

Joint Meeting on the Prospects of Ratification of the Rome Statute in the Philippines*

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Introduction

I would like to begin my speech today by expressing how pleased I am to participate in this Seminar on the International Criminal Court for Victims of Human Rights in Asia, and to thank the Coalition for the International Criminal Court, Forum-Asia and AFAD for the opportunity to be here.

Your contribution to this Seminar is a further demonstration of the importance the Philippine Government accords to the International Criminal Court, and I hope is an indication that the Philippines is considering joining the International Criminal Court in the near future. Your presence would be a welcome addition to the Assembly of States Parties.

As one of the first eighteen judges elected to the ICC, I am happy to address an audience composed of representatives of governments and civil society from Asia, a region crucial to the development of ICC.

As Coordinator of the Working Group of Victim's Issues at the Court, I am honored to be in the presence of those for whom this Court was created: the women, men and children who have suffered from the worst crimes known to humankind.

The institution which I represent may not be able to address the crimes committed against you in the past. But I envision a day when all such crimes will be addressed, and on behalf of my colleagues, I promise

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that we will work towards that day. Your fellow countrypersons, your families, this region and the world deserve nothing less.

The creation of the ICC is the direct result of the fact that the last century has witnessed gross human rights violations, and the perpetration of atrocities of the most extreme nature. This conference today focuses on realizing justice for victims. The most obvious manner in which the ICC will help address impunity is, of course, by punishing those who would commit genocide, crimes against humanity and war crimes.

Ending impunity for perpetrators is, however, but one manner in which the ICC will support victims.

Indeed, my principal interest in becoming Coordinator of the Working Group of Victims' Issues was my belief that despite the clear value of retributive justice, without a restorative component any mechanism of international justice will fall short of its true potential.

And so I embrace my role within the International Criminal Court with the satisfaction of knowing that one of the great innovations of the Rome Statute and its Rules of Procedure and Evidence is the series of rights accorded to victims. Many of these rights have never before been included in the mandate of an international court.

Thus, with the progressive development of the rights of victims, working together, from The Hague to The Philippines to every other State in Asia, we will help put an end to impunity and provide to victims the rights which they deserve under international law.

In my presentation today I will focus on four distinct but inter-related issues. The first is the nature and development of the International Criminal Court; the second is when and how the Court can exercise its jurisdiction; the third is the victim's rights standards which currently exist at the ICC; and the fourth is the importance of accession efforts to achieve the goals of Rome Statute and the requirement that States Parties implement relevant provisions of the Statute into national law, including those which bolster the rights of victims.

The Nature and Development of the International Criminal Court

As victims and representatives of victims' groups, you need not hear explanation as to the consequences of serious crimes. I need not inform you of how impunity for the perpetrators of these crimes can lead to a lifetime of frustration and fear for victims. And certainly do not have to describe for you how rare it is that many of these perpetrators are brought to justice.

When any person who would commit the worst crimes known to humankind goes unpunished, it has a profound impact on many, many people.

When those who bear the greatest responsibility for the commission of these crimes go unpunished, the impact can be even wider, and lead to seemingly endless cycles of violence. In the words of the Preamble of the Rome Statute, the crimes themselves "threaten the peace, security and well-being of the world."

The International community has no option but to collaborate in addressing these crimes and those who commit them. The International Court is leading the way in this effort. Ours cannot be the voice of all victims, but when we act, we act on behalf of victims.

Of course, as is the case with any crime, it is better for investigations and prosecution to take place at the national level. For the institutional development of a country, for the benefit of its victims and for the sake of reconciliation, a State's willingness to take ownership over righting the wrongs committed by its citizens must be encouraged.

Unfortunately, States have too often proven themselves unwilling or unable to seek justice for those accused of the worst crimes known to humankind. This is why we need international law and the International Criminal Court. The Preamble of ICC Statute affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished," and the determination of States Parties "to put an end to impunity and thus to contribute to the prevention of such crimes."

