Northeast Asia	5		2	2 on-going	1	2
Central Asia	6	2	1		5	
Total	30	5	6	3 on-going 2 stalled		

ICC Process in Southeast Asia

State	Signature	Ratification (r) Accession (a)	Drafting of implementing legislation	BIA	APIC
Brunei Darussalam				*	
Myanmar (Burma)					
Cambodia		11 April 2002	Drafting stalled	Signed -23 June 2003 Ratified -18 May 2005	
Indonesia			Human Rights law passed in 2001 incorporating 3 ICC crimes		
Lao PDR				24 December 2003	
Malaysia					
Philippines	28 December 2000		Bill on international humanitarian law with ICC provisions pending in Congress	14 May 2003 (executive agreement)	
Singapore				17 October 2003 (executive agreement)	
Thailand	8 October 2000			3 July 2003	
Timor-Leste		6 September 2002 (a)	Drafting stalled	Signed -23 August 2002 Approved by the Council of Ministers -October 2003	
Vietnam					
Total	2 signatures	2 ratifications	2 processes stalled	7 BIAs	

ICC Process in South Asia

State	Signature	Ratification (r) Accession (a)	Drafting of implementing legislation	BIA	APC
Afghanistan		10 Feb 2003 (a)	On-going	20 Sept 2002 (executive agreement)	
Bangladesh	6 Sept 1999			17 Aug 2003	
Bhutan				Signed – 2 May 2003 Ratified – 12 Aug 2004	
India				26 Dec 2003	
Maldives				9 April 2003	
Nepal				31 Dec 2002	
Pakistan				21 July 2003	
Sri Lanka				22 Nov 2002	
Total	1 signature	1 ratification		8 BIAs	

ICC Process in Northeast Asia

State	Signature	Ratification (r) Accession (a)	Drafting of implementing legislation	BIA	APC
China					
Japan					
Mongolia		11 April 2002 (r)	Inter-ministerial working group formed	*	*
N. Korea					
S. Korea		13 Nov 2000 (r)	Implementation law pending Parliament approval		*
Total		2 ratifications		1 BIA	2 APC