These objectives are, of course, not new; the problem of grave crimes going unpunished is unfortunately not new either. Just as the

twentieth century was a canvas for atrocities on a scale that remains difficult to imagine, so too did that century give rise to the first efforts to address impunity through an international response. Since the days of Nuremburg people have sought to devise one Court which would hold the world's people to account, according to the highest standards of human rights. But the necessary conditions for developing such an institution did not exist until the 1990s, with the end of the Cold War and the two terrible conflicts in the former Yugoslavia and Rwanda.

In response to those conflicts, the United Nations Security Council established *ad hoc* tribunals (the ICTY and ICTR) to try those most responsible for crimes in those two situations. These Tribunals demonstrated that international criminal justice was a practical solution even to complex international and internal conflicts. Although the work of these Tribunals is important, they cover only specific situations and they have retroactive jurisdiction.

At the same time efforts to create a permanent international criminal court were continuing. And, in 1998, this momentum led to the Rome Diplomatic Conference on the International Criminal Court.

139 States signed the Rome Statute, which resulted from this conference and which establishes the International Criminal Court.

Under the Statute, however, States must ratify or accede to the Rome Statute in order for the Court's jurisdiction to apply fully to them. 92 States have ratified or acceded to the Statute thus far, only six of which are from Asia.

Today, the Court is a reality. You may have heard that the Government of Uganda recently referred the situation concerning the Lord's Resistance Army to the Prosecutor of the ICC. The next step will be for the Prosecutor to determine whether there is a reasonable basis for him to commence an investigation. This determination will be made on the basis of information his office receives from States, international organizations, NGOs and individuals.

As announced last July, the Prosecutor is also following closely the urgent situation in Ituri, in the Democratic Republic of the Congo.

The Prosecutor has also received other communications, drawing his attention to alleged crimes. As of January 2004, his office had received over 715 communications, sent by non-governmental organizations and individuals from 72 different countries. Most of these communications, however, describe crimes that are outside the jurisdiction of the Court.

The Jurisdiction of the International Criminal Court

In order to have a meaningful dialogue on the potential of the International Criminal Court, as well as to gain a sense of its limitations, it is important to be familiar with its jurisdictional boundaries.

During the Rome Conference, one of the concerns about the Court was that it could be politicized. There are thus many restrictions and safeguards built into the Rome Statute that prevent this from happening.

The ICC has jurisdiction over individuals who commit the most serious crimes in the world: genocide, crimes against humanity, war crimes and aggression, although the Court will not deal with this latter crime until the Assembly of States Parties has agreed upon its formal definition. The Rome Statute and the Court's Elements of Crimes provide specific definitions of the first three of these crimes, however. I will provide a brief summary of their principal components.

Genocide includes acts committed with the intent to destroy in whole or in part a national, ethnical, racial or religious group, including murder, causing serious bodily or mental harm, inflicting on a group conditions of life calculated to bring about its physical destruction, imposing measures intended to prevent births or forcibly transferring children of the group to another group. These acts need not be committed during a war.

Crimes against humanity include acts committed as part of a widespread or systematic attack against a civilian population, such as murder, enslavement, deportation, and forcible transfer of population, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and enforced disappearance of persons. These acts need not be committed during a war.

War crimes include such acts as murder against neutral or vulnerable persons, mutilation, torture, recruiting or forcing children under the age of 15 to fight in an army or armed group, torture, taking of hostages and

extensive destruction and appropriation of property not justified by military necessity. These acts must be committed either in a war or in an internal armed conflict.

Because the Court has just been created, however, it was decided by States that it should only have jurisdiction over people who committed these crimes after July 1, 2002.

In almost all cases, the ICC's jurisdiction is also limited to prosecuting people who are the nationals of a State which is a "Party" (like a member) of the Court, or people who commit one of these crimes on the territory of such a State. There are certain circumstances where these rules do not apply, such as when the UN Security Council refers a situation to the Court or where a State which has not yet ratified the Rome Statute accepts the Court's jurisdiction on an *ad hoc* basis. Nevertheless, for present purposes, we can work on the assumption that the majority of cases the Court hears in the near future will have some link to a particular State having ratified or acceded to the Rome Statute. Either a State Party will refer a situation to the Prosecutor, or the Prosecutor will seek to initiate an investigation based upon information he has received from States, organizations or individuals from any country in the world.

When I speak of a "situation," this means that a State Party cannot simply ask the Prosecutor to investigate a specific person or group, or a particular occurrence of a crime. A State may only refer to the Prosecutor a holistic situation in which crimes may have occurred. It is up to the Prosecutor to determine what crimes have been committed within a given situation, and who is responsible for them. As I mentioned previously, before the Prosecutor can commence an investigation, he has to determine that there is a reasonable basis on which to proceed, and the Pre-Trial Chamber of the Court must authorize the investigation unless it arises from a referral by a State Party. This provides a check on the ability of the Prosecutor to engage in a politically motivated prosecution.

Another limitation on the ICC's jurisdiction is that it can exercise its jurisdiction only where States that would otherwise have jurisdiction are unwilling or unable to bring transgressors to justice; this principle is known as complementarity.

In order to determine inability, the Court will consider whether a State's national judicial system has partially or totally collapsed. In order

to determine unwillingness, the ICC will examine whether a State has acted in such a way as to try to shield an accused from criminal responsibility. Note that a State can still be considered willing where it refuses to prosecute an individual, so long as there has been a genuine investigation and the relevant national authorities deemed that no trial was necessary.

States thus retain the primary role in punishing even the crimes over which the Court has jurisdiction. For this reason the ICC is referred to as a Court of last resort. If all national systems had appropriate legislation prohibiting the ICC crimes, and always acted to enforce these laws, the ICC would never need to hear a single case. As a Judge at the Court, I would consider this to be a resounding success for the cause of international justice and the rights of victims.

Nobody in the world has immunity from the International Criminal Court, although the ICC cannot prosecute a child (any person under the age of 18 when she or he committed a crime). This means that the ICC can prosecute Presidents, Members of Parliament, any Government Official and leaders of rebel movements. And even where a powerful person does not actually commit a crime, that person may be held responsible for the crimes committed by those who work for her or him.

Within this context of ending impunity, the ICC is also intended to help give justice to victims of these terrible crimes. The ICC is governed by rules which provide strong victims' rights and protections. For the first time in the history of international criminal law, the participation of victims before the proceedings of this Court is provided for. Victims can also request reparations from the Court.

Victim's Rights before the ICC

Perhaps most pertinent to the government officials, victims and representatives of victims' organizations here today are the rights and protections afforded to victims before the International Criminal Court, and so I will discuss some of these with you.

These rights are relevant to your organizations' respective mandates. You may one day have the opportunity to appear before the ICC as the representative of a victim. And, through national law reform associated with ICC implementation, you will have an opportunity to assess the

victim-related provisions in your national legislation and make changes to incorporate some of the standards that exist before the ICC.

Victims before the ICC will have rights and assistance that have never before been incorporated into the mandate of an international court or tribunal. Rather than serving just as witnesses to a prosecution or as the beneficiaries of a conviction, the ICC allows victims to participate and benefit from the work of the Court in novel and innovative ways. The two units of the Court which deal primarily with victims' rights are the Victims Participation and Reparations Unit and the Victims and Witnesses Unit.

A person will be considered to be a victim by the Court where her or his personal interests have been affected because of the commission of a crime falling within the jurisdiction of the ICC. It will be up to the ICC to determine whether an individual is in fact a victim as defined by the Court.

Victims before the ICC may be individual persons or organizations or institutions, and the harm that a victim suffers may take different forms. It can be physical harm to a person's body; psychological harm, by which a person's mind is affected because of what she or he has had to do or see; or material harm, by which goods or property has been damaged or lost as the result of a crime.

A victim can also be a person who has not directly suffered harm. For example, a victim may be a person whose family member has been killed or suffered harm as the result of a crime.

Victims will be able to participate in stages of the Court's proceedings determined to be appropriate by the Court, and in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial. The views and concerns of the victim may also be presented by a legal representative at stages where the Court considers it appropriate. The ICC may provide financial assistance to assist victims in securing legal representation if necessary.

The victim may explain why she or he thinks a case falls within the jurisdiction of the Court; present views and concerns where his or her personal interests are affected at different stages of the proceedings; participate in the oral proceedings of the Court, for example by making opening and closing statements; may question witnesses; or ask the Court

to take special gender-sensitive measures, especially if she or he is a victim of sexual violence.

A victim may also apply to receive reparations from the ICC. Reparations means that a victim may be entitled to receive compensation, rehabilitation and/or restitution for the harm suffered as a result of the crime which was committed against her or him.

Thus, while it is impossible to place a price on how much a victim has suffered, the ICC may give victim money to compensate for what the victim has lost as a result of a crime, and to compensate for her or his suffering. The ICC can order that the person convicted of a crime against a victim pay the victim these reparations. A Trust Fund has also been established to gather funds that will be used to provide victims with reparations.

Restitution involves returning to a victim her or his property where it was illegally taken away, while rehabilitation is intended to allow the victim to continue his or her life as normally as is possible. This can take the form of money to pay for legal, medical, psychological and other care, and can even include apologies from perpetrators of crimes to the victims.

The Victims Participation and Reparations Unit of the ICC will facilitate the ability of victims to participate in Court proceedings and receive reparations, which I have described. As we speak, the members of this Unit are refining policies to ensure that the rights of victims enshrined in the Rome Statute are as effective in practice as they are inspiring in principle.

Equally important as the ability of victims to participate and receive reparations before the Court is the Court's function related to the protection of victims and witnesses appearing before the Court: experience from the Tribunals for the former Yugoslavia and Rwanda has shown how crucial it is for any international criminal tribunal to arrange for the protection and assistance of victims and witnesses that appear before the Court so as to contribute to the establishment of truth about the most serious crimes existing.

To this end, and learning from the experience of the two *ad hoc* International Penal Tribunals, the Rome Statute mandated the Registrar to set up a Victims and Witnesses Unit within the Registry. This Unit

provides, in consultation with the Office of the Prosecutor, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses, as well as protective measures and security arrangements for them. The Unit will include staff with expertise in trauma, including trauma related to crimes of sexual violence.

The Rules of Procedure and Evidence detail the functions of the Victims and Witnesses Unit. Thus, the Unit ensures the protection and security of all witnesses and victims that appear before the Court through appropriate measures and establishes short and long-term plans for their protection. Moreover, the Unit helps victims who appear before the Court, as well as witnesses, to receive medical and psychological care. It also, in consultation with the Office of the Prosecutor, will draw up a code of conduct emphasising the vital importance of security and professional secrecy for investigators of the Court, the defence and for all inter-governmental and non governmental organisations acting on behalf of the Court.

Ratification and Implementation of the Rome Statute

As we have discussed, the ICC's jurisdiction is limited in a number of respects which bear upon the importance of ongoing accession and implementation efforts throughout the world, and particularly in under-represented regions such as Asia.

The greater the number of countries that accede to the Rome Statute, the greater the number of victims who will have the possibility of exercising their rights before the Court. And, once States accede, they will be in a position to review their existing domestic legislation and incorporate greater protections and rights for victims through the implementation process.

Accordingly, it may be argued that the most pressing issues facing the development of the ICC as a truly effective institution for ending impunity and meeting the needs of victims are ones which emanate from places far removed from The Hague.

To understand the importance of accession and implementation, one must begin, with the fact that the ICC has neither a police force nor a prison, as well as the obvious limitations of a single Court to provide an "end to impunity."

The Court will rely upon the cooperation of States in many areas pertinent to the rights of victims, such as freezing assets of perpetrators and fulfilling reparations orders. States which are not party to the Rome Statute have no obligation to engage in such cooperation, and without the necessary laws and procedures in place, even States Parties may have trouble fulfilling their obligations to the Court. Consequently, the willingness of States to accede to the Rome Statute, develop their respective domestic laws to allow for cooperation with the Court and incorporate the crimes and rights embodied in the Rome Statute into existing legislation will eventually determine whether the ICC meets the lofty standards which have been set for it.

Since the Rome Statute's entry into force on July 1, 2002, greater attention and resources have been paid than ever before to encouraging accessions and the development of national criminal legislation and procedure which respect the jurisdiction and principles of the Rome Statute.

Through the work of international, national and local civil society stakeholders, many of which are represented in this room, these campaigns are advancing at a steady pace.

Of course, one of the most valuable aspects of the Rome Statute is that it sets a minimum rather than a maximum jurisdictional standard that must be met by States Parties incorporating the provisions of the Statute into national law.

As officials of government and advocates for victims, you are strongly encouraged to develop frameworks to collaborate in acceding to the Rome Statute and engaging in national law reform implementing the Statute in a manner which incorporates the rights accorded to victims before the ICC. Such implementing legislation would address issues of accountability and procedure with respect to victims in a broader-based context, while remaining compatible with and reflect the values of the Statute.

Given the ever-increasing number of States Parties to the Rome Statute, and what I believe will be an exponentially larger number of States Parties from Asia in the near future, the need for the adoption of implementing legislation and the breadth and quality that this legislation takes with respect to victims' rights, is more important than ever .

The value of good implementing legislation in Asia, with a strong victims' rights component, to provide instruction to stakeholders in future implementation processes has, therefore, never been higher. Although country-specific considerations will always be of paramount importance to the accession and implementation processes, the goals of these processes, particularly with respect to victims, are to a large extent comparable.

As I mentioned earlier, only six of the 92 ICC States Parties are from Asia. The background document for this Seminar underscores the importance of the ICC for Asia, as "world statistics on hunger, deprivation, political dissent repression, internal conflict, war casualties and human atrocities would often include people from Asia as among the most seriously victimized." The document goes on to state that "the cycle of violence and atrocities persists because there are no effective means to address impunity in the region."

I notice, however, that the document explains the disproportionate under- representation of Asia in the ICC's Assembly of States Parties by citing this region's widespread poverty and political conflict.

I thought perhaps that it might assist in assessing the challenges facing effective accession and implementation efforts in Asia to consider the situation in Africa, another region which knows great poverty and conflict.

There are 21 States Parties to the Rome Statute in Africa. One of these, South Africa, has currently completed the process of developing legislation which allows for cooperation and national jurisdiction over the ICC crimes. Other States are actively in the process of drafting implementing legislation. In Senegal and the Democratic Republic of the Congo public drafts have already been distributed for review and comment. Draft legislation is almost completed in Lesotho, and firm government commitments to the drafting of legislation have been received from The Gambia and Sierra Leone.

This then begs the question, why has the ICC ratification/accession and implementation campaign been so successful in Africa, despite the post-conflict nature of many States Parties on that continent? A principal reason is that civil society organizations, including many victims' rights groups, have conducted targeted advocacy and awareness raising efforts, and governments have followed through on their praise of the ICC with meaningful action.

I am acquainted with the great value that many Asian governments have placed on the ICC, as well as the wonderful efforts that have been undertaken to date by the Coalition for the International Criminal Court, FORUM Asia and AFAD. I recognize the challenges that have been overcome as I observe the challenges still to be faced. I applaud you for your successes and I wish you the greatest luck in the future.

And, looking at the assembled audience here today, I have no doubt that I am witnessing an important next step in the development of an advocacy campaign for Asia, built around supporting the rights of victims, which will result in greater accession and implementation of the Rome Statute.

Conclusion

As advocates for victims, you know that excuses are not a sufficient response to those who have suffered and continue to suffer. This Court cannot meet its potential without the meaningful participation of Asia. I recognize the challenges you face. I recognize that there are other States, not in this region, which do not support the ICC and place pressure on Asian governments not to accede to or implement the Rome Statute.

My only response to you is that this Court serves the same purpose as your organizations with respect to victims. We share a common goal. And while we may go about achieving this goal in a different manner, we rely upon each other.

So fight for this Court as you fight for victims. Work within your countries and advocate with your governments to build and strengthen this institution.

But do not let your efforts end there. Be active participants in the development of the International Criminal Court, so that generations from now people can look back and say that an important step was made on behalf of victims through a common appreciation that they have suffered enough, and that the lessons of the past must inform the actions of the future.

Help victims learn about this Court. Help them participate before the Court if that is what they wish to do. And tell us how we can improve our policies and our work.

This is a Court made up of States, and States are made up of individuals. Never forget that, despite the image that may be portrayed by some, this Court has a human face. It is a reflection of yourselves